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War in Rio de Janeiro: A Tale of Two Worlds

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Trabalho de conclusão de curso de graduação apresentado à Faculdade de Direito da Universidade Federal do Rio Grande do Sul como requisito parcial para a obtenção do título de Bacharel em Ciências Jurídicas e Sociais.

Orientador: Prof. Dr. Fábio Costa Morosini.

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It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.

Charles Dickens, *A Tale of Two Cities*, Book the First, Chapter I.

RESUMO

Este trabalho trata do estudo do caso da região metropolitana do Rio de Janeiro considerando-se o direito internacional humanitário como base. Define-se o que seria um conflito armado no seu sentido técnico-legal, desde uma perspectiva do Norte Global. Em seguida, verifica-se que a atual situação da região metropolitana do Rio de Janeiro enquadra-se nessa definição puramente legal. Apresentam-se, então, os problemas decorrentes desse enquadramento, desde o ponto de vista prático, considerando a proteção dos civis que vivem na região do conflito armado e dos próprios *fighters*. No momento seguinte, propõe-se uma nova interpretação do conceito de conflito armado (ou guerra), desde a perspectiva do Sul Global, que refuta a ideia de que a classificação do conflito armado carioca seja a única interpretação legal para o cenário. Por fim, utiliza-se de argumentação jurídica para afirmar que, ainda que não se aceite a referida interpretação do conceito de conflito armado proposta, o direito internacional humanitário é *derrogável (defeasible)* no caso concreto.

Palavras-chave: direito internacional humanitário; conflito armado; guerra; direito internacional dos direitos humanos; Rio de Janeiro; *defeasibility*.

ABSTRACT

This work deals with the case study of the metropolitan region of Rio de Janeiro considering international humanitarian law as its basis. It defines what would be an armed conflict in its technical-legal sense, from the perspective of the Global North. Then, it assesses that the current situation in the metropolitan region of Rio de Janeiro fits this purely legal definition. Next, the problems arising from this framework are presented, from a practical point of view, considering the protection of civilians living in the region of the armed conflict and of the fighters themselves. Furthermore, a new interpretation of the concept of armed conflict (or war) is proposed, from the perspective of the Global South, which refutes the idea that the classification of Rio's armed conflict is the only legal interpretation for the scenario. Finally, legal arguments are used to affirm that, even in case the proposed interpretation of the concept of armed conflict were not to be accepted, international humanitarian law is defeasible in the specific case.

Keywords: international humanitarian law; armed conflict; war; international human rights law; Rio de Janeiro; defeasibility.

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1 INTRODUCTION

The idea for this TCC¹ was first considered when I took part in the Jean Pictet Competition (2018), representing the team of the Justus Liebig University of Giessen. While discussing *conflict classification* – I shall explain this jargon later –, I consulted with one of the judges of the Competition about the presence of the International Committee of the Red Cross (ICRC) in Rio de Janeiro. The answer was surprisingly brief and rather preoccupying: that matter was “confidential”.

I do understand that the ICRC has to tackle with political pressure coming from many actors and I also understand that its work is sometimes cloaked from the general public due to the fact that the ICRC must at all times be impartial – and, of course, it must first be authorized by a given State to exercise a certain mandate. What I did not understand at the time were the reasons why the ICRC would be present in Rio de Janeiro.

I decided to analyze the current scenario in Rio de Janeiro from the perspective of international humanitarian law (IHL) in order to (try to) understand what was and is still happening. The result of this thorough analysis is expounded throughout this TCC, although I do not have all the answers to important questions that I have elaborated during my time researching the topic.

I started to write this TCC in the middle of 2019, i.e. before the CoViD-19 apocalypse started. I had a kind of black-letter idea of how this work would be written but I did not know so – I thought my work was some sort of a manifesto against how international humanitarian law and international law in general work in the real world. Little had I noticed that I was actually just using the same concepts and structures that the Global North² uses to convince the Global South that “that is just how things work”.

The main objective of this work was to assess the classification of the situation of armed violence between Brazilian public security forces and organized armed groups currently taking place within the metropolitan region of Rio de Janeiro as a non-international armed conflict (a

¹ Final work submitted by undergraduates to obtain the title of Bachelor of Laws, or *Trabalho de Conclusão de Curso*, in Portuguese.

² I apply the binary “Global South-Global North” as explained, among others, with or without some criticism, by MIMIKO, Nahzeem Oluwafemi, **Globalization: The politics of global economic relations and international business**, [s.l.]: Carolina Academic Press, 2012, p. 47; THERIEN, Jean-Philippe, Beyond the North-South divide: The two tales of world poverty, **Third World Quarterly**, v. 20, n. 4, p. 723–742, 1999, p. 723–742; DADOS, Nour; CONNELL, Raewyn, The Global South, **Contexts**, 2012; DE SOUSA SANTOS, Boaventura; MENESES, Maria Paula (Orgs.), **Epistemologias do Sul**, Coimbra: Almedina, 2009, p. 23-.

NIAC, as I also shall explain further on this work). The second objective of this work, thinking of the protection of lives and human dignity, was finding the best legal tools which could be used to improve the lives of those directly and indirectly affected by the NIAC and to punish any possible violations committed by any of the parties to the conflict.

This work and its objectives have now changed – I changed, I guess – due to two major circumstances. First, I had the fortunate chance of reading an excellent paper³ criticizing the very fundamental concept I would unravel and discuss throughout my TCC: *war*. “War never changes”⁴, I once heard on a videogame, but I have to disagree. The Global South would benefit from untying itself from old, Eurocentric conceptions of war – or armed conflict, if one wishes to be technical. Anyway, I hope I managed to finally write a – at least a little bit – significant work. Second, my supervisor, Prof. Dr. Fábio Morosini, offered me some useful and eye-opening notes for a draft of this TCC, which made me try to fine-tune my writing style and, of course, simply stop assuming that everyone knows what some complicated concepts of international humanitarian law mean. With this in mind, I hope this work is more accessible to those who are otherwise not familiar with this branch of law – or are not familiar with law at all.

In this TCC one will find an – I hope – easy, light reading. I tried my best to get rid of old, unuseful jargon used by those who are more traditional. I am not a native speaker of English but I tried my best to be clear. I take full responsibility for sentences which are either incomprehensible or ambiguous.

The structure of this work is pretty straightforward. Chapter 1 corresponds to this brief introduction, the objective of which is to explain to the reader what they will find throughout this reading. The reader will find my methodological and theoretical assumptions on Chapter 2. On Chapter 3, I introduce the concept of war, or armed conflict, according to international humanitarian law as interpreted by the Global North. I use selected authors from Europe and selected jurisprudence from international tribunals as representative and relevant sources for the concepts being discussed. Chapter 4 is dedicated to a case study, in which I use the concept of armed conflict expounded on the previous chapter to classify the current situation in the metropolitan region of Rio de Janeiro – I claim that the situation amounts to a so-called non-international armed conflict (a NIAC), and I know this position is vastly criticized. This case

³ BARKAWI, Tarak, Decolonising war, *European Journal of International Security*, v. 1, n. 2, p. 199–214, 2016.

⁴ The videogame is actually the *Fallout* series. Produced by Tim Cain and developed by Interplay Productions.

study is relevant because it allows me to later on explain the cracks in the system of classification of conflicts used by the Global North. On Chapter 5, I explain why applying international humanitarian law to the situation in Rio de Janeiro – were it to be classified as a NIAC – would not be a good idea, at least from the perspective of the civilians living in the favelas in the region. On Chapter 6, I propose a new way of interpreting war in the Global South – even though I speak mostly from the point of view of Brazil, in general, and Rio de Janeiro, more specifically. On Chapter 7, for the sake of argument, I try to call the attention of those who are still willing to accept the traditional concept of armed conflict to the legal doctrine of defeasibility, as I argue that international humanitarian law is, in fact, defeasible in the case of Rio de Janeiro.

Finally, I wish to clarify that a long and quite uninteresting introduction to the history of IHL or international human rights law would not fit the purposes of this work. I hope to provide the reader with sufficient background while trying to find a balance between writing a whole chapter about the “Code of Hammurabi”⁵ and just assuming that every reader is an expert on the subject.

⁵ For a quick discussion about the problem, see: OLIVEIRA, Luciano, Não fale do Código de Hamurábi: A pesquisa sócio-jurídica na pósgraduação em direito, *in*: **Sua excelência o comissário e outros ensaios de sociologia jurídica**, Rio de Janeiro: Letra Legal Editora, 2004, p. 137–167.

2 METHODOLOGY AND METHODS

As the topic I chose to discuss is quite complex and requires interdisciplinary approaches to the problem, I prefer not to elect the “black-letter” or “doctrinal research”⁶ as a basis for this work and, instead, I used it subsidiarily. The starting point for this TCC was setting my goals for this research. As Fink specifies, there are some rules for a good legal research, i.e. “1. Specific research questions; 2. Defined and justified sample; 3. Valid data collection; 4. Appropriate analytic methods; 5. Interpretations based on the data.”⁷ This TCC is mainly based on empirical research,⁸ mixing qualitative and quantitative methods according to the hypothesis being tested and the type of data being collected. My main objective with carefully choosing the methodology for this research lies on my wish to avoid repetition of what mainstream literature has already concluded, as well as on my wish to produce something new, reach new conclusions that could be useful in practical terms.

When it comes to empirical research, I chose a method which is sometimes non-doctrinal or doctrinal, sometimes qualitative or quantitative.

I collected data about violence in the metropolitan region of Rio de Janeiro as follows. Since I am Brazilian and a native speaker of Brazilian Portuguese, I was able to relatively easily collect raw information from both the Brazilian government and non-governmental organizations working in the region. Sometimes I was able to find trustworthy sources for statistical information about the levels of violence in the region, about the conduct of hostilities promoted by the Brazilian State, about the types of weapons used during confrontations and, in general terms, about the lives of those who live in the area. Nevertheless, I must also admit that this is not so true when it comes to identifying and collecting information about organized armed groups which operate in Rio de Janeiro. Of course, their activities are illegal and the government has a hard time assembling reliable data thereof. Thus, I believe the hardest task I had to face while describing the situation in Rio de Janeiro actually refers to finding data which could be *honestly* used in this TCC. I needed to collect as much data as possible about armed violence in Rio de Janeiro while considering the degree of trustworthiness of data I collected

⁶ MCCONVILLE, Mike; HONG CHUI, Wing (Orgs.), **Research Methods for Law**, Second Edition, New to this Edition: Oxford, New York: Oxford University Press, 2017, p. 3.

⁷ FINK, Arlene, **Conducting Research Literature Reviews: From the Internet to Paper**, Thousand Oaks: SAGE, 2005, p. 138 *apud* MCCONVILLE; HONG CHUI (Orgs.), **Research Methods for Law**, p. 33.

⁸ EPSTEIN, Lee; MARTIN, Andrew D., **An Introduction to Empirical Legal Research**, Oxford: OUP Oxford, 2014, chap. 1.1.

online. For this reason, I needed to carefully select trusted sources to provide the reader with information for this query. Thus, there is a risk that the criteria used to select sources are biased according to my personal preferences.⁹

At the same time, analyzing sometimes old and rather stiff bodies of (international) law seemed to be quite important for this work. I used a classic doctrinal research approach in order to assess the classification of the situation as a NIAC. I agree that

[u]ltimately law may be knowable but it is not necessarily predictable. Doctrinal research is not simply a case of finding the correct legislation and the relevant cases and making a statement of the law which is objectively verifiable. It is a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation. For this reason it can be argued that doctrinal research is qualitative.¹⁰

Ultimately, written (or given) law was my guide, especially on Chapter 3, where I analyze and discuss some traditional concepts propelled by the Global North. As I mentioned in the introduction to this TCC, I chose to use authors from the Global North with the objective of later offering a different point of view, this time from the Global South. Moreover, I had to work with jurisprudence from international courts because they simply reflect and complement what the Global North wants international law to be. This is a structural assumption of mine, but the reader could otherwise find evidence sustaining it in different academic papers and books which discuss international law from the Global South.

Finally, I conducted a – rather small – number of interviews with authors and researchers who more or less have contact with the subject matter. Therefore, I also counted on recommendations made by them regarding books and academic articles. Some of their opinions are explained on Chapter 4, but I preferred not to mention their names on this TCC for privacy and ethical reasons, even though they agreed to have their names mentioned. Raw data can be found with the author upon request. I first found those interviewees on the Brazilian curricula platform *Lattes*. I used relevant keywords to search for curricula of those who work with or research international humanitarian law or international human rights law; I also used a time filter – considering only curricula updated in the last 5 years –. I proceeded on contacting a number of candidates by email. Those who agreed to participate received questions via email. I understand that emails might have posed some limitations to my communication with the

⁹ Other authors have reported the same problem. See, for example, PETERKE, Sven, Urban Insurgency, “Drug War” and International Humanitarian Law: The Case of Rio de Janeiro, **Journal of International Humanitarian Legal Studies**, v. 1, n. 1, p. 165–187, 2010, p. 167, footnote 12.

¹⁰ MCCONVILLE; HONG CHUI (Orgs.), **Research Methods for Law**, p. 21–22.

interviewees, nevertheless I chose this method because of my schedule and other personal limitations.

3 HOW TO FIND A NIAC

In this chapter I discuss the concept of war, better known as *armed conflict*, according to selected sources from the Global North. As referred in Chapters 1 and 2, this was a conscious choice, mainly because I wish to explain how the concept is understood by those selected sources from the Global North and later apply it to a case study – I eventually try to reformulate it according to the needs of the Global South.

Before I start the discussion, I would like to bring about some remarks made by prof. Dr. Sven Peterk during my presentation of this work. Peterke affirmed that this work does not differentiate war from armed conflict. In his opinion, war is a larger gender in which the species armed conflict is inserted. He also mentioned that the concept of *animus belligerendi* is no longer important. Yet, my personal view is that this distinction becomes clear as I try to describe, in Chapter 6, what “war from the Global South perspective” would mean.

Public international law is a rather broad branch of law that deals mostly with relations between States and relations between States and individuals.¹¹ There are many ramifications of public international law, such as international environmental law, international investment law, international maritime law etc. One of those ramifications is called international humanitarian law (also identified in this work as IHL). This branch of law deals with armed conflicts or, better said, tries to protect those who are not or are no longer taking part in an armed conflict. A number of authors prefer to say “armed conflict” instead of “war” for a bunch of reasons not worth mentioning here, but I agree that this nomenclature makes it easier for one to distinguish the two types of war covered by international humanitarian law.

The sources of this branch of law are diverse and not unified, but it is worth mentioning that the four Geneva Conventions of 1949 and their Additional Protocols¹² are probably the

¹¹ For a more comprehensive definition, even though Eurocentric, see: CRAWFORD, James, **Brownlie’s principles of public international law**, Oxford: Oxford University Press, USA, 2019.

¹² Brazil signed the Conventions in August 12, 1949; deposited the ratification instrument in June 29, 1957; and they became effective in December 12, 1957. BRAZIL. Decreto Nº 42.121, Promulga as Convenções concluídas em Genebra, a 12 de agosto de 1949, destinadas a proteger as vítimas da guerra, de 21 de agosto de 1957. Their Additional Protocols were ratified by Brazil in May 05, 1992, and became effective in November 05, 1992. BRAZIL. Decreto Nº 849, Promulga os Protocolos I e II de 1977 adicionais às Convenções de Genebra de 1949, adotados em 10 de junho de 1977 pela Conferência Diplomática sobre a Reafirmação e o Desenvolvimento do Direito Internacional Humanitário aplicável aos Conflitos Armados, de 25 de junho de 1993.

most useful and comprehensive sources. Judicial decisions are also important for international humanitarian law, especially those which are or were produced by the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ).

Armed conflicts are divided in two types. There are *international* armed conflicts, referred to as IACs, and there are *non-international* armed conflicts, referred to as NIACs.

An IAC is simply defined as the type of conflict that happens when two or more States use force against each other with the intent of starting a conflict (also known in Latin as *animus belligerendi*). This means that a simple accidental shot fired by a soldier from, let us say, Brazil in the direction of Argentina at the border would not amount to an IAC, whereas if a Brazilian soldier were ordered to invade Argentina with a tank, this would certainly trigger an IAC. An IAC triggers the application of the four Geneva Conventions of 1949, their Additional Protocol I, and other relevant treaties (when ratified by a given State, of course). The reader should bear in mind, and I cannot stress this enough, that, as mentioned, while an IAC triggers the application of *almost all* the provisions of the Geneva Conventions of 1949, a NIAC does not have this effect – I will also explain this below.

