

EDITORIAL

ORGANIZED CRIME IN ARMED CONFLICTS AND OTHER SITUATIONS OF VIOLENCE

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Organized crime is more easily described than defined. A generic overview provided by the 2000 United Nations Convention on Transnational Organized Crime (UNTOC) describes organized crime in generic terms as consisting of a structured group of three or more people involved in coordinated activities with the intention of seeking material benefits.¹ On this score, organized crime certainly delivers the goods: all told, criminal actors generate at least \$9 trillion in earnings every year, depending on who's counting.²

Not surprisingly, organized crime is also detrimental to peace and security. In some cases, armed criminal groups fighting with State actors or with one another generate exceedingly high levels of violence and casualty rates far exceeding those occurring in some war zones. The human costs of violent criminality are catastrophic, including hundreds of thousands of lives lost and disappeared, tens of millions of ruined livelihoods, far-reaching restrictions on access to health and educational services and the corrosion of State and societal institutions.

This issue of the *Review* features a carefully curated slate of articles examining the intersections between organized crime, armed conflict and other situations of violence. A particular focus of legal scholars is on the applicability of international humanitarian law (IHL) and international human rights law to organized crime groups in settings that are categorized as non-international armed conflicts or that fall just below that threshold. Other social scientists and humanitarian practitioners, in turn, emphasize the insidious collusion between organized crime and other State and non-State actors, and the opportunities available to mitigate its effects on the delivery of protection and assistance.

A vexing question for lawyers, humanitarians, police and military alike is whether and when organized criminals fall under the provisions of IHL. Resolving this query is especially pressing in settings already beset by armed conflict or other situations of violence. Several contributors to this issue believe that criminals may be automatically excluded from IHL, since only groups pursuing political motives can be party to a conflict and thus be subject to that body of law. Others take an opposing view, arguing that it is pointless to impute

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subjective motives to an actor, that *de facto* actions (“facts on the ground”) and outcomes are what counts, and that in certain cases criminal groups are on par with insurgents and constitute legitimate armed opposition.

One reason why it is difficult to determine whether and when humanitarian law applies to organized crime is because organized criminals are themselves a blurry category. The UNTOC offers frustratingly limited guidance in this regard – despite the reality that on the ground, across the Americas, Africa and Asia, the distinctions between criminal organizations and conventional armed non-State actors are often negligible. In settings characterized by active armed conflict or other situations of violence, the determination of whether an organized crime group qualifies as armed opposition has far-reaching implications for everything from the rules of engagement and the proportional use of force to the protection of civilians and the treatment of detainees.

Seen up close, there are several ways in which supposedly economically motivated organized criminal groups operate similarly to politically motivated non-State armed actors. Consider powerful drug trafficking factions in Brazil that routinely take up arms against rival factions and co-opt State and city governments and police forces to protect their interests. Likewise, in Colombia, gangsters and self-defence groups have evolved into powerful militia and paramilitary-style organizations that control large swathes of territory and even the apparatus of the State itself. And in Haiti, heavily armed gangs that have long been recruited by State and non-State actors – including political and economic elites – to do their dirty work are now controlling key ports, road networks and critical infrastructure.

Unsurprisingly, humanitarian, law enforcement and military experts do not always agree on the criteria that should be applied to determine whether IHL can or should apply to organized criminal groups. Some metrics that are frequently invoked are the ideological posture of the group in question, the extent of territory under its control, its relative level of command and control, and even the types of weapons being used. Another set of indicators relate to the intensity of violence and the extent of organization of the group in question. If the scale and duration of violence and the extent of organizational coherence of the group exceed a certain threshold, then the violence could potentially be classified as an armed conflict, in which case IHL applies.

What are less in dispute are the ways in which organized crime and criminal organizations are evolving and influencing the dynamics of armed conflicts around the world. From Afghanistan to Libya and Mali to Sierra Leone, ostensibly criminal actors are fundamentally connected to extreme violence, contributing to casualties, displacement and immense instability. Often, these

- 1 See Global Initiative against Transnational Organized Crime, *Global Organized Crime Index 2021*, 2021, available at: <https://globalinitiative.net/wp-content/uploads/2021/09/GITOC-Global-Organized-Crime-Index-2021.pdf> (all internet references were accessed in January 2023).
- 2 See United Nations, “Tax Abuse, Money Laundering and Corruption Plague Global Finance”, Department of Economic and Social Affairs, 24 September 2020, available at: www.un.org/development/desa/en/news/financing/facti-interim-report.html.

actors are not operating autonomously, but rather symbiotically with State and non-State parties to an armed conflict. Indeed, all of these entities are frequently enmeshed in criminal economies ranging from drugs to diamonds that benefit from rents and monopolies associated with extraction, trade and theft. Prolonged instability may be the object of tensions, not the by-product. Of course, organized criminal groups are hardly homogeneous – heavily armed elements may operate alongside white-collar money launderers, for example. Yet social scientists are finding that as often as not, criminal groups are not necessarily opposing State entities, but rather seeking to collude with, control and coerce them. In areas of high scarcity, the State itself may be the prize, allowing criminal groups to reach greater scale and immunity.

