

The Applicability of International Humanitarian Law in Peacetime Urban Civilian Operations: Analysing the Deployment of the Army to Fight Gang Violence in the Cape Flats

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Abstract

The International Committee of the Red Cross (ICRC) estimates that over 50 million people across the globe are displaced as a result of urban conflicts, or armed conflict taking place within their cities. Such conflict situations place at risk not only civilian lives but civilian infrastructure and critical services as well. Given that over 50 per cent of the world's population lives in cities, this is indeed a cause for concern. South Africa's legislative capital, Cape Town, has had its fair share of this global nemesis, flowing from protracted gang 'wars' in the Cape Flats and years of government failure to contain the situation. The suffering of urban civilians in the Cape Flats area has been widely documented on various media platforms across South Africa and has even attracted the attention of Parliament. In response to this new urban scourge, some politicians called upon the national government to assist the obviously overwhelmed local law enforcement agencies by deploying the military to tackle gang-related violence. These calls were met with ambivalent responses from various sectors of society, with some supporting it, whilst others vehemently opposed the intervention of the armed forces in civilian following operations. The challenges flowing from the involvement of the army bring to bear the question(s): Is the army well suited for the fight against gang violence in the Cape Town urban area? What international regime regulates the deployment of military personnel in civilian policing functions? This article, through a desktop analysis of reports on gangsterism in the Cape Flats, seeks to close existing gaps in the literature on urban conflict and the use of the army in civilian policing functions; particularly in instances of what is termed 'other situations of violence'.

Keywords: gangsterism; gang warfare; other situations of violence; military deployment; law of armed conflict



Introduction*

South Africa has been battling with the problem of gangsterism for quite some time now. Although current discourse on this nemesis focuses on the city of Cape Town, in particular the Cape Flats area, gangsterism is a national phenomenon, which manifests in other provinces as well.¹ Be that as it may, the Western Cape seems to be the epicentre of this social malady. It is common knowledge that gangsterism brings with it supplementary social problems such as urban violence or conflict, and erosion of the rule of law, and puts a strain on ordinary policing functions. With the growing intensity of gang-related violence in the Cape Flats, questions have been asked about the propriety of deploying the army to deal with the lawlessness currently grappling the city. This article interrogates that topical issue and poses pertinent questions on whether the situation in the Cape Flats can be addressed with resort to the law of armed conflict. To that end, it seeks to answer the following questions:

- (i) How can the violence in the Western Cape be classified within the context of international humanitarian law?
- (ii) Is the army well suited for the fight against gang violence in the Cape Town urban area?
- (iii) What international regime regulates the deployment of military personnel in civilian policing functions?

Over the past century, there has been a change in the character of conflicts globally. The rise in the number of non-international armed conflict has led to the blurring of the thin line between combatant and civilian, and the distinction between peace and war. In recent years, urban spaces have gradually turned into conflict zones, which affected over 50 million people globally. These incidents of urban violence have over the years produced more casualties than other forms of political violence and have reigned supreme as the number one cause of instability globally.²

* Portions of this paper were first presented at the 'New Security Challenges: Organized Crime & Urban Conflict in the Americas' Conference, Universidad del Pacifico Law School, Lima, Peru 24–26 October 2019. The author acknowledges the financial support provided by the College of Law, Research Committee at UNISA to facilitate travel to and participation at this conference. The usual disclaimers apply.

1 See generally Vusi Mncube and Nomanesi Madikizela-Madiya, 'Gangsterism as a Cause of Violence in South African Schools: The Case of Six Provinces' (2014) 5(1) *Journal of Social Anthropology* 43–50.

2 Nicholas Barnes, 'Criminal politics: An Integrated Approach to the Study of Organised Crime, Politics and Violence' (2017) 15(4) *Perspectives on Politics* 967–987, 969.

Statistics taken in 2016 showed that over 55 per cent of the global population lived in cities.³ This is projected to reach 68 per cent by 2050.⁴ The UN defines a city with reference to three definitions canvassed by different schools of thought. On the one hand, a city can be understood according to its administrative boundaries. On the other, through the lenses of urban agglomeration, the extent of the contiguous urban area, or built-up area, is used to delineate the city's boundaries. The third understanding of what a city is focuses on what is termed the 'metropolitan area'. Here the determining factors for identifying the city's boundaries include, for example, the degree of economic and social interconnectedness of nearby areas, which can be identified by interlinked commerce or commuting patterns.⁵

Cities can play a huge role in conflict situations, such as providing relative safety and being the centre of economic activity during a conflict. Hence the need to study how instances of urban conflict affect city dwellers and city infrastructure. The scourge of urban warfare spells untold hardships for the urban population. Quite often, city-dwellers who are forced to hurriedly flee the conflict zone lose relationships, the safety of their homes and their sources of income.⁶

City dwellers are thus given the hard choice between leaving or remaining in these unsafe urban spaces. For those who wish to remain, life becomes extremely dangerous. Their very social fabric disintegrates, and so do much-needed social services. For instance, in the gang-riddled areas of Cape Town (such as Mitchells Plain, Nyanga, Khayelitsha, Gugulethu, Lavender Hill, Hanover Park, Manenberg and Elsies River) basic services such as emergency medical care has already been threatened by ongoing violence.⁷ Ambulances are often hijacked, and emergency personnel are attacked unless they respond to call-outs accompanied by armed police for protection. As a result, emergency personnel have in some instances refused to respond to distress calls because the area they were expected to go to was regarded as a hot spot for gang violence. In 2016 alone, the Western Cape province recorded more than 100 gang-related attacks on emergency personnel.⁸ In the same period, the province lost over 3000 workdays due to

3 United Nations, 'The World's Cities in 2016' (United Nations, 2016) 3 <http://www.un.org/en/development/desa/population/publications/pdf/urbanization/the_worlds_cities_in_2016_data_booklet.pdf> accessed 20 August 2018.

4 World Health Organization, 'Urban Health' <https://www.who.int/health-topics/urban-health#tab=tab_1/> accessed 20 July 2022.

5 United Nations (n 3).

6 Vincent Bernard, 'War in Cities: The Spectre of Total War' (2016) 98(1) IRRC 1.

7 James de Villiers, 'Cape Town Ambulance Ambush Leaves 1 Dead, 1 Cop Critically Injured' (*News 24*, 24 August 2017) <<https://www.news24.com/SouthAfrica/News/cape-town-ambulance-ambush-leaves-1-dead-1-cop-critically-injured-20170824>> accessed 20 August 2018.

8 AFP, 'Under Police Escort, South African Ambulances Brave Attacks' (5 May 2017) <<https://www.news24.com/SouthAfrica/News/under-police-escort-south-african-ambulances-brave-attacks-20170520>> accessed 19 August 2018.

staff being off work after traumatic incidents. By 2020 of every 69 gang-related deaths countrywide, 59 were from the Western Cape.⁹

This breakdown in the social fabric also opens room for other opportunistic crimes to creep in. For instance, in one reported case, an ambulance was hijacked en route to the hospital, and the patient, a five-year-old boy, was dumped on the roadside with the emergency personnel. Sadly, he later passed away due to the interruption of his medical treatment.¹⁰

Service delivery also becomes negatively affected. Such areas may experience shortages of power, water, and food supplies. For instance, in Somalia's Mogadishu, al Shabab militants have turned to switching off the city's water supply as part of their strategy against the government.¹¹ In the Cape Town area, there have been reports of construction companies pulling out of projects in the Manenberg area citing fears of gang shootings.¹² Another startling report was that of Manenberg residents who had to form a human shield around technicians to ensure their safety. The technicians were repairing an electrical box to restore power in the area which had been cut off for two days. That unfortunate 48-hour period had turned the impoverished Manenberg into a conflict zone, with gangsters shooting rampantly.¹³

Children's lives can also be affected by schools shutting down. In the Mitchell's Plain and Bishop Lavis areas, children often perform safety drills, with simulated gang shootings. These drills are meant to prepare them for real-life shootings that happen quite frequently whilst they are in class. Incidents of real gunfire being exchanged whilst classes are in progress are very common, and this disrupts the teaching and learning process. As soon as gunshots are heard, school children lie down on the floor until the shooting subsides.¹⁴ The psychological impact of these disturbances on school children in the Western Cape cannot be over emphasised. Apart from schools, State institutions

9 Sisonke Mlamla, (*IOL News*) 'Of 63 Gang-Related Murders in SA, 59 were in the Western Cape' <<https://www.iol.co.za/capeargus/news/of-63-gang-related-murders-in-sa-59-were-in-the-western-cape-303d753d-7cdb-4e1c-9ec7-5495be378eac>> accessed 7 April 2021.