A NIAC, however, is a bit more complicated. It can be defined negatively as, essentially, not an IAC. A NIAC starts whenever there is use of force between a State and a (or more than one) non-state armed group or between two or more such groups without the presence of a State. There are many nuances to this definition, which can be found below.

On the four Geneva Conventions of 1949 there is a special, important article which is common to the four of them, i.e. this article reads the same on the four treaties. It is often referred to simply as *Common Article 3*. Common Article 3 is the *only* one in the Geneva Conventions which defines a NIAC, and it does so as an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”. A “High Contracting Party” is simply a State.

Article 1 of Additional Protocol II to the Geneva Conventions of 1949 provides a similar definition, with the addition of a higher threshold for its application, namely the requirement that the organized armed groups “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. However, it excludes conflicts between organized groups without the presence of the State.

To simplify a bit, a NIAC does not trigger the application of the four Geneva Conventions of 1949 as a whole. If the NIAC fulfills the requirements of Common Article 3,

then Common Article 3 applies to the situation; if it fulfills the requirements of Additional Protocol II, then Common Article 3 and Additional Protocol II apply to the situation. Of course, other customary norms are also applicable.

Customary norms are quite controversial and difficult to define. I will define them as simply unwritten rules which are applicable to all States, regardless of their acquiescence to be bound by them. Customary norms are created with two elements: State practice – that is, practical actions or omissions of States – and a subjective element called *opinio juris* – that is, the feeling of State that acting or not acting is their duty because *law* says so. A much more complex and elaborate explanation of customary norms can easily be found in other works.

3.1 COMMON ARTICLE 3

The Geneva Conventions of 1949 and their Additional Protocols do not provide more information on how to find a NIAC. Yet, customary international law and jurisprudence from international tribunals can provide the criteria used to assess the existence of a NIAC which triggers the application of Common Article 3.¹³ I shall use a bit of technical vocabulary for this section.

The first important criterion is the threshold of violence of a given situation. After the ICTY decided in the *Tadić* case that the existence of a NIAC requires the existence of “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”,¹⁴ the criterion was reproduced in the Rome Statute (see, for instance, article 8(2)(f)).¹⁵ The word “protracted” can present two aspects within it, (1) time and (2) intensity, the latter being the most relevant. As for (1), the fact that a conflict had a short duration of time does not mean it cannot be classified as a NIAC.¹⁶ As for (2), the indicators used by the ICTY in the *Haradinaj et al.* case to assess if the violence level was high enough to trigger the application of IHL in Kosovo were: the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number

¹³ DAPO AKANDE, *Classification of Armed Conflicts: Relevant Legal Concepts*, in: ELIZABETH WILMSHURST (Org.), **International Law and the Classification of Conflicts**, London: Oxford University Press, 2012, p. 50–51.

¹⁴ ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.

¹⁵ The Rome Statute of the International Criminal Court. Enacted in Brazil in 2002: BRAZIL. Decreto Nº 4.388, Promulga o Estatuto de Roma do Tribunal Penal Internacional, Brasília, de 25 de setembro de 2002. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/2002/D4388.htm>. Last access: 11.11.2020.

¹⁶ See, for example, IAHR, *Juan Carlos Abella v. Argentina*, Case 11.137, Report Nº 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997).

and caliber of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.¹⁷ Alarming numbers do not necessarily imply the application of IHL, for one needs to show that the violent confrontations happen *between the parties to the conflict* – one cannot add up all the violence in a certain territory and claim that the threshold of violence has been filled.¹⁸

The second important criterion refers to the parties to the possible conflict. A NIAC which triggers the application of Common Article 3 may be a conflict between a State and a non-state group, or even solely between non-state groups. What is pertinent in this matter is that non-state armed group(s) fighting a NIAC must have a “certain level of organization with a command structure”.¹⁹ The ICTY defined a number of indicators for the organization parameter: the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a 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 ceasefire or peace accords.²⁰ Organized armed groups in a certain situation cannot be taken as one single armed group, since some of them may not be sufficiently organized.²¹ The headquarters indicator seems to be used in a figurative sense, and the control of territory seems to be actually unnecessary to Common Article 3.²²

A brief parenthesis on the organization parameter. One could argue that organized armed groups may be sophisticated and extremely well organized, however, the definition of organization in the context of an armed conflict may be different from the definition of organization used in the context of (domestic) crimes. For a certain organized criminal group

¹⁷ ICTY, Prosecutor v. Haradinaj et al., Judgement, Case No. IT-04-84-T, T.Ch. I, 3 April 2008, para. 49.

¹⁸ Many valuable arguments were provided during a debate held between Marco Sassòli and Noam Lubell at the University of Columbia. See SASSÒLI, Marco; LUBELL, Noam, *The Law of Armed Conflict and Drug Policy Debate*, University of Columbia Law School: [s.n.], February 11, 2013. Available at: <<https://web.law.columbia.edu/human-rights-institute/speakers-events/video#The%20Law%20of%20Armed%20Conflict%20and%20Drug%20Policy>>. Last access: 11.11.2020.

¹⁹ PEJIĆ, Jelena, *Status of Armed Conflicts*, in: WILMSHURST, Elizabeth; BREAU, Susan (Orgs.), **Perspectives on the ICRC Study on Customary International Humanitarian Law**, [s.l.]: Cambridge University Press, 2007, p. 85–86 *apud* DAPO AKANDE, *Classification of Armed Conflicts: Relevant Legal Concepts*.

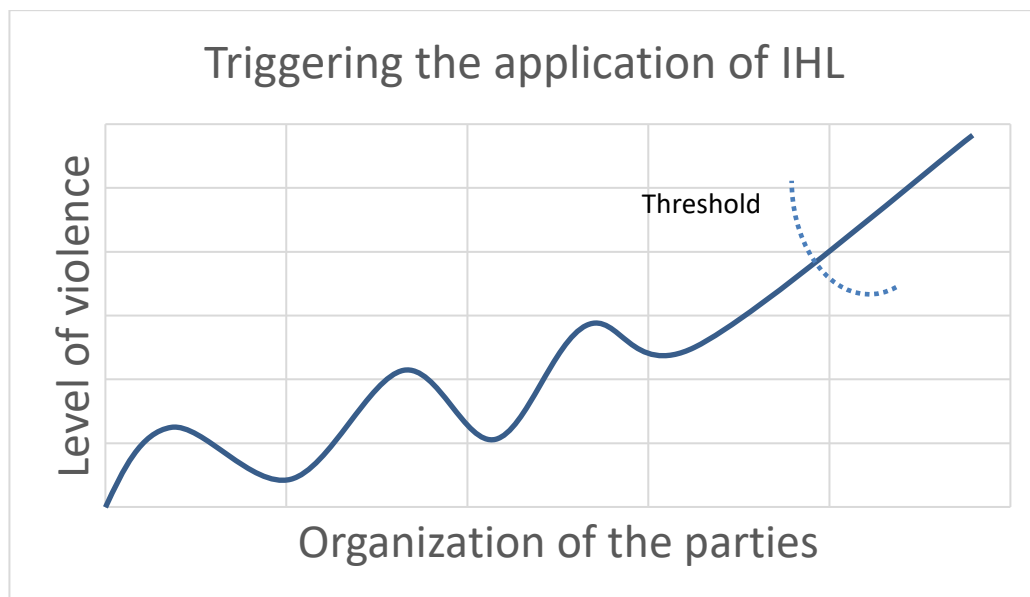
²⁰ ICTY, Prosecutor v. Haradinaj et al., Judgement, Case No. IT-04-84-T, T.Ch. I, 3 April 2008, para. 60.

²¹ SASSÒLI; LUBELL, *The Law of Armed Conflict and Drug Policy Debate*.

²² *Ibid.*

to be a party to a NIAC there would be the need to prove that the group (i) is capable of enforcing its own rules in a certain territory and that (ii) it has a hierarchical structure. On the other hand, groups like the Taliban – usually accepted to be a party to an armed conflict – show a high degree of organization and are rather fragmented in little groups. In Somalia, organized armed groups rapidly shift and change their hierarchical structure. This happens precisely because governmental forces are constantly trying to dismantle them.²³ Perhaps a relevant side to these points is that organized armed groups are often composed of different kinds of people, for instance, “farmers”, workers of methamphetamine laboratories, workers of processing factories, people who transport drugs, drug dealers, accountants, lawyers, corrupt politicians. This is one of the reasons why targeting fighters could be an extremely hard task: who would be a lawful target under IHL rules or even under human rights rules in that scenario and in which circumstances? Even so, the business side of the organized armed groups seems to be more organized than the “violent one”.²⁴

These indicators, both the protracted armed violence and the organization of non-state armed groups, are, as the word suggests, *indicators*, not *conditio sine qua non* elements.



1: diagram representing the factors that indicate the existence of a NIAC and trigger the application of IHL.

As the diagram above illustrates, whenever the relevant *factual* conditions that compose a NIAC are met – according to the above-mentioned legal sources – IHL is applicable. Of course, no mathematical formula could ever say how much violence or how much organization

²³ *Ibid.*

²⁴ *Ibid.*

is necessary for a situation to be considered a NIAC. However, only precise, ground-level information shall be used to assess the situation. Thus, a State may not simply “choose” to deny the existence of a NIAC as it pleases.

3.2. CRIMINAL ORGANIZATIONS WITHOUT A POLITICAL MOTIVE

The analysis of the parties to a possible conflict may also bring up a problem: what if one of the parties to the possible conflict is a criminal organization which does not have a political motive? That would be the case of at least two organized criminal groups based in the metropolitan region of Rio de Janeiro. Usually, non-state armed groups involved in armed conflicts have a political aim, for instance, the FARC and the ELN in the 60’s and 70’s in Colombia, the IRA in Northern Ireland, the Hezbollah in Lebanon. Is a political motive a requirement? The answer is no. As Akande describes,

“[t]he cases in the international criminal tribunals, which set out the criteria for classifying conflicts, do not include reference to the motivation or purpose of the groups in questions. What is important is that the group has a sufficient degree of organization, taking into account the factors indicated above, and that the group is able to and does conduct, or is otherwise involved, in an armed campaign which reaches the required degree of intensity. Factually, it is unlikely that these conditions will be met with criminal gangs but the possibility cannot be ruled out.”²⁵

Thus, if a criminal group meets the organization criterion set out by the ICTY, there is no reason why it could not be considered a non-state armed group in a certain conflict.

One last controversial comment. The United Nations Security Council (UNSC), in Resolution 1851, may have indicated its position on the possibility of applying IHL to a NIAC involving non-politically motivated groups: the UNSC accepted the use of “applicable international humanitarian and human rights law” for the purposes of eliminating piracy in Somalia.²⁶ Even though the UNSC clearly mentions the use of IHL during these “law enforcement operations”, Resolution 1851 seems to lead to two possible interpretations. As third parties to the on-going conflict in Somalia had been using force within its territory with the authorization of the Transitional Federal Government (TFG) in the country, the UNSC may have meant either (a) that they (the third parties) would become parties to the already-existing NIAC by collaborating with the TFG; or (b) that the counter-piracy operations conducted in the region could *per se* reach the requirements for the application of IHL. When I asked them about Resolution 1851 and the possibility of applying IHL to anti-piracy operations, a professor from

²⁵ DAPO AKANDE, *Classification of Armed Conflicts: Relevant Legal Concepts*, p. 52.

²⁶ UNITED NATIONS SECURITY COUNCIL (UNSC), Resolution 1851 (2008), adopted by the Security Council at its 6.046th meeting, S/RES/1851, parag. 6.

the Côte d’Azur University, member of the Institute for Peace and Development Law, observed that Akande’s interpretation should be read carefully.

Finally, the ICTY and the ICRC have rejected the idea that the political aim of armed groups shall be taken into account.

4 RIO DE JANEIRO: A NIAC IN THE EYES OF THE GLOBAL NORTH

In this chapter I will try to apply the definition of a NIAC expounded on Chapter 3 to a real case: the metropolitan region of Rio de Janeiro.

Urban violence related to organized crime in Brazil started many years ago with the process of urbanization. Violence levels have risen and dropped across the years and across the country but this TCC focuses on the most recent findings from the metropolitan region of Rio de Janeiro. As I will later explain, even though armed violence exists outside the territory of Rio de Janeiro, it is only in that region that the combination of factors allows for the classification of the situation as a NIAC. Moreover, the two largest organized criminal groups in Brazil are geographically organized in such a way that Rio de Janeiro has its own local organized criminal groups and militias.

I take selected non-governmental organizations as key sources of information about violence in Rio de Janeiro, given their generally recognized credibility, impartiality and methodology for the production and publication of reports.

One of the earliest public reports from Human Rights Watch (then known as *Americas Watch*) that addresses the issue of violence in Brazil dates back to the second half of the eighties. It mentions the “killing by suffocation of 18 inmates in a punishment cell in a São Paulo jail”. After the event, Americas Watch published “Prison Conditions in Brazil” and brought the matter to the Inter-American Commission on Human Rights of the OAS.²⁷ The organization’s world report in 1990 mentioned a “staggering rate of violent crime” and “extrajudicial executions of suspected criminals [committed by the police]”. The report further analyzed episodes of violence promoted by the Brazilian State in Rio de Janeiro against civilians, even claiming that “[t]he Rio de Janeiro police department has admitted that half the city’s identified death squad members are policemen”.²⁸ Nonetheless, “Brazilian officials have failed to take action to stop these death squads and punish those responsible for such abuses”.²⁹ A report from

²⁷ HUMAN RIGHTS WATCH, *Human Rights Watch World Report 1989*, [s.l.]: Human Rights Watch, 1989.

²⁸ HUMAN RIGHTS WATCH, *Human Rights Watch World Report 1990*, [s.l.]: Human Rights Watch, 1990.

²⁹ *Ibid.*

1993, also from Human Rights Watch, offers an update on a report published in 1987 by Americas Watch about Urban Police Violence in Brazil, claiming that “the problem of extra-judicial killings by vigilante groups continues”.³⁰ In 1996, Human Rights Watch published another report, this time entitled “Fighting Violence With Violence – Human Rights Abuse and Criminality in Rio de Janeiro”.³¹ The organization claims that homicide rates had tripled at the time, from 2,826 murders in 1980 to 8,408 in 1994. The report also explains that the source of criminality in Rio consists of criminal gangs and drug trafficking.

While clashing against criminal groups, police committed several violations of human rights, remaining “abusive, violent, and corrupt”.³² This truculence against the “lower levels of trafficking hierarchy [...] dominated by organized crime gangs ensconced in the favelas” oftentimes resulted in indiscriminate shooting, also harming and killing civilians. In 1994 the state of Rio de Janeiro agreed to send military troops into favelas to try to take control over the situation through an operation known as “Operation Rio”. The police were able to arrest more than 500 people, seize 300 firearms and capture 74 kilograms of marijuana. As soon as troops left the favelas the trafficking went back to “normal”. While Operation Rio was in place, several cases of torture, arbitrary detentions, warrantless searches and unnecessary use of lethal force happened. Human Rights Watch claims that some of these abuses were authorized and even encouraged by the higher ranking authorities in the military-police joint effort.³³

4.1 DATA FROM RECENT YEARS

More recently, the *Mapa da Violência* Report³⁴ evaluated that within an estimated total of 15.2 million firearms in private hands there is a total of 3.8 million firearms in the hands of criminals in Brazil. Between 1980 and 2014 more than 1 million people died in the country due to injuries caused by firearms – there were more than 42 thousand victims of homicide in 2014. Surprisingly, the number of deaths caused by homicide in the state of Rio de Janeiro decreased 47.8% between 2004 and 2014. This number reaches 67% considering only the city of Rio de Janeiro.³⁵

³⁰ HUMAN RIGHTS WATCH, **Urban Police Violence in Brazil | Torture and Police Killings in Sao Paulo and Rio De Janeiro after Five Years**, [s.l.]: Human Rights Watch, 1993.

³¹ HUMAN RIGHTS WATCH, **Fighting Violence with violence: Human Rights Abuse and Criminality in Rio de Janeiro**, **Human Rights Watch Publications**, v. 8, n. 2 (B), 1996.

³² *Ibid.*

³³ *Ibid.*

³⁴ Literally “Violence Map”.

³⁵ JACOBO WAISELFISZ, Julio, *Mapa da Violência 2016: homicídios por armas de fogo no Brasil*, 2016.

