

Organized crime and gang violence in national and international law

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Abstract

Organized crime and gang violence are global phenomena that often emerge in urban areas. Although they are not new, states only recently began to perceive them as serious threats to public security. Laws specifically designed to combat them have consequently been enacted. This article outlines the difficulties of dealing adequately in legal terms with these phenomena and analyses the different approaches adopted so far at the national and international level.



Organized crime and gang violence can be found in both poor and rich countries. They often pose serious problems, particularly in urban areas, to the state and to society.¹ Various national and international laws have consequently been enacted to combat organized crime as well as gangs and their violence more effectively. Due to the gangs' highly dynamic and heterogeneous nature, dealing with them in legal terms has proved to be a challenging and even delicate task. Although it seems more appropriate to distinguish between organized crime and gangs and their violence, such a distinction is often difficult to draw. Legislators have therefore opted for different approaches. The present article analyses the steps taken so far at the national and international level, against the background of the respective practical and theoretical challenges.

Organized crime, gangs, and gang violence as analytical concepts

The study of organized crime, gangs, and gang violence belongs to the domain of criminal science, especially criminology.² It is through this interdisciplinary lens that the challenges posed by them to state and society are primarily comprehended.³ Analysis of the difficulties in adequately addressing these phenomena in legal terms therefore presupposes some knowledge of how far they have evolved as analytical concepts.

Organized crime

Numerous national and international instruments, in particular the United Nations Convention against Transnational Organized Crime (UNTOC),⁴ indicate that '(transnational) organized crime' has become a legal concept.⁵ Whether this is the case or not is, however, of minor practical relevance. For the purposes of the present article it is important to understand why the definition of 'organized crime' is the object of continuing controversy and what this means for law-making and enforcement.

Definitional problems

'Organized crime' is a very pithy term that has become part of the vocabulary of many politicians and the broader public as well. It is often applied without a clear reference point and is, in fact, highly indeterminate and vague.⁶ This lack of clarity also affects the relevant academic debate.

On the one hand, the term can be used to refer to certain types of more sophisticated criminal activities embedded, in one form or another, in complex

- 1 Graduate Institute of International and Development Studies (ed.), *Small Arms Survey 2007: Guns and the City*, Cambridge University Press, Cambridge, 2007, pp. 169–176; see also Olivier Bangerter, 'Territorial gangs and their consequences for humanitarian players', in this issue.
- 2 Michael Levi, 'Organized crime and terrorism', in Mike Maguire, Rod Morgan, and Robert Reiner (eds), *The Oxford Handbook of Criminology*, Oxford University Press, Oxford and New York, 2007, p. 771; Hans Joachim Schneider, 'Organisiertes Verbrechen', in Rudolf Sieverts and Hans Joachim Schneider (eds), *Handwörterbuch der Kriminologie*, de Gruyter, Berlin and New York, 1998, p. 562.
- 3 Bernd-Dieter Meier, *Kriminologie*, Beck, Munich, 2007, p. 27; Klaus von Lampe, 'The interdisciplinary dimensions of the study of organized crime', in *Trends in Organized Crime*, Vol. 9, No. 3, 2006, pp. 77–94.
- 4 UN Convention against Transnational Organized Crime (2000), 40 ILM (2001), 335 (entered into force 29 September 2003).
- 5 Sappho Xenakis, 'Difficulties in applying generic conceptualizations of organized crime to specific national circumstances', in Franck G. Shanty and Patit Paban Mishra (eds), *Organized Crime: An International Encyclopedia*, ABC-Clio, Santa Barbara, CA, 2008, p. 47; Fusun Sukullu-Akinci, 'Transnational organized crime and trafficking of human beings', in Joshua D. Freilich and Rob T. Guerette (eds), *Migration, Culture Conflict, Crime and Terrorism*, Aldershot, Hampshire, 2006, p. 157.
- 6 Michael Woodiwiss and Dick Hobbs, 'Organized evil and the Atlantic Alliance: moral panics and the rhetoric of organized crime policing in America and Britain', in *British Journal of Criminology*, Vol. 49, 2009, pp. 106–128.

illicit markets. Arms, drug, and human trafficking are often correlated with a set of ‘enabling activities’ such as (the threat of) violence, corruption, and money laundering.⁷ One group of authors assumes that the former constitute core activities of organized crime;⁸ another refers to the latter.⁹ In both cases the offences can usually be categorized as ‘serious crimes’. It may be more accurate to use the term ‘organized criminality’.

One problem of this approach is that it is merely based on indicator criminality. Violence against persons, for instance, may be an important means for and characteristic of some illegal activities, but not necessarily.¹⁰ Furthermore, there exist numerous illicit markets, ranging from trade in contraband cigarettes and stolen cars to extortion of multinational corporations, gambling, prostitution, and so forth.¹¹ Yet, as the example of prostitution shows, it is not possible to state in general terms that those engaged in the respective activities are involved in organized criminality. One may consequently find that ‘a simple listing of crimes does not tell us much about organized crime’.¹² Hence, an alternative approach puts organized crime on a level with ‘professional crime’,¹³ confining – and thus diminishing – the inalienable breadth that any definitional concept of organized crime has to have.

On the other hand, ‘organized crime’ may be used in the sense of criminal organizations¹⁴ such as the Colombian and Mexican ‘drug cartels’, the Japanese ‘yakuza’, the Chinese ‘triads’, or the Italian and US ‘mafia’.¹⁵ However, as complex

- 7 Alan Wright, *Organised Crime*, Willan Publishing, Cullompton, Devon and Portland, OR, 2006, p. 49.
- 8 See Jan van Dijk, ‘Mafia markers: assessing organized crime and its impact on societies’, in *Trends in Organized Crime*, Vol. 10, 2007, p. 40; Allan Castle, ‘Transnational organized crime and international security’, Institute of International Relations, University of British Columbia, Working Paper No. 19, 1997, p. 2; Stefan Mair, ‘The world of privatized violence’, in Alfred Pfaller and Marika Lerch (eds), *Challenges of Globalization: New Trends in International Politics and Society*, Transaction Publishers, New Brunswick, NJ, 2005, p. 54.
- 9 Edgardo Buscaglia and Jan van Dijk, ‘Controlling organized crime and corruption in the public sector’, in *Forum on Crime and Society*, Vol. 3, Nos. 1 and 2, 2003, p. 6; Donald Cressy, *The Theft of the Nation*, Harper and Row, New York, 1969, p. 1.
- 10 R. Thomas Naylor, ‘Violence and illegal economic activity: a deconstruction’, in *Crime, Law and Social Change*, Vol. 52, No. 3, 2009, pp. 231–242; H. Richard Friman, ‘Drug markets and the selective use of violence’, in *Crime, Law and Social Change*, Vol. 52, No. 3, 2009, pp. 285–295.
- 11 See Cyrille Fijnaut, ‘Transnational crime and the role of the United Nations in its containment through international cooperation: a challenge for the 21st century’, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 8, No. 2, 2000, p. 121; Michael D. Lyman and Gary W. Potter, *Organized Crime*, Pearson Prentice Hall, Upper Saddle River, NJ, 2007, pp. 148–185.
- 12 James O. Finckenauer, ‘Problems of definition: what is organized crime?’, in *Trends in Organized Crime*, Vol. 8, No. 3, 2005, p. 75.
- 13 Edwin H. Sutherland, *The Professional Thief*, University of Chicago Press, Chicago, 1937; see further, Mary McIntosh, *The Organisation of Crime*, Macmillan, London, 1975, pp. 9ff.
- 14 Hagan proposes ‘that “Organized Crime” be used to refer to crime organizations, while “organized crime” will refer to activities, crimes that often require a degree of organization on the part of the committing them’ and notes ‘that not all “organized crime” is committed by “Organized Crime” groups’. See Frank E. Hagan, ‘“Organized Crime” and “organized crime”: indeterminate problems of definition’, in *Trends in Organized Crime*, Vol. 9, No. 4, 2006, p. 134.
- 15 Whether the Italian mafias can be classified as organized crime is controversial. Against that classification see Mario Bezotti, ‘Organisierte Kriminalität: zur sozialen Konstruktion einer Gefahr’, in *Angewandte Sozialforschung*, Vol. 22, Nos. 3 and 4, 2002, p. 136; see also Douglas Meagher, *Organised Crime: Papers*

and different as the illicit markets are the defining characteristics of the groups that supply them. They vary from small, loosely connected networks, comprising a handful of persons, to large, hierarchical organizations.¹⁶ Not all of them, whether small or not, highly organized or rather disorganized, use secret codes, skilled personnel (such as economists, lawyers, or technicians), or behave like legal enterprises.

It is therefore very difficult to reach a consensus on the appropriate use and meaning of the term ‘organized crime’.¹⁷ Suggestions have been made that this concept, suspected of being a vehicle for ideologically motivated repression of individuals and social groups, an ‘enemy’ artificially created but ill-defined, should be abandoned.¹⁸ This, however, has not happened.

Analytical and practical consequences

There are good reasons to deem a definition of organized crime desirable and necessary. One is that the repression of organized crime often implies law measures that may conflict with fundamental guarantees such as the right to privacy or the freedom of communication. Without a definition that steers its correct application, activities and groups of individuals that in fact do not represent organized crime, and consequently pose no serious threats to public security, might be affected and criminalized. Furthermore, defining ‘organized crime’ facilitates the work of the law-enforcement institutions by giving it a clearer focus and therefore tends to increase its effectiveness, avoiding the waste of human and financial resources.

Obviously the dilemma is that, if ‘organized crime’ is defined too broadly, the steps taken may be ineffective or incompatible with the rules and principles of the constitutional state, and might even become abusive. However, if ‘organized crime’ is defined too narrowly, important developments and events that could have been prevented may be left out of range.

Another question that has practical implications for legislators is which of the two basic options described above is more appropriate. The focus on illegal activities is clearly favoured by the fact that modern criminal law does not punish individuals for what they are (e.g. members of a criminal organization) but for what they do (e.g. application of violence). Using ‘indicator activities’ may also be helpful in detecting ‘organized crime’ as clandestine criminality that only becomes

presented by Mr Douglas Meagher, Q.C., to the 53rd ANZAAS Congress, Perth, Western Australia, 16–20 May 1983, AGPS, Canberra, 1983, pp. 3ff.

16 Phil Williams, ‘Transnational criminal networks’, in John Aquilla and David F. Ronfeld (eds), *Netwars and Networks: The Future of Terror, Crime, and Militancy*, RAND, Santa Monica, CA, 2001, p. 65; United Nations Office on Drugs and Crime (UNODC), *Global Programme against Transnational Organized Crime: Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries*, Geneva, 2002, p. 30.