10 Tammy Petersen, 'EMS Crew Ambushed on N2 While Taking Boy, 8, to Hospital' (*News24*, 11 August 2017) <<https://www.news24.com/SouthAfrica/News/boy-8-dies-in-ambulance-after-ems-crew-ambushed-on-n2-20171108>> accessed 5 August 2018.

11 PRI, 'Al-Shabaab's "Water Terrorism" is Yielding Results and Tragedy in Somalia's Civil War' (12 August 2014) <<https://www.pri.org/stories/2014-08-08/how-al-shabaab-using-water-tool-terrorism>> accessed 27 April 2018.

12 Lauren Isaacs, 'Manenberg: Gang Activity Affects Service Delivery' (*Eyewitness News*) <<http://ewn.co.za/2014/10/29/Manenberg-Gang-activity-affecting-service-delivery>> accessed 18 August 2018.

13 Lauren Isaacs, 'Manenberg Residents Form Human Shield as Technicians Restore Power' (*Eyewitness News*) <<https://ewn.co.za/2018/04/20/manenberg-residents-form-human-shield-as-technicians-restore-power>> accessed 20 August 2018.

14 Irvin Kinnes, 'Contested Governance: Police and Gang Interactions' (PhD Thesis, University of Cape Town 2017) 183. Kinnes asserts that at times pandemonium ensues when mothers rush to school to fetch their children before the gang shooting starts.

are also not spared from gang criminality. For instance, in 2016, the Simon's Town Naval Base was robbed, and arms were stolen from the armoury.¹⁵ Corruption within the police service also ensures that gangs remain well-resourced with access to stolen guns taken from police evidence rooms.¹⁶

Definition of a Gang

As Shestack puts it, 'human beings are stalkers of meaning'.¹⁷ This means that words are not mere utterances devoid of meaning, they symbolise certain things in relation to our world outlook, so that we as human beings can interpret and make sense of our world. Although the word gang has mutated over the years, it is largely agreed that today there is no singular definition of what a gang is or isn't.¹⁸ In fact, Curry and Decker argue that the definition of a gang is problematic.¹⁹ For me, as a youngster reading novels by Enid Blyton (such as the Secret Seven and Famous Five), the word gang had a positive meaning. It signified a group of children bound together by a sense of common purpose, friendship, comradeship, and a commitment to the pursuit of fun, adventure and fantasy.

In today's parlance, the term gang has mutated to mean a broad range of things, all of which are characterised by a coalition of common purpose and violence as a means of amassing economic benefits. Wegner and others assert that gangs represent an anti-social way of life that demands loyalty from its members before loyalty to institutions of civil society.²⁰ Roloff asserts that in the Western Cape four gang typologies exist. He classified them as: Crews, cliques, gangs and prison gangs.²¹ These different gang

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- 15 Dan Plato, 'Simon's Town Naval Base Robbery – More Guns Now in the Hands of Gangs' (*Western Cape Government*, 27 July 2016) <<https://www.westerncape.gov.za/news/simon%E2%80%99s-town-naval-base-robbery-%E2%80%93-more-guns-now-hands-gangs>> accessed 20 August 2018.
- 16 Jason Felix, 'Cops are Selling Stolen Guns to Gangsters: Deputy Minister' (*IOL News*, 8 September 2017) <<https://www.iol.co.za/news/south-africa/western-cape/cops-are-selling-stolen-guns-to-gangsters-deputy-minister-11131650>> accessed 21 August 2018; See also Caryn Dolley, 'Police Guns Have Fuelled Gang Wars, Taxi and Political Killings' (*Mail and Guardian*, 22 November 2018) <<https://mg.co.za/article/2017-11-02-police-guns-have-fueled-gang-wars-taxi-and-political-killings>> accessed 20 August 2018.
- 17 Jerome Shestack, 'The Philosophic Foundations of Human Rights' (1998) 20 *Human Rights Law Quarterly Review* 210.
- 18 Delano van der Linde, 'Considering the Constitutionality of South Africa's Anti-Gang Legislation in Light of the Principle of Legality' (2020) *SAJHR* 36(2-3) 221–241, 230.
- 19 David Curry and Scott Decker, 'What's in a Name? A Gang by Any Other Name Isn't Quite the Same' (1997) 31(2) *Valparaiso University Law Review* 501, 503.
- 20 Lisa Wegner, Ayesha Behardien, Cleo Loubser, Widaad Ryklief and Desiree Smith, 'Meaning and Purpose in the Occupations of Gang-Involved Young Men in Cape Town' (2016) 46(1) *SAJOT* 53, 53.
- 21 Nathaniel Roloff, 'Gang Typologies of the Western Cape' (*The Safety Lab*, May 2014) 2 <<https://static1.squarespace.com/static/5c1baaf812b13fda0ba2fd26/t/5c47128e032be40b0138bff4/1548161683435/Gang+Typologies+of+Western+Cape++Final+updated+print.pdf>> accessed 18 July 2018.

typologies are largely differentiated by factors such as the economics of the gang, its structure, size, geography, violence, operations and relationships. Other factors include status in their communities,²² reputation and the types of crimes they specialise in. For instance, the prison gang system consists of the numbers gang, a very violent grouping. It consists of the so-called 26s, the 27s and the 28s.²³

Gastrow defines a gang as ‘consisting of an organised group of members which has a sense of cohesion and is generally territorially bound, which creates an atmosphere of fear and intimidation in the community.’ Its members engage in gang-focused criminal activity either individually or collectively.²⁴ Crawage defines gangsterism as ‘the evolution of an urban identity determined along racial and economic lines.’²⁵

Writing on gangs in the United States of America, Esbensen *et al* sought to understand gangs in a very age-restricted context. They argued that there are two most widely accepted criteria for whether a group qualifies as a gang. These are: (i) age, which they argue consisted mainly of adolescents, and pegged the age range between 14 and 24. This first leg of the characterisation of a gang is not helpful for the South African context because children far younger than 14 are often recruited into and become active members of gangs. Equally, there are plenty of reports of gang members above the age of 24. (ii) The second leg is that these members must be engaged in law-violating or imprudent behaviour.²⁶ This element resonates with the culture of gangs in the Cape Flats, since their activities include murder, selling drugs, theft etc. The definition or rather perception of what a gang is will differ from one context to another, influenced by institutional and political leanings.²⁷

22 See Rachel Bray and others, ‘*Growing up in the New South Africa: Childhood and Adolescence in Post-Apartheid Cape Town*’ (HRSC Publishing 2010) 245. Rachel Bray argues that gang membership offers young men social status from the moment they join.

23 Plato (n 15) 54. Apart from those in the list, other groupings include: The Sexy Boys, the Americans, Hard Livings, the Firm and Mongrels.

24 Peter Gastrow, ‘Organised Crime in South Africa: An assessment of its Nature and Origins’ ISS Monograph 28 (Institute for Security Studies, 1 August 1998) 67.

25 Margaritha Crawage, ‘How Resilient Adolescent Learners in a Township Cope with School Violence: A Case Study’ (PhD Thesis, University of Johannesburg) 45.

26 Finn-Aage Esbensen, Thomas Winfree, Ni He and others, ‘Youth Gangs and Definitional Issues: When is a Gang a Gang, and Why Does it Matter?’ 2001 (47) *Crime and Delinquency* 105, 106.

27 Debra Lindberg, ‘Gangs and Gang Activity in America: A Prevention Report’ (*PDXScholar*, 2011) <http://pdxscholar.library.pdx.edu/ccj_capstone/2> accessed 6 November 2018.