Data from the last 5 years show that these numbers started to rise again in 2016, after the World Cup contributed to leave the city and the state of Rio de Janeiro bankrupt.³⁶ The number of homicides in the state grew almost 20% in relation to 2015.³⁷

As the numbers rapidly rose, former president Michel Temer called for a military intervention in the state of Rio de Janeiro between February and December 2018, giving the Brazilian army a “*carte blanche*” (“*carta branca*”) to act.³⁸³⁹ The results of this intervention were a major disaster, as described below.

4.1.1 THE MILITARY INTERVENTION IN RIO DE JANEIRO

After the state of Rio de Janeiro went through a severe financial crisis – for several reasons – and violence levels rose significantly, former president Michel Temer authorized the military intervention in the state of Rio de Janeiro based on the Brazilian Federal Constitution.⁴⁰ Its article 34(III) allowed Temer to temporarily remove public state authorities from Rio de Janeiro from their posts and replace them with federal agents, due to the “serious compromise of public order in the state”. General Walter Souza Braga was appointed as the head of operations, supervising the intervention from March to December 2018 but still subordinate to the former president.

After spending almost 900 million Reais (around 232 million US Dollars in Dec. 2018) throughout a series of operations – 711 operations and 211 patrolling missions were monitored by the *Observatório da Intervenção*⁴¹ –, General Braga was not able to reverse or improve the situation in Rio de Janeiro. In fact, *Observatório da Intervenção* reports, referring to the intervention, “not only was it [the intervention] not successful in increasing the protection of the lives of the population, but it also accentuated longstanding problems in the state, such as

³⁶ RIO DE JANEIRO (estado), Decreto N° 45.692 de 17 de junho de 2016.

³⁷ IPEA, **Número de homicídios dolosos no Rio cresce quase 20% em 2016**, disponível em: <<http://www.ipea.gov.br/atlasviolencia/noticia/2/numero-de-homicidios-dolosos-no-rio-cresce-quase-20-em-2016>>, acesso em: 14 jun. 2019.

³⁸ SARAIVA, Jacqueline, Temer cede a Pezão e decide decretar intervenção no Rio de Janeiro, **Correio Braziliense**, 2018. Available at: <https://www.correiobraziliense.com.br/app/noticia/politica/2018/02/16/interna_politica,660233/como-sera-a-intervencao-do-governo-na-seguranca-do-rio-de-janeiro.shtml>. Last access: 06.06.2019.

³⁹ BRAZIL, Decreto N° 9.288, de fevereiro de 2018. Publicado em: 16/02/2018, Edição: 32-A, Seção: 1 – Extra, Página: 1.

⁴⁰ BRAZIL. Constitution (1988). Available at <https://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm>. Last access: 11.11.2020.

⁴¹ Observatório da Intervenção is an initiative of the Center for Security and Citizenship Studies at Cândido Mendes University (CESeC / Ucam).

the history of armed clashes that for decades has fueled violent deaths in Rio”.⁴² Numbers from different sources confirm that violence in Rio de Janeiro has gotten worse.



2: military agents during an operation in Rio de Janeiro. Mauro Pimentela/AFP/Getty Images.

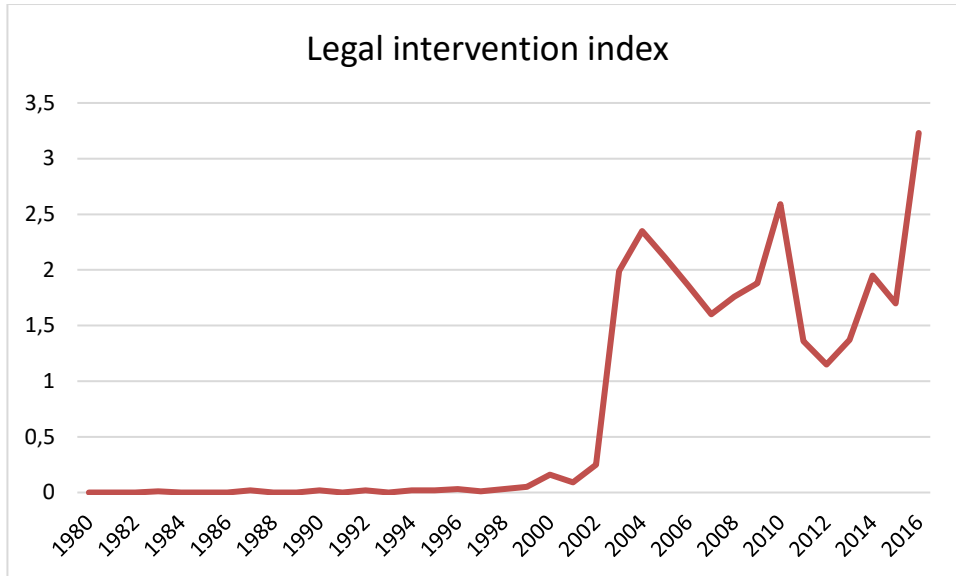
IPEA, Brazil’s Public Institute of Applied Economic Research, published an online database containing valuable information about violence in Rio de Janeiro.⁴³ The so-called *legal intervention* index,⁴⁴ which encompasses the number of deaths caused by public agents while acting on duty and during war operations⁴⁵ divided by the population in a given year, significantly increased in 2002. The highest number recorded by IPEA, considering the timeframe of 1980-2016, was 2016, right before the intervention:

⁴² OBSERVATÓRIO DA INTERVENÇÃO; CENTRO DE ESTUDOS DE SEGURANÇA E CIDADANIA, **Intervenção Federal: um modelo para não copiar**, Rio de Janeiro: Observatório da Intervenção, 2018, p. 12.

⁴³ IPEA. Atlas da Violência, 2018. Available at: <<http://www.ipea.gov.br/atlasviolencia/>>. Last access: 11 February 2020.

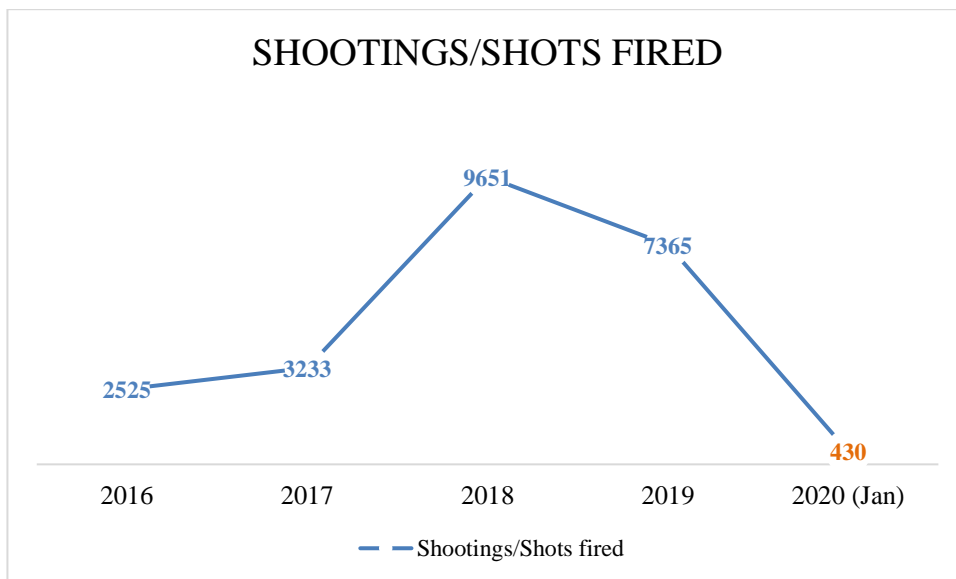
⁴⁴ Which matches diseases Y35 and Y36 of WHO’s ICD-10. Available at <<https://icd.who.int/browse10/2019/en>>. Last access: 11.11.2020.

⁴⁵ Nomenclature used by IPEA, according to WHO’s ICD-10.

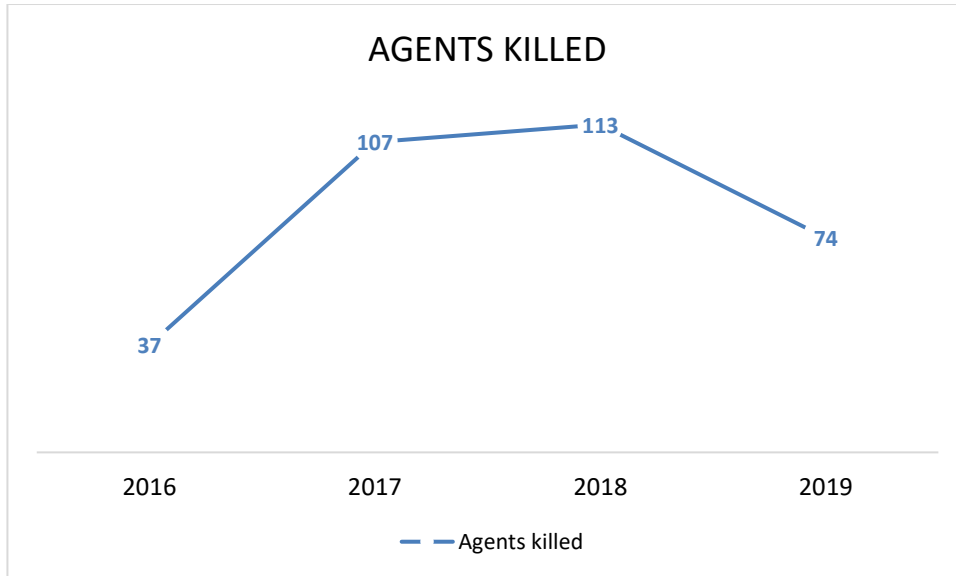


3: legal intervention index. RJ state. Multiplied by 100,000. IPEA/Diest.

Individual confrontations in Rio de Janeiro between (1) state and non-state agents and (2) non-state agents against each other have been recorded through an online platform named *Fogo Cruzado*. January 2018 showed the highest number of shootings/shots fired, with 9,651 incidents, of which 1,434 involved state agents, followed by 7,365 in the following year, of which 1,594 involved state agents, and 430 in January 2020. Rio de Janeiro had 73 shootings related to disputes among different criminal groups in 2019. The number of agents killed reached its peak in 2018, during the intervention, with 113 deaths. These numbers are illustrated in the following graphs.

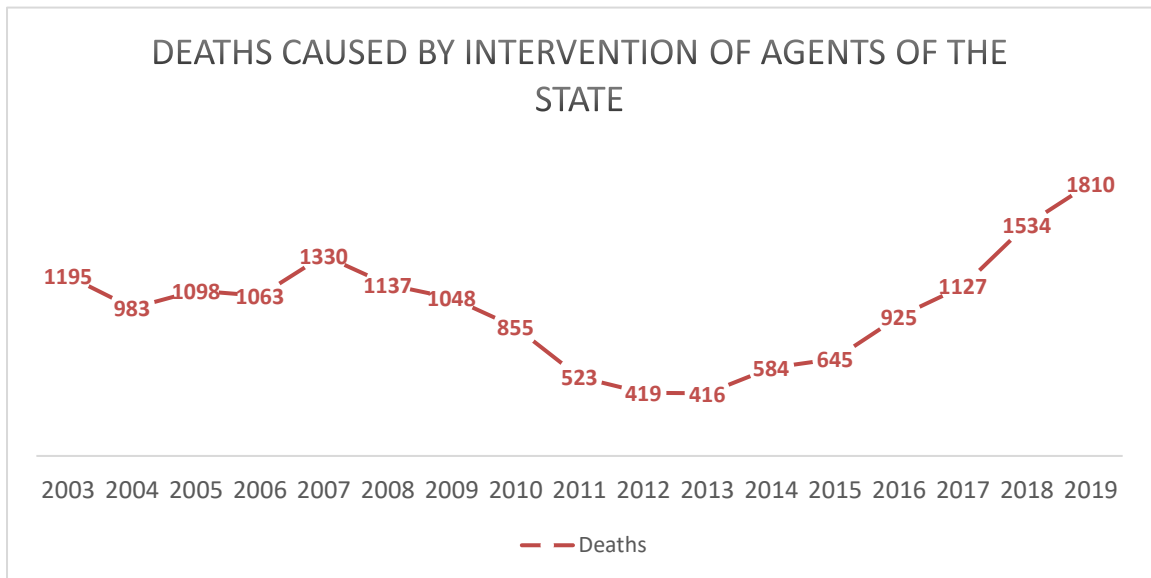


4: shootings/shots fired. RJ state. Fogo Cruzado.



5: agents killed during confrontations with firearms. RJ state. Fogo Cruzado.

Recent data from *ISP-RJ*, the Public Security Institute of Rio de Janeiro, show that the death toll caused by “intervention of agents of the state” in Rio de Janeiro reached atrocious levels in 2018 and 2019. Agents killed 1,534 people during the intervention in 2018, and 1,810 in 2019.⁴⁶ These numbers are equivalent to more than four and almost five deaths per day, respectively. The raw numbers are as follows.

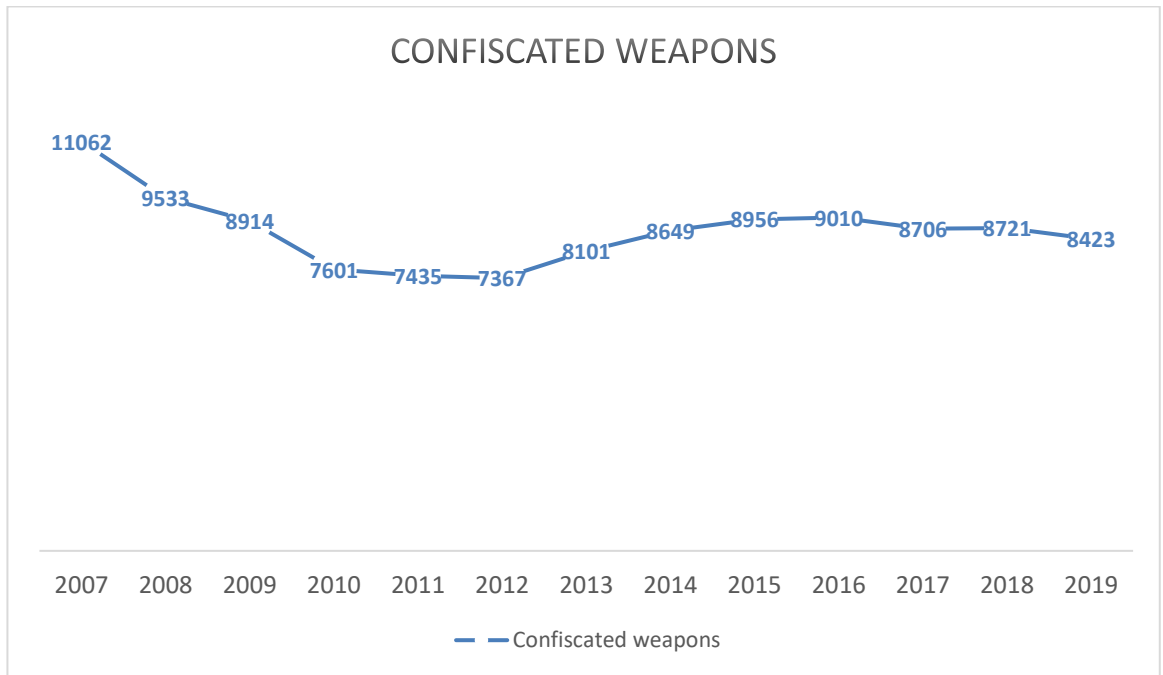


6: deaths caused by intervention of agents of the state. RJ state. ISP-RJ.

The same source reports that in 2018 there was an increase of 1.3% in the number of pistols, revolvers, rifles, machine guns and submachine guns removed from the streets. In 2018

⁴⁶ ISP RJ. Visualização de Dados, 2020. Available at <<http://www.isp.rj.gov.br/>>. Last access: 11 February 2020.

state agents confiscated 8,721 weapons in Rio de Janeiro, and 8,423 in 2019. The following graph illustrates the numbers from 2007 until the present day.



7: Confiscated weapons. RJ state. ISP-RJ.

The number of weapons seized by public authorities in Rio de Janeiro is used to estimate the number of weapons currently in the hands of criminals. As of 2010, the Small Arms Survey estimated that illicit firearms in the hands of criminals in Rio de Janeiro make up the amount of 5,256,091 firearms.⁴⁷ In a report published in 2018, researchers estimated that Brazilian civilians hold 17,500,00 legal and illicit firearms;⁴⁸ in another report from the same year researchers estimated that law enforcement agents in Brazil hold approximately 803,000 firearms.⁴⁹

The geographical distribution of shootings, deaths, firearms seized, military operations, criminal activities and so on is not evenly distributed across the city nor the state of Rio de Janeiro. Law enforcement agents allegedly hold maps that are up-to-date and show where the violence stems from. As we shall see in section 4.1.3, the population has also used their creativity to formulate maps.