17 For a comprehensive list of definitions, see Klaus von Lampe’s compilation, available at: <http://www.organized-crime.de/OCDEF1.htm> (last visited 15 February 2010).

18 Peter-Alexis Albrecht, *Kriminologie: Eine Grundlegung zum Strafrecht*, Beck, Munich, 2005, pp. 343–352.

evident upon further investigation. Yet the existence of criminal organizations is also a fact. Even if the desirability of their criminalization is questioned, it is at least important to observe and, if possible, to deter and destroy such groups.

In view of these considerations, it is entirely understandable that legislators have gone in quite different directions when dealing with organized crime, and why finding a common denominator is so difficult. While it cannot be ignored that specific political and institutional interests underlie the various initiatives to fight what is deemed to be ‘organized crime’, there can ultimately be no doubt of the existence of phenomena of collective criminality that can have devastating effects on state and society, impeding the rule of law, sustainable development, and, in particular, human security.¹⁹ In extreme cases, organized criminal groups dominate entire social segments, such as the hundreds of thousands of inhabitants of Rio de Janeiro’s shanty towns.²⁰

Gangs and gang violence

An alternative approach, which may be seen as a compromise with regard to the aforesaid risks and challenges, is to draw a line between ‘organized crime’ and less professional and less sophisticated criminal collectives. The situation in Rio de Janeiro is a good illustration of the need to distinguish between ‘organized crime’ and gangs and gang violence, and of the problems involved in doing so.

In Rio de Janeiro, urban violence results in far more than one thousand homicides per year.²¹ Adolescents and young men toting machine guns and grenades who patrol through the city’s shanty towns have become symbolic of this complex situation.²² They are systematically used by drug lords, who pay them (well) for defending their territory against the state and rival groups.²³ The drug

19 Nicole Sobotkiewicz and Matthias Klopstein, ‘Organisierte Kriminalität: bestehende Bedrohung – trotz definitorischer Unbestimmtheit’, in *Angewandte Sozialforschung*, Vol. 22, Nos 3 and 4, 2002, pp. 151–154; Katarina Hofmann, ‘The impact of organized crime on democratic governance: focus on Latin America and the Caribbean’, in *FES Briefing Paper*, No. 13, 2006, pp. 2–8; John T. Picarelli, ‘Transnational organized crime’, in Paul D. Williams (ed.), *Security Studies: An Introduction*, Routledge, New York, 2008, p. 464.

20 For a description of Rio de Janeiro’s urban violence, see Sven Peterke, *Rio de Janeiro’s ‘Drogenkrieg’ im Lichte der Konfliktforschung und des Völkerrechts*, Berliner Wissenschafts-Verlag, Berlin, 2009, pp. 5–22; Robert Neuwirth, *Shadow Cities: A Billion Squatters, a New Urban World*, Routledge, New York, 2006, pp. 253–270.

21 For details see ‘Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development’, Report of the Special Rapporteur on extrajudicial, summary, and arbitrary executions, Mr Philip Alston, Addendum, ‘Mission to Brazil’, UN Doc. A/HRC/11/2/Add.2, 23 March 2009, p. 9.

22 For an instructive analysis and photos, see Luke Dowdney, *Children of the Drug Trade: A Case Study of Children in Organized Armed Violence in Rio de Janeiro*, 7Letras, Rio de Janeiro, 2003. See also Jailson de Souza e Silva and André Urani, *Brazil: Children in Drug Trafficking – A Rapid Assessment*, International Labour Office (ed.), International Programme against the Elimination of Child Labour, Geneva, 2002, pp. 5–8.

23 L. Dowdney, above note 22, pp. 46–51.

lords are embedded in larger but only loosely connected criminal organizations that have emerged from prison gangs.²⁴ As drug dealers in the streets of the shanty towns, the many so-called ‘foot-soldiers’ are not directly engaged in the ‘big business’ of the local criminal networks that order and purchase tons of drugs and thousands of weapons, manipulate corrupt officials, and maintain contact with other criminal organizations. It therefore seems appropriate to qualify the groups of adolescents and young men as gangs whose violence may be attributed to the respective criminal organization,²⁵ while not placing them on an equal footing with it and treating them accordingly.

Many efforts have been made to distinguish gangs and their delinquency from more (and less) severe forms of collective criminality. Studies have shown that the formation of youth gangs is primarily a result of ‘street socialization’ and social exclusion: their members often share the same bleak situation of unemployment and lack of prospects. Gangs and their specific ‘culture’, sometimes consisting of rituals, symbols, and the like, seem to impart a sense of identity, status, and solidarity,²⁶ which the use of violence and ‘turf wars’ (the defence of territory) often serve to strengthen. It can be said that gang violence is mainly of a tactical nature to achieve short-term goals, whereas criminal organizations use violence more strategically to consolidate long-term goals.²⁷ Many authors therefore stress that gangs are less sophisticated and are not true market players: they do not exist to provide regular goods or services professionally, but commit less well-organized and well-planned crimes without any clearly defined purpose.²⁸

In practice, however, the dividing line between gangs and organized crime often becomes blurred. Again, the dynamics and heterogeneity of the phenomena in question must be borne in mind. Criminal organizations often emerge out of gangs (and hence continue to use their names and symbols) and may also recruit members of street gangs to spread violence or provide other services.²⁹ Indeed, there are well-structured gangs that represent quite permanent associations and professionally commit serious and even transnational crimes.³⁰

24 Although many refer to them as ‘gangs’, their classification as criminal organizations does not seem to be controversial. See Roberto Porto, *Crime organizado e sistema prisional*, Atlas, São Paulo, 2006, p. 86; Ana Luiza Almeida Ferro, *Crime organizado e organizações criminosas*, Juruá, Curitiba, 2009, p. 545.

25 In favour of such differentiation: Dieter Schwind, *Kriminologie: eine praxisorientierte Einführung mit Beispielen*, Kriminalistik Verlag, Heidelberg, 2008, p. 620; S. Peterke, above note 20, p. 9.

26 The numerous theories attempting to explain the phenomenon outlined cannot be presented here. For a general overview, see Larry J. Siegel and Brandon C. Welsh, *Juvenile Delinquency: Theory, Practice, and Law*, Wadsworth, Belmont, CA 2009, pp. 312–315; Merry Morash, ‘Gangs, groups and delinquency’, in *British Journal of Criminology*, Vol. 23, No. 4, 1989, pp. 309–331.

27 Scott H. Decker and Barrik van Winkle, *Life in the Gang: Family, Friends, and Violence*, Cambridge University Press, Cambridge, 1996, pp. 23–25; A. Wright, above note 7, p. 44.

28 M. W. Klein, *Gang Cop: The Words and Ways of Officer Paco Domingo*, Alta Mira Press, Walnut Creek, CA, 2004, p. 59; Ulrich Eisenberg, *Kriminologie*, Beck, Munich, 2005, p. 920; D. Schwind, above note 25, p. 583.

29 See Francis A. Ianni with Elizabeth Reuss-Ianni, *A Family Business: Kinship and Social Control in Organized Crime*, Russel Sage Foundation, New York, 1972, p. 53; A. Wright, above note 7, pp. 38–39.

30 See Celinda Franco, *The MS-13 and 18th Street Gangs: Emerging Transnational Threats?*, CRS Report for Congress, Congressional Research Service, Washington, DC, 2008, p. 6; Deborah L. Weisel, ‘The

It might therefore be argued that the distinction between organized crime, gangs, and gang violence is artificial and of little use. Whether and to what extent such a view can be justified ultimately depends on the definitions applied.³¹ However, as we have seen, there is no satisfactory definition and consequently no consensus in that regard.³²

Organized crime and gang violence in national (criminal) law

Against this background, national legislators have taken different approaches to deal with organized crime on the one hand, and with gangs and gang violence on the other.

‘Organized crime’ has only rarely become a legal term of art in national legislation. One example is the Indian ‘Maharashtra Control of Organised Crime Act’ of 1999. It defines organized crime as

any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency.³³

This definition is evidently very broad and covers phenomena, such as insurgency, that the majority of academics would presumably exclude from the term ‘organized crime’. India, however, is not unique in this respect. Mexico, for instance, has only recently opted to criminalize ‘organized delinquency’³⁴ and the definition of that term explicitly includes terrorism.³⁵

Other states have opted for a more differentiated approach. One example is Austria. Instead of criminalizing ‘organized crime’, Austria’s Penal Code criminalizes the formation of a ‘criminal organization’ (*kriminelle Organisation*),³⁶ and the former offence of ‘formation of a gang’ (*Bandenbildung*) has now become the

evolution of street gangs: an examination of form and variation’, in Winifred L. Reed and Scott H. Decker (eds), *Responding to Gangs: Evaluation and Research*, US Department of Justice, National Institute of Justice, Washington, DC, pp. 25–65.

31 Irving A. Spergel, *The Youth Gang Problem: A Community Approach*, Oxford University Press, New York, 1995, p. 129.

32 Richard A. Ball and G. David Curry, ‘The logic of definition in criminology: purposes and methods for defining “gangs”’, in *Criminology*, Vol. 33, No. 2, 1995, p. 225; Jonathan Matusitz and Michael Repass, ‘Gangs in Nigeria: an updated examination’, in *Crime, Law and Social Change*, Vol. 52, 2009, p. 496; A. Wright, above note 7, p. 31.

33 Maharashtra Control of Organised Crime Act, Art. 2(e), available at: <http://www.satp.org/satporgtp/countries/india/document/actandordinances/maharashtra1999.htm> (last visited 30 March 2010).

34 Ley Federal contra la Delincuencia Organizada, DOF 23–01–2009, available at: <http://www.cddhcu.gob.mx/LeyesBiblio/pdf/101.pdf> (last visited 30 March 2010).

35 *Ibid.*, Art. 2.