History of Gangs and Gang Warfare in the Western Cape

The history of gangs in the Western Cape dates back to the apartheid era.²⁸ It was catalysed by the forced removal of people from their original homes.²⁹ Dixon and Johns assert that the current demographic distinctiveness of the Western Cape is not a historical accident but a deliberate design achieved through the social policies of the apartheid regime.³⁰ These policies were aimed at creating a black labour force.³¹ Urban areas which were regarded as attractive to live in were classified as white-only zones. These included seaside locations, attractive suburban spaces and lucrative farming sites.³² This culminated in the forced removals of black residents of Cape Town from their homes in District Six,³³ and their resettlement in areas such as Mitchells Plain, Lavender Hill, Manenberg, Hanover Park, Heideveld, Bonteheuwel, Elsies River, Langa and Nyanga (collectively known amongst South Africans as the Cape Flats).³⁴ The townships of Langa and Nyanga were formed in the 1920s following the forced removal of black people from Maitland (Ndabeni location) pursuant to the Urban Areas Act of 1923; whose sole purpose was to enforce the compulsory residence of Africans in certain locations.³⁵ The larger land dispossessions happening around that time across South Africa can also not be divorced from an analysis of the creation of a black labour force in Cape Town, through the ‘ghettoization’ of non-white residents. A migrant labour system was created which benefitted from Africans migrating to Cape Town in

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- 28 SA History Online ‘The Small Matter of a Horse: The life of “Nongoloza Mathebula, 1867 – 1948’ by Charles van Onselen (04 January 2012) <<https://www.sahistory.org.za/archive/small-matter-horse-life-nongoloza-mathebula-1867-1948-charles-van-onselen-04-january-2012/>> accessed 20 July 2022. The historical record asserts that gangsterism also existed elsewhere, and the first gang was established between 1880 and 1890 in the mines of the Witwatersrand in Johannesburg under the leadership of Mzuzephi Mathebula, otherwise known as Nongoloza. The main aim was the criminal accumulation of wealth, but this gang outfit also played the role of fighting against the oppression of black people by the white regime.
- 29 Bray (n 22) 49.
- 30 Bill Dixon and Lisa-Marie Johns, ‘Gangs, Pagad and the State: Vigilantism and Revenge Violence in the Western Cape’ (CSVr, May 2001) Violence and Transition Series Vol 2 <<http://www.csvr.org.za/docs/gangs/gangspagadstate.pdf>> accessed 20 August 2018.
- 31 Black in this context is understood as it is defined in the Broad-Based Black Economic Empowerment Act 53 of 2003, as a generic term to include Africans, Coloureds and Indians. In essence, it refers to people of colour, or to non-caucasian or non-European persons.
- 32 SA History Online, ‘Forced Removals in South Africa’ <<https://www.sahistory.org.za/article/forced-removals-south-africa>> accessed 2 November 2018.
- 33 Doria Daniels and Quinton Adams, ‘Breaking with Township Gangsterism: The Struggle for Place and Voice’ (2000) 11(4) African Studies Quarterly 45–57, 47.
- 34 SA History online, ‘Athlone – or Cape Flats, Cape Town’ <<https://www.sahistory.org.za/place/cape-flats-cape-town>> accessed 7 April 2021.
- 35 SA History Online, ‘Langa Township, Cape Town’ <<https://www.sahistory.org.za/place/langa-township>> accessed 1 November 2018.

search of employment,³⁶ after the government of the day had passed laws to restrict Africans to bantustans.³⁷

The Cape Flats comprise of purpose-built ghettos with no communal amenities and no employment opportunities either.³⁸ These new settlements were designed in such a way as to limit the number of points of exit and entry, in a bid to ensure that the inhabitants could easily be policed and cordoned off by the apartheid government.³⁹

Finding themselves despondent and unemployed, some of the evictees turned to gangsterism.⁴⁰ Today it is estimated that 150 000 people belong to 100 gangs in the Cape Flats alone.⁴¹ Statistics show that there are about 10 000 children in the Cape Flats area who are trapped in violent conflicts and are recruited into gangs.⁴² Some of these recruits are as young as 13,⁴³ or even younger. Although the United Nations does not include South Africa in its list of territories experiencing the scourge of child soldiers⁴⁴

36 This was achieved through such laws as the 1913 Native Land Act, the 1906 and 1908 Asiatic Law Amendment Ordinance No 29, the 1936 Native Trust Land Act and the Group Areas Act of 1950. Collectively, these laws limited the freedom of all people who were not classified as white by controlling their movement, land ownership, and the ability to operate businesses. The main goal was to utilise these laws to control all non-white people and exploit them as a source of cheap and reliable labour.

37 Laura Phillips, 'History of South Africa's Bantustans' (July 2017) <<http://africanhistory.oxfordre.com/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-80?print=pdf>> accessed 1 November 2018. Bantustans were enclaves created by the apartheid regime to control movement and restrict Africans to certain spaces. The aim was to prevent them from freely moving into urban spaces occupied by whites. The apartheid regime achieved this using the Bantu Authorities Act of 1951.

38 *ibid.*

39 Andre Standing, *Organised Crime: A Study from the Cape Flats* (Institute for Security Studies 2006) 5.

40 Catherine Ward, 'It Feels Like it's the End of the World: Cape Town's Youth Talk about Gangs and Community Violence' (Institute for Security Studies 2007) 5.

41 Lois Law, 'The Impact of Gang Violence on Children' (*Southern African Catholic Bishops' Conference, Parliamentary Liaison Office, Briefing Paper*, December 2018) 448 <<http://www.cplo.org.za/wp-content/uploads/2018/02/BP-448-The-Impact-of-Gang-Violence-on-Children-December-2017.pdf>> accessed 18 September 2018.

42 Christina Pitt, 'Children of the Cape Flats are Child Soldiers – Ugandan academic' (*News24*, 15 May 2018) <<https://www.news24.com/SouthAfrica/News/children-of-the-cape-flats-are-child-soldiers-ugandan-academic-20180514>> accessed 15 April 2018.

43 Nadine Bowers Du Toit, 'Gangsterism on the Cape Flats: A Challenge to "Engage the Powers"' (2014) 70(3) HTS Teologiese Studies/Theological Studies 1–7, 3 <<http://dx.doi.org/10.4102/hts.v70i3.2727>> accessed 15 May 2018.

44 See the Cape Town Principles the Cape Town Principles and Best Practices Annex: Definitions <https://childrenandarmedconflict.un.org/publications/ParisCommitments_EN.pdf> 1 November 2018. The Cape Town Principles define a child soldier as[A]ny person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such group, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.

or children in armed conflict,⁴⁵ some authors argue that the reality of children engaged in violent conflict in the Cape Flats means that they are child soldiers.⁴⁶ Whether these arguments are tenable or not often gets lost in the problems with the definition, the fact that there is currently no precise definition of what constitutes a child soldier.⁴⁷ What further compounds this issue, as will be discussed below, is that the definition of a child soldier is built around a perception that they participate in either an international armed conflict or a non-international armed conflict. The definitional scheme does not envisage children involved in other situations of violence, such as the ongoing gang violence in the Cape Flats. International law thus concentrates on restricting the participation of children in armed conflict properly so-called.⁴⁸

The statistics on the total number of gang members, however, differ from one research institute to the other. For instance, the Institute for Security Studies estimates 75 to 100 gangs with a membership of around 10 000,⁴⁹ instead of the over 100 000⁵⁰ estimated by other research institutes.⁵¹ Despite these conflicting statistics, all institutes agree that Cape Town is a haven for gangs and gangsterism. Whilst largely believed to be a phenomenon that is limited to the poor black areas of Cape Town, recent occurrences tend to confront this perception. For example, the gang-related killing of Cape Town Advocate Pete Mihalik indicates that gangsterism has now crept into affluent places. Mihalik was shot in the exclusively wealthy suburb of Greenpoint whilst dropping off

45 In its 2016 Report, the UN made reference to a number of affected countries, including Syria, Nigeria, Afghanistan, Central African Republic, Democratic Republic of Congo, Israel, Palestine, Lebanon, Libya, Mali, Myanmar, Somalia, South Sudan, Sudan, Yemen, and Columbia. See UN Report of the Secretary-General on 'Promotion and Protection of the Rights of Children' (20 April 2016) A/70/836-S/2016/360.