⁴⁷ DREYFUS, Pablo *et al*, **Small Arms in Brazil: Production, Trade, and Holdings**, Geneva: Small Arms Survey, 2010, p. 102.

⁴⁸ KARP, Aaron, **Estimating Global Civilian-Held Firearms Numbers**, Geneva: Small Arms Survey, 2018, p. 4.

⁴⁹ KARP, Aaron, **Estimating Global Law Enforcement Firearms Numbers**, Geneva: Small Arms Survey, 2018, p. 4.

Not only raw numbers from the military intervention in the state are concerning, but also reports of violations of human rights and, possibly, international humanitarian law.

4.1.2 POLICE OPERATIONS AND VIOLATIONS

Authorities from the state of Rio de Janeiro come and go as fast as one changes a lightbulb. 6 former governors of the state have been either suspended from their position or arrested in the last 4 years.⁵⁰ Governor Wilson Witzel is now (since early 2020) under scrutiny and faces a tough impeachment process. He has been suspended from his position and awaits trial after an initial voting session in the state house of deputies ended badly for him.

Witzel has been an advocate of president Bolsonaro and his policy of “shoot to kill” or “shoot first, check later”. He defended the idea that anyone carrying arms openly should be targeted by the police under his command. In August 2019, he publicly affirmed that “we [the police and the government] are not going to budge [yield] even a millimeter”.⁵¹

This position caused major international and national uproar. The Special Rapporteur on extrajudicial, summary or arbitrary executions and the Inter-American Commission on Human Rights sent a communication letter to the governor of Rio de Janeiro⁵² stating relevant, possible violations of human rights to his attention. According to the letter, both entities:

“received [reports] concerning excessive use of force, including shoot-to-kill policing tactics that resulted in killings by the state in the context of joint military police and armed forces operations in Rio de Janeiro targeting poor neighbourhoods where a majority of residents are people of African descent”.⁵³

Extrajudicial killings and racially-biased operations have been reported in favelas of Rio de Janeiro in the context of anti-drug operations, which was reported in another joint communication sent to the governor of Rio de Janeiro by the Working Group of Experts on people of African Descent; the Special Rapporteur on extrajudicial, summary or arbitrary

⁵⁰ 6 GOVERNADORES do Rio foram afastados ou presos nos últimos 4 anos. **Poder 360**, August 28, 2020. Available at: <<https://www.poder360.com.br/brasil/6-governadores-do-rio-foram-afastados-ou-presos-nos-ultimos-4-anos/>>. Last access: 21/10/2020.

⁵¹ BOECKEL, Cristina. “Os cadáveres desses jovens estão no colo dos direitos humanos”, afirma Witzel. **G1**, August 16, 2020. Available at: <<https://g1.globo.com/rj/rio-de-janeiro/noticia/2019/08/16/os-cadaveres-desses-jovens-estao-no-colo-dos-direitos-humanos-afirma-witzel.ghtml>>. Last access: 05/11/2019.

⁵² SPECIAL RAPPORTEUR on extrajudicial, summary or arbitrary executions; Inter-American Commission on Human Rights, Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Inter-American Commission on Human Rights, Geneva, AL BRA 9/2019, 20 Jun. 2019.

⁵³ SPECIAL RAPPORTEUR on extrajudicial, summary or arbitrary executions; Inter-American Commission on Human Rights, Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Inter-American Commission on Human Rights, p. 1.

executions; and the Special Rapporteur of everyone to the enjoyment of the highest attainable standards of physical and mental health.⁵⁴

During law enforcement operations, police allegedly destroyed evidence of their human rights violations; used tear gas and pepper spray against innocents; removed bodies from possible crime scenes; shot more than 250 rounds towards innocents during a certain incident; used snipers and fired against civilians from helicopters; executed individuals who had already surrendered.⁵⁵

The Special Rapporteur and the Commission made reference to right to life, and claimed that law enforcement agents acted in violation of Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR); Article 6 of the Convention on the Rights of the Child; Article 3 of the Universal Declaration of Human Rights (UDHR); and Article 4, Article 7 (1) of the American Convention on Human Rights.⁵⁶

Human Rights Watch expressed on their World Report 2018 their concerns with abuses by police forces in Brazil. According to the NGO, there are “documented scores of cases in the past decade where there was credible evidence of an extrajudicial execution or a cover-up that were not properly investigated or prosecuted”. The organization was likewise worried about violence promoted by organized criminal groups.⁵⁷ On their World Report 2019 the NGO declared that “[t]he federal government has failed to publish a yearly report about killings by and of police officers, as ordered by the Inter-American Court of Human Rights in a 2017 ruling”.⁵⁸

The Inter-American Commission on Human Rights on its Annual Report 2018 articulated its concern with the intervention in Rio de Janeiro and “the increase in the numbers of shootings and people killed by the police”.⁵⁹

Nationally, the matter was brought before a local court and, later, before the Brazilian Supreme Court (STF). The State Public Attorney (*Defensoria Pública do RJ*) filed a lawsuit before the Rio de Janeiro State Court demanding the police ceased abusing the population living in the *Complexo da Maré* region. The matter was then brought before the Rio de Janeiro

⁵⁴ BRA 7/2017.

⁵⁵ SPECIAL RAPPORTEUR on extrajudicial, summary or arbitrary executions; Inter-American Commission on Human Rights, Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Inter-American Commission on Human Rights, p. 1-3.

⁵⁶ *Ibid.* p. 3.

⁵⁷ HUMAN RIGHTS WATCH, **World Report 2018**, New York: Human Rights Watch, 2018, p. 88–89.

⁵⁸ HUMAN RIGHTS WATCH, **World Report 2019**, New York: Human Rights Watch, 2019, p. 91.

⁵⁹ IACHR, **Annual Report 2018**, Costa Rica: Inter-American Commission on Human Rights, 2018, p. 272–273.

Appeals Court, which decided that police should abide by a “plan to reduce damages during police operations”.⁶⁰

In June 2020, the Brazilian Supreme Court limited police operations in favelas of Rio de Janeiro during the Coronavirus pandemic.⁶¹ Namely, justices limited “the use of helicopters, demanded the preservation of crime scenes and prohibited the use of schools and health units as operational bases for the civil and military police”.⁶² Yet, there are reports that some operations keep happening at full speed, deadly as ever.⁶³

4.1.3 ORGANIZED CRIMINAL GROUPS

I am aware of the several, comprehensive studies committed to understanding how criminality and (organized) criminal groups in Brazil work, and I must state that such a comprehensive analysis is not the objective of this work.⁶⁴ Nevertheless, the essential information shall be summed-up in order to allow the NIAC-hypothesis to be tested (and, later, confirmed).

The two largest criminal groups in Brazil are PCC and CV. There are more criminal groups in the country, of course, but all of them are somehow linked with either one or the other. The Federal Prison Bureau estimates that there are other “23 distinct groups in deferral Brazilian prisons”⁶⁵ but his number is surely underestimated.

⁶⁰ JUSTIÇA volta a determinar medidas para evitar violações de direitos dos moradores da Maré. **G1 Rio**, August 14, 2019. Available at: <<https://g1.globo.com/rj/rio-de-janeiro/noticia/2019/08/14/justica-volta-a-determinar-medidas-para-evitar-violacoes-de-direitos-dos-moradores-da-mare.ghtml>>. Last access: 21/10/2020.

⁶¹ BRAZIL. Brazilian Supreme Court (STF), ADPF 635/RJ. Filed November 20, 2019. Available at: <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5816502>>. Last access: 11.11.2020.

⁶² STF impõe novas restrições para operações policiais no Rio de Janeiro. **Consultor Jurídico**, August 18, 2020. Available at: <<https://www.conjur.com.br/2020-ago-18/stf-impoe-novas-restricoes-operacoes-policiais-rio-janeiro>>. Last access: 21/10/2020.

⁶³ DEFENSORIA questiona PM sobre operações em favelas do Rio mesmo com proibição do STF. **Brasil de Fato**, October 27, 2020. Available at: <<https://www.brasildefato.com.br/2020/10/27/defensoria-questiona-policia-militar-sobre-operacoes-em-favelas-do-rio>>. Last access: 12.11.2020; STABILE, Arthur. Mesmo proibidas, operações policiais seguem no RJ e passam a focar milícias, **Ponte**, October 20, 2020. Available at: <<https://ponte.org/mesmo-proibidas-operacoes-policiais-seguem-no-rj-e-passam-a-focar-milicias/>>. Last access: 11.11.2020.

⁶⁴ For instance: BEATO, Cláudio; ZILLI, Luís Felipe, A estruturação de atividades criminosas. Um estudo de caso, **Revista Brasileira de Ciências Sociais**, v. 27, n. 80, p. 71–88, 2012; DE SOUSA BRANDÃO, Thadeu, Organizações Criminosas no Brasil: uma Análise a partir da teoria das Elites e da Teoria da Ação Coletiva, **Revista Inter-Legere**, n. 3, 2008; CARDOSO, Francisca Letícia Miranda Gadelha *et al.*, Homicídios no Rio de Janeiro, Brasil: uma análise da violência letal, **Ciência & Saúde Coletiva**, v. 21, p. 1277–1288, 2016; MANSO, Bruno Paes; DIAS, Camila Nunes, **A guerra: a ascensão do PCC e o mundo do crime no Brasil**, [s.l.]: Editora Todavia SA, 2018; PENGLASE, Ben, The bastard child of the dictatorship: The Comando Vermelho and the birth of “narco-culture” in Rio de Janeiro, **Luso-Brazilian Review**, v. 45, n. 1, p. 118–145, 2008; LESSING, Benjamin, As facções cariocas em perspectiva comparativa, **Novos estudos CEBRAP**, n. 80, p. 43–62, 2008.

⁶⁵ MUGGAH, Robert, Um estado de insegurança: o caso do Rio de Janeiro, **Cadernos de Campo: Revista de Ciências Sociais**, v. 0, n. 22, p. 75–110, 2017, p. 83. Available at: <<https://periodicos.fclar.unesp.br/cadernos/article/view/10664>>. Last access: 07.03.2020.

PCC, or *Primeiro Comando da Capital*, was founded in 1993 inside a prison in the state of São Paulo. Inspired by the trade union model, the criminal group started gathering more and more members. It would offer protection and legal counselling in exchange for money. PCC would only recur to violence in extreme circumstances, yet it quickly started spreading to other prisons. In 1999, the criminal group began expanding its activities to drug trafficking and bank robbery. It was in 2002 when a Chilean terrorist who had trained guerrilla warfare with the Cuban army was arrested and imprisoned in Brazil together with one of the heads of PCC.⁶⁶

The criminal group started planning terrorist attacks and decided to support political candidates in the state of São Paulo. PCC signed a secret agreement with the state government and started to collaborate to decrease violence levels in São Paulo – it had the “monopoly of crime” in the state. This “system” was then exported throughout Brazil and, eventually, other Latin American countries, including Paraguay, Bolivia, Peru and Colombia. PCC more recently started recruiting refugees from Venezuela and buying weapons from hungry, desperate Venezuelans. Some estimate that PCC owns 60% of the drugs market share in Brazil. The criminal organization is able to profit billions of dollars each year because of its incredible military-like hierarchical organization.⁶⁷ The police and the *Ministério Público* estimate that the criminal organization has 30 thousand active members and around 2 million “men, women and teenagers” who are “low-level workers or sympathizers of criminal organizations”.⁶⁸

CV, or *Comando Vermelho*, was founded in 1979 inside a Brazilian prison in the state of Rio de Janeiro. A considerable number of political prisoners of the military dictatorship period (1964-1985) were placed together with regular criminals, which meant that some of them started exchanging guerrilla and urban warfare training. CV has connections with Colombian cartels – as well as the FARC. In fact, one of CV’s leaders established a partnership with the FARC in the 1990s, and the two criminal groups started cooperating with the objectives of importing arms trafficked from Suriname and selling drugs to Europe, the US and in Brazil.⁶⁹ The criminal groups is described as “very territorial”, and this description matches Rio de Janeiro’s geography.⁷⁰ Local criminal groups, including the CV, take advantage of the fact that

⁶⁶ I understand that this information might sound a bit reactionary, however true.

⁶⁷ COUTINHO, Leonardo, The Evolution of the Most Lethal Criminal Organization in Brazil—the PCC, **PRISM**, v. 8, n. 1, p. 56–67, 2019. Available at: <<http://cco.ndu.edu/News/Article/1761039/the-evolution-of-the-most-lethal-criminal-organization-in-brazil-the-pcc/>>. Last access: 15.03.2020.

⁶⁸ VILARDAGA, Vicente; LAVIERI, Fernando, A facção que mais cresce no mundo, **IstoÉ**, 2018. Available at: <<https://istoe.com.br/a-facao-que-mais-cresce-no-mundo/>>. Last access: 16.03.2020.

⁶⁹ COUTINHO, Leonardo, The Evolution of the Most Lethal Criminal Organization in Brazil—the PCC.

⁷⁰ MUGGAH, Um estado de insegurança, p. 84.

the city has plenty of hills – or *morros*, as the locals say –, where the population is divided in many *favelas*. CV is, therefore, territorial in the sense that every favela has its own leader who is consequently a member of CV. Their duties vary, and comprehend territorial dominance, “business” management, fighting other groups and controlling the local population. According to witnesses, CV is organized according to three basic characteristics: “horizontality”, “capillarity” and “reciprocity”.⁷¹ The criminal organization has regional leaders who are in close contact with their main national leaders. Their decisions are implemented wherever there are members of CV but also where they manage to find local criminals to execute orders. Lastly, every action is duly planned and collectively discussed before being executed, which creates a sense of brotherhood.

Another important actor that simply cannot be ignored is the militia. These groups firstly emerged in the 1970s as “security patrols” in favelas in Rio de Janeiro.⁷² This is how the militia work: former law enforcement agents – and, sometimes, active agents – engage in certain illicit activities in exchange for money. The militia offer “public” security, services and products to locals and demand financial compensation in exchange. Locals are oftentimes obliged to obey their “local laws”, otherwise they risk being threatened or killed. Local authorities often endorse these groups,^{73,74} and there are reports that even the Brazilian president and his family have close connection with members of the *carioca* militia.⁷⁵ Similarly, there are accounts that local politicians from Rio de Janeiro established powerful alliances with militiamen.⁷⁶ The biggest militia group, *Liga da Justiça*, was found to control “a vast network of pharmacies, bakeries,

⁷¹ BAU MACEDO, Luís Otávio, Lições que aprendi com o Comando Vermelho, **A Tribuna**, 2019. Available at: <<https://www.atribunamt.com.br/2019/12/08/licoes-que-aprendi-com-o-comando-vermelho/>>. Last access: 16.03.2020.

⁷² MUGGAH, Um estado de insegurança, p. 87.

⁷³ *Ibid.*

⁷⁴ SOARES, Rafael, Mensagens de Orlando Curicica revelam elo da milícia com batalhão de Jacarepaguá, **Extra**, 2019. Available at: <<https://www1.folha.uol.com.br/poder/2020/02/bolsonaro-diz-que-miliciano-morto-era-um-heroi-quando-foi-homenageado-por-flavio.shtml>>. Last access: 15.03.2020.

⁷⁵ ALBUQUERQUE, Ana Luiza, Bolsonaro diz que miliciano morto era um herói quando foi homenageado por Flávio, **Folha de S. Paulo**, 2020. Available at: <<https://www1.folha.uol.com.br/poder/2020/02/bolsonaro-diz-que-miliciano-morto-era-um-heroi-quando-foi-homenageado-por-flavio.shtml>>. Last access: 15.03.2020; ENTENDA a morte de miliciano ligado a Flávio Bolsonaro e veja perguntas sem resposta, **Folha de S. Paulo**, 2020. Available at: <<https://www1.folha.uol.com.br/poder/2020/02/entenda-a-morte-de-miliciano-e-os-elos-dele-com-flavio-bolsonaro.shtml>>. Last access: 15.03.2020; CALIXTO, Larissa, Dez fatos que ligam a família Bolsonaro a milicianos, **Congresso em Foco**, 2019. Available at: <<https://congressoemfoco.uol.com.br/congresso-em-foco/dez-fatos-que-ligam-a-familia-bolsonaro-a-milicianos/>>. Last access: 15.03.2020; PIRES, Breiller, Família Bolsonaro molda narrativa ambígua para se descolar de miliciano morto na Bahia, **El País**, 2020. Available at: <<https://brasil.elpais.com/brasil/2020-02-20/familia-bolsonaro-molda-narrativa-ambigua-para-se-descolar-de-miliciano-morto-na-bahia.html>>. Last access: 15.03.2020.

