

Can criminal organizations be non-State parties to armed conflict?

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Abstract

The motivations of armed groups are widely considered to be irrelevant for the applicability of international humanitarian law (IHL). As long as organized violence is of sufficient intensity, and armed groups have sufficient capacity to coordinate and carry out military operations, there is an armed conflict for purposes of international law. It follows that large-scale criminal organizations can, in principle, be treated legally on a par with political insurgent groups. Drug cartels in particular, if sufficiently armed and well organized, can constitute armed opposition groups in the legal sense when their confrontation with State forces is sufficiently intense. This article problematizes this interpretation. It corroborates standing legal doctrine in finding that subjective motives are not a sound basis to exclude the application of IHL, but it argues that a workable distinction can be made between the strategic

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logic and the organizational goals of criminal groups and those of political insurgents. Drawing on a growing body of empirical studies on the political economy of criminal violence, a strong presumption is defended against qualifying as armed conflict organized violence involving criminal organizations.

Keywords: criminal violence, organized crime, non-international armed conflict, *Tadić* ruling, threshold of IHL application, drug trafficking, drug cartels, Latin America.



Introduction

Over the past two decades, the use of military force or militarized police against large-scale organized crime has been widespread in Latin America.¹ Governments in Colombia, Peru, Mexico, El Salvador and Brazil have notably treated armed organized criminal groups as enemies of the State, and have deployed against them levels and means of force typically associated with non-international armed conflicts (NIACs). The capacity for coordinated action of these non-State armed groups, and the toll in violent deaths and destruction derived from either governmental “wars on crime” or “turf wars” among criminal groups, appear to be at the level of situations of violence that have been qualified as NIACs in international law. The huge revenues derived from illicit markets, drug trafficking in particular, have allowed criminal organizations to create paramilitary forces with weaponry and manpower to match or exceed the armed capabilities of political insurgent groups.

Some of these situations of violence have been qualified as NIACs by legal and security experts, sometimes by States, and in rare cases, by the International Committee of the Red Cross (ICRC) itself. In the case of Colombia, six overlapping NIACs were identified by the ICRC for 2021.² Of these, five involve non-State groups that appear to be predominantly criminal, with unclear ideological orientations, and only half involve State forces. In 2015, twelve members of the drug trafficking organization Clan del Golfo were killed in aerial bombings carried out by the Colombian air forces; since 2016, carrying out such bombings has become official policy of the Ministry of Defence and the National Prosecutor’s Office, which, relative to these groups, operate under the hostilities paradigm.³ More recently, in early 2022, fifteen members of the Clan del Golfo were killed in bombardments that took place notwithstanding the 2016 peace

1 See, generally, Gustavo Flores-Macías and Jessica Zarkin, “The Militarization of Law Enforcement: Evidence from Latin America”, *Perspectives on Politics*, Vol. 19, No. 2, 2019; Juan Albarracín and Nicholas Barnes, “Criminal Violence in Latin America”, *Latin American Research Review*, Vol. 55, No. 2, 2020.

2 International Committee of the Red Cross (ICRC), *Retos Humanitarios 2022: Colombia*, Bogotá, 2022; “Pico más alto de violencia en Colombia en los últimos cinco años fue en 2021: CICR”, *El Espectador*, 23 March 2022.

3 “Bombardean campamento del ‘Clan Úsuga’ en Chocó”, *Revista Semana*, 3 November 2015; Ana Balcazar Moreno *et al.*, *The War Report 2017: Gang Violence in Colombia, Mexico, and El Salvador*, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), 2018, pp. 2–6.

accords between the Colombian government and the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) guerrillas. The peace accords were supposed to mark the beginning of the end of Colombia's decades-long NIAC.⁴

In the case of Peru, while expert opinion has not qualified as NIAC the organized violence in the coca-producing VRAEM region (the valley of the rivers Apurimac, Ene and Mantaro), the Peruvian government has issued legislation and emergency decrees since 2007 that declare drug trafficking organizations in the area "hostile groups" and as such lawful targets under international humanitarian law (IHL). A leading figure in a prominent local group was killed at the end of 2020, along with three others, in aerial bombings carried out by the Peruvian army.⁵

In contrast to Peru, many legal and security experts have found Mexico's "war on drugs" to be a case of NIAC, at least in certain regions and for certain periods of time since 2006.⁶ The 2017 *War Report* of the Geneva Academy describes Mexico as "armed gang violence sliding into armed conflict", and the Academy's 2018 *War Report* and Rule of Law in Armed Conflict (RULAC) platform have qualified as a NIAC the violence between the Mexican authorities and the Sinaloa Cartel and Jalisco New Generation Cartel (Cartel Jalisco Nueva Generación, CJNG).⁷ Unlike Colombia and Peru, Mexican authorities have not invoked IHL in the context of their "war on drugs", notwithstanding this expert opinion.⁸ Neither have authorities in El Salvador, even though legal and security experts have qualified as a NIAC the violence involving State forces and the

4 "Al menos 15 muertos deja como saldo operación contra el 'clan del Golfo'", *El Tiempo*, 2 February 2022. On the Colombian peace accords as an opportunity to "supercede IHL", see Pablo Kalmanovitz, "Ius post Bellum and the Imperative to Supercede IHL", *American Journal of International Law Unbound*, Vol. 110, 2016.