46 News24, 'Children of the Cape Flats are child soldiers – Ugandan academic' (*News24*, 15 May 2018) <<https://www.news24.com/News24/children-of-the-cape-flats-are-child-soldiers-ugandan-academic-20180514>> accessed 20 October 2018. Studies commissioned by local non-governmental organisations working in gang-afflicted Hanover Park indicated a growth in gang recruitment of 'child soldiers' from 450 to 500 in 2018.

47 Ah-Jung Lee, 'The Gap Between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People's Military Recruitment' (*Refugee Studies Centre Working*, January 2009) <<https://www.rsc.ox.ac.uk/files/files-1/wp52-understanding-addressing-child-soldiers-2009.pdf>> accessed 1 November 2018.

48 Leonie Steinl, *Child Soldiers as Agents of War and Peace* (Springer 2017) 8.

49 Khalil Goga, Eduardo Salcedo-Albaran, Charles Goredema 'A Network of Violence – Mapping a Criminal Gang Network in Cape Town' Institute for Security Studies Paper 271 (November 2014) 4.

50 Lisa Wegner, Ayesha Behardien, Cleo Loubser and others, 'Meaning and Purpose in the Occupations of Gang-Involved Young Men in Cape Town' (2016) 46(1) SAJOT 53–58, 53 <<http://dx.doi.org/10.17159/2310-3833/2016/v46n1a11>>

51 Tony Samara, *Cape Town After Apartheid: Crime and Governance in the Divided City* (University of Minnesota Press 2011) 97.

his children at a private school.⁵² It seems that gangsterism is infiltrating the comfort of richness in Cape Town.

The South African Medical Research Council reported that Cape Town is indeed one of South Africa's biggest drug markets and that this market is made functional by the gang network. Peltzer and others explain this on the basis that black-on-black crimes and illegal drug use or sale were rarely investigated nor prosecuted by the apartheid government.⁵³ As more governments globally started clamping down on gang activities such as drug and human trafficking, gangs looked to South Africa as an emerging market.⁵⁴ Hence the gang industry today is characterised by Nigerian cocaine cartels, Chinese triads, Moroccan protection gangs and Pakistani textile syndicates.⁵⁵

Challenges of Classification: A New Type of 'War'?

The concept of war has evolved over the years. That notwithstanding, the question that begs an answer is whether the current situation of violence in the Cape Flats can be classified as a war; or whether the term 'gang warfare' that is loosely thrown around renders the situation a 'war'? It is trite that cities today have become battlefields, whereas in the past, war often took two distinct formats, namely a confrontation on a battlefield in open country, or siege of a city or fortress.⁵⁶ Cities were protected by fortified perimeter walls and threats to the city's peace often came from outside, and rarely from within. Graham argues that in pre-modern times cities were constructed primarily for defence and other activities such as commerce, political and religious experiences.⁵⁷ Thus the threats were mainly external and rarely arose from within; fighting rarely took place on the streets.⁵⁸ Indeed Konaev and Spencer argue that the history of urban warfare mainly involved militaries fighting *for* cities, not *in* them.⁵⁹

52 Lou-Anne Daniels, 'Top Advocate Pete Mihalik Gunned Down in Hit Outside School, (*IOL News*, 30 October 2018) <<https://www.iol.co.za/news/south-africa/western-cape/breaking-news-top-advocate-pete-mihalik-gunned-down-in-hit-outside-school-17697062>> accessed 6 February 2019.

53 Karl Peltzer and others, 'Illicit Drug Use and Treatment in South Africa: A Review' (2010) 45(13) *Substance Use Misuse* 2221, 2222.

54 Irvin Kinnes 'From Urban Street Gangs to Criminal Empires: The Changing Face of Gangs in the Western Cape' ISS Monograph 48 (Institute for Security Studies, 1 June 2000) 4.

55 *ibid.*

56 Bernard (n 6) 2.

57 Stephen Graham, *Cities, War, and Terrorism: Towards an Urban Geopolitics* (Blackwell 2004) 2.

58 ICRC, 'War in Cities: What is at Stake?' (4 April 2017) <<https://www.icrc.org/en/document/war-cities-what-stake-0>> accessed 12 August 2018.

59 Margarita Konaev and John Spencer, 'The Era of Urban Warfare is Already Here' (22 February 2018) <https://www.realcleardefense.com/articles/2018/03/22/the_era_of_urban_warfare_is_already_here_113233.html> accessed 13 August 2018.

As such, wars historically took place in frontline spaces, away from the city. Armies would meet in open fields, or the ocean and they fought there.⁶⁰

The situation of gang violence in Cape Town cannot be classified as urban warfare.⁶¹ Even with the deployment of the military (discussed below) it still does not fall into the ambit of military operations that are largely perceived as ‘operations in the urban space’. These are known as either ‘military operations on urban terrain’ (MOUT), ‘operations in built-up areas’ (OBUA) or fighting in built-up areas (FIBUA).⁶² Hills, drawing inspiration from the US Doctrine for Joint Urban Operations defines these types of city-based war as:

[O]perations planned and conducted across the range of military operations on, or against objectives within, a topographical complex and its adjacent natural terrain, where manmade construction or the density of non-combatants are the dominant features.⁶³

The prevailing situation in Cape Town, although it occurs on natural terrain where man-made construction and the density of non-combatants feature dominantly, it is not planned or organised. Neither is it a military operation, but the main proponents and victims are civilians.

Kaldor, writing on what she terms the ‘new wars’ classifies this new type of war into three categories, namely: (i) organised violence for political ends, (ii) crime, which manifests in organised violence for private ends, and (iii) human rights violations which are characterised by violence against civilians. Kaldor further asserts that the term is not suitable for discussing the type of ‘new war’ that currently afflicts cities such as Cape Town. Her sentiment is that the reference to war somehow legitimises all forms of urban violence and lends itself to the increasing calls for military intervention. In other words, where the reference to war is avoided, these urban situations of violence remain illegitimate and require policing rather than a political or military response. For this reason, she submits that gang warfare must be classified as criminal.⁶⁴

60 Saskia Sassen, ‘When the City Itself Becomes a Technology of War’ (2010) 27(6) *Theory, Culture and Society* 33, 34.

61 This classification becomes extremely important as it has implications for both actors in any conflict. It should be noted that IHL mostly applies during armed conflicts, with the exception of a few rules which can also be applied for the protection of civilians during peacetime. See in this regard Lizaveta Tarasevich, ‘Participation of Non-State Armed Groups in the Formation of Customary International Humanitarian Law: Arising Challenges and Possible Solutions’ (2019) *Geneva Academy of International Humanitarian Law and Human Rights* 9.

62 Alice Hills, *Future War in Cities: Rethinking a Liberal Dilemma* (Routledge 2004) 5.

63 *ibid.*

64 Mary Kaldor, ‘In Defence of New Wars’ (2013) 2(1) *Stability* 1, 6.

How Can the Cape Flats Situation be Classified?

International Humanitarian Law (IHL) conceives of two forms of conflict, namely international armed conflict (IAC) and non-international armed conflict (NIAC). An IAC exists where both parties to the conflict comprise of the armed forces of the states in conflict. A NIAC on the other hand exists where the conflict is either (i) between a state's armed forces and a non-state armed group, or (ii) between non-state armed groups *inter se*.⁶⁵ Whatever the classification, IHL seeks to achieve two objectives, that is (i) the protection of persons, and (ii) placing restrictions on the means and methods of warfare. Chiefly, it seeks to protect those who are not or no longer participating in the conflict (*hors de combat*), mainly civilians.⁶⁶

Various sources of international law give direction on when an armed conflict can be said to exist. These include military manuals, the writings of eminent jurists and decisions of international judicial bodies. It is only once a conflict is regarded to be in existence (either as a NIAC or an IAC) that IHL will apply, and that can only happen upon the fulfilment of the criteria contained in Articles 2 and 3 Common to the 1949 Geneva Conventions.