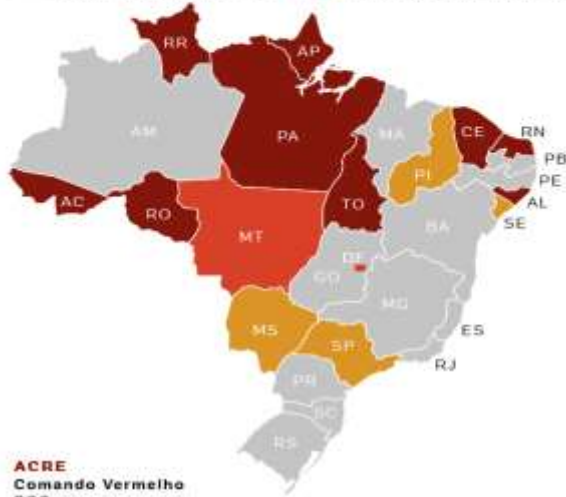
⁷⁶ MUGGAH, Um estado de insegurança, p. 89.

beauty salons and street vendor collectives” and “small and medium-sized hotels, local non-profit organizations and public-housing projects” in different cities in Rio de Janeiro.⁷⁷

⁷⁷ *Ibid.*, p. 90.

As principais facções criminosas em cada estado brasileiro

■ Conflito entre PCC e filiais do Comando Vermelho
■ Domínio do PCC
■ Conflito entre facções regionais
■ Domínio do Comando Vermelho



ACRE
Comando Vermelho
PCC
Bonde dos 15

AMAPÁ
Comando Vermelho
PCC

ALAGOAS
Comando Vermelho
PCC

AMAZONAS
FDN
PCC

BAHIA
PCC
Catiara
Comando da Paz
Quadrilha do Perna
Bonde do Maluco
Mercado do Povo Altitude

CEARÁ
PCC
Comando Vermelho
Guardões do Estado

DISTRITO FEDERAL
Comando Vermelho

ESPÍRITO SANTO
PCC
PCV

GOIÁS
PCC
Família Monstro

MARANHÃO
Bonde dos 40
PCM
PCC

MATO GROSSO
Comando Vermelho

MATO GROSSO DO SUL
PCC

MINAS GERAIS
PCC
Família Monstro

PARÁ
PCC
Comando Vermelho
Comando Classe A
Bonde dos 50
União do Norte

PARAÍBA
PCC
Okaida
EUA

PARANÁ
PCC
Máfia Paranaense

PERNAMBUCO
PCC
Okaida

PIAUI
PCC

RIO DE JANEIRO
Comando Vermelho
Amigos dos Amigos
Terceiro Comando Puro

RIO GRANDE DO NORTE
PCC
Comando Vermelho
Sindicato do Crime

RIO GRANDE DO SUL
Manos
Balas na Cara
Abertos
Unidos pela Paz
Primeiro Comando do Interior
Os Tauros
Os Brasas

RONDÔNIA
Comando Vermelho
PCC

RORAIMA
Comando Vermelho
PCC

SANTA CATARINA
PCC
PGC

SÃO PAULO
PCC

SERGIPE
PCC
Bonde do Maluco

TOCANTINS
PCC
Comando Vermelho
Máfia Tocantinense

Fonte: Pesquisadores Camilla Nunes Dias e Bruno Paes Manso

Arte/IOL

8: "The main criminal groups in each Brazilian state". UOL, 2018. Available at: <https://noticias.uol.com.br/cotidiano/ultimas-noticias/2018/08/22/mapa-das-faccoes-no-brasil-pcc-e-comando-vermelho-disputam-hegemonia-do-crime-em-9-estados.htm>. Last access: 03.2020.

PCC and CV “abided by a truce for two decades”⁷⁸ until 2016⁷⁹ but the militia have always been their emphatic opponent. The two criminal groups and the different militia leaders are currently fighting for dominance and territory in the state of Rio de Janeiro. The illustration above shows (a) in dark red, states in which there is a conflict between PCC and CV; (b) in light red, states controlled by CV; (c) in orange, states controlled by PCC; and (d) in grey, states in which there are conflicts between local criminal groups. A memorable episode occurred in November 2016, when CV “attempted to invade” a territory controlled by the militia in the and the results were catastrophic: policemen and CV engaged in active gunfights, a military police helicopter crashed, and 7 bodies were later found in a *favela*.⁸⁰

As mentioned in section 4.1.1, researchers and civilians have created multiple maps, some more trustworthy than others, to try to describe which areas of the region are controlled by those organized criminal groups.

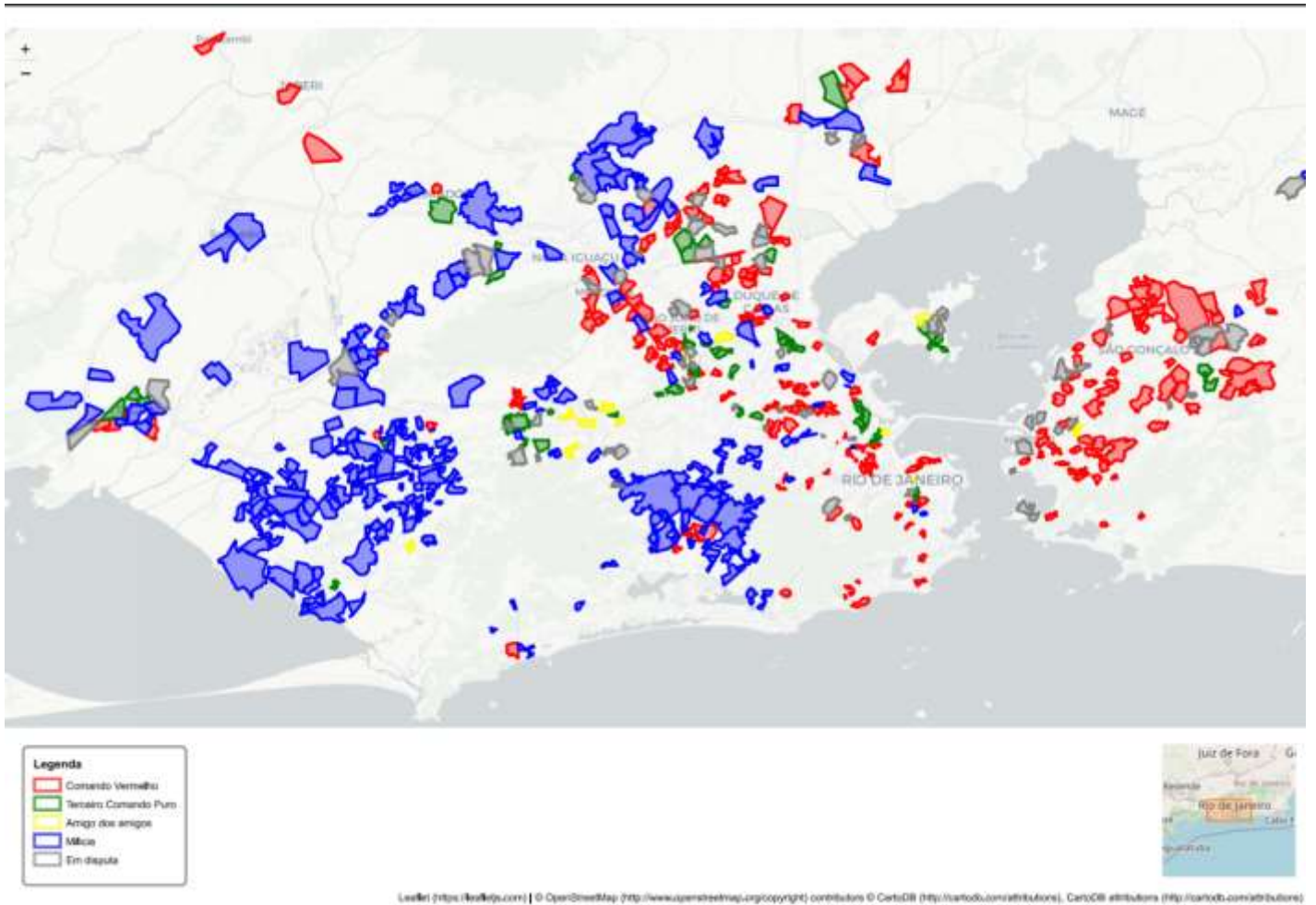
One of those maps was elaborated by Fogo Cruzado, New Illegalities Study Group (Federal Fluminense University), Violence Study Nucleus (University of São Paulo); Pista News, and an anonymous hotline which receives calls regarding criminality in Rio de Janeiro (*Disque Denúncia*).⁸¹

⁷⁸ *Ibid.*, p. 84.

⁷⁹ RIBEIRO, Aline, A íntegra do “salve” que explica as guerras entre facções, *Época*, 2016. Available at: <<https://epoca.globo.com/tempo/noticia/2016/10/integra-do-salve-que-explica-guerras-entre-faccoes.html>>. Last access: 16 mar. 2020.

⁸⁰ MUGGAH, Um estado de insegurança, p. 90.

⁸¹ MAPA dos grupos armados do Rio de Janeiro. **Fogo Cruzado, Grupo de Estudos dos Novos Illegalismos da Universidade Federal Fluminense, Núcleo de Estudos da Violência da Universidade de São Paulo, Disque-Denúncia, Pista News**, 2019. Available at: <https://atualprodutora.com/wp-content/uploads/2020/10/Apresentac%CC%A7a%CC%83o-ao-mapa-dos-grupos-armados-do-Rio-de-Janeiro_final_final.pdf>; and at: <https://atualprodutora.com/wp-content/uploads/2020/10/output_dd-21.html>. Last access: 11.11.2020.

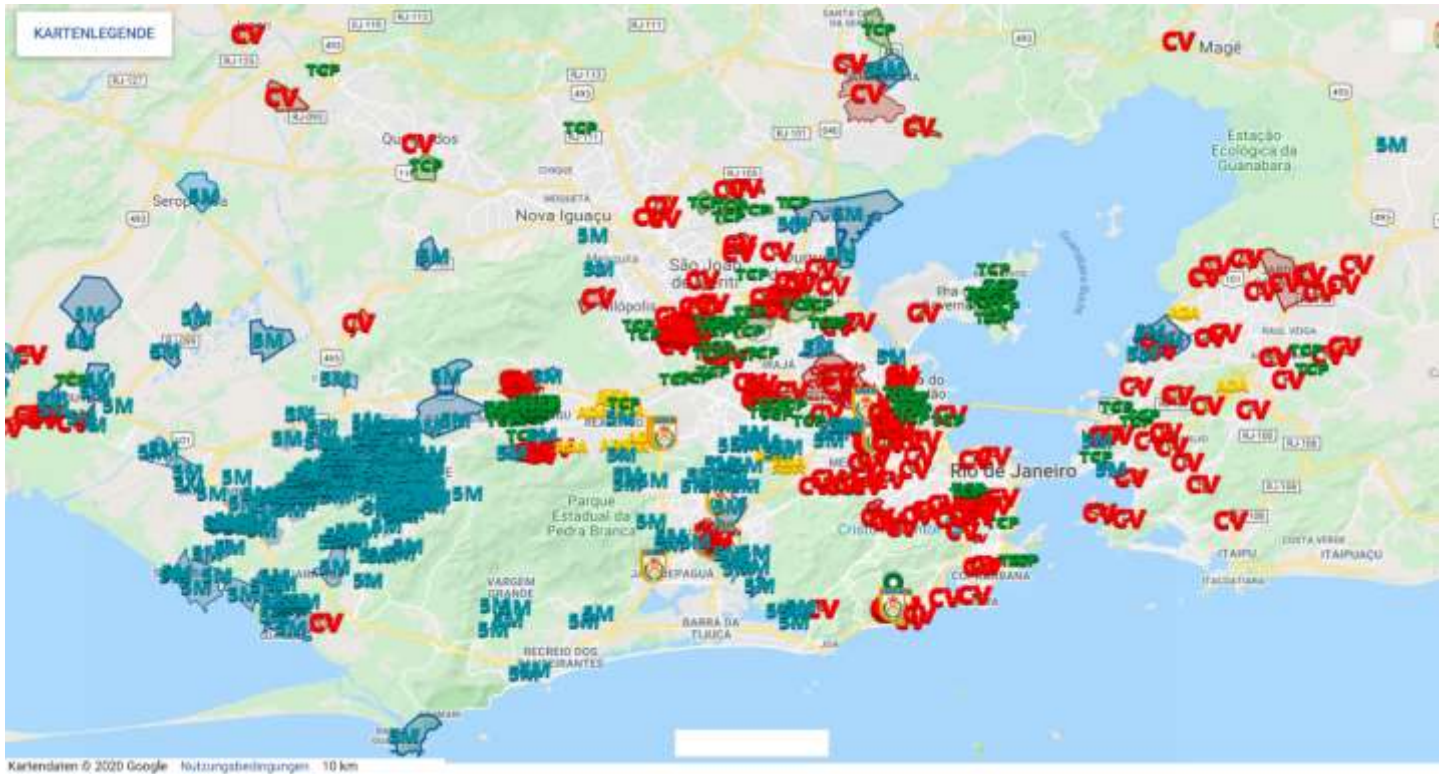


9: Map showing areas controlled by different organized criminal groups in RJ. Source: see footnote 79.

Highlighted in red are areas controlled by Comando Vermelho; in green by Terceiro Comando Puro; in yellow by Amigos dos Amigos; in blue the militia. Disputed areas are shown in grey. In 2019, 58% of the territory analyzed was controlled by militia, 11,6% by Comando Vermelho, 3,7% by Terceiro Comando and 0,3% by Amigos dos Amigos. 25,7% of the territory was disputed by those groups.

Another map was created by an anonymous user and uploaded to the internet for the general public.⁸² Yet, its creator does not inform their methodology nor their methods.

⁸² SÓ Favelas. Map. Available at: <https://www.google.com/maps/d/viewer?mid=1mH6lpI3tZ29SYgfHpXd5L5sbYCSlo0ZI&shorturl=1>. Last access: 11.11.2020.



10: Map showing regions in RJ controlled by different organized criminal groups. Source: see footnote 80.

Even though this map was not originally produced by the academia, its similarity with the previous one shown here is noticeable.

4.2 RIO DE JANEIRO: A CONTROVERSIAL NON-INTERNATIONAL ARMED CONFLICT

Of course, the metropolitan region of Rio de Janeiro is rather *sui generis*. As shown throughout this chapter, the region suffers with active, violent non-state organized armed groups and police forces which are currently guided by a disastrous public policy.

I contend that the requirements necessary for a NIAC to exist are met on the present case. As shown the parties to the conflict are organized enough to abide by IHL – they are able to obey and apply rules and principles of IHL, at least in theory. Criminal groups such as the CV and the TCP, as well as militia, have strong leaders and control a significant area in the region. Also, the levels of violence are high enough: there are thousands of deaths, extremely powerful weapons are employed, and guerrilla-like tactics seem to be the “new normal” in the region. For a full description of the level of organization of the parties and the level of violence of the situation, please consult the subdivisions of Chapter 4 above.

Even though some of the selected interviewees I consulted contend that there is no NIAC in the metropolitan region of Rio de Janeiro, I still defend the opposite idea. I sent them (some of) the following questions by email, according to their area of expertise:

1. The state of Rio de Janeiro is currently facing an extremely delicate moment when it comes to public security. What is the importance of NGOs at helping civilians who fall victims of violence and at helping the State managing and deescalating the situation?
2. A given situation of armed violence between a State and criminal organizations (factions) may spark up discussions about the applicability of IHL to the case. After analyzing what the doctrine and jurisprudence of international courts have to say on the matter, it is clear that there are some requirements which need to be met for a given scenario to be classified as an armed conflict.
 - a. In your opinion, could a criminal organization (faction) be part of a NIAC? Is there any case that would match this description?
 - b. In your opinion, could a terrorist group be part of a NIAC? Is there any case that would match this description?
 - c. What are the main differences between a terrorist group and a criminal group (for example, CV and PCC)?
3. Brazilian public authorities have recently manifested their appreciation for “shoot to kill” policies in military and police operations in the favelas of Rio de Janeiro. What are the political implications caused by this kind of policy to local politics and public security, both nationally and internationally?
4. About rules of engagement adopted by the Brazilian army in operations in favelas, does the army pay any kind of special attention to IHL?
 - a. Does the army pay any kind of special attention to international human rights law?
5. Does the level of violence in Rio de Janeiro match the “protected armed violence” criterion commonly used by international tribunals to describe a NIAC?
6. What would be the best body of rules in order to protect the victims of armed violence in Rio de Janeiro?
7. Could the scenario in Rio de Janeiro be described as a NIAC, in the same sense adopted by Common Article 3 to the Geneva Conventions of 1949? Is there any similar case which could illustrate your answer, such as in Colombia or Mexico?