In certain cases, the distinctions between non-State, semi-State and State actors and their interests and actions are disappearing. The lines are particularly blurred in situations of extreme violence that fall below the threshold of armed conflict. Examples include parts of Brazil, Guatemala, Mexico, Pakistan and South Africa where impunity is pervasive and the prevalence of lethal violence exceeds most war zones. In some neighbourhoods of Acapulco, Rio de Janeiro, Karachi and Durban, drug trafficking cartels, militia and mafia engage in pitched battles with heavily armed military, paramilitary and police units. In these situations, some national and subnational governments are exploring the selective application of IHL and the lowering or even suspension of human rights.

At the very least, the explosion of organized criminal violence in non-war settings is challenging cherished notions of what constitutes armed conflict, and by extension, the applicability of IHL. Article 1(1) of Additional Protocol II to the 1949 Geneva Conventions sets out, for the purposes of that treaty, the scope of application of what constitutes a non-international armed conflict, including the involvement of armed forces and dissident armed forces or organized groups under the leadership of a responsible command and with the capacity to carry out continuous and organized military operations. Article 8(2)(f) of the 1998 Rome Statute of the International Criminal Court also adds a temporal dimension, while International Committee of the Red Cross (ICRC) opinions and international jurisprudence emphasize the intensity of violence and the level of organization of non-State actors.³ Yet the rise of mega-cartels, super-gangs and hyper-violent extremist organizations begs the question of whether new rules are needed.

These questions have gained added salience with the emergence of strident war narratives and militarized approaches to confronting organized crime, not least the so-called wars on drugs, terrorism and crime. The five-decade-old “war on drugs”, in particular, has progressively militarized and privatized counter-narcotics measures around the world. The spectacular growth of private military and security companies is often tightly correlated with violence, raising questions about the applicability of IHL and the limits of human rights law. The two-

3 See Dustin A. Lewis, “The Notion of ‘Protracted Armed Conflict’ in the Rome Statute and the Termination of Armed Conflicts under International Law: An Analysis of Select Issues”, *International Review of the Red Cross*, Vol. 101, No. 912, 2019.

decade-old “war on terror” has raised new dilemmas, including those related to the distinction between combatants and civilians and the rules of engagement outside war zones.

Many of the contributors to this issue of the *Review* ask to what extent IHL applies in non-conflict settings where States are confronting criminal and extremist groups with the ability to challenge State authority and control territory. Several conclusions emerge, some more controversial than others. One that appears more than a few times is that international human rights law is necessary, but may prove insufficient in situations that fall below the threshold of armed conflict. Across all the contributions is some level of anxiety that existing international legal regimes are not keeping pace with changes in peace, crime and war.

A more hopeful observation is that IHL and international human rights law are complementary and should be regarded as such in situations of extreme organized crime. The Inter-American Court of Human Rights, for example, has demonstrated this complementarity in rulings regarding both Colombia and Mexico.⁴ Situations can be classified as armed conflicts for the duration of confrontations in particular settings, even in the absence of all-out conflict elsewhere. IHL can offer opportunities to strengthen protection of civilians and regulate hostilities between two or more parties, but has limited bearing on law enforcement; human rights law, on the other hand, can offer more protections against the excessive use of police force and deprivation of freedoms.

There is nevertheless a widespread assumption that IHL and human rights law are still insufficiently adapted to regulate situations involving organized crime. To be sure, the use of human rights law to complement IHL in international and non-international armed conflicts is accepted practice. This is not necessarily the case, however, in other situations of violence that fall below the threshold of armed conflict, such as the widespread banditry facing northern and central Nigeria or the maras operating across Central America’s Northern Triangle, where human rights law is the baseline legal regime. The law will need to adapt in order to respond to evolving challenges ranging from the rising threat of organized criminal organizations to the militarization of law enforcement and the privatization of military services.