Common Article 2(1) stipulates that it applies to 'all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.' Whilst this was the prevailing notion during the drafting of the Geneva Conventions, there has been a shift in the character of war or conflict, and how it is perceived by the role players involved. Lee asserts that the conduct of hostilities is no longer largely between States but within States.⁶⁷

What has been established is that there is ongoing violence, and armed conflict so to speak, in the greater Cape Town metropolitan area. However, the facts clearly demonstrate that the violence in the city of Cape Town cannot be classified as an international armed conflict, for both of the parties involved are not States.⁶⁸ Gangs by their nature are non-State actors. The United Nations Security Council has defined non-State actors as an 'individual or entity, not acting under the lawful authority of any State.'⁶⁹ Hence an analysis of the foregoing begs the question: Does the gang violence in the Western Cape amount to a non-international armed conflict, to which IHL should

65 Jelena Pejic, 'The Protective Scope of Common Article 3: more than meets the eye' (2011) *International Review of the Red Cross* 93 (881) 189–225, 191.

66 United Nations Human Rights Office, *International Legal Protection of Human Rights in Armed Conflict* (UN 2011) 12.

67 Amra Lee, 'The Case for Strengthening Protection Frameworks in "other situations of violence"' (2014) *Journal of Humanitarian Assistance*.

68 Hennie Strydom, Gerhard Kemp and Oliver Ruppel, *International Law* (OUP 2016) 376.

69 United Nations Security Council Resolution 1540 (2004) (adopted 28 April 2004).

be applied?⁷⁰ It is accepted that IHL requires two criteria to be satisfied before a non-international armed conflict can be said to exist. The first is that the armed groups involved must show a minimum degree of organisation. This requirement is hardly problematic when dealing with State armed forces, for these are presumed to be organised.⁷¹ The African Union's (AU) definition of an armed group captures this as 'dissident armed forces or other organised armed groups that are distinct from the armed forces of the State.' The Achilles heel of the AU's definition is that it uses the term 'armed group' to attempt to define 'armed group'.⁷² Kleffner argues that organised armed groups are those groups that are sufficiently organised to render them a party to an armed conflict.⁷³ However, this definition does not assist much in determining what an organised group is. Dörmann *et al* assert that such a group must first and foremost possess organised armed forces, who must be under a certain command structure. They must be able to sustain military operations.⁷⁴ The level of organisation expected from non-State groups is not of the same level and sophistication as that of a State armed force. What is required is that the non-State party must have ingrained in its structures a certain level of hierarchy and discipline. This must be accompanied by the ability to implement IHL obligations. This brings to bear the question, do gangs in the Western Cape have the type of command structure envisaged by international law? Do they have the ability to respect IHL obligations?

For gangs to have the requisite level of organisation, one of the things that must be proved is the existence of a command structure and disciplinary rules and mechanisms within the group.⁷⁵ The group must also have a headquarters, control a certain territory, and have the ability to gain access to weapons and other military equipment. Further, such a group must be able to recruit and train its members militarily, as well as coordinate and carry out military operations. Overall, the organisation must employ military tactics in its activities.

Whilst gangs are largely able to recruit and train their members, there remains doubt about the nature of the training and the operations they undertake. There is no military element involved. Even the control of territory by gangs is not at the level of control

70 What makes this question pertinent is that quite often non-international armed conflicts result in human rights abuses and extreme human suffering. See Lizaveta Tarasevich, 'Participation of non-state armed groups in the formation of customary international humanitarian law: arising challenges and possible solutions' (LLM Thesis, Geneva Academy of International Humanitarian Law and Human Rights 2019) 3.

71 Knut Dörmann and others, Commentary on the First Geneva Protocol (CUP 2016) 156.

72 See Art 1 of the African Union's Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention) which came into force on 6 December 2012.

73 Jann Kleffner, 'The Applicability of International Humanitarian Law to Organised armed Groups' (2011) 93(882) *International Review of the Red Cross* 444.

74 ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (Opinion Paper 2008) 3.

75 *The Prosecutor v Boskoski and Tarculovski* Case No. ICTY-IT-04-82-T, Judgment (Trial Chamber) 10 June 2008, paras 194–205.

that is often witnessed when 'real armed groups' control an area in a conflict zone. It is merely controlled in the sense that the gang members regulate the carrying out of commercial and criminal activities in those areas falling under their control. Otherwise, normal day-to-day activities and services continue relatively unhindered, even law enforcement operations by the police continue, albeit under extreme circumstances.

Turning to the requirement that the armed group must have the ability to implement the obligations of IHL, there is doubt that gangs, being criminal in nature, would want to observe and respect any law. The recorded cases of gang activity indicate that gangs do not work within the parameters of any law, and they have been known to disregard human life, civilian life and key infrastructure. For them, everything and everyone has a strategic advantage. They do not apply the principles of distinction at all. Their attacks are indiscriminate. It would seem that because of the manner in which gangs are constituted and operate, they do not meet the requirements for an organised armed group as envisaged in IHL.

The second element is that the activities of the group, ie the armed confrontations, must reach a minimum level of intensity. Several factors can be used to determine the intensity of the violence. These include, but are not limited to, the number of civilians forced to flee from the combat zones; the type of weapons used, especially the use of heavy weapons and other military equipment; the shelling of towns etc.⁷⁶ Kleffner argues that these elements are not constitutive, but merely indicative. In other words, they do not constitute the group as an 'organised armed group'. These elements are merely a guide to ascertain the status of a group.⁷⁷

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Dusko Tadic* case also stipulated that a conflict exists whenever there is resort to armed force between states.⁷⁸ Also where there is protracted armed violence between governmental authorities and organised armed groups, or between such groups within a state. In terms of the *Dusko Tadic* decision, IHL applies from the moment the armed conflict is initiated and outlives such conflict until hostilities cease and there is a return to peace. It is difficult to categorise the Cape Town gang violence within the categories highlighted in the case. Although the Cape gangs are armed, there is no certainty on the status of their organisation. In other words, it is not quite clear if they qualify as an organised group as such.

Common Article 3 does not provide a detailed definition of its scope of application, nor does it contain factors to be used in determining if it applies to a particular situation. Instead, the provision simply calls for certain provisions to be respected by the parties

76 *ibid*, para 177.

77 Jann Kleffner, 'The Applicability of the Law of Armed Conflict and Human Rights Law to Organised Armed Groups' in Erika de Wet and Jann Kleffner (eds), *Convergence and Conflicts: Of Human Rights and International Humanitarian Law in Military Operations* (PULP 2014) 50.

78 *Prosecutor v Tadic* (Appeals Chamber Decision) Case No. IT-94-1-A (15 July 1999) para 84.

to the conflict,⁷⁹ where the armed conflict ‘not of an international character’ occurs on the territory of one of the High Contracting Parties, which South Africa is. Strydom argues that Common Article 3 provides for certain minimum standards that must apply during non-international armed conflicts.⁸⁰

Essentially, if the gang conflict in the Western Cape amounted to a non-international armed conflict, the applicability of Common Article 3 and other provisions of humanitarian law germane to a non-international armed conflict would ensure that gang members (as parties to the conflict) are under an international legal obligation. As such, they would be bound to grant certain fundamental protections to the victims of the conflict with respect to the rules on the conduct of hostilities.

Also, worth noting is the provisions of Additional Protocol II, in particular Article 1(2), which provides that the Protocol shall not apply to situations of internal disturbances and tension such as riots, isolated and sporadic acts of violence and other actions of a similar nature. The term ‘other situations of violence’ refers to two distinct instances where the fighting involves the following groups: (i) police or security officers versus military, para-military forces, or a group, or (ii) individual groups versus individuals or groups. According to the ICRC, the groups can be organised or not.⁸¹ The intensity of the violence in such situations is usually low, characterised by riots, demonstrations, isolated sporadic acts of violence, mass arrests and enforced disappearances. In such instances, international human rights law, and not IHL, applies.

It should be noted that there is currently no treaty instrument offering a definition of the precise scope of the term ‘other situations of violence’.⁸² However, from the above analysis, it emerges that the situation in Cape Town can only be classified as an ‘other situation of violence’, and as such IHL does not apply.

Until recently, there was a paucity of regulations on the applicability of humanitarian law to instances of urban violence. There was also a dearth of regulations or guidelines on how the army was to relate with other role players once deployed with policing functions. In the US context, these role players produced the Guidelines for Relations

79 Marco Sassoli and Laura Olson, ‘The Relationship Between International Humanitarian and Human Rights law Where it Matters: Admissible Killing and Internment of Fighter in Non-International Armed Conflicts’ (2008) *International Review of the Red Cross* 90(871), 599–627, 602. Sassoli argues that common Article 3 is equally binding for all parties to the conflict. *International Review of the Red Cross* 90(871), 599–627, 602.