Most of the answers do not recognize the scenario in Rio de Janeiro as a NIAC, for two major reasons: the interviewees believe either that (i) criminal groups are not organized enough; or that (ii) the levels of violence are not high enough; or that (iii) criminal groups cannot be parties to an armed conflict without political motivation; or that (iv) applying IHL to the case would be worse for the victims. Some of the interviewees who are members of the Brazilian army admitted that IHL was to be observed by agents on ground, which I found surprising; one of them rejected applying jurisprudence of international courts as interpretive guides: their answer to question 5 was “I have not seen this term [protracted armed violence] either in the Hague or the Geneva Conventions, nor in their Protocols. One interviewee, who is a political scientist, believed that there is, in fact, a “war happening in Rio de Janeiro”, but “political forces” will never admit it.

I found only one book⁸³ explicitly discussing the application of IHL to the metropolitan region of Rio de Janeiro: “Territorial Gangs and International Law of Armed Conflicts”, written by Carlos Frederico de Oliveira Pereira.⁸⁴ My opinion is that Pereira wrote a controversial work, to say the least. Pereira states, for example, that IHL would be more protective for the victims of the armed conflict,⁸⁵ and that public agents have a “legal duty” (*dever legal*) to shoot and kill fighters, which would entail a “qualified immunity” (*excludente de ilicitude*).⁸⁶ He agrees that IHL should be applied to the situation in Rio de Janeiro, even though it is my opinion that his reasons may be more political than legal.

I address most of these difficulties throughout this chapter in the sections above, for which I still believe that there is a NIAC in Rio de Janeiro. Nevertheless, one of the items above,

⁸³ Although I did find interesting papers studying the case of Rio de Janeiro written by prof. Dr. Sven Peterke: PETERKE, Urban Insurgency, “Drug War” and International Humanitarian Law; PETERKE, Sven, Die gewalttätige organisierte Kriminalität in und um Rio de Janeiro Favelas aus interdisziplinärer Sicht, *Zeitschrift für die gesamte Strafrechtswissenschaft*, v. 129, n. 4, p. 1125–1155, 2018; PETERKE, Sven, A violência urbana no Rio de Janeiro: um conflito armado? Uma crítica à retórica de guerra, *in*: DA SILVA DINIZ, Ariosvaldo *et al* (Orgs.), *As múltiplas faces da segurança pública: entre a pretensão dos direitos humanos e as resistências cotidianas*, João Pessoa: Ideia, 2016, p. 242–272; PETERKE, Sven, Aplicabilidade e Exibilidade dos Direitos Humanos em Situações de Guerra, *in*: TOSI, Giuseppe; GUERRA FERREIRA, Lúcia de Fátima (Orgs.), *Ditaduras Militares, Estado de Exceção e Resistência Democrática na América Latina*, João Pessoa: CCTA, 2016, p. 281–302; PETERKE, Sven; WOLF, Joachim, International Humanitarian Law and Transnational Organised Crime, *in*: *International Law and Transnational Organised Crime*, Oxford: Oxford University Press, 2016, p. 381–405; PETERKE, Sven, Mediendemokratie und Verfassungskontrolle à brasileira: Zur Bundesintervention in Rio de Janeiro, *VRÜ Verfassung und Recht in Übersee*, v. 52, n. 1, p. 90–114, 2019; PETERKE, Sven; HAUCK, Pierre, Organized crime and gang violence in national and international law, *International Review of the Red Cross*, v. 92, n. 878, p. 407–436, 2010.

⁸⁴ PEREIRA, Carlos Frederico de Oliveira. *Gangues territoriais e direito internacional dos conflitos armados*. Curitiba: Juruá, 2016.

⁸⁵ *Idem*, p. 251.

⁸⁶ *Idem*, p. 241.

namely the discussion whether victims would be better off without IHL, deserves one's close attention.

5 RIO DE JANEIRO: A LEGAL DISASTER

In this chapter I shall discuss the difficulties and problems that could be caused if IHL were *actually* applied to the NIAC in the metropolitan region of Rio de Janeiro. I shall first explore the possible interactions between the body of law that constitutes IHL on one side and the Brazilian Federal Constitution on the other. Next, I explore some practical problems that could affect civilians and even fighters involved with the NIAC, including issues connected to targeting.

5.1 IHL AND THE BRAZILIAN FEDERAL CONSTITUTION

When it comes to the Brazilian domestic legal system, there is an interesting discussion about the hierarchy of international treaties ratified by Brazil in relation to the Brazilian Federal Constitution and other “regular” norms. To complicate things even further, the majority of authors separate treaties that regulate international human rights law from other treaties that regulate different matters: I shall try to explain my personal position on this issue.

The Brazilian Supreme Court (STF) and a number of authors defend different, sometimes conflicting positions in this matter. Yet, for the purposes of this work, I shall adopt the arguments of Flávia Piovesan⁸⁷ in order to interpret the Brazilian Federal Constitution. I chose Piovesan as a guide for, in my view, their writings are the most progressive and the most aligned with the spirit of the Brazilian Federal Constitution when it comes to opening Brazil to the international legal order⁸⁸ with the objective of solidifying the human dignity of those under its jurisdiction.⁸⁹

The controversy I just mentioned actually originates from different possible interpretations of the Brazilian Federal Constitution. Within its Title II, on fundamental rights and guarantees, Chapter I, on individual and collective rights and duties, Article 5 reads that “[a]ll persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms”. An extensive list of fundamental

⁸⁷ PIOVESAN, Flávia, **Direitos Humanos e o Direito Constitucional Internacional**, 18. ed. São Paulo: Saraiva, 2018.

⁸⁸ TAVARES, André Ramos. *Curso de Direito Constitucional*. 16^a ed. São Paulo: Saraiva Educação, 2018. p. 417.

⁸⁹ PIOVESAN, **Direitos Humanos e o Direito Constitucional Internacional**.

rights follows. This list is considered to be an entrenched clause (*cláusula pétrea*, in Brazilian Portuguese), that is, impossible to be altered through amendments to the Constitution.

I emphasize that the following provisions are key to understanding what is at stake: Paragraph 1 of the mentioned Article 5 reads that “[t]he provisions defining fundamental rights and guarantees are immediately applicable”, and Paragraph 2 reads that “[t]he rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from other international treaties in which the Federative Republic of Brazil is a party”.

These two paragraphs have two practical consequences – this is my personal view, and Piovesan seems to think similarly. One, all rights and guarantees provided for in treaties ratified by Brazil are automatically incorporated into its Federal Constitution and, thus, are immediately applicable.⁹⁰ Two, provisions that *do not* regulate rights and guarantees do not get to be automatically incorporated into the Brazilian Federal Constitution. Yet, they have a special “supralegal” and “infraconstitutional” status,⁹¹ i.e. they stand somewhere between the Brazilian Federal Constitution and other “regular” norms, such as federal laws and all norms which stand below them.

A number of authors, including sometimes Piovesan, seem to have created a rather artificial categorization of treaties for the purposes of interpreting the Brazilian Federal Constitution, separating them in (i) “human rights treaties” and (ii) other treaties. I find it quite hard, if not impossible, to categorize a treaty as a “human rights treaty”, because even if one thinks of the most obvious candidates for this category, e.g. the American Convention of Human Rights, there are many provisions in it that do not exactly create “human rights”, such as those that deal with procedural matters or those that create the Inter-American Court of Human Rights. I would prefer to refer to them as “treaties which regulate human rights”, but one would still run into some problems when categorizing, for example, the Geneva Conventions of 1949 – I explain this in a moment. Furthermore, the Brazilian Federal Constitution does not even mention “human rights” as a workable category.

I shall later return to my conception that rights and guarantees are automatically incorporated into the Brazilian Federal Constitution. For the moment, I will continue to consider the categories I just criticized.

⁹⁰ *Ibid.*, p. 114-.

⁹¹ See, for instance: MAZZUOLI, Valério de Oliveira, *Teoria geral do controle de convencionalidade no direito brasileiro*, **id/496913**, 2009, p. 114.

Much of this controversy lies on the fact that the STF interprets⁹² Article 5, Paragraph 2 of the Brazilian Constitution as attributing “international human rights treaties” a “supralegal”, “infraconstitutional” status, but other international treaties would have a non-special status,⁹³ enjoying the same hierarchy as, for instance, a regular federal law.⁹⁴

As I have written somewhere else, together with my dear colleague Julia B. Ospina, this puts the Geneva Conventions of 1949 in a peculiar spot.⁹⁵ On the one hand, the Geneva Conventions of 1949 and their Additional Protocols, as well as other international treaties that regulate international humanitarian law, are not to be considered, at least for the purposes of this work, international human rights treaties. International humanitarian law regulates ultra-specific aspects of armed conflict, even though it ultimately aims to preserve human dignity. Its main purposes are regulating means and methods of combat and minimizing the suffering of those who are not, or no longer, participating in hostilities. On the other hand, there are some provisions in the Geneva Convention that do “aim at directly protecting human dignity and, in this sense, create rights and guarantees”. We used the principle of humanity as an example of how human life ought to be favorably balanced with military necessities. Thus, are these Conventions (a) “constitutional” or (b) “supralegal”, “infraconstitutional”?

It is worth noting that the Geneva Conventions of 1949 and their Additional Protocols are treated by the Brazilian Supreme Court as a non-constitutional group of norms, at least in theory.⁹⁶ If the Brazilian Federal Constitution prioritizes international human rights law over international humanitarian law, at least when it comes to their hierarchy, one shall ask what to do when a certain norm of one collides with a certain norm of the other body of law.

Authors usually discuss issues related to the interaction of humanitarian with human rights law assuming that they lie on the same hierarchical level, as is usual in most States. Accordingly, some authors use the principle of *lex specialis* to resolve the most important issues of this debate, often trying to define what would be the definition of this principle and how to

⁹² BRAZIL. Brazilian Supreme Court (STF), RE 466.343-1/SP; BRAZIL. Brazilian Supreme Court (STF), RE 349.703/RS; BRAZIL. Brazilian Supreme Court (STF), RE 511.961/SP.

⁹³ MARINONI, Luiz Guilherme, *Controle de convencionalidade (na perspectiva do direito brasileiro)*, **Controle de Convencionalidade: um panorama latino-americano**. 1^a ed. Brasília: *Gazeta Jurídica*, 2013, p. 7.

⁹⁴ See, for details: BRAZIL. Brazilian Supreme Court (STF), DJU 25.jun.2009, HC 87.585/TO, Rel. Min. Marco Aurélio.

⁹⁵ MAC FADDEN, Gabriel Lee; OSPINA, Julia Brito. A hierarquia das Convenções de Genebra de 1949 e seus Protocolos Adicionais no ordenamento jurídico brasileiro. *Boletim UFRGS IHL Clinic*, v. 1. Porto Alegre: Jun., 2020. p. 14-16. Available at: <https://ufrgsihlclinchome.files.wordpress.com/2020/06/boletim-ihl-clinic-retificado.pdf>. Last access: 23.10.2020.

⁹⁶ Until this moment, no case concerning the application of international humanitarian law in Brazil has ever risen to the Brazilian Supreme Court, except for some old cases related to the II World War.

correctly apply it. Most authors would argue that international humanitarian law is always the most specialized body of law when it comes to a situation involving armed conflicts,⁹⁷ but other authors have argued the exact opposite.⁹⁸ Marco Sassòli, however, innovates and prefers using the “greatest common contact surface area”⁹⁹ to decide which body of law ought to be applied, i.e. a case-by-case analysis would be required in order to clarify which body of law suits a given situation best. These solutions would not be applicable to the Brazilian legal order, as the current interpretation of the Brazilian Federal Constitution given by the STF does not conceive treaties that regulate international humanitarian law as having the same hierarchy as treaties that regulate international human rights law.

A brief comment shall be registered. When I first presented this problem at my university’s 2019 Symposium of Undergraduate Research, one of the attending professors asked me whether I believed that the use of “conventionality control” would be enough to solve the hermeneutical problem I just described. The idea is interesting but insufficient for our case. Conventionality control is a tool used by the STF, *put simply*, similar to the constitutionality control. Just as much as the STF analyzes the compatibility of domestic norms with the Brazilian Federal Constitution, it also analyzes the compatibility of domestic norms with international human rights treaties ratified by Brazil.¹⁰⁰ As explained by Mazzuoli, international human rights treaties, being part of the Brazilian Federal Constitution, shall be used as a paradigm to analyze the *conventionality* – as opposed to *constitutionality* – of domestic norms.¹⁰¹ Other international treaties ratified by Brazil, such as international humanitarian law treaties, have a supralegal status and shall be used as paradigm to analyze the *legality* of domestic norms. I have not found any academic work discussing whether it would be possible for the Brazilian Federal Constitution and international human rights treaties to be used as

⁹⁷ DROEGE, Cordula, The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, *Israel Law Review*, v. 40, n. 2, p. 310–355, 2007, p. 337.

⁹⁸ For example, see: PRUD’HOMME, Nancie, Lex Specialis: Oversimplifying A More Complex and Multifaceted Relationship?, *Israel Law Review*, v. 40, n. 2, p. 356–395, 2007, p. 390–391; BOWRING, Bill, The Death of Lex Specialis? Regional Human Rights Mechanisms and the Protection of Civilians in Armed Conflict, *in: Civilian Protection Between Human Rights and the Laws of War*, Oxford: Hart Publishing, 2018, 480 p.

⁹⁹ SASSÒLI, Marco; OLSON, Laura M., The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts, *International Review of the Red Cross*, v. 90, n. 871, p. 599–627, 2008, p. 604.

¹⁰⁰ DE CARVALHO RAMOS, André, Supremo Tribunal Federal brasileiro e o controle de convencionalidade: levando a sério os tratados de direitos humanos, *Revista da Faculdade de Direito, Universidade de São Paulo*, v. 104, p. 241–286, 2009, p. 245; MARINONI, Controle de convencionalidade (na perspectiva do direito brasileiro), p. 9; MAZZUOLI, Teoria geral do controle de convencionalidade no direito brasileiro, p. 114.

¹⁰¹ MAZZUOLI, Valério de Oliveira, Teoria geral do controle de convencionalidade no direito brasileiro, p. 114.

paradigms to analyze the constitutionality and conventionality of international humanitarian law treaties.

Coming back to my personal opinion that rights and guarantees are automatically incorporated into the Brazilian Federal Constitution, I would argue, somewhat controversially, that all rights and guarantees expressed in *any* treaty ratified by Brazil are automatically absorbed by the Constitution, specifically by the so-called *constitutional set*¹⁰² of rights and guarantees provided by Article 5. This means that any and all provisions contained in the Geneva Conventions of 1949 and their Additional Protocols – or, in fact, in any other treaty, including those that regulate international humanitarian law – that confer rights and guarantees have the same hierarchy as the Brazilian Federal Constitution.

Only if one accepts this last conclusion would the *lex specialis* principle – or Sassòli’s hermeneutical invention – be applicable to the NIAC in Brazil.

5.2 SOME DIFFICULTIES: COULD A FIGHTER BE SHOT AT SIGHT?

As I mentioned in the end of Chapter 4, the discussion whether victims would be better off without IHL deserves one’s close attention. I believe that IHL is, in fact, *less* protective for those who are not or are no longer taking part in hostilities – in comparison with IHRL, of course. There are many reasons for this opinion, perhaps the main one being that under IHL it is *not* prohibited to kill civilians. Yes, the reader read it correctly.