5 Alonso Gurmendi, *Conflicto armado en el Perú*, Fondo Editorial Universidad del Pacífico, Lima, 2019, pp. 149–152; Parker Asmann and Laura Ávila, "Shining Path Commander's Death Strikes Blow to Peru Rebel Group", *Insight Crime*, 31 March 2021, available at: <https://insightcrime.org/news/shining-path-death-peru/> (all internet references were accessed in August 2022).

6 Carina Bergal, "The Mexican Drug War: The Case for a Non-International Armed Conflict Classification", *Fordham International Law Journal*, Vol. 34, No. 4, 2011; Callin Kerr, "Mexico's Drug War: Is It Really a War?", *Texas Law Review*, Vol. 54, No. 1, 2012; Craig Bloom, "Square Pegs and Round Holes: Mexico, Drugs, and International Law", *Houston Journal of International Law*, Vol. 34, No. 2, 2012; Carrie Comer and Daniel Mburu, "Humanitarian Law at Wits' End: Does the Violence Arising from the 'War on Drugs' in Mexico Meet the International Criminal Court's Non-International Armed Conflict Threshold?", *Yearbook of International Humanitarian Law 2015*, T. M. C. Asser Press, The Hague, 2015; Grotius Centre for International Legal Studies, Universiteit Leiden, *La situación de la violencia relacionada con las drogas en México del 2006 al 2017: ¿Es un conflicto armado no internacional?*, bilingual ed., Instituto Tecnológico y de Estudios Superiores de Occidente and Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, Guadalajara, 2019, available at: <https://tinyurl.com/39zekcdv>; Ana Gabriela Rojo Fierro, "La guerra contra el narcotráfico en México: ¿Un conflicto armado no internacional no reconocido?", *Foro Internacional*, Vol. 60, No. 4, 2020.

7 Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2017*, Geneva Academy, Geneva, 2018, p. 83; Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2018*, Geneva Academy, Geneva, 2019, p. 33. The RULAC study is available at: www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico.

8 Pablo Kalmanovitz and Alejandro Anaya-Muñoz, "To Invoke or not to Invoke: International Humanitarian Law and the 'War on Drugs' in Mexico", unpublished manuscript, 2022.

gangs Mara Salvatrucha and Barrio 18, including, notably, in the 2016 and 2017 *Armed Conflict Surveys* by the International Institute for Strategic Studies.⁹

For all the differences and controversies regarding the qualification of these situations of organized violence, all legal assessments agree on the well-established principle according to which, in the process of establishing the applicability of IHL, the armed actors' motives and proclamations are irrelevant. According to the well-known formulation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case, "an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".¹⁰ If the level of violence is sufficiently high, and the groups engaged in violence sufficiently organized, then a NIAC exists in which relevant IHL norms apply.

What counts as sufficient violence and collective organization can be spelled out through a number of indicia produced in jurisprudence and legal commentary, which have been widely recognized as authoritative for establishing the applicability of Article 3 common to the four Geneva Conventions and of customary IHL, as well as the war crime regimes in international criminal law.¹¹ These indicia do not include the actors' motives. The applicability of IHL depends on existing patterns of violence and modes of organization, which can be recognized without reference to subjective motives. As Sivakumaran concludes in his authoritative study of the law of NIAC, "the reasons that motivate the fighting are irrelevant insofar as the existence of a non-international armed conflict is concerned".¹²

While the rationale for such exclusion was not elaborated at length in ICTY jurisprudence, the 2011 report of the 31st International Conference of the Red Cross and Red Crescent does make a strong case for agnosticism about motives:

Under IHL, the motivation of organized groups involved in armed violence is not a criterion for determining the existence of an armed conflict. Firstly, to introduce it would mean to open the door to potentially numerous other motivation-based reasons for denial of the existence of an armed conflict. Secondly, political objective is a criterion that would in many cases be difficult to apply as, in practice, the real motivations of armed groups are not always readily discernible; and what counts as a political objective would be controversial. Finally, the distinction between criminal and political

9 See also Ximena Galvez Lima, "Inked or Not: Maras and Their Participation in El Salvador's Recent Armed Conflict", *Journal of International Humanitarian Legal Studies*, Vol. 10, No. 2, 2019; Kirsten Ortega Ryan, "'Urban Killing Fields': International Humanitarian Law, Gang Violence, and Armed Conflict on the Streets of El Salvador", *International and Comparative Law Review*, Vol. 20, No. 1, 2020. The Geneva Academy's 2017 *War Report* did not qualify violence in El Salvador as a NIAC, but deems its own position "controversial": see A. Bellal (ed.), *The War Report: 2017*, above note 7, p. 64.