80 Strydom and others (n 68) 395.

81 ICRC, ‘Characteristics of Armed Conflicts and Other Situations of Violence’ <https://www.icrc.org/en/download/file/67234/handout_3_-_characteristics_of_armed_conflicts_other_situations_of_violence.pdf> accessed 21 August 2018.

82 International Institute of Humanitarian Law, ‘International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence’ (San Remo, Italy, November 2003) 2 <https://www.icrc.org/eng/assets/files/other/interplay_other_regimes_nov_2003.pdf> accessed 1 August 2018.

Between US Armed Forces and Non-governmental Humanitarian Organisations⁸³ to regulate the interactions of humanitarian organisations and the members of armed forces on the ground. Manifestations of this breakdown of law enforcement by the state can be seen in the formation of the organisation People Against Gangsterism and Drugs (PAGAD) in the 1990s in Cape Town.

As already indicated, the gangsterism problem, manifesting as an ‘other situation of violence’ in the Cape Flats is not necessarily a unique problem afflicting that city only.⁸⁴ Literature shows that this is a growing phenomenon globally.⁸⁵ It is common cause that the world today has fewer armed conflicts, and more gang and urban violence and that this poses a problem for governments worldwide. Indeed, Petrus and Kinnes argue that such urban violence renders the state unable to exercise governance functions in the affected areas. Police authority and operations are also viewed with disdain by these gangs, leading to more conflict.⁸⁶

Is the Army Well Suited for Stemming Gangsterism?

The Response of the National Government to the Gang Violence in the Cape Flats

The gang problem and its attendant social ills have been the bane of the existence of the Western Cape Provincial Government, run by the opposition party, the Democratic Alliance (DA). Through its then Premier Hellen Zille, the provincial government requested the national government run by the ruling party, the African National Congress (ANC) to deploy members of the South African National Defence Force (SANDF) to the suburbs of Lavender Hill and Hanover Park. The then former President Zuma responded by informing the Western Cape Government that he had requested the Minister of Defence and the Minister of Police to assess the situation and report to him.⁸⁷ President Zuma would eventually decline to acquiesce to the Western Cape Government's request, citing the following reasons for the refusal to deploy members of SANDF in the Cape Flats: (i) the situation required a long-term and multi-disciplinary

83 This code was drafted by InterAction which comprises over 500 humanitarian NGOs in 2006 – 2007. This code was subsequently endorsed by the US Army. See ‘Guidelines for Relations Between US Armed Forces and Non-Governmental Humanitarian Organisations in Hostile or Potentially Hostile Environments’ <<https://www.usip.org/publications/2007/07/guidelines-relations-between-us-armed-forces-and-nghos-hostile-or-potentially>> accessed 20 October 2021.

84 Theodore Petrus and Irvin Kinnes, ‘New Social Bandits? A Comparative Analysis of Gangsterism in the Western and Eastern Cape Provinces of South Africa’ (2019) *Criminology and Criminal Justice* 19(2), 179–196, 180.

85 Vincent Bernard, ‘Interview with David Kilcullen’ (2011) *International Review of the Red Cross* 93 (883) 587–601, 589.

86 *ibid* 182.

87 Presidential Letter to Premier Hellen Zille, (12 August 2012) <<https://www.westerncape.gov.za/text/2012/7/Reply%20from%20President%20-%2012%20July.pdf>> accessed 20 August 2018.

approach; (ii) the South African Police Services had the necessary capacity to deal with the situation in those areas; (iii) the situation did not require the deployment of members of the SANDF; and (iv) there were socio-economic conditions which needed to be addressed in those areas.⁸⁸

In November 2012, Zille wrote to the Minister of Defence requesting her to authorise the deployment of the SANDF to play a peace-keeping role in areas prone to violence and arson.⁸⁹ In August 2013, Zille made another call for the army to be deployed to gang violence hotspots, following reports that schools in the Manenberg area were closed for two days due to gang fighting.⁹⁰ The tussle between the national government and the Western Cape Provincial Government would continue over the years, with the request for army deployment being tossed back and forth between the two centres of power like the proverbial political football.

In 2017, the Government of South Africa was again mulling over the idea of deploying the army to deal with the widespread gangsterism in Cape Town. The Minister for Police promised to deploy the SANDF before the end of 2017⁹¹ but emphasised that the army would be linked to an operation for a specific period. He stressed that it had to be a police-led operation, not a military operation as such. It would later turn out that the Minister had spoken out of turn, as the president never authorised such deployment.

Policing Gang Warfare as Political Football

It should be noted that the South African Police Service (SAPS) has the primary mandate for policing across South Africa. Its functions include crime prevention, crime detection, crime investigation and evidence gathering to secure successful prosecutions.⁹² The SANDF on the other hand is constitutionally mandated to defend and protect the Republic, its territorial integrity, and its people in accordance with the

88 Defence Web, 'Military Not to Help Fight Cape Gangs' (16 August 2018) <http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=27267:military-not-to-help-fight-cape-gangs&catid=56:diplomacy-a-peace&Itemid=11> accessed 18 September 2018.

89 Western Cape Government Media Statement, 'Premier Zille requests Minister of Defence Mapisa-Nqakula to deploy the SANDF in Western Cape Farm Areas' (28 November 2012) <<https://www.westerncape.gov.za/news/premier-zille-requests-minister-defence-mapisa-nqakula-deploy-sandf-western-cape-farm-areas>> accessed 12 August 2018.

90 SAPA, 'Zille Calls for Army to Tackle Gangs' (*IOL*, 14 August 2013) <<https://www.iol.co.za/news/zille-calls-for-army-to-tackle-gangs-1562452>> accessed 14 August 2018.

91 Mary-Anne Gontsana, 'Soldiers Will Be in Gang Areas by Christmas, says Mbalula' (*Times Live*, 16 November 2017) <<https://www.timeslive.co.za/politics/2017-11-16-soldiers-will-be-in-gang-areas-by-christmas-says-mbalula/>> accessed 18 August 2018.

92 Section 205 of the South African Constitution Act 1996 grants police these powers. It proceeds to confer upon SAPS the responsibility to protect individuals and their property; uphold and enforce the law; create a safe environment for all people in South Africa; and participate in efforts to address the causes of crime, amongst others.

Constitution, and in compliance with international humanitarian law. In fact, the Constitution employs the words ‘in accordance with ... the principles of international law regulating the use of force.’⁹³ The constitutional text indicates that the SANDF was established for situations of armed conflict, not general law enforcement operations that can be done by the members of the SAPS.

The Constitution does, however, anticipate collaborative work between SANDF and the SAPS as and when the situation arises. Hence Section 201(2) stipulates that only the president in his capacity as head of the national executive may authorise the defence force to work in co-operation with the police service. In cases where the president mandates the SANDF to work with the SAPS in law enforcement operations, he is obliged by the Constitution to inform parliament promptly and in detail of the reasons for the deployment of the defence force.⁹⁴ The president's brief to parliament must also include the place where the SANDF members have been deployed to; the number of members deployed and the duration of their deployment.

In mid-2018, the DA renewed its calls for the deployment of the SANDF. Former DA leader Mmusi Maimane led a march to the Nyanga Police Station, to deliver a petition calling for soldiers to be stationed in gang hotspots. The deputy minister for police refused to accept his petition, stating that the township of Nyanga was not gang-ridden, but only experienced common crime. In the political arrangements of the time, Nyanga fell within the control of the ANC, and Maimane's march and petition were seen as political mudslinging, with the minister indicating that he ought to have delivered his petition in Mitchells Plain, which is gangster territory and is under the control of the DA. This was viewed as cheap politicking by the DA, a strategy to garner more votes and stir tensions between the Coloured population and the African population which largely dominates the township of Nyanga.⁹⁵

The DA adopted the mantra #SendArmyNow as their political rallying cry ahead of the 2019 general elections. This was largely criticised by some members of the public as a dangerous ‘game’.⁹⁶ This call was perceived as an attempt to strengthen the DA's political position and to bolster its ambitions to dislodge the ruling ANC from the national government.