36 Austrian Penal Code, Art. 278a, available at: <http://www.ibiblio.org/ais/stgb.htm> (last visited 30 March 2010).

offence of forming a ‘criminal association’ (*kriminelle Vereinigung*), with its own separate section under the heading of Chapter 28 (‘Criminal conduct against the public peace’).³⁷ A ‘criminal organization’ is qualified as being businesslike and consisting of a larger number of persons. Other provisions also penalize the foundation of and participation in a ‘terrorist organization’ and ‘armed associations’.³⁸

Apart from that quite exceptionally wide-ranging legislation, most countries in the European Union, for instance Germany, tend to punish participation in ‘criminal’ and ‘terrorist associations’ only.³⁹ Those offences, which do literally require some sort of personal set-up, significantly used to be called ‘organization offences’ (*Organisationsdelikte*). Furthermore, as is typical of both civil and common law jurisdictions, the German Penal Code considers an aggravation of rather ubiquitous everyday crimes such as theft, robbery, or bodily harm to be attributable to group and gang conduct. Hence, conduct by somewhat ‘organized’ groups may easily rate as an aggravated case of serious theft or serious robbery committed by a gang (*Bandendiebstahl/Bandenraub*)⁴⁰ and of dangerous bodily harm committed jointly.⁴¹ These offences ‘qualify’ (*qualifizieren*) the underlying basic offence for a higher level of sentencing, which is why their existence mainly belongs to the domain of sentencing. When it finally comes to sentencing, offenders operating in groups or gangs often receive a more severe sentence, in common law countries too,⁴² because such conduct is deemed to involve greater harm, greater fear, a greater sense of helplessness, and uncontrollable group dynamics.

Other states largely follow this doctrinal approach, though without clearly distinguishing between the formation of gangs and that of criminal associations or organizations. For example, Brazil’s Penal Code criminalizes the association of ‘*quadrilhas e bandas*’.⁴³ Special legislation designed to combat organized crime also exists.⁴⁴ It does not, however, define or delimit this term in relation to the aforesaid

37 *Ibid.*, Art. 278(2): ‘A criminal association is a confraternity of more than two people established for a longer period of time and for the commitment by one or more of its members of one or more felonies [*Verbrechen*], other serious crimes [*Gewalttaten*] against life or limb, not only minor damage to property, thefts, frauds, or offences [*Vergehen*] under Articles 104a, 165, 177b, 233 to 239, 241a to 241c, 241e, 241f, 304 or 307 [of the Penal Code] or under Articles 114(2) or 116 of the Aliens Police Law [*Fremdenpolizeigesetz*]. Conversely, the formation of a gang (*Bandenbildung*) only required a loose confraternity of more than two people to commit an ‘undetermined multitude’ of crimes, according to Gudrun Hochmayr, ‘Österreich’, in Walter Gropp and Arndt Sinn (eds), *Organisierte Kriminalität und kriminelle Organisationen: präventive und repressive Massnahmen vor dem Hintergrund des 11. September 2001*, Nomos, Baden-Baden, 2007, pp. 262ff.

38 Austrian Penal Code, Arts. 278b and 279.

39 German Penal Code, Arts. 129, 129a, 129b, available at: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (last visited 30 March 2010).

40 *Ibid.*, Arts. 244(1)2, 244a, 250(1)2, and (2)2.

41 See *ibid.*, Art. 224(1)2, No. 3.

42 See, also for the following analysis, Andrew Ashworth, *Sentencing and Criminal Justice*, 5th edn, Cambridge University Press, Cambridge, 2010, p. 163, with further references in note 29.

43 Código Penal, Art. 288, available at: <http://www.planalto.gov.br/CCIVIL/Decreto-Lei/Del2848.htm> (last visited 30 March 2010).

44 Law No. 9.034 (1999), modified by Law No. 10.217 (2001), available at: http://www.planalto.gov.br/ccivil_03/Leis/L9034.htm (last visited 30 March 2010).

phenomena.⁴⁵ In the United States of America, states such as California punish active participation in ‘criminal street gangs’, described as

any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity,⁴⁶

when this membership is followed by an act of promotion of, furthering, or assistance in any felonious criminal conduct by members of that gang.

Another way to take in gang or organized group conduct is by referring to general principles of criminal law, particularly as regards the inchoate offence of conspiracy in common law jurisdictions and – its equivalent in civil law countries – attempted participation.

In common law countries such as England, both group and organized deviance often fulfils the requirements for the inchoate offence of conspiracy.⁴⁷ This crime consists of an agreement between two or more persons to commit a criminal offence and more precisely exists

if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible.⁴⁸

Of course, this approach entails another, different concept that indeed ‘may be defended as a vital tool against organized crime’.⁴⁹ However, as ‘preliminary crimes’, inchoate offences incur the punishment of conduct prior to any harm being inflicted.⁵⁰ On that basis, the scope of criminal liability is extended to activities that normally constitute a much less serious nuisance but show a mere intention that is to be prevented.⁵¹ There are, however, states such as Japan that

45 For details, see Sven Peterke, ‘Die Strafbarkeit krimineller Vereinigungen nach brasilianischem Recht’, in *Zeitschrift für Internationale Strafrechtsdogmatik*, Vol. 3, No. 5, 2008, p. 259, available at: http://www.zis-online.com/dat/artikel/2008_5_237.pdf (last visited 30 March 2010).

46 California Penal Code, Section 186.22.(f), available at: <http://law.justia.com/california/codes/pen.html> (last visited 30 March 2010). For further analysis, see François Haut and Stéphane Quéré, *Les bandes criminelles*, Presses Universitaires de France, Paris 2001, pp. 13ff.

47 For the three distinct forms of conspiracy under English law, see *Blackstone’s Criminal Practice 2009*, Oxford University Press, Oxford, 2008, A6.39ff.

48 Criminal Law Act 1977, Section 1(1).

49 Andrew Ashworth, *Principles of Criminal Law*, 6th edn, Oxford University Press, Oxford, 2009, p. 452. For the ambivalent nature of conspiracy, see *ibid.*, p. 451.

50 Glanville Williams, *Criminal Law: The General Part*, 2nd edn, Sweet & Maxwell, London, 1961, p. 609.

51 For the debate on the justification for the offence, see A. Ashworth, above note 49, pp. 448–452; G. Williams, above note 50, p. 710.

have no conspiracy law, nor have they criminalized participation in an organized criminal group.⁵²

A further characteristic of national jurisdictions is to deal with *gang violence* in particular as a criminal offence affecting public order. As ‘violent disorder’ (e.g. in England and Wales under the Public Order Act 1986), gang violence requires the use or threat of violence by three or more people in a way that would cause a person of reasonable firmness present at the scene to fear for his personal safety.⁵³ Here, in contrast to the offence of conspiracy, harm already exists in the form of actual violence or the threat thereof, but in this case, too, there are limitations to the criminalization of gang violence: the conduct has to affect the public in some way and, as long as fewer than three persons engage in it, the offence is not given.⁵⁴ Interestingly, English courts tend to impose heavier sentences whenever there is evidence of ‘organization’. Civil law jurisdictions often arrive at the same result by statutory provisions aggravating the sentence for group or gang conduct.⁵⁵

In essence, none of these offences criminalizes conduct that actually harms legally protected interests of an individual (they do not criminalize violence, damage to property, etc.), but founding those organizations as such is held to endanger public order in an abstract manner.

To sum up, many national laws differ substantially with regard to the treatment of organized crime, gangs, and gang violence. There are highly differentiated and less differentiated approaches to criminalization. Sometimes, as in the case of Japan, there are still no specific laws designed to combat organized crime. Most of the concepts presented seem to provide an understanding of organized crime broad enough to cover all the facets of gang violence. Conversely, no single national jurisdiction would include gang violence as such as an organized crime, because gang violence in itself simply lacks too many elements required by the prevalent understanding of organized crime. Thus organized crime and gang violence share an intersection or interface but are not congruent phenomena in national legislation.

Organized crime and gang violence in public international law

Organized crime and gang violence has increasingly become subject to international regulation. Particularly after the cold war, states became more and more

52 Chris Coulson, ‘Criminal conspiracy law in Japan’, in *Michigan Journal of International Law*, Vol. 28, 2007, p. 864.

53 Public Order Act 1986, Section 2(1). German law provides for a very similar concept in Section 125 of the Penal Code.

54 In German law, there is a similar restriction for what is termed ‘act from out of a crowd’ (*Menschenmenge*), i.e. an act by fewer than a crowd.

55 See e.g. German Penal Code, Art. 244(1)2 (from a fine to imprisonment from six months to ten years), Art. 250(1)2 (from at least one year’s to at least three years’ imprisonment) and Art. 224(1)2 No. 4 (from a fine to at least six months’ and up to ten years’ imprisonment), increasing the mandatory range of punishment for theft, robbery, and bodily harm in cases of group or gang conduct.

aware of the transnational dimensions of organized crime as a side-effect of globalization.⁵⁶ They therefore adopted an international framework to repress ‘organized criminal groups’ and their most harmful activities. The following analysis will begin by explaining the evolution and significance of the legal regime.

International humanitarian law (IHL) and international criminal law both address violence by ‘organized armed groups’. This raises the question whether armed criminal groups may become party to an armed conflict and, if so, under which specific preconditions. Their qualification as an ‘organized armed group’ would then allow for their members to be held responsible for international crimes.

International framework to combat organized crime

Co-operation in criminal matters is a very sensitive issue. Its effectiveness often depends on the confidential exchange of information and a common interest in the success of a particular operation. During the cold war, such mutual confidence was rather limited in the community of states. Organized crime was moreover perceived as being primarily a domestic problem. Yet the lack of common interests and mutual confidence, and the slowly developing awareness of the transnational dimensions of organized crime, explain only in part why states have been reluctant to establish a legally binding multilateral framework designed to encourage and promote international co-operation for the suppression of organized crime.⁵⁷ As transnational offending⁵⁸ – truly a catch-all term understood to mean deviant behaviour at a level of criminality that by its very nature necessarily involves either transcending state borders, violating the laws of several states, or evading a state’s jurisdiction by not being attributable to a certain state territory⁵⁹ – many forms of organized crime have tended to be subject to so-called suppression treaties, that is, multilateral agreements between state parties in order to fight deviance effectively from an international perspective.

A glance a little further back in history shows that states themselves have often tried to profit from markets that later become illegal and are therefore now supplied by criminal organizations. This holds especially true for drug and human

56 David Felsen and Akis Kalaitzidis, ‘A historical overview of transnational crime’, in Philip Reichel (ed.), *Handbook of Transnational Crime and Justice*, SAGE Publications, London, 2005, p. 12; Robert Esser, *Auf dem Weg zu einem europäischen Strafverfahrensrecht*, DeGruyter, Berlin, 2002, p. 22.

57 Although bilateral agreements undoubtedly have been and still are of great relevance, often containing special rules or closing important legal gaps, these international treaties cannot be dealt with in the present article.