Several of this issue’s contributors venture the idea that new legal frameworks and rules may be needed that could specifically address violence between State forces and organized crime groups, including drug cartels. They contend that rigid legal categories such as “fighters” with continuous combat functions or “unarmed civilians” do not reflect the realities on the ground. Existing law enforcement paradigms are also inadequate to address situations where the intensity and organization of violence approaches levels meeting the requirements of IHL. Some scholars contend that in the absence of new rules, IHL should be applied to discrete settings or actors such as heavily armed drug

4 See Christina M. Cerna, “The History of the Inter-American System’s Jurisprudence as Regards Situations of Armed Conflict”, *International Humanitarian Legal Studies*, Vol. 2, 2011; Inter-American Commission on Human Rights, *Situation of Human Rights in Mexico*, Doc. 44/15, Washington, DC, 2015.

cartels. But in the longer run, changes in the nature of non-international armed conflict and the technologies of violence necessitate new rules.

Approaches to addressing organized crime are likewise in urgent need of a serious upgrade. The UNTOC and its protocols are the principal instruments for fighting organized crime, and set the standards for States to follow. The 2003 UN Convention against Corruption is relevant as well.⁵ All of these instruments are managed by the UN Office on Drugs and Crime. Meanwhile, the International Criminal Police Organization, known as Interpol, provides support to national law enforcement agencies, while the European Union supports measures through Europol. Given the gravity of the challenge, however, global efforts to develop collective responses are fragmented, piecemeal and ineffective.⁶ For its part, the UNTOC has struggled to remain relevant as criminal groups and their tactics evolve, and experts believe a more comprehensive and reinvigorated approach is needed.

While scholars wrestle with legal frameworks and norms, humanitarian organizations need to be pragmatic and get on with the challenging task of delivering assistance in complex environments. For its part, the ICRC devises its strategies based on dynamic needs assessments, the availability of partners, the humanitarian consequences, and its own capacity to respond. Along with the Fundamental Principles of the International Red Cross and Red Crescent Movement, including those of neutrality, impartiality and independence, a fundamental guiding principle in situations involving complex organized crime and conflict dynamics is complementarity – that is, working with multiple stakeholders such as the National Red Cross and Red Crescent Societies, non-governmental organizations and local authorities. While the efforts of these stakeholders are not easily scaled, as the examples of safer access to public services in Brazil and support for displaced families in Honduras show, they can be impactful.

While some are more controversial than others, several contributions to this issue of the *Review* explore new avenues for engaging directly and indirectly with organized crime groups. Truces, negotiations and even amnesties are more common than is widely appreciated, raising tricky questions of ethics, practice and policy.⁷ In the absence of a formal peace deal, there are few incentives for States to openly negotiate with criminal organizations, and there are high political costs and moral hazards to opting instead for heavy-handed enforcement operations. Even so, international law can play a role in de-risking the political costs and complications associated with negotiations, and could be geared toward dialogue opportunities.

5 See UN Convention against Corruption, UNGA Res. 58/4, 31 October 2003, available at: www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

6 See Council on Foreign Relations, “Global Governance Monitor: Crime”, 2021, available at: www.cfr.org/global-governance-monitor/#!/crime.

7 See Robert Muggah, Ami C. Carpenter and Topher McDougal, “The Inconvenient Truth about Gang Truces in the Americas”, *Freedom From Fear*, Vol. 2016, No. 10, 2016, available at: www.un-ilibrary.org/content/journals/25190709/2016/10/12.

The convergence of armed conflict and organized crime raises vexing legal, ethical and operational questions for scholars and practitioners alike. These challenges are not going away – rather, there are signs that conflict and crime are becoming more complex and lethal, not less.⁸ Moreover, new fronts are emerging that raise difficult issues related to the application of international human rights law and IHL, not least the migration of conflict, crime and violence to the digital domain. Gathering evidence of, and assigning attribution to, digital harms is exceedingly difficult in stable contexts, let alone in settings beset by extreme insecurity.⁹ Ultimately, by sharpening the analytical lens and advancing new agendas, the contributors to this issue of the *Review* will help advance the cause of humanitarian action in a volatile era.

8 See, for example, International Institute for Strategic Studies, *The Armed Conflict Survey 2022*, Routledge, London, 2022; Interpol, *2022 Interpol Global Crime Trend Summary Report*, Lyon, 2022.

9 See ICRC, “Cyber-Attack on ICRC: What We Know”, 16 February 2022, available at: www.icrc.org/en/document/cyber-attack-icrc-what-we-know.