The ANC provincial structures were of the view that the DA's call was influenced by vestiges of apartheid and racism. To them, the DA has never looked at poor black people

93 *ibid* s 200(2).

94 *ibid* s 201(3)(a).

95 Paul Herman, ‘Deputy Police Minister Refuses to Accept DA's “Send the Army” Memorandum’ (*News24*, 19 September 2018) <<https://www.news24.com/SouthAfrica/News/deputy-police-minister-refuses-to-accept-das-send-the-army-memorandum-20180719>> accessed 19 August 2018.

96 Rebecca Davis, ‘DA wants to send the army into the Cape Flats – communities, not so much’ (*Daily Maverick*, 19 July 2018) <<https://www.dailymaverick.co.za/article/2018-07-19-da-wants-to-send-the-army-into-the-cape-flats-communities-not-so-much/>> accessed 21 July 2022.

(both African and Coloured people) as human beings. The organisation intimated that this was the reason the DA was prepared to go to war with the black people who live in the gang-infested townships.⁹⁷ This was further bolstered by the comments of the Minister of Police Bheki Cele in mid-2018 when he urged the DA to stop making crime and the deployment of the army a political football.⁹⁸

Only in November 2018 did President Ramaphosa inaugurate a new elite police unit set up specifically to fight gangsterism in the Cape Flats.⁹⁹ The President handed over fifty BMW vehicles to be used by the Anti-Gang Unit (AGU) amidst laughter and mocking from some residents who heckled him, accusing his party, the ANC, of not doing anything for the residents of Hanover Park.¹⁰⁰ Gang members also mocked the move, indicating that jailing them would not necessarily work, since they will come out of jail and continue with their trade. Their outbursts align with what the ANC government had always said in relation to the gang problem in the Cape Flats, that a multi-pronged solution was required, one which would take into account the historical, socio-economic and political nuances of this nemesis.

Apart from the AGU, President Ramaphosa eventually deployed the army to the Cape Flats in June 2019. The deployment was initially for a period of three months. It was later extended to 31 March 2020.

The politicisation of gangsterism is a real problem in the Cape Town area. Promises to solve this problem have featured centrally in the messaging of political parties ahead of elections; rendering it a political football for political party contestation.¹⁰¹ Petrus and Kinnes further cite corruption and the relationships some politicians have with high-level gangsters as one of the factors that compound the fight against gangsterism. Politicisation thus exacerbates the problem rather than remedying it.¹⁰²

97 *ibid.*

98 Siviwe Breakfast, 'Cele Slams DA for Calling for Deployment of Army in the Cape Flats' (*The South African*, 19 September 2018) <<https://www.thesouthafrican.com/cele-slams-da-for-calling-for-deployment-of-army-in-the-cape-flats/>> accessed 17 August 2019.

99 Saam Jalinous, 'Where are the Gangsters? Asks Ramaphosa, While Surrounded by the Gangsters' (*The Citizen*, 2 November 2018) <<https://citizen.co.za/news/south-africa/2031603/where-are-the-gangsters-asks-ramaphosa-while-surrounded-by-the-gangsters/>> accessed 6 November 2018.

100 See Dave Chambers, 'Two Anti-Gang Unit Members Arrested for Alleged Theft During Raid' (*Times Live*, 2 November 2018) <<https://www.timeslive.co.za/news/south-africa/2018-12-04-two-anti-gang-unit-officers-arrested-for-alleged-theft-during-raid/>> accessed 2 February 2019. It is quite ironic that barely four weeks after inaugurating this elite unit, some of its members were arrested for theft during a raid.

101 Theodore Petrus and Irvin Kinnes, 'New Social Bandits? A Comparative Analysis of Gangsterism in the Western and Eastern Cape Provinces of South Africa' (2019) *Criminology and Criminal Justice* 19(2), 179–196, 192.

102 *ibid.*

The Applicability of International Humanitarian Law in Urban Warfare

It is trite that not all situations of violence qualify as armed conflicts under international law. This inevitably brings to the fore the question of the applicability of IHL in that particular situation. It is now settled law that to trigger the applicability of IHL in the context of an armed conflict, certain determining factors need to be satisfied. However, it is worth noting that the question of applicability largely centres on an assessment of the facts on the ground. In other words, IHL will only apply in a given situation if that particular conflict satisfies the threshold as an armed conflict.¹⁰³

International Law Regulations on the Use of the Military in Civilian Operations

The recent deployment of the SANDF was not necessarily the first, as the army had been deployed to the Cape Flats before. Notable instances include the involvement of soldiers to help police with the xenophobic violence in 2008, 2012 and 2015 as part of Operation Fiela.¹⁰⁴ There is also evidence of pre-1994 deployment when the apartheid government deployed the South African Defence Force (SADF) to the Cape Flats in 1989.¹⁰⁵ The deployment lacked coordination at first. Each agency held its own separate briefings, intelligence integration between the agencies was non-existent, and the SAPS and the SANDF operations within the affected communities lacked collaboration.¹⁰⁶

The deployment of the military in civilian operations is also regulated under international law. Ordinarily, there ought to be a mission-specific code of conduct before members of the SANDF are deployed. Such a code of conduct, in conjunction with the general SANDF Code of Conduct, coupled with international human rights law would then govern the conduct of members of the military in carrying out their operations in gang-infested areas.

Notable amongst these international instruments is the United Nations Code of Conduct for Law Enforcement Officials of 1979.¹⁰⁷ The resolution places a duty on officers to protect the communities they are serving; to respect and protect human dignity and human rights (Article 2); and to only use force when strictly necessary (Article 3). It

103 Theresa Akpoghome, 'Other Situations of Violence: Classification Issues and Concerns: The Nigerian Situation' (2015) 3:1 *Journal of Law and Criminal Justice* 73, 74. See also Strydom and others (n 68) 375.

104 Carla Bernardo, 'Measuring the Success of the Cape Flats Army Deployment, (16 January 2020) <<https://www.news.uct.ac.za/article/-2020-01-16-measuring-the-success-of-the-cape-flats-army-deployment>> accessed 2 April 2021.

105 *ibid.*

106 *ibid.*

107 United Nations Human Rights Office of the High Commissioner, 'Code of Conduct for Law Enforcement Officials' adopted by the General Assembly Resolution 34/169 of 17 December 1979, <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>> accessed 7 April 2021.

further prohibits torture (Article 5).¹⁰⁸ The resolution's understanding of the term 'law enforcement official' is broad enough to include military officials deployed in gang-infested areas. Article 1(a) defines law enforcement officials to include all officers of the law who exercise police powers, especially the powers of arrest and detention. It proceeds in paragraph (b) to state that in territories where police powers are exercised by military authorities, these shall be regarded as law enforcement officials in much the same way as police officers.

Once deployed, members of the SANDF would be guided by the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990.¹⁰⁹ These Basic Principles impose positive duties on states and law enforcement agencies to adopt and implement regulations on the use of force against persons. It also creates a duty for officers to use non-violent means of policing, to the extent that this is possible.¹¹⁰

Is the Army Well Suited for the Fight Against Gang Violence in the Cape Town Urban Area?

Public sentiment on the DA's request to deploy the SANDF was ambivalent. Most residents of the Western Cape welcomed the idea of soldiers moving into ganglands and cleaning those areas. There were, however, dissenting voices that felt that such a deployment would be premature.

Stupart argues that the army is not well suited for combating gangsterism in Cape Town because soldiers are trained to 'find, fix and finish' their 'enemy'.¹¹¹ He proceeds to state that the SANDF's response to gang violence would be to shoot first and ask questions later. This would be problematic given the fact that gang members are not distinguishable from civilians. Stupart points out that another risk that comes with deploying the army is that the local police could likely experience an escalation in the frequency and intensity of violence from gangs, as a response to the clampdown by the army.

High population density coupled with close proximity of civilians to military objectives complicate military planning. It is trite that the violence in the ganglands of the Western

108 Angelo Dube, 'The Challenges of Deploying the Army in Civilian COVID-19 Policing Operations – a South African Perspective' (27 August 2020) <<https://rightsblog.net/2020/08/27/the-challenges-of-deploying-the-army-in-civilian-covid-19-policing-operations-a-south-african-perspective/>> accessed 7 April 2021.