58 See in general Nikos Passas (ed.), *Transnational Crime*, Ashgate, Aldershot, Hampshire, 1999; Raimo Väyrynen, *Illegal Immigration, Human Trafficking, and Organized Crime*, United Nations University, World Institute for Development Economics Research, Helsinki, 2003; Gargi Bhattacharyya, *Trafficked: The Illicit Movement of People and Things*, Pluto, London, 2005; Kimberley L. Thachuk (ed.), *Transnational Threats: Smuggling and Trafficking in Arms, Drugs, and Human Life*, Praeger Security International, Westport, CT, 2007; David Kyle and Rey Koslowski (eds), *Global Human Smuggling: Comparative Perspectives*, Johns Hopkins University Press, Baltimore, 2001.

59 Neil Boister, ‘Transnational criminal law?’, in *European Journal of International Law*, Vol. 14, No. 5, 2003, p. 954; Nikos Passas, in *European Journal of International Law*, Vol. 14, No. 5, 2003, pp. xiii–xiv.

trafficking, which are today considered to be the world's most harmful and most lucrative illegal activities.⁶⁰

Human trafficking is essentially a modern form of slave trade that involves practices such as sexual exploitation, forced labour, slavery, and similar practices.⁶¹ Mainly for economic reasons, governments hesitated until the nineteenth century to recognize in their constitutional instruments the fundamental right of every person not to be held in slavery or servitude and not to be traded as a commodity.⁶² In the United States, a civil war (1861–1865) was fought to enable this basic human right to prevail over the economically driven interests of the South. In other states, for instance Brazil, its recognition came about peacefully, but even later.⁶³ It was not until after the Second World War that it was universally recognized⁶⁴ and subsequently became customary international law with the status of *jus cogens*, from which obligations *erga omnes* derive.⁶⁵ European states had adopted the Declaration on the Abolition of the Slave Trade in 1815,⁶⁶ yet it took more than a hundred years to reach an international consensus on a relatively narrow definition of slavery, slavery-like institutions and practices, and the slave trade.⁶⁷ Telling documents addressing shameful issues, such as the 1904 International Agreement for the Suppression of the White Slave Traffic,⁶⁸ mark this historic struggle. While slavery, slave-related practices, and forced labour became recognized as

60 The UNODC estimates the global value of the illicit drug trade at US\$ 322 billion, and that of human trafficking at US\$ 32 billion; see UNODC (ed.), *2007 World Drug Report*, UNODC, New York, 2007, p. 170.

61 Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz*, Nomos, Basel, 2005, p. 411. For an instructive historical overview, see David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, New York and Geneva, 2002 (UN Doc. HR/PUB/02/04), pp. 3–8.

62 See Seymour Drescher, *Abolition: A History of Slavery and Antislavery*, Cambridge University Press, New York, 2009, pp. 267ff.; Michael Haas, *International Human Rights: A Comprehensive Introduction*, Routledge, New York, 2008, pp. 47–50.

63 Brazil formally abolished slavery in 1888. See Luiz Flávio Gomes and Valério de Oliveira Mazzuoli, *Comentários à Convenção Americana sobre Direitos Humanos: Pacto de San José da Costa Rica*, Editora Revista dos Tribunais, São Paulo, 2009, p. 46.

64 See e.g. Universal Declaration of Human Rights, 10 December 1948, GA Res. 217A (III), Art. 4; and International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 8 (entered into force 23 March 1976).

65 International Court of Justice (ICJ), *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, Judgment of 5 February 1970, ICJ Reports 1970, p. 32; Anne M. Trebilcock, 'Slavery', in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV, 2000, p. 422; A. Yasmin Rassam, 'Contemporary forms of slavery and the evolution of the prohibition of slavery and the slave trade under customary international law', in *Virginia Journal of International Law*, Vol. 3, 1999, p. 303.

66 Declaration Relative to the Universal Abolition of the Slave Trade, 8 February 1815, 63 Consol. TS 473, adopted during the Peace Conference in Vienna.

67 1926 Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention, 25 September 1926, 212 UNTS 17, Art. 1 (entered into force 9 March 1927). The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 226 UNTS 3 (entered into force 30 April 1957) broadened its scope of application.

68 International Agreement for the Suppression of the White Slave Traffic, 18 May 1904, 11 LNTS 83 (entered into force 18 July 1905); succeeded by the International Convention for the Suppression of the White Slave Traffic, 4 May 1910; both instruments were supplemented by the International Convention for the Suppression of the Traffic in Women and Children, 30 September 1921 (entered into force 15 June 1922), which abolished the limitation to white persons.

international crimes before the adoption of the 1988 Rome Statute of the International Criminal Court (ICC),⁶⁹ it was not until the year 2000 that states adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.⁷⁰

Great Britain fought the Opium Wars (1839–1842, 1856–1860) to force China to accept free trade in that drug and to open its domestic market. The process of international repression of drugs only started in 1909 with the Shanghai Opium Conference.⁷¹ It led to the first international anti-drug treaty, the 1912 International Opium Convention,⁷² which related to the trade in cocaine and heroin and distinguished between legal and illegal drugs.⁷³ Various other anti-drug instruments have been adopted since then, successively criminalizing all kinds of drugs, their production, trading, and consumption.⁷⁴ In Article 2 of the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs,⁷⁵ states parties were enjoined ‘to make the necessary legislative provisions for severely punishing’ acts such as ‘possession, offering (for sale), distribution, purchase, sale, delivery ..., brokerage, despatch (in transit), transport, importation, and exportation of narcotic drugs’. In addition, the *aut dedere aut judicare* principle was included (Articles 7, 8, and 9(1–3)), with an exception for ‘not sufficiently serious’ crimes (Article 9(4)).⁷⁶ As the power, influence and transnationality of criminal groups involved in these markets became more evident in the 1980s, the international efforts to combat them culminated in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and

69 See e.g. Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 7(2) (entered into force 1 July 2002); M. Cherif Bassiouni, ‘Enslavement as international crime’, in *New York University Journal of International Law*, Vol. 23, 1991, p. 448.

70 Adopted by UN General Assembly Resolution 55/25 of 15 November 2000, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 49 (A/45/49)*, Vol. I (entered into force 25 December 2003).

71 Sandeep Chawla and Thomas Pietschmann, ‘A historical overview of transnational crime’, in P. Reichel, above note 56, p. 161; Istvan Bayer and Hamit Ghodse, ‘The evolution of international drug control, 1945–1995’, in *Bulletin on Narcotics*, Vol. 51, Nos 1 and 2, 1999, p. 1.

72 International Opium Convention, 23 January 1912, 8 LNTS 187 (entered into force 19 February 1915).

73 *Ibid.*, Art. 8–16 and 19–21.

74 To name a few: Second International Opium Convention, 19 February 1925, 81 LNTS 318 (entered into force 25 September 1928); Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 13 July 1931, 139 LNTS 301 (entered into force 9 July 1933); Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 26 June 1936, 198 LNTS 299 (entered into force 26 October 1939); Single Convention on Narcotic Drugs, 1961, 520 UNTS 204 (entered into force 13 December 1964); Protocol Amending the Single Convention on Narcotic Drugs, 25 March 1972, 976 UNTS 3 (entered into force 8 August 1975); Convention on Psychotropic Substances, 21 February 1971, 1019 UNTS 175 (entered into force 16 August 1976). Yet some issues, such as the status of coca, still remain unclear. See Francis E. Thoumi, ‘A modest proposal to clarify the status of coca in the United Nations conventions’, in *Crime, Law and Social Change*, Vol. 42, 2004, pp. 297–307.

75 See Patrick Robinson, ‘The missing crimes’, in Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court*, Oxford University Press, Oxford, 2002 pp. 498–499 and 523–524, listing the thirteen most important conventions.

76 This convention was – like many others – signed in 1936 by the more or less particularly affected states, such as China, Colombia, Cuba, Ecuador, Honduras, Mexico, Panama, Uruguay, and Venezuela.

Psychotropic Substances,⁷⁷ which today enjoys quasi-universal character.⁷⁸ Again, however, it only covers one specific illegal market and does not address organized crime in a more comprehensive way.

These treaties have mainly focused on international consent and co-operation, rather than on establishing international or even universal jurisdiction over the crimes concerned. It is therefore safe to say that group or organized criminal conduct might indeed be regulated by them. The criminalization of those crimes, however, rests with national jurisdictions, not with supranational authorities, and it is hard to link the notion of transnational offending to gang violence and organized crime whenever the deviance does not cross borders.

The United Nations Convention against Transnational Organized Crime

In view of these antecedents, the United Nations Convention against Transnational Organized Crime (UNTOC), adopted in Palermo, Italy, on 15 December 2000, marks a major breakthrough, as the following brief outline of its content and significance shows.⁷⁹

The declared purpose of the Convention is ‘to promote cooperation to prevent and combat transnational organized crime’.⁸⁰ Since the effectiveness of such co-operation depends on the applicability of common legal standards, the Convention obliges states parties to criminalize participation in an organized criminal group, corruption,⁸¹ the laundering of the proceeds of crime (money laundering),⁸² and the obstruction of justice.⁸³ It thus focuses on the ‘enabling’ or ‘secondary activities’ that are characteristic of organized crime. The ‘primary activities’ have been separated from the core instrument and are dealt with by the three Protocols thereto. This approach facilitated finding a consensus and increases

77 Adopted on 20 December 1988, entered into force on 11 November 1990 (reprinted in 28 ILM 493 (1988)).

78 In January 2010, it had 184 states parties: see <http://www.unodc.org/unodc/en/treaties/illicit-trafficking.html> (last visited 29 January 2010).

79 For a comprehensive study, see David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols*, Oxford, 2007.

80 UNTOC, Art. 1.

81 Independently from organized crime, corruption is dealt with in a series of universal and regional instruments, and in particular in the United Nations Convention against Corruption, 31 October 2003, 43 ILM (2004) 37 (entered into force 14 December 2005). For an instructive overview of pertinent instruments, see Sebastian Wolf, ‘Internationale Korruptionsbekämpfung: Anmerkungen zum zehnjährigen Jubiläum des OECD-Bestechungsübereinkommens’, in *Kritische Justiz*, Vol. 41, No. 4, 2008, pp. 367–370.

82 Similarly, money laundering and asset recovery are dealt with independently from organized crime in a series of instruments such as the above-mentioned United Nations Convention against Corruption or the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8 November 1990, Council of Europe, CETS No. 141. However, the 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances already obliged states to criminalize the laundering of profits obtained from drug offences.