IHL has many rules and principles, the most important ones deriving from a balance between the principle of humanity and military necessity. I will not go into detail describing all other rules and principles which derive from the balance, but it is worth mentioning the three most important ones: principle of distinction (civilians and civilian objects must be distinguished from military objectives at all times)¹⁰³, principle of proportionality (incidental loss of civilian life, injury to civilians or damage to civilian objects must be proportional in relation to the concrete and direct military advantage anticipated)¹⁰⁴ and the principle of precaution (an individual must, before and during an attack, take all feasible measures to avoid or minimize harm to civilians and civilian objects)¹⁰⁵. These principles allow for one party to a conflict to attack members of another party, even if there are some expected casualties of

¹⁰² “*bloco constitucional*”, in Brazilian Portuguese.

¹⁰³ Additional Protocol I, art. 48; rules 1-10 in HENCKAERTS, Jean-Marie; DOSWALD-BECK, Louise, **Customary International Humanitarian Law: Volume 1: Rules**, Cambridge: Cambridge University Press, 2005.

¹⁰⁴ Additional Protocol I, art. 51; rules 11-14 in *Ibid.*

¹⁰⁵ Additional Protocol I, art. 57; rules 15-24 in *Ibid.*

civilians. If the right balance between the military necessity and the principle of humanity is found, there are many possibilities for one to promote an attack. Essentially, if dropping a bomb on a house with a couple of civilians and a military general would mean “winning” an armed conflict, then it would probably be allowed. Please note that this analysis is extremely complex and involves many variables, and the example above is just a pedagogical illustration.¹⁰⁶

During an IAC – an international armed conflict –, a soldier is allowed to kill an enemy soldier. These soldiers are called *combatants*, which is a special status created by the Geneva Conventions of 1949. Those who have this status are, as mentioned, allowed to kill other combatants without the risk of being punished after the armed conflict is over. It is “part of the game”. A combatant is, therefore, a legitimate target.

During a NIAC – a non-international armed conflict, such as the one happening in Rio de Janeiro –, there are *no* combatants. This special status does not exist during NIACs. Public agents and members of a non-state organized group fighting in the context of the NIAC are called *fighters*. There is a right to kill fighters during a NIAC, and they may be prosecuted by a State after the NIAC ends.

International human rights law (IHRL), on the other hand treats human lives differently. The right to life is non-derogable, i.e. it cannot be “set aside” for any reason except for self-defense. The two most relevant international guidelines for law enforcement officials conducting law enforcement operations are the UN Code of Conduct for Law Enforcement Officials (CCLEO) of 1979¹⁰⁷ and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) of 1990.¹⁰⁸ Summarizing their content, a police officer needs to approach suspects in a very precise, controller manner so as to avoid causing death. Only in the specific circumstance when there is absolutely no other means of protecting themselves could officers target civilians. Still, this targeting should not aim at *killing*, but at

¹⁰⁶ Should you wish to learn more about the principles of IHL, please refer to these examples: MORRISON, Alasdair; TSAGOURIAS, Nicholas (Orgs.), *Fundamental Principles of International Humanitarian Law*, in: **International Humanitarian Law: Cases, Materials and Commentary**, Cambridge: Cambridge University Press, 2018, p. 39–54; SASSÒLI, Marco, **International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare**, Cheltenham: Edward Elgar Publishing, 2019; MELZER, N.; KUSTER, E., **International humanitarian law: a comprehensive introduction**, Geneva: International Committee of the Red Cross, 2016.

¹⁰⁷ UNITED NATIONS. Code of Conduct for Law Enforcement Officials, General Assembly, Resolution 34/169, December 17, 1979.

¹⁰⁸ UNITED NATIONS. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990.

stopping the individual from presenting an active threat to the lives of the officers or other people in the surrounding area.

Here is where things start to get cloudy. Whenever police conduct operations, they usually act under the so-called “law enforcement paradigm” (LEP). In this case, IHRL is applicable and IHL is not. Differently, whenever public agents, including soldiers, conduct military operations in the context of an armed conflict, they usually act under the so-called “conduct of hostilities paradigm” (CoHP). In this case, IHRL and IHL are *both* applicable – as IHRL is applicable at all times in any circumstance.

Here are some important comparisons between the CoHP and the LEP in practical situations:¹⁰⁹

1. Under the CoHP, the principle of necessity is presumed, whereas under the LEP “absolute necessity”¹¹⁰ is required before an officer can use force.
2. Under the CoHP, “the legitimate target of an attack [...] is not covered by the principle of proportionality”¹¹¹, only the civilians and civilian objects surrounding it. Under the LEP, the target is covered by the principle, and those in the surroundings shall not be incidentally hurt (excessive damage is not tolerated).
3. Under the CoHP, parties to a conflict must at all times apply precautionary measures so as to avoid excessive damage to civilians, but the use of force is, again, allowed. Under the LEP, precautions are directed at *not using force* as far as possible.

Yet, what we see in real life in the metropolitan region of Rio de Janeiro is public agents’ personal biases when choosing which paradigm to operate with.

Race, gender, and social inequalities, play a huge role when it comes to how the police and the military think and act in operations in Rio de Janeiro. Statistics show that black males are the most likely to be targeted and killed by the police,¹¹² who apply the CoHP without admitting there is a NIAC happening in the region. Members of non-state armed groups unknowingly also act according to the CoHP, without giving officers a chance to deescalate confrontations. On the one hand, police officers come into *favelas* with war tanks and

¹⁰⁹ These extremely useful examples were taken from **The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms – Expert Meeting**, Geneva: International Committee of the Red Cross, 2013, p. 8–9.

¹¹⁰ *Ibid.*, p. 8.

¹¹¹ *Ibid.*

¹¹² FÓRUM BRASILEIRO DE SEGURANÇA PÚBLICA, **Anuário Brasileiro de Segurança Pública 2020**, Brasil: Fórum Brasileiro de Segurança Pública, 2020, p. 62.

helicopters filled with snipers, instantly shooting any suspect who matches their own biased description of a criminal; on the other, members of non-state armed groups use AK-47s and RPGs to fight the State.

Not all criminals who belong to, say, TCP or CV are exactly fighters. Some of them are “simply” accountants, promoters or dealers. Then how could the State know which paradigm to correctly apply when confronting alleged criminals?

A civilian would only lose their special protection – opening the possibility to be lawfully targeted under the CoHP – if they *directly participated in hostilities*.¹¹³ There is much controversy when trying to specify what amounts to direct participation in hostilities, but the ones taken from the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Law are:

- a. “the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);”
- b. “there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation);” and
- c. “the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).”¹¹⁴

As a general rule, a civilian only loses their special protection “for the duration of their direct participation in hostilities”.¹¹⁵ However, a civilian who acts according to these criteria may act either (a) spontaneously or (b) during an extended period of time. As an example of (a), a drug dealer who is a member of CV may take up arms against police officers during the period of time corresponding to the moment when the police invade their house and start shooting; during this confrontation, they (the drug dealer) would probably be directly participating in hostilities, assuming that there is a nexus with the NIAC. An example of (b)

¹¹³ Additional Protocol I, art. 51(3); rule 6 in HENCKAERTS; DOSWALD-BECK, **Customary International Humanitarian Law**.

¹¹⁴ These three criteria were extracted *ipsis litteris* from Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009, **International Review of the Red Cross**, v. 90, n. 872, p. 991–1047, 2008, p. 995–996.

¹¹⁵ MELZER; KUSTER, **International humanitarian law: a comprehensive introduction**, p. 86.

would be a member of a non-state armed group who decides to take up arms and patrol their base every day.

If a civilian directly participates in hostilities for an extended period of time, they may be considered to have a *continuous combat function*, which does not represent a special status, but allows the State to target them at all times as if they were directly participating in hostilities. As defined by the Interpretive Guidance,

“individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.”¹¹⁶

Thus, were the police or the military in the metropolitan region of Rio de Janeiro to find “a fighter belonging to [a non-state armed group] [sleeping] at home with his family in a part of the territory controlled by the government”, which paradigm should be applied?¹¹⁷

Experts point to examples of human rights bodies that have applied the LEP in similar cases.¹¹⁸ Yet, the matter remains controversial, and some aspects surrounding the example of the “sleeping fighter” are still highly debatable.

Does it matter where the fighter is located (in or out of the combat zone)? In the case of Rio de Janeiro, the combat zone is nowhere and everywhere, as civilians and fighters live in tight, packed areas. The areas controlled by non-state armed groups change every day. It would be silly to decide which paradigm fits best according to where the fighter is found, because this information does not say much *per se*.

Does the intensity of violence and degree of control over the territory matter? In the case of Rio de Janeiro, the intensity of violence is generally high, but the degree of control over the territory rapidly changes. There are powerful territorial disputes between different criminal groups in the region, and every centimeter counts. The State also loses and conquers territories quite quickly. Again, deciding which paradigm to use based on the intensity of violence and degree of control over the territory would not exactly be precise. The idea is that

“the conduct of hostilities paradigm would prevail over the law enforcement paradigm when force is used against legitimate targets and when the degree of violence is high while the control

¹¹⁶ Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, p. 1007.

¹¹⁷ **The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms – Expert Meeting**, p. 13.

¹¹⁸ In *Ibid.*, p. 14–15, the following cases were mentioned: Guerrero case, UNHR Committee; in the context of the territories occupied by Israel, the Human Rights Committee and its 2003 Concluding Observations; in the context of the violence between the Turkish government and the Kurdistan Workers’ Party (PKK) in the late 1990s, the ECtHR, *Gül v. Turkey*, 14 December 2000.

exercised over the area and over the circumstances is low. On the other hand, the more control over the area and circumstances, the more the possibility of applying the law enforcement paradigm – and thus the rationale to capture rather than kill – would exist. In the same vein, the lower the intensity of violence in the area, the more the law enforcement paradigm would appear adequate and be preferred to the conduct of hostilities paradigm.”

This rationale is hard to defend. If control over the circumstances is low, public authorities should actually think twice before acting without a detailed plan, risking lives of civilians in the surrounding areas. It is important to note that residences in *favelas* are usually crowded, filled with innocent people who may have no other choice but try to dodge bullets or even “open their doors” to criminals seeking refuge.

I would personally argue that the “sleeping fighter” example is perfect to criticize the application of the CoHP in police or military operations in Rio de Janeiro. Applying this paradigm allows populist politicians to freely use their “shoot to kill” policies without much restraint and completely eliminates one’s right to be duly brought before a court of law before being simply executed.

Being stuck in a legal limbo, with public authorities never admitting the application of IHL to the NIAC in Rio de Janeiro while, in practice, applying it, is worse for those who do not or no longer participate in hostilities.

I have argued that (i) there is a NIAC in the region and that (ii) IHL is applicable to the situation, but I have shown that (iii) applying IHL to this NIAC would bring about catastrophic consequences. How, then, could the State and the victims escape this tragedy? First, I invite the reader to appreciate a new perspective on the concept of war.

6 WAR FROM THE PERSPECTIVE OF THE GLOBAL SOUTH

In this chapter I discuss the concept of war from the perspective of the Global South. I decided to bring the ideas of Barkawi to this TCC due to their potency and clarity. The author wrote a paper proposing the decolonization of the concept of war as one may be used to, going straight to the important points. There are, of course, other academics who work with this perspective, but, in my personal opinion, not as brightly as Barkawi.

Decolonizing this concept, as the author defines, “means critiquing the ways in which Eurocentric ideas and historiographies have informed the basic categories of social and political thought”.¹¹⁹ Of course, Europeans who designed the concept of war, or armed conflict, had not

¹¹⁹ BARKAWI, Decolonising war.

thought that this concept would ever be used in such *sui generis* contexts such as the one happening in Rio de Janeiro – and other places in the Global South.

The Geneva Conventions of 1949 and their Additional Protocols dedicate most of their provisions to IACs. The “High Contracting Parties” thought that States fighting States was the most common, “real” kind of war, whereas other relatively smaller events were categorized as *something else*. As many times mentioned in this TCC, the Conventions dedicate only one simple article to the so-called NIACs, and explicitly exclude their application 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.”¹²⁰ States were afraid to lose their sovereignty to deal with internal wars without having to worry too much about the international community prying into their internal matters. They also worried that “recognizing” Small Wars as such could legitimize non-state organized groups.

Barkawi explains that Eurocentric traditions of the concept of war created the following ideas, which shall be detailed and refuted:

1. War *versus* peace;
2. An international system of sovereign and national States; and
3. NIAC *versus* IAC.¹²¹¹²²

These ideas are to be replaced by the following:

1. Battle *versus* repression;
2. War in transnational context, amid international hierarchies; and
3. “Small Wars”.¹²³

The “war *versus* peace” binary distinguishes *war* and *peace* as if they were complete opposites. According to the Eurocentric view, a situation of war involves a period of extreme violence, with huge armies and large operations, whereas a situation of peace involves a period of calm, steady waters. Barkawi affirms that the most obvious example of this binary is “[e]nclosing the First and the Second World Wars between 1914-1918 and 1939-1945”.¹²⁴ Our domestic and international legal systems are built according to this binary, as “there is wartime and peacetime”.¹²⁵ The Brazilian Federal Constitution, for example, allows for punishment of

¹²⁰ Additional Protocol II, art. 1(2).

¹²¹ The author actually uses the terms “international war” and “civil war”, which I adapted.

¹²² BARKAWI, *Decolonising war*, p. 3.

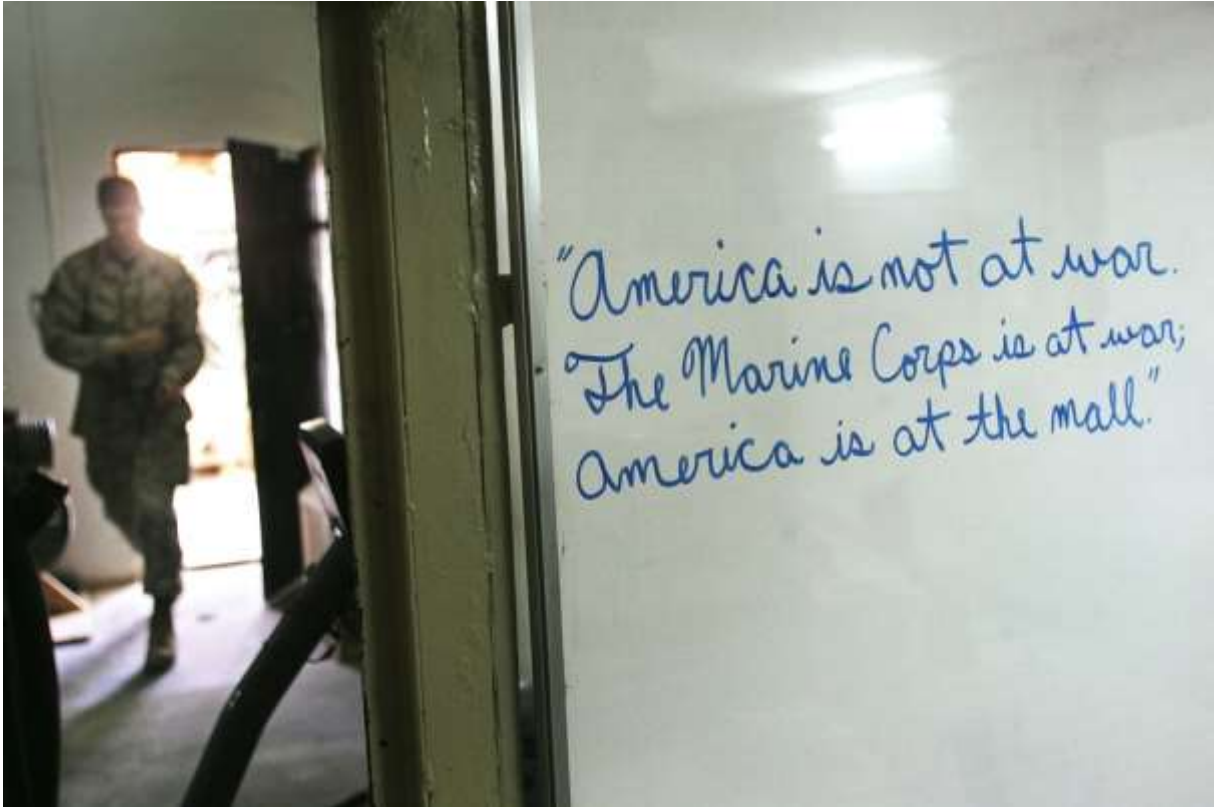
¹²³ *Ibid.*, p. 3–4.

¹²⁴ *Ibid.*, p. 5.