109 United Nations, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990' <<https://www.un.org/ruleoflaw/files/BASICP~3.PDF>> accessed 13 April 2021.

110 Dube (n 108).

111 John Stupart, 'Sending the Army to the Townships' (*African Defence Review*, 15 October 2017) <<https://www.africandefence.net/army-to-the-townships/>> accessed 16 August 2018.

Cape take place in very densely populated, poorly spatially planned residential areas.¹¹² These are areas that were deliberately planned in this manner by the apartheid government in order to allow cordoning off and control of the population in these places.¹¹³ These spatial and demographic considerations would negatively affect targeting decisions by military personnel. Turok asserts that cities and towns in South Africa, like Cape Town, are highly polarised.¹¹⁴ They present with stark disparities in living conditions, which are intimately connected to income and quality of life. Informal settlements and townships (two places in which gangsterism and gang violence thrive) characterise the spatial design of the Western Cape.

There are recent examples of military deployment to urban cities for purposes of crime prevention and law enforcement. The February 2018 deployment of the Brazilian military to Rio de Janeiro is illustrative in this regard.¹¹⁵ Over 10 000 additional soldiers and police officers had been deployed to provide security. This followed gloomy statistics regarding the violent death toll which increased from 6262 in 2016 to 6731 in 2017. The deployment was a response to the escalating death toll, which flowed from incidents of political violence and armed group activity within the city. Brazilian President Michael Temer labelled the deployment an extreme measure necessitated by the need to crack down on organised crime and drug trafficking that had overtaken the city. Over 6.5 million residents of Rio de Janeiro were affected by the wanton killing, closure of schools, theft and violence.¹¹⁶ Preliminary reports showed that six months into the Brazilian deployment, crime continued to be a problem in Rio de Janeiro.¹¹⁷ As

112 Western Cape Government, 'Western Cape Spatial Development Framework' (March 2014) <https://www.westerncape.gov.za/eadp/files/atoms/files/psdf_report.pdf> accessed 17 August 2018.

113 These spatial patterns were further bolstered by the provisions of the Native Land Act 1913, which made it criminal for black people to own land. As a result, non-white residents were lumped in low-cost housing, with poor infrastructural design, which acted as a catalyst for the development of gangs and lawlessness.

114 Ivan Turok, 'Planning for Spatial Transformation' in Western Cape Government, *Land Use Planning Land Reform in the Western Cape* <https://www.westerncape.gov.za/eadp/files/atoms/files/LAND%20USE%20PLANNING%20LAW%20REFORM_THE%20ROAD%20TO%20TRANSFORMATION_06122017.pdf> accessed 17 August 2018.

115 BBC, 'Rio Military Deployment Stirs Controversy in Brazil' (28 February 2018) <<https://www.bbc.com/news/world-latin-america-43225217>> accessed 18 August 2018.

116 Marina Lopes, 'Brazil's Military to Take Over Security in Violence-Scarred Rio de Janeiro' (*The Washington Post*, 16 February 2018) <https://www.washingtonpost.com/world/the_americas/brazils-military-to-take-over-security-in-violence-scarred-rio-de-janeiro/2018/02/16/5ff9aeea-1341-11e8-a68c-e9374188170e_story.html?noredirect=on&utm_term=.442fa389d010> accessed 20 August 2018.

117 Philipp Lichterbeck, 'Brazil Military Intervention in Rio de Janeiro a "Publicity" Stunt' (*Deutsche Welle*, 17 August 2018) <<https://www.dw.com/en/brazil-military-intervention-in-rio-de-janeiro-a-publicity-stunt/a-45121358>> accessed 21 August 2018.

Stuurman puts it, the army deployment in Rio led to human rights violations and polarised tensions between the residents who felt marginalised and the state.¹¹⁸

The army is trained to engage in warfare, unlike the police who are equipped for crime prevention and law enforcement. The army's main goal is to neutralise an enemy of the Republic,¹¹⁹ and this well-established perception has the potential to vilify those living in the gang-ridden communities.¹²⁰

Post the Army Deployment, Can the Political Aversion be Justified?

In order to get a sense of whether the deployment achieved its intended purpose or not, one would have to understand how residents of the Cape Flats feel after the army was deployed. To do this, one would need to design a research tool to enable the collection of raw data from such residents. That unfortunately is currently outside the scope of this study. Regard must therefore be had to media reports about the perceptions of Cape Flats residents. A quick scan of available media reports indicates that residents do not feel any safer after the deployment.

The other measuring factor would be to determine if armed gangs continued to exist and if their ability to operate in the affected areas was dented by the presence of the army; and if this situation did not abate after the army deployment came to an end. For this type of information, one needs to turn to the latest crime statistics and compare those with the period immediately preceding the deployment.

As stated above, the army was deployed to the Cape Flats in July 2019, initially for three months, and its stay was extended by the president until 31 March 2020. The 2019/2020 Crime Statistics for the period April 2019 to March 2020, released by the SAPS indicated overall national statistics of gang-related murders standing at 1023. Out of those, the Western Cape province accounted for the highest at 821.¹²¹ The statistics of the previous period, 2018/2019 stood at 1120 gang-related murders nationally, with 938 of those coming from the Western Cape.¹²² It is clear that with the army deployed to the

118 Ziyanda Stuurman, 'Policing Inequality and the Inequality of Policing: A Look at the Militarisation of Policing Around the World, Focusing on Brazil and South Africa (2020) SAJIA 27(1) 43–66, 54.

119 Cornelius Friesendorf, *The Military and Law Enforcement in Peace Operations: Lessons from Bosnia-Herzegovina and Kosovo* (Geneva Centre for Democratic Control of Armed Forces: Geneva 2009) 1.

120 Adam Armstrong, 'Deploying the Army to the Cape Flats Won't Work' (*Ground Up*, 29 April 2014) <<https://www.groundup.org.za/article/deploying-army-cape-flats-wont-work/>> accessed 1 April 2021.

121 SAPS, 'Crime Statistics' <https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf> accessed 3 June 2021.

122 *ibid.*

Cape Flats, gang murders jumped from 938 down to 821, a reduction of 117 murders or 12.5 per cent.

In the 2019/2020 period, gang-related attempted murders stood at 1438 nationally, with the Western Cape accounting for 1186 of those. In the period before that, the national statistics stood at 1847 with 1511 coming out of the Western Cape. Again, in this category, the province had the highest stats in both periods. This represents a reduction of 336 gang-related attempted murders (or a decline of 18.2 per cent) in the Western Cape after the deployment of the army. There may be some credence to the argument that the presence of the army did in some ways deter or restrict gang activity, hence the reduction in the statistics for that period.

The other factor that could aid such an assessment would be to look at the financial and social costs of the operation. Media reports put the cost of deployment of the army over three months at a staggering R23 million. To spend millions of Rands and achieve a reduction in key gang-related crimes of 18 and 12 per cent can be lauded as a milestone on the part of the SANDF.

Conclusion

The foregoing has demonstrated that the gang violence currently afflicting the Cape Flats has been reduced to a political football by both the national and the provincial governments. The situation became a politicking point, used to score points ahead of 2019 elections, and to try and discredit political opponents. For the DA, it is a clear demonstration of failure by national government to carry out its constitutional mandate. For the ANC, the rampant gang violence represents the failures of the DA to govern the City of Cape Town and the Province as a whole. Since the gang violence is largely centred in the non-white areas, it also lends credence to the prevailing perceptions that the DA does not concern itself with black South Africans, save for a fleeting interaction with their pressing issues during election time. As a consequence, the real issue is overshadowed by the political wrangling of the two parties. Gangsterism and gang violence continue unabated, and it is clear that the police are not coping with the ever-mutating manifestations of gang violence in the Cape Flats. Whether or not the deployment of the army would arrest the situation gets lost in the political noise the two camps make around the issue.

The article set out to determine whether the situation in the Cape Flats can be addressed with resort to the law of armed conflict. A discussion of leading scholars and other authorities in the field revealed that IHL cannot be invoked to address the nemesis currently facing the Cape Flats. This is largely due to definitional and classification considerations, since neither the character and nature of the conflict itself, not that of the role players fit within the ambit IHL. As a result, it is clear that the violence can only be classified as an 'other situation of violence'.

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