83 UNTOC, Arts. 5, 6, 8, and 23.

the Palermo Convention's chance of gaining universal acceptance. Indeed, it already has 147 states parties.⁸⁴ Moreover, the decision to deal with the 'primary activities' in autonomous international treaties allows for the adoption of further protocols dedicated to specific aspects that are not covered by the existing instruments. It also facilitates its revision and amendment.

The Convention against Transnational Organized Crime does not lay down a legal definition of (transnational) organized crime. As we have seen, a consensus to that effect would have been impossible to reach, and the desirability of such a definition may be questionable in light of the dynamics, explained above, of the phenomena.⁸⁵ However, the Convention does specify the use of some basic terms⁸⁶ in order to give states some necessary guidance for its implementation in national law. Article 2 contains meaningful explanations with regard to the duty to criminalize participation in an 'organized criminal group' (Article 5). It stipulates that:

For the purposes of the Convention:

- a) 'Organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.
- b) 'Serious crime' shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.
- c) 'Structured group' shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure...

These definitions are subject to criticism for being over-inclusive and vague.⁸⁷ While this point is relatively easy to make, it must not be overlooked that the

84 See <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> (last visited 25 March 2010). Major countries that still have not ratified the UNCTOC include the Czech Republic, Greece, Japan, the Republic of Korea, Thailand, and Vietnam.

85 See UNODC (ed.), *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, United Nations, New York, 2006, p. xxi.

86 UNCTOC, Art. 2.

87 See e.g. Alexandra W. Orlova and James W. Moore, '“Umbrellas” or “building blocks”: defining international terrorism and transnational organized crime in international law', in *Houston Journal of International Law*, Vol. 27, No. 2, 2005, pp. 282–287; J. O. Finckenauer, above note 12, p. 68. The UNCTOC treaty is also criticized for other reasons: see e.g. Jennifer L. Enck, 'The United Nations Convention against Transnational Organized Crime: is it all that it is cracked up to be? Problems posed by the Russian mafia in the trafficking of human beings', in *Syracuse Journal of International Law and Commerce*, Vol. 30, 2003, pp. 394.

consensus reached is nonetheless a remarkable achievement. Since it is the result of difficult multilateral negotiations, it at least represents a quasi-universal common denominator.⁸⁸

The definition recognizes that criminal associations do not always have a hierarchical structure comparable to real enterprises, but often function as networks consisting of a few loosely connected members.⁸⁹ Nonetheless, there has to exist a ‘Structured group ... that is not randomly formed for the immediate commission of an offence’. This means that more spontaneous forms of collective criminality are excluded from it. This is an important limitation that may help to draw a line between organized crime and gang criminality.

Furthermore, the subjective element (‘in order to obtain, directly or indirectly, a financial or other material benefit’) confirms the dominant view that organized crime is not driven by political motives but is primarily out to make a profit. Groups such as terrorists and insurgents are therefore not covered by the scope of application of the Convention against Transnational Organized Crime.⁹⁰ This protects the Convention from being overly politicized. Whether such an important consensus could have been achieved after the 11 September 2001 terrorist attack on the United States and the US-proclaimed ‘merger of terrorism and organized crime’ is doubtful.⁹¹

Admittedly, the reference to the commitment of ‘serious crimes’ gives states considerable latitude in deciding whether to criminalize a specific form of conduct as being constitutive of an organized criminal group.⁹² The more explicit mention in Article 2(b) that serious crimes would be those ‘punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’ still allows for a very broad interpretation of the term. Yet it is difficult to imagine an alternative solution that would have met with the approval of states. In the final analysis, it is their responsibility to implement the Palermo Convention in good faith in accordance with their national particularities and in conformity with the rule of law and other international obligations.⁹³

As the purpose of the Convention against Organized Transnational Crime is to promote co-operation in police and judicial matters, the majority of its

88 For the struggle to reach a definition in the *travaux préparatoires*, see D. McClean, above note 79, pp. 38ff.

89 Stefano Betti, ‘New prospects for inter-state co-operation in criminal matters: the Palermo Convention’, in *International Criminal Law Review*, Vol. 3, 2003, p. 152.

90 UNODC (ed.), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto*, United Nations, New York, 2004, para. 26.

91 Recent studies convincingly demonstrate the continuing need to distinguish between these phenomena. See e.g. Vanda Felbab-Brown, *Shooting Up: Counterinsurgency and the War on Drugs*, Brookings, Washington, DC, 2010; also Emma Björnehed, ‘Narco-terrorism: the merger of the war on drugs and the war on terror’, in *Global Crime*, Vol. 6, Nos 3–4, 2004, p. 315.

92 Valsamis Mitsileges, ‘From national to global – from empirical to legal: the ambivalent concept of transnational organized crime’, in Margaret E. Beare (ed.), *Critical Reflections on the Concept of Transnational Organized Crime*, University of Toronto Press, Toronto, 2003; A. W. Orlova and J. W. Moore, above note 87, p. 284.

93 Sven Peterke and Silvia Regina Pontes Lopes, ‘Crime organizado e legislação brasileira à luz da Convenção de Palermo: algumas observações críticas’, in *Verba Juris*, Vol. 7, 2008, p. 413.

forty-one articles specify how this is to be achieved. Among other things, it deals with international co-operation for purposes of confiscation of proceeds of crime, extradition and transfer of criminals, mutual legal assistance, and joint investigations.⁹⁴ In addition, it addresses the protection of witnesses and victims, data collection and exchange, training and technical assistance, and special investigative techniques.⁹⁵ A special provision is devoted to the prevention of organized crime.⁹⁶ As an abstract definition of such measures is hardly possible, these norms are primarily meant to guide the states parties in their efforts to implement the Convention. Such efforts by states are, however, obligatory.⁹⁷

A crucial point for all international treaties is the existence of a mechanism that promotes and reviews the respective treaty's effective implementation. The Palermo Convention delegates this task to the Conference of the Parties to UNCTOC,⁹⁸ which is assisted by a Secretariat.⁹⁹ So far, the Conference has not set up such a mechanism.¹⁰⁰ A recent evaluation shows, however, that the Convention is being increasingly applied by states as a legal basis for international co-operation, in particular with regard to extradition, mutual legal assistance, and confiscation of proceeds of crime.¹⁰¹ Yet many states parties still have not fully implemented the Convention.¹⁰² In this respect, important assistance is offered by the United Nations Office for Drugs and Crime (UNODC).¹⁰³

All in all, it can be said that the United Nations Convention against Transnational Organized Crime is the most important and comprehensive international instrument to combat organized crime.¹⁰⁴ As it obliges states to establish the aforesaid offences 'independently of the transnational nature or the involvement of an organized criminal group',¹⁰⁵ its impact goes beyond improving and promoting international co-operation against transnational organized crime¹⁰⁶ and

94 See UNCTOC, Arts. 11–21.

95 *Ibid.*, Arts. 20, 24–30.

96 *Ibid.*, Art. 31.

97 *Ibid.*, Art. 34(1); UNODC, above note 90, para. 36.

98 UNCTOC, Art. 32(1).

99 *Ibid.*, Arts. 33(1), (2)(a) and (b).

100 Its last session was held in Vienna, 8–17 October 2008. The numerous documents produced are available at: <http://www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP.html?ref=menuaside> (last visited 22 February 2010).

101 Decision 4/2, 'Implementation of the provisions on international cooperation of the United Nations Convention against Transnational Organized Crime', in *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime in its Fourth Session*, UN Doc. CTOC/COP/2008/19, 1 December 2008, sub-para. II(i).

102 Decision 4/1, 'Possible mechanisms to review implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto', in *ibid.*, sub-para. (f).

103 For an overview of the work done by UNODC, see <http://www.unodc.org/unodc/en/organized-crime/index.html?ref=menuaside> (last visited 22 February 2010).

104 Thilo Marauhn, 'Völkerrechtliche Massnahmen zur Bekämpfung von organisierter Kriminalität und Terrorismus', in W. Gropp and A. Sinn, above note 37, pp. 485ff.

105 UNCTOC, Art. 34(2). With regard to the involvement of an organized criminal group, the article makes it clear that Article 5 (participation in an organized criminal group) logically presupposes such an association.

106 For this, 'substantial effects in another State' are sufficient (UNCTOC, Art. 3(2)).

thus helps to create ‘a common language in the fight against organized crime’ in general.¹⁰⁷

The Protocols to the Palermo Convention

The three Protocols supplementing UNCTOC and dealing with specific ‘primary activities’ are as follows: the aforesaid Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol);¹⁰⁸ the Protocol against the Smuggling of Migrants by Land, Sea, and Air (Migrant Smuggling Protocol);¹⁰⁹ and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition¹¹⁰ (Firearms Protocol).

The Firearms Protocol is intended to play an important part in reducing the violence and harm resulting from firearms illegally produced and supplied by organized criminal groups.¹¹¹ As we have seen above, urban areas in particular are often plagued by firearms-related gang violence. Ultimately, there can be no doubt that an international mechanism for the record-keeping, marking, and tracing of arms that promotes their deactivation and creates a licensing and authorization system for their import, transit, and export¹¹² is indispensable to avert or de-escalate a number of violent situations, armed conflicts included. However, the Firearms Protocol itself proved very difficult to negotiate. It was therefore not adopted until 2001 and only seventy-nine states have ratified it to date;¹¹³ these do not include the most relevant arms-producing countries.¹¹⁴ Regional instruments and initiatives try to compensate for that deficit,¹¹⁵ but the firearms business is global. As with the fight against drug and human trafficking, the reluctance of states is once again largely due to economic considerations.¹¹⁶

107 Vincenzo Militello, ‘The Palermo UN Convention: a global challenge against transnational organised crime’, in Jan C. Joerden et al. (eds), *Vergleichende Strafrechtswissenschaft: Frankfurter Festschrift für Andrzej Szwarc zum 70. Geburtstag*, Duncker & Humblot, Berlin, 2009, p. 365.

108 Adopted on 15 November 2000, entered into force 25 December 2003, UN Doc. A/Res/55/25.

109 Adopted on, 15 November 2000, entered into force 28 January 2004, UN Doc. A/Res/55/25.

110 Adopted on 31 May 2001, entered into force 3 July 2005, UN Doc. A/Res/55/255.

111 Firearms Protocol, Art. 1. For a discussion of the drafting history, see Marjorie Anne Brown, ‘The United Nations and “gun control”’, in Marilyn F. Swartz (ed.), *United Nations in Focus: Issues and Perspectives*, Nova, New York, 2007, pp. 61–67.

112 Based on a broad definition of ‘firearm’ (Art. 3(a)), Articles 8 and 9 in particular of the Firearms Protocol contain important minimum standards for record-keeping and marking.