¹²⁵ *Ibid.*, p. 6.

death only in cases of “declared war”;¹²⁶ the power to “declare war” and “make peace” is reserved to the Federal Union and the President.¹²⁷

The author brings about¹²⁸ a powerful, “widely circulated” photo that shows a whiteboard with a sentence written by a US Marine in Iraq:¹²⁹



11: A U.S. Marine passes a hand-written notice at an American military civil affairs office January 30, 2007 at the Government Center in Ramadi in Iraq’s Anbar province. Photo: John Moore/Getty Images.

How could a State be “at war” while its citizens have the sensation of “peace”, shopping “at the mall” as if there were nothing extraordinary happening? The answer is probably that the binary “war *versus* peace” simply does not correspond to reality. Barkawi notes that “the larger point is that war and peace are together interwoven into social, economic, political and cultural life”. This binary does not even work for the most powerful State in the world (at the moment).

A substitute for this binary is the understanding that war is political. Barkawi quotes from Clausewitz, concluding that there are times when force is used and times when force is

¹²⁶ Brazilian Federal Constitution, art. 5, XLVII, a.

¹²⁷ Brazilian Federal Constitution, art. 21, II; art. 84, XX and XIX.

¹²⁸ BARKAWI, *Decolonising war*, p. 7.

¹²⁹ Source for the image and the story behind it: MAASS, Peter. AMERICA’S WAR NARRATIVE FOCUSES ON ITS SOLDIERS. AFGHANS AND IRAQIS ARE BRUSHED ASIDE. *The Intercept*, September 2, 2018. Available at: < <https://theintercept.com/2018/09/02/americas-war-narrative-focuses-on-its-heroes-and-victims-afghans-and-iraqis-are-brushed-aside/>>. Last access: 25/10/2020.

being threatened to be used.¹³⁰ Threatening to use force, implicitly or explicitly, is a tool used by States to negotiate with other States, or to negotiate with its own citizens. Active hostilities, therefore, is not the only moment when *force* is at play.¹³¹

There is, thus, the “battle *versus* repression” binary. Since the first Europeans arrived in the Global South with the specific objective of colonizing it, a continuous war has begun. Barkawi quotes from Hull that “[t]he colonial situation was identical to war”,¹³² in the sense that the colonizers committed genocide, brought diseases and explored resources to their exhaustion. Nowadays, citizens have to fight the State terror apparatus: truculent police operations,¹³³ extrajudicial executions,¹³⁴ normalized violence and all forms of racial,¹³⁵ gender, sexual orientation and inequality oppressions. As the author rightly states, “[w]ar shades into coercion when violence is not reciprocated”.¹³⁶ But happens when violence is, in fact, reciprocated?

In the metropolitan region of Rio de Janeiro, citizens may expect violence from all sides at all times, but especially those who live in territories disputed by the State and factions. In their homes,¹³⁷ at school¹³⁸ or on the streets,¹³⁹ dodging bullets is a skill everyone needs to master. As mentioned in Chapter 4, statistics show that shootings are extremely common in the

¹³⁰ CLAUSEWITZ, Carl von, **On War**, Princeton: Princeton University Press, 1976, p. 604–606 *apud* BARKAWI, Decolonising war, p. 8–9.

¹³¹ BARKAWI, Decolonising war, p. 9.

¹³² HULL, Isabel V., **Absolute Destruction: Military Culture and the Practices of War in Imperial Germany**, Illustrated Edition. Ithaca, NY: Cornell University Press, 2006, p. 332 *apud* BARKAWI, Decolonising war, p. 13.

¹³³ OLIVEIRA, Caroline. O que está por trás da truculência da Polícia Militar?. Brasil de Fato, October 02, 2020. Available at: <<https://www.brasildefato.com.br/2020/10/02/o-que-esta-por-tras-da-truculencia-da-policia-militar>>. Last access: 25/10/2020.

¹³⁴ MORTE de 13 pessoas no Rio de Janeiro foi execução, afirma comunidade. Ponte Jornalismo, February 09, 2019. Available at: <<https://ponte.org/policia-mata-13-pessoas-em-comunidade-do-rio-de-janeiro/>>. Last access: 25/10/2020.

¹³⁵ RODRIGUES, Matheus; COELHO, Henrique. Pretos e pardos são 78% dos mortos em ações policiais no RJ em 2019: ‘É o negro que sofre essa insegurança’, diz mãe de Ágatha. G1 Rio, June 06, 2020. Available at: <<https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/06/06/pretos-e-pardos-sao-78percent-dos-mortos-em-acoes-policiais-no-rj-em-2019-e-o-negro-que-sofre-essa-inseguranca-diz-mae-de-agatha.ghtml>>. Last access: 25/10/2020.

¹³⁶ BARKAWI, Decolonising war, p. 13.

¹³⁷ LUCHESE, Bette *et al.* ‘Coração arrasado’, diz mãe de rapaz morto por bala perdida dentro de casa no Rio. G1 Rio, October 19, 2020. Available at: <<https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/10/19/coracao-arrasado-diz-mae-de-razap-morto-com-tiro-de-bala-perdida-dentro-de-casa-no-rio.ghtml>>. Last access: 25/10/2020.

¹³⁸ PAIVA, Letícia. A luta de professoras para proteger crianças das balas perdidas no Rio. Cláudia, November 13, 2019. Available at: <<https://claudia.abril.com.br/sua-vida/professoras-favelas-bala-perdida-rio-de-janeiro/>>. Last access: 25/10/2020.

¹³⁹ LEMOS, Marcela. Rio: mulher morre com bala perdida na cabeça durante perseguição policial. UOL, October 23, 2020. Available at: <<https://noticias.uol.com.br/cotidiano/ultimas-noticias/2020/10/23/rio-mulher-morre-com-bala-perdida-na-cabeca-durante-perseguiacao-policial.htm>>. Last access: 25/10/2020.

region and can happen at any time. Police and military also struggle with sudden attacks performed by criminals.¹⁴⁰

Force, the threat to use it and its actual use are a constant in Rio de Janeiro. One could not tell when war in Rio de Janeiro began if not by analyzing when *force* started to play a role in local politics. Perhaps *force* has always been at play. In times (perhaps) closer to those of the reader, the military dictatorship in Brazil acted as a proxy for the US. Who was the enemy if not Brazilian citizens?

Distinguishing a NIAC from an IAC and distinguishing peace from war in Rio de Janeiro would not make sense. Local history does not allow for a “special trigger” – the criteria for an armed conflict to be characterized as such – to be activated, bringing with it a whole body of law – IHL.

Instead, understanding that Rio de Janeiro goes through political chaos is more helpful. The best way to spare lives in the region is by applying domestic law and IHRL, who are independent of a Eurocentric concept of war.

The only legal way to set aside the application of IHL in the region is by recourse to *legal defeasibility*. This concept is explained in the next chapter.

7 DEFEASIBILITY

Applying international humanitarian law to the NIAC in Rio de Janeiro would, ironically, be a complete humanitarian disaster. In this chapter, I argue that the (legal) decision to apply IHL to the situation at hand is *defeasible*. I am not even close to being an expert in legal theory or legal reasoning, hence my remarks about defeasibility are rather simple and straightforward. I have drawn much of my considerations from Fernando Atria, who I believe to write clearly.¹⁴¹

Before I started reading Atria, I suspected that the NIAC in Rio de Janeiro would be a so-called *hard* case. I did not have special legal arguments sustaining this claim – I could only claim that this is an unusual NIAC for several reasons explained in previous chapters. I also suspected that *hard* cases would require some kind of special interpretation of the law, even though I did not know how this could be so. After reading Atria, my suspicion was confirmed,

¹⁴⁰ RIANELLI, Erick. PM Morre em ataque de bandidos na Avenida Brasil; homem também é baleado. Bom Dia Rio, October 12, 2020. Available at: <<https://g1.globo.com/rj/rio-de-janeiro/noticia/2020/10/12/pms-atacados-na-zona-norte-do-rio.ghtml>>. Last access: 25/10/2020.

¹⁴¹ ATRIA, Fernando, **On law and legal reasoning**, Oxford: Hart Publishing, 2001. I shall thank my dear friend Pedro Hiroshi Watanabe di Gesu for introducing me to this brilliant author.

in the sense that I now have a theoretical framework to sustain my hypothesis that the NIAC in Rio de Janeiro is, in fact, a hard case, and that it requires a special (legal) approach. This is precisely how I argue that IHL is *not* to be applied to the case, as it is *defeasible*.

Defeasibility is not a new concept,¹⁴² nor is it uncontroversial. While trying to explain and define it, Atria draws much of his reasoning from Hart's positivist tradition, even though his (Atria's) legal reasoning is a modified version of Hart's. While analyzing whether law and morality are separate from each other – at least to a certain extent –, Atria wonders “what the law *ought to be*”¹⁴³ in the so-called *hard* cases.

First, clarifying what I understand to be a *hard* case is necessary. Atria claims that

“[...] Hart's view on hard cases would be:

(i) a case is hard when the application of the (prima-facie) law is deemed objectionable (i.e. when the prima-facie solution is such that the demand for appropriateness is stronger than the demand for certainty);

(ii) when a case is hard, the law is unsettled, and the courts have discretion.

In short, when the application of an otherwise clear legal rule to a case that belongs, so to speak, to its core of meaning produces an objectionable result, *it is the law* that there is no law on the subject. What the law is for the case depends upon what the law (i.e. the balance between predictability and appropriateness) *ought to be* for the case. When the (prima-facie) law *ought to be* different, it is different. *Lex iniusta non est lex!*”¹⁴⁴

On the case at hand, the prima-facie application of IHL is objectionable, since the demand for appropriateness is – I argue –, in fact, stronger than the demand for certainty. Hence, the law applicable to the case is what the law *ought to be* for it. Atria argues that this *ought* is a moral judgement.¹⁴⁵ The problem here is that the balance between certainty and appropriateness can be influenced by what Atria calls an “image of law”.¹⁴⁶ In other words, society's understanding of what “legal discourse is about”¹⁴⁷ will influence the level of formality of rules in a system and, ultimately, the type of legal reasoning admitted by judges in a certain legal system.

I would not be able to (try to) describe in this work the image of law that exists in Brazil. Rather, the reader may be satisfied to know that it is reasonable to assume that most judges in the country, if compelled to decide upon a case – and I got this example from Atria – involving a rule that read that “It shall be a misdemeanour, punishable by fine of £5, to sleep in any

¹⁴² See, for instance, GUASTINI, Riccardo, **Interpretare e argomentare**, Milano: Giuffrè Editore, 2011, p. 42–43.

¹⁴³ *Ibid.*, p. 164–165.

¹⁴⁴ *Ibid.*, p. 164.

¹⁴⁵ *Ibid.*, p. 166.

¹⁴⁶ *Ibid.*, p. 204.

¹⁴⁷ *Ibid.*

railway station”¹⁴⁸, would likely analyze whether there was an exclusionary reason for this rule not to be applied, i.e. if a given person caught sleeping in a railway station did it because, e.g. they were drugged by someone else.

Analogously, I argue that most judges in Brazil would analyze the applicability of IHL to the situation in the metropolitan region of Rio de Janeiro through the means of classifying the conflict according to Eurocentric standards. Yet, I claim that the analysis of appropriateness of the application of IHL to the case requires understanding that the humanitarian disaster that would result outweighs the certainty of applying those rules to the case. A “common” judge would, even when considering Eurocentric conflict classification, be able to assess the possible consequences of their decision to apply IHL to the case.

Another useful analogy drawn from Atria regards institutions and games. There are *constitutive* and *regulative* institutions: games are an example of the former, while law is an example of the latter. The point here is that games are “systems of rules whose point is to create new possibilities of behaviour rather than to regulate antecedently existing forms of it (though they doubtless do regulate some pre-existing forms of behaviour in order to do this)”; law is made to “to regulate antecedently existing forms of behaviour (and to do that in a better and more efficient way it creates the possibility of new forms of behaviour)”. In other words, games are institutions that regulate to create something (the game itself), while law is created to regulate actions, reactions etc.

If one accepts the conclusion that law is a means to achieving something – not an end on itself –, then it is not hard to see why it would not make sense to apply certain norms which defy their very reason to exist – protecting human beings from war. Hence, applying IHL to a case when IHL would represent a humanitarian disaster would not be the best solution.

The alternative body of rules to be applied to the case is IHRL and, of course, domestic law.

8 FINAL CONCLUSIONS

This TCC offers an alternative view to the war currently taking place in the metropolitan region of Rio de Janeiro. I insist that I understand that my point of view over the situation is not a broadly accepted one, and I am open to criticism for that. Nevertheless, reading the war

¹⁴⁸ *Ibid.*, p. 89.

as it represents a contribution to those who tirelessly work on improving the situation in the region.

I sincerely hope that this “tale of two worlds”, this division between the Global North and the Global South, stops representing such a powerful impediment to peace in Rio. Only by seeing the chaos – our chaos – with our own eyes, without resorting to “legal transplants” can Brazilians achieve a ceasefire.

As I argued throughout the previous chapters, applying international humanitarian law to the war in Rio de Janeiro would not fit the interests of those who struggle with the chaotic problems in the region. Yet, seeing the NIAC as such – or, as I argue, seeing the war as such – allows one to set aside all the legal tools which could help “legalizing” the shoot-to-kill policy currently taking place. Authorities in Rio de Janeiro openly use the conduct of hostilities paradigm when the law enforcement paradigm should be the one to be chosen.

Understanding that there are other possible frameworks to be applied to the situation instead of “legalized” brute force, e.g. Brazilian domestic law and international human rights law, opens the way for academics and society in general to take action against *status quo*.

9 FUTURE PATHS AND IMPROVEMENTS FOR THIS WORK: SUGGESTIONS OFFERED DURING MY PRESENTATION

I presented this work before my supervisor, prof. Dr. Fábio Costa Morosini, and prof. Dr. Martha Jimenez and prof. Dr. Sven Peterke. My supervisor acted as a moderator, and eventually offered positive remarks about the quality of this work. He emphasized that this work was produced by an undergraduate student, and the level of commitment and quality hereby shown should not be compared to those required from a master’s or PhD student. Profs. Jimenez and Peterke posed critical comments and offered me various suggestions for improvements and future paths where I could take my investigations.

Prof. Peterke suggested I improved the concepts of war and armed conflict used in this work. He also claimed that it would be useful to consult Muslim and Chinese international law to compare their conception of how their law of armed conflict works. Furthermore, prof. Peterke disagreed with my conflict classification, after explaining his vast experience with international humanitarian law. He mentioned that even though I tried to organize and I explain the criteria used by the ICTY to identify a NIAC, I failed to separately indicate the qualitative and the quantitative factors that would make the situation in Rio de Janeiro a NIAC. Additionally, he stated that organized criminal groups in Rio de Janeiro do not have the capacity to conduct military operations, which would be a *conditio sine qua non*. In this matter, he asked

the reason why I brought PCC to my work, even though they are not massively present in the region. Moreover, prof. Peterke emphasized that I should have interpreted the Geneva Conventions of 1949 and their Additional Protocols using a teleological interpretation: it is crucial to take into account the special scope of protection of those involved in an armed conflict. Thus, he asked me how would I describe the temporal and territorial scope of application of international humanitarian law in Rio de Janeiro. Also, Dr. Peterke asked me to improve my conception of war from the Global South, and inquired whether I could offer him some perspectives about the consequences of analyzing war from this different perspective. Finally, Dr. Peterke insisted I should be careful with my methodology and methods, especially when trying to find trustworthy sources for this work.

Prof. Jimenez also posed a number of remarks. She asked me to improve my definition of public international law, as well as international customary law. Additionally, she inquired what were my objectives with the conflict classification I proposed. Next, Prof. Jimenez urged me to improve the chapter where I try to explain why applying international humanitarian law to the situation in Rio de Janeiro would be a “legal disaster”. She referred me to two important, yet unmentioned by me, decision from the Brazilian Supreme Court about *jus cogens* and international humanitarian law, which could be useful for this work. Dr. Jimenez contested the comparison made by me between the FARC and the CV, as they are, in her academic opinion, very different groups. She also suggested I checked how Colombia applies the law enforcement and the conduct of hostilities paradigms, as this comparison with how Brazilian authorities act might be useful. Finally, Dr. Jimenez asked me to mention more sources and authorities to support my arguments in this work.

I am thankful for their time and attention. I did try to improve this paper using their guidance, and truly expect to have met their expectations. I urge the reader to bear in mind that, due to time restraints, I was not able to adopt all suggestions to their full extent. Nevertheless, I hope to keep working with the vast majority of ideas brought to the reader on this work.

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