113 See <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> (last visited 25 February 2010).

114 For an instructive list of countries, see <http://www.iansa.org/un/firearms-protocol.htm> (last visited 29 April 2010).

115 Besides numerous plans or actions and pertinent soft law, there are, for instance, the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, 14 November 1997; the Southern African Development Community’s Protocol on the Control of Firearms, Ammunition and Other Related Materials, 14 August 2001; and the Organization for Security and Cooperation in Europe (OSCE) Document on Small Arms and Light Weapons, 24 November 2000.

116 For a discussion of the difficulties in regulating the trade in small arms, see Nicholas Marsh, ‘Two sides of the same coin? The legal and illegal trade in small arms’, in *The Brown Journal of World Affairs*, Vol. 9, No. 1, 2002, p. 217.

More successful in terms of acceptance by states are the Trafficking and Migrant Smuggling Protocols. The former contains a very broad definition of its subject matter:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs ...¹¹⁷

In contrast, the latter states that:

‘Smuggling of migrants’ shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident...¹¹⁸

The reason for this distinction seems to be the intention to deal under different premises with the criminal organizations involved. States are of the opinion that, because smuggled migrants agree with that illicit activity, they deserve less protection.¹¹⁹ In practice, however, many persons who pay criminal groups to be smuggled, often in inhumane conditions, are handed over to other criminal organizations for purposes of exploitation, in particular sexual.¹²⁰ Despite this critique it can be said that both instruments, which are supplemented by a number of international and especially regional instruments,¹²¹ set up a specific framework for co-operation. To date, 137 states have ratified the Trafficking Protocol and 123 the Migrant Smuggling Protocol.¹²² Since these treaties are less accepted than the mother convention, they share the latter’s shortcomings in terms of implementation. However, it might still be too early to evaluate their success.

117 Trafficking Protocol, Art. 3(a), supplemented by sub-para (b) and (c). The details of this definition are not easy to understand and are subject to criticism. See Silvia Scarpa, ‘Child trafficking: international instruments to protect the most vulnerable victims’, in *Family Court Review*, Vol. 44, No. 2, 2006, p. 434; Hans-Joachim Heintze and Sven Peterke, ‘Inhalt und Bedeutung des VN-Protokolls zur Verhütung, Unterdrückung und Bestrafung des Menschenhandels’, in *Humanitäres Völkerrecht-Informationsschriften*, Vol. 21, No. 1, 2008, pp. 10–11.

118 Migrant Smuggling Protocol, Art. 3(a).

119 Anne Gallagher, ‘Trafficking, smuggling and human rights: tricks and treaties’, in *Forced Migration Review*, No. 12, 2002, pp. 25–27.

120 Jacqueline Bhaba and Monette Zard, ‘Smuggled or trafficked?’, in *Forced Migration Review*, No. 25, 2006, p. 8.

121 For a listing of the pertinent instruments, see Irena Omelaniuk, *Trafficking in Human Beings*, United Nations Expert Group Meeting on Migration and Development, 6–8 July 2005, UN Doc. UN/POP/MIG/2005/15, 1 July 2005, p. 8. See also the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (entered into force 1 February 2008).

122 See <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> (last visited 25 February 2010).

As we have seen, the fact that a general framework has been adopted to combat organized crime is in itself remarkable.

The impact of the treaty on European Union law

Within the European Union in particular, member states are already obliged to approximate their national laws in order to fight organized crime, by virtue of European Union law (see Articles 83(1) and 87(2)(c) of the Treaty on the Functioning of the European Union).¹²³ Thus supranational demands outside general public international law are superimposed on national law even in terms of defining ‘organized crime’. According to the so-called working definition of the EU being used in many reports and documents:

In order to speak about organised crime at least six of the following characteristics need to be present, four of which must be those numbered 1, 3, 5 and 11:

1. Collaboration of more than 2 people;
2. Each with own appointed tasks;
3. For a prolonged or indefinite period of time (refers to the stability and (potential) durability);
4. Using some form of discipline and control;
5. Suspected of the commission of serious criminal offences;
6. Operating at an international level;
7. Using violence or other means suitable for intimidation;
8. Using commercial or businesslike structures;
9. Engaged in money laundering;
10. Exerting influence on politics, the media, public administration, judicial authorities or the economy;
11. Determined by the pursuit of profit and/or power.¹²⁴

Moreover, the Council Framework Decision of 24 October 2008 on the ‘Fight against Organised Crime’ recently defined a ‘criminal organisation’ as being:

a structured association [i.e. not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure], established over a period of time, of more than two persons acting in concert with a view

123 C 115/47 (entered into force 1 December 2009), *Official Journal of the European Union*, 9 May 2008. See Arndt Sinn, ‘Das Lagebild der organisierten Kriminalität in der Europäischen Union: Tendenzen, rechtliche Initiativen und Perspektiven einer wirksamen OK-Bekämpfung’, in W. Gropp and A. Sinn, above note 37, pp. 506ff.

124 ‘Towards a European strategy to prevent organised crime’, Commission Staff Working Paper, joint report from Commission services and EUROPOL, SEC (2001) 433, Annex, p. 42, available at: http://ec.europa.eu/justice_home/news/information_dossiers/forum_crimen/documents/sec_2001_433_en.pdf (last visited 29 April 2010).

to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit.¹²⁵

Regarding the implementation of these European specifications, it has already been pointed out above that, interestingly, like Germany, most European Union countries do not refer to the term 'organized crime' in their legislation at all, but intend to deal with the underlying criminal conduct indirectly by using various legal measures to punish behaviour that typically accompanies organized crime.

International law and the use of force

The terrorist attacks of 9/11 have provoked an intense debate about non-state entities and international law governing the use of force. In this particular context, little attention has been paid to the role and significance of organized crime and gang violence as potential immediate threats to international peace and security. However, it is by no way excluded that powerful drug barons and arms traffickers are capable of launching similar attacks, for example in order to blackmail governments. While it certainly is an adequate approach to consider merely the individual attacks and to qualify them, under certain conditions, as terrorism, another question is whether the groups behind it can therefore be classified as terrorist organizations.¹²⁶ It may be recalled that the death of 107 passengers of the Avianca Airlines Flight 203 of 27 November 1989 was due to a bomb for which the Medellín Cartel, at that time headed by Pablo Escobar-Gavira, assumed responsibility.¹²⁷ It should, moreover, be noted that Rio de Janeiro's most famous drug trafficker, 'Fernandinho Beira-Mar' (Luiz Fernando da Costa), whose detention in Colombia in April 2001 was even commented on by the US Secretary of State, Colin Powell, is supposed to have tried to purchase a Stinger missile.¹²⁸ Also in Rio de Janeiro, members of the city's drug factions shot down a military police helicopter as recently as October 2009.¹²⁹

Article 2(4) of the UN Charter¹³⁰ prohibits 'the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Since it is

125 See Article 1 of the Council Framework Decision 2008/841/JHA of 24 October 2008, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:300:0042:0045:EN:PDF> (last visited 30 March 2010).

126 As explained above, criminal organizations can metamorphose into terrorist organizations. When this point is reached is difficult to say. It is clear that criminal organizations also pursue political interests, but their primary motivation is material benefit and not an ideology.

127 See David Southwell, *Die Geschichte des organisierten Verbrechens*, Fackelträger, Cologne, 2007, p. 283.

128 See Carlos Amorim, *CV-PCC: A Irmandade do Crime*, Record, Rio de Janeiro and Sao Paulo, 2005, p. 380.

129 Three policemen died. See E. Luiz, 'PM não resiste a queimaduras', in *Correio Braziliense*, 20 October 2009. At least thirty-nine people were killed in the wave of violence that followed.

130 Charter of the United Nations, 26 June 1945, UNCIO XV, 355 (entered into force 24 October 1945).

customary international law¹³¹ and has the status of *jus cogens*,¹³² its content is binding for all entities with international legal personality. However, the proposal by some writers that Al Qaeda be recognized as a (passive) subject of international law, in order to justify self-defence against its attacks on foreign territory,¹³³ has gained little support in legal literature. Agreement with this assumption would raise the question whether the prohibition of the use of force is also binding for certain criminal organizations comparable to Al Qaeda. The dominant doctrine is that acts of criminal and terrorist organizations need to be attributable to a state or other recognized subject of international law and that terrorists have no such status.¹³⁴ In the Friendly Relations Declaration (Resolution 2625 (XXV) of 24 October 1970), the UN General Assembly stated that: ‘Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State’. The term ‘armed bands’ can be interpreted as also including criminal organizations and even gangs. The resolution was applied by the International Court of Justice in the *Nicaragua* case, in which it declared that financial support for armed bands – in the case in point, rebels – was sufficient to attribute their violence to a state.¹³⁵

Whether and to what extent states sponsor (clandestinely) criminal collectives that are not driven by an ideology is difficult to answer. The rule is that democratically elected governments try to fight these groups. Sometimes, as the so-called ‘war on drugs’ shows, they even use military means to arrest criminals or destroy their infrastructure. An example is Colombia, whose government receives international military assistance for that purpose, namely from the United States.¹³⁶ It should also be noted, however, that in 1989 the US invaded Panama to capture General Noriega, who was at that time the head of government and commander-in-chief. Noriega was transferred to the US and initially treated as a common criminal, then later as a prisoner of war, but was finally convicted of drug-related offences against US law.¹³⁷ This shows that there is sometimes a thin line between organized crime and state governments and that in this context the prohibition of the use of force may become relevant.

131 ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ICJ Reports 1986, pp. 14ff., para. 147.

132 *Ibid.*, para. 100; Georg Dahm, Jost Delbrück, and Rüdiger Wolfrum, *Völkerrecht*, Vol. I/2, Duncker & Humblot, Berlin 2002, p. 822; Knut Ipsen, *Völkerrecht*, Beck, Munich, 2004, para. 58, margin note 29.

133 Seemingly: see Thomas Bruha and Matthias Bortfeld, ‘Terrorismus und Selbstverteidigung: Voraussetzungen und Umfang erlaubter Selbstverteidigungsmassnahmen nach den Anschlägen des 11. September 2001’, in *Vereinte Nationen*, Vol. 49, No. 5, 2001, p. 163.

134 Ian Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford and New York, 2008, pp. 732ff.; Stefan Hobe, *Einführung in das Völkerrecht*, UTB, Köln, 2008, p. 328; Joachim Wolf, *Die Haftung der Staaten für Privatpersonen nach Völkerrecht*, Duncker & Humblot, Berlin, 1997, pp. 456ff.

135 ICJ, above note 131, para. 191.

136 See Dario Azzellini, ‘Kolumbien: Versuchslabor für privatisierte Kriegsführung’, in Dario Azzellini and Boris Kanzleiter (eds), *Das Unternehmen Krieg: Paramilitärs, Warlords und Privatarmeen als Akteure der Neuen Kriegsordnung*, Assoziation A, Berlin, 2003, p. 32.

137 See Leslie C. Green, *The Contemporary Law of Armed Conflict*, Juris Publishing, New York, 2008, p. 93.

The 9/11 debates mainly concentrated on the question whether states can invoke the right to self-defence against armed attacks by non-state entities, in particular terrorists. The subjects discussed included not only the actual level of intensity required for the attacks to qualify as ‘armed’, but also the (non-)applicability of the rules of attribution.¹³⁸ Although the details of this discussion cannot be spelled out here, it is evidently assumed in some legal literature that the intensity required to constitute an ‘armed attack’ does not need to stem from a single act, but that the threshold can be reached by the cumulative effect of various low-intensity acts that have resulted in a high number of victims and that disrupt the functioning of the state.¹³⁹ On the other hand, the ICJ has stated that terrorist acts have to be attributable to a state.¹⁴⁰ If this were not so, states could easily invoke the right of self-defence against criminal organizations in particular, by referring to the cumulative effects doctrine. The difficult question that still lacks authoritative clarification concerns the conditions for such an attribution of private criminal acts to the state to be deemed admissible: that is, what kind or degree of control or co-operation is necessary.¹⁴¹ Those who advocate a broad interpretation usually do not ask how far such a standpoint could be (ab)used by states to justify military means against non-state entities other than terrorist organizations on foreign territory.

All this shows that international law governing the use of force can become relevant in the context of organized crime and gang violence. In this respect, many questions still need to be raised and answered.

International humanitarian law

In exceptional circumstances, the armed violence of gangs and criminal organizations can fall within the scope of IHL. As a rule, however, this body of law is not applicable in efforts to combat these non-state entities.

The applicability of IHL presupposes the existence of an armed conflict. According to the widely recognized definition by the International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁴² such a situation exists ‘whenever

138 For an overview of the discussion, as well as references, see S. Hobe, above note 134, pp. 341ff.; Carsten Stahn, ‘International law at a crossroads? The impact of September 11’, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 62, 2002, pp. 183ff.

139 Matthias Herdegen, *Völkerrecht*, Beck, Munich, 2006, p. 240; See also Peter Malanczuk, ‘Countermeasures and self-defence as circumstances precluding wrongfulness in the International Law Commission’s Articles on State Responsibility’, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 43, 1983, p. 797.

140 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, pp. 136ff., para. 139.

141 See Joachim Wolf, ‘Terrorismusbekämpfung unter Beweisnot: völkerrechtliche Informationsanforderungen im bewaffneten Konflikt’, in *Humanitäres Völkerrecht-Informationsschriften*, Vol. 14, No. 4, 2001, pp. 210ff.; S. Hobe, above note 134, pp. 341f.

142 Christopher Greenwood, ‘The development of international humanitarian law by the International Criminal Tribunal for the former Yugoslavia’, in *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 114; Robert Heinsch, *Die Weiterentwicklung des humanitären Völkerrechts durch die*

there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.¹⁴³ As many main cities and regions are plagued by the armed violence of organized criminal groups, for instance in Rio de Janeiro or parts of Mexico,¹⁴⁴ it may be asked whether such disquieting situations suffice to trigger the applicability of the law of non-international¹⁴⁵ armed conflict. Answering this question always presupposes a comprehensive factual assessment.¹⁴⁶ The following explanation can therefore only indicate some general elements whose presence needs to be established in each specific case.

Intensity requirement

Even if criminal collectives have machine guns, grenades, mines, or anti-tank rockets that enable them to defend certain territories against law enforcement operations by state security forces or against rival groups, far more complex considerations are needed to determine whether the intensity criterion (protracted armed violence) is satisfied.¹⁴⁷ Indicative factors that must be examined are:

the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre 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. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.¹⁴⁸

Not all these factors need to be present.¹⁴⁹ The problem lies in their interpretation. Various quantitative indicators (number and duration of individual

Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda, Berliner Wissenschafts-Verlag, Berlin, 2007, p. 92. See also Rome Statute of the International Criminal Court, Art. 8(2)(f).

143 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Decision on the Defence Motion to Interlocutory Appeal on Jurisdiction (Appeals Chamber), Case No. IT-94-1-AR72, 2 October 1995, para. 70.

144 With regard to Rio de Janeiro, see S. Peterke, above note 20, pp. 6–22; for the situation in parts of Mexico, see Karl-Dieter Hoffmann, 'Regierung contra Kartelle: der Drogenkrieg in Mexiko', in *Internationale Politik und Gesellschaft*, No. 2, 2009, pp. 56–77.

145 Other, in particular transnational, constellations will not be examined here. For a brief discussion of armed conflicts and transnational armed groups, see e.g. Dieter Fleck, 'The law of non-international armed conflicts', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2008, margin note 1201.

146 International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Rutaganda*, Judgement (Trial Chamber), 6 December 1999, para. 91.

147 Whether and how exactly the element of 'protracted armed violence' has to be interpreted is controversial, but cannot be discussed here. See e.g. Derek Jinks, 'September 11 and the laws of war', in *Yale Journal of International Law*, Vol. 28, No. 1, 2003, p. 28; Kai Ambos, *Internationales Strafrecht: Strafanwendungsrecht: Völkerstrafrecht: Europäisches Strafrecht*, Beck, Munich, pp. 235–237.

148 ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Judgement (Trial Chamber), Case No. IT-04-84, 3 April 2008, para. 49.

149 *Ibid.*: 'Trial Chambers have relied on indicative factors relevant for assessing the "intensity" criterion, none of which are, in themselves, essential to establish that the criterion is satisfied.'

confrontations, weapon calibre, extent of material destruction, etc.) give a very broad idea of the elements involved. Simply referring to a high number of casualties caused by weapons that are also used by the armed forces is not enough. Careful analysis of the international tribunals' case law on the respective criterion, as well as teleological and comparative considerations, seem indispensable to reach a more coherent conclusion.

If it is assumed that the intensity criterion is primarily meant to identify situations amounting to a severe public emergency, which in turn justifies the application of a legal regime that profoundly changes the rules and principles governing the modern constitutional state in peacetime, at least two important observations can be made.

The first is that the violence of organized crime and gangs, although worrying, is non-ideological and principally clandestine in nature and therefore does not usually destabilize a country in a way that would justify rating the situation as a public emergency. It might claim many lives and cause considerable material destruction, yet the full involvement of armed forces is rarely needed. An armed conflict, however, is a severe emergency situation that requires their large-scale and longer-term participation.

Second, the vagueness of the said indicators enables the intensity criterion to be very broadly interpreted, which might have unwanted and unforeseeable legal consequences. As IHL applies, with regard to the right to life, as *lex specialis* to international human rights law,¹⁵⁰ the state concerned no longer has to strictly abide by the constitutional state's 'law enforcement model' and can target the 'criminals' – as fighters directly participating in hostilities – in accordance with IHL.¹⁵¹ Especially in urban violence, the simultaneous application of both legal regimes may water down the presumption of innocence, the right to a fair trial, and the state's obligation to punish human rights violations committed by its security forces. This might generate an atmosphere of impunity that, in turn, often exacerbates situations of violence. While the complex relationship of the two legal regimes raises other difficult questions that make a narrower interpretation appear desirable,¹⁵² the possibility that the violence of criminal organizations and gangs might in certain circumstances reach the intensity threshold cannot be categorically excluded.

150 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106; Human Rights Committee, General Comment No. 31, 'The nature of the general legal obligations imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 11.

151 David Kretzmer, 'Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?', in *European Journal of International Law*, Vol. 16, No. 2, 2005, p. 178; Tom Hadden and Colin J. Harvey, 'The law of internal crisis and conflict', in *International Review of the Red Cross*, Vol. 81, No. 833, 1999, p. 119.

152 For detailed discussion, see Heike Krieger, 'A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC Customary Law Study', in *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006, pp. 265–291; Noam Lubell, 'Challenges in applying human rights law to armed conflict', in *International Review of the Red Cross*, Vol. 87, No. 860, 2005, pp. 737–754.

Organizational requirement

However, only proving that a violent conflict has reached a certain intensity is insufficient to trigger the applicability of IHL. In addition, it has to be demonstrated that the criminal organization or gang constitutes an ‘organized armed group’. According to the ICTY, such an entity is characterized by

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 cease-fire or peace accords.¹⁵³

Many of these elements stem from Article 1(1) of Additional Protocol II to the Geneva Conventions.¹⁵⁴ However, the special regime of Additional Protocol II is based on a far narrower notion of internal armed conflict than that of Article 3 common to the Geneva Conventions, as it presupposes compliance with all criteria laid down by its Article 1. In order to qualify as an ‘organized armed group’ under IHL, an armed organized criminal group has to show some structural similarities with armed forces. Its armed members must be co-ordinated to a certain degree by superiors, so that they are theoretically capable of controlling territory. However, ‘some degree of organization’ suffices;¹⁵⁵ a hierarchical system of military organization is not needed.¹⁵⁶ Nonetheless, it is hardly thinkable that clandestine criminal groups can define a military strategy and co-ordinate and carry out military operations. In Rio de Janeiro, for instance, where the drug factions defend their ‘turf’ with considerable success against the state, their ‘soldiers’ are frequently subordinated to a ‘security manager’, who in turn is subordinated to a ‘general manager’, who again is responsible to the local drug baron.¹⁵⁷ They also have access to military weapons and training.¹⁵⁸ Yet these fighters primarily react to acts of repression by the state and apply guerrilla-style hide-and-seek tactics, and

153 ICTY, *Prosecutor v. Ramush Haradinaj et al.*, above note 148, para. 60.

154 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977), 1125 UNTS 609 (entered into force 7 December 1978).

155 ICTY, *Prosecutor v. Limaj et al.*, Judgement (Trial Chamber), Case No. IT–03–66–T, 30 November 2005, para. 89.

156 ICTR, *Prosecutor v. Alfred Musema*, Judgement and Sentence (Trial Chamber), Case No. ICTR–96–13–IT, 27 January 2000, para. 257.

157 L. Dowdney, above note 22, pp. 47ff.; S. Peterke, above note 20, pp. 8f.

158 S. Peterke, above note 20, p. 10; Eugênio J.G. de Aragão, *Strategien zur Durchsetzung der völkerrechtlichen Verpflichtung zur Strafverfolgung der Folter am Beispiel Brasiliens: eine Untersuchung zum Verhältnis zwischen Völkerstrafrecht und Staatenverantwortlichkeit*, Berliner Wissenschafts-Verlag, Berlin, 2007, p. 43.

sometimes even terrorist methods. This still seems an inadequate basis for deducing that they have the ability to plan, co-ordinate, and carry out military operations.

As their violence is not driven by an ideology or legitimate political intentions, the criminal organizations not only have no interest in confronting the government and assuming its powers and responsibility, they also have no interest in imposing disciplinary rules and mechanisms to guarantee respect for IHL.¹⁵⁹ This, however, is a crucial point, although compliance with IHL is not needed.¹⁶⁰ While the qualification as an organized armed group is based on objective criteria in order to avoid the application of subjective elements such as the group's motivation, the law is not completely 'blind' in that respect. For instance, the organizational criterion, by demanding an objectively verifiable military strategy or capacity to carry out military operations, rules out entities that rely exclusively on terrorist, guerrilla, and other perfidious methods: that is, groups whose 'business' is to assert their egoistic interests through cruel and arbitrary practices. It does not criminalize or delegitimize armed collectives in general, but it does exclude them from having the status of a party to conflict. Often organized criminal groups do not even act identifiably. This is another reason why it is difficult to treat them as groups possessing international legal personality and require them to assume duties under international law.¹⁶¹

It must also be borne in mind that such groups are not static phenomena, but are often in a process of transformation.¹⁶² They might become politicized, thus gaining legitimacy, strength, and support from larger segments of society that enable them to openly attack the armed forces. Some organized criminal groups therefore have the potential to develop into organized armed groups (and vice versa).¹⁶³ This would, however, primarily create international obligations. It does

159 For a discussion of the level of organization required by IHL, see Anne-Marie La Rosa and Carolin Wuerzner, 'Armed groups, sanctions and the implementation of international law', in *International Review of the Red Cross*, Vol. 90, No. 870, 2008, pp. 329–330; Christian Schaller, *Humanitäres Völkerrecht und nichtstaatliche Akteure: neue Regeln für asymmetrische bewaffnete Konflikte*, SWP-Studie, Berlin, 2007, pp. 20f.

160 Toni Pfanner, 'David gegen Goliath oder asymmetrische Kriegsführung', in *Humanitäres Völkerrecht-Informationsschriften*, Vol. 18, No. 3, 2005, p. 171; Helen Duffy, *The 'War on Terror' and the International Framework of International Law*, Cambridge University Press, New York, 2005, p. 222.

161 Gabor Rona, 'Interesting times for international humanitarian law: challenges from the "war on terror"', in *Fletcher Forum of World Affairs*, Vol. 27, No. 2, 2003, p. 60; Marco Sassöli, *Transnational Armed Groups and International Humanitarian Law*, Harvard University, Occasional Papers Series, No. 6, Winter 2006, p. 11.

162 Phil Williams, 'Terrorist financing and organized crime: nexus, appropriation, or transformation?', in Thomas J. Bierstecker and Sue E. Eckert (eds), *Countering the Financing of Terrorism*, Routledge, London and New York, 2008, p. 134.

163 Organized criminal groups often pose serious threats to fundamental human rights too. International human rights law usually comes into play if the state does not fulfil its duty to protect individuals against such non-state entities. The premises that trigger state responsibility will not be explained here. See e.g. W. Kälin and J. Künzli, above note 61, pp. 107–113. Evidently, weak and failed states are often unable to effectively investigate powerful criminal collectives, hold their members responsible, and protect their victims and those who defend them. Yet holding organized criminal groups directly responsible for human rights violations is still considered difficult to reconcile with the traditional notion of human rights, i.e. as guarantees against the state, although the theoretical bases to justify the horizontal effect of human rights already exist. See e.g. Javier Mijangos y González, 'The doctrine of the in *Drittwirkung der*

not prevent states from punishing these groups for their criminal acts and, if necessary, having recourse to the international framework designed to promote co-operation in criminal matters, in particular the Palermo Convention.

International criminal law

As certain organized criminal groups may qualify as organized armed groups, they may be held responsible for committing international crimes. Therefore, although proposals to establish an international tribunal for the prosecution of terrorism and drug trafficking did not succeed,¹⁶⁴ their conduct may come within the scope of international criminal law and in particular the Rome Statute.

Organized crime and gang violence as subject matter of the Rome Statute

On the face of it, and like terrorism,¹⁶⁵ organized crime or gang conduct do not in themselves usually amount to the crime of genocide according to Article 6 of the Rome Statute, unless they take place with the specific ('genocidal') 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.¹⁶⁶ For instance, in remote places such as the Amazon rainforest where criminal collectives engage in all kinds of illicit trafficking activities, they may deliberately expel or eliminate groups such as indigenous peoples defending their territory against the intruders.

According to Article 7(1) of the Rome Statute, to constitute a crime against humanity 'the following acts [must be] committed as part of a widespread or systematic attack directed against any civilian population'. The acts listed include several crimes typically also committed by criminal organizations: murder, extermination, enslavement, deprivation of physical liberty, torture, rape, and so forth. Interestingly, in light of the international fight against human trafficking outlined above, the term 'enslavement' is defined by the Rome Statute as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.¹⁶⁷ Its Article 7(2) states that, for the purpose of paragraph 1, an

'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against

Grundrechte in the case law of the Inter-American Court of Human Rights', in *InDret*, Vol. 1, 2008, pp. 1–25, available at: <http://www.ssrn.com/abstract=1371114> (last visited 25 February 2010).

164 See K. Ambos, above note 147, p. 99.

165 See, with special reference to that subject, Claus Kress, 'Völkerstrafrecht der dritten Generation gegen transnationale Gewalt Privater?', in Gerd Hankel (ed.), *Die Macht und das Recht: Beiträge zum Völkerrecht und Völkerstrafrecht zu Beginn des 21. Jahrhunderts*, Hamburger Edition, Hamburg 2008, pp. 323ff.

166 For further analysis, see Kai Ambos, 'What does "intent to destroy" in genocide mean?', in *International Review of the Red Cross*, Vol. 91, No. 876, 2009, p. 833–858.

167 Rome Statute, Art. 7(2)(c).

any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

The provision clarifies that crimes against humanity can be committed by non-state entities.¹⁶⁸ However, what can be understood as an ‘organization’ under Article 7(2) is very controversial. One tendency is not to import the criteria that apply to ‘armed organized groups’ but to use different ones, such as power and use of force comparable to those of state institutions.¹⁶⁹ Although the details of that complex provision cannot be analysed here, it is evident that organized criminal groups only exceptionally meet this requirement.

Under Article 8(2)(f) of the Rome Statute, other serious violations of the laws and customs applicable to armed conflicts not of an international character, which are committed in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups, constitute war crimes.¹⁷⁰ The requirements for the status of a party to an armed conflict¹⁷¹ have already been discussed above.

The ‘next generation’ of international criminal law

As explained above, international criminal law may in exceptional circumstances apply to conduct by organized criminal groups as being crimes that can be tried before the International Criminal Court or other national or international tribunals. It is interesting to note that, nowadays, there is even a third way in which organized crime is within the reach of international criminal law. In the wake of the Yugoslav wars of the 1990s and despite the ICTY’s ongoing jurisdiction, the international community took steps both to recover and to extend international judicial authority in nation-states after periods of transition. Thus, for example, the Court of Bosnia and Herzegovina was founded in 2002 and mainly has jurisdiction over war crimes, but also – and very decisively for the present analysis – over organized crime.¹⁷² This new mechanism clearly shows the close link between international criminal law and the establishment of new judicial competences relating to organized crime. Indeed, violence by private gangs or any other organized group conduct incurs individual criminal responsibility by virtue of national jurisdiction, but triggered essentially by international criminal law.

168 See also ICTY, *Prosecutor v. Tadić*, above note 143, paras. 654–655.

169 See Cherif M. Bassiouni, *Crimes against Humanity in International Law*, Kluwer International, The Hague, 1999, p. 275; Alicia Gil Gil, ‘Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermordes im Römischen Statut des Internationalen Strafgerichtshofs’, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 112, No. 2, 2000, pp. 391–393; K. Ambos, above note 147, p. 215.

170 See Gerhard Werle, *Principles of International Criminal Law*, Oxford University Press, Oxford 2009, margin note 982.

171 Whether Article 8(2)(f) of the Rome Statute establishes a threshold that differs from that of Article 3 common to the four 1949 Geneva Conventions has been subject to discussion in legal literature. See D. Fleck, above note 145, p. 610. That discussion is of no relevance for the purposes of the present analysis.

172 For further details, see the court’s website, available at: <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=3&jezik=e> (last visited 30 March 2010).

Within this framework of an ‘international criminal law of a *new generation*’,¹⁷³ combating organized crime is also a matter of constituting the appropriate judicial authority and competence at the national level, mindful of the prerequisites for any criminalization of gang violence or organized criminal conduct in public international law: due allowance must be made for a framework of normative boundaries set by IHL, the law of peace and armed conflict, the protection of human rights, and the rule of law.¹⁷⁴

Conclusion

Dealing with organized crime and gang violence is a practical and also a theoretical challenge involving highly complex and dynamic phenomena. While national legislators have reacted in very different ways according to the peculiarities that they (believe they) identify, the fight against organized crime, gangs, and gang violence has increasingly become the subject of international regulation. It focuses on the transnational dimensions of organized crime and expresses the will of states to co-operate more effectively and to harmonize national laws. A complex international framework has been established, but it still lacks universal acceptance and full implementation. According to the prevailing doctrine, international law governing the use of force can become relevant only insofar as the criminal acts in question can be attributed to a state. In exceptional circumstances, however, organized crime and gang violence may fall within the scope of IHL and international criminal law; in general, this requires that the criminal collectives have developed into organizations possessing powers and/or structures similar to those of states.

173 Freely adapted from C. Kress, above note 165, pp. 323ff., who speaks of an ‘international criminal law of the *third generation*’ (emphasis added); for further details, see Kai Ambos, ‘International criminal law at the crossroads: from ad hoc imposition to treaty-based universal jurisdiction’, in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice*, TMC Asser Press/Cambridge University Press, The Hague, 2010, pp. 161–177.

174 See C. Kress, above note 165, p. 411.