10 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

11 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 164–182; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, pp. 117–158.

12 S. Sivakumaran, above note 11, p. 182.

organizations is not always clear-cut; it is not rare for organizations fighting for political goals to conduct criminal activities in parallel and vice versa.¹³

To open the Pandora's box of motives would make the assessment of the nature of violence impossibly difficult and would thereby obstruct humanitarian action. By resorting instead to factual criteria, which can be verified on the basis of observable evidence, excessive politicization is avoided, as well as legal paralysis and betrayal of humanitarian imperatives.

In fact, the very distinction between political and criminal violence appears empirically dubious, as political insurgents can be driven by all sorts of motives, often including "greed" and exploitation of illicit markets.¹⁴ The literature on "new wars" has emphasized how twenty-first-century insurgencies are impossible to distinguish from large-scale organized criminality, as both have little incentive to negotiate peace or take over the tasks of political rule in "failed" States.¹⁵ When organized armed groups can extract abundant revenues from extortion and illicit business, even ideologically driven rebels can make of war a way of life, rather than an instrument for State-level political change.

The present article pushes back against this consensus in legal doctrine. While sceptics are correct to question the practical viability of using subjective motives as a criterion for distinguishing between political and criminal violence, this article argues that there are other ways of making this distinction which are objective, observable, and relevant for the normative assessment of large-scale organized violence.

Specifically, the article draws on a growing empirical literature on the political economy of criminal violence, which has studied the strategic dynamics of criminal violence and the criminal governance of illicit markets. Leveraging this literature, it is argued that criminal and political violence can and should be distinguished on the basis of the contrasting strategic logics that govern resort to violence, which in turn follow from their specific and contrasting organizational goals. Diverging strategies and organizational goals lead to contrasting approaches to State authorities. Centrally for present purposes, it is usually in the interest of criminal groups to *avoid* direct confrontations with State forces and resort to violence in a limited manner.¹⁶ The article's central normative thesis is that, given the ways in which criminal organizations are known to operate vis-à-vis State authorities, there are good reasons for a *presumption against* qualifying situations of large-scale criminal violence as NIAC.

13 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, p. 11.

14 Paul Collier and Anke Hoefler, "Greed and Grievance in Civil War", *Oxford Economic Papers*, Vol. 56, No. 4, 2004.

15 Mary Kaldor, "In Defence of New Wars", *Stability*, Vol. 2, No. 1, 2013; Christine Chinkin and Mary Kaldor, *International Law and New Wars*, Cambridge University Press, Cambridge, 2017.

16 Diego Gambetta, *The Sicilian Mafia*, Harvard University Press, Cambridge, MA, 1993; Richard Snyder and Angélica Durán-Martínez, "Does Illegality Breed Violence? Drug Trafficking and State-Sponsored Protection Rackets", *Crime Law and Social Change*, Vol. 52, No. 3, 2009.

Following this introduction, the first section of the article reinforces the claim that subjective motives are not a sound basis for NIAC qualification by showing that insurgent groups and large-scale criminal organizations have both economic and political motives. The second section draws on recent empirical literature on organized criminal violence to show that criminal and political violence have contrasting organizational goals and strategic reasons for resort to force, and argues that a legally workable distinction can be made on this basis. The third section discusses the implications of this reworked distinction for NIAC qualifications. It argues that criminal organizations are unlikely to have responsible command structures and the capacity to comply with IHL. The fourth section makes a *jus ad bellum* case against resort to military force by States in order to fight organized criminal organizations. On the basis of the arguments in the third and fourth sections, the fifth section concludes by proposing and defending a presumption against NIAC qualifications of organized criminal violence.

Motives

It is natural and common to posit motives as the criterion for distinguishing conceptually between criminal and political violence. While agents of political violence are driven by ideology and an interest in effecting political change, those engaged in criminal violence are driven by profit and an interest in maximizing illegal revenues. Motives have been used in this way both in empirical studies of violence and in international policy fora dedicated to transnational crime.

As Phillips succinctly puts it in his study on the undesirable effects of decapitation of criminal organizations, “it is motives, not methods, that separate criminal groups from terrorists and insurgents”.¹⁷ Contrasting motives can help explain why decapitating criminal organizations leads to an increase in criminal violence, not a decrease as one would expect in the case of political insurgent groups. Whereas charismatic commanders can make a crucial difference in political insurgencies, and their loss can gravely affect troops’ morale, in the case of organized crime, decapitation leads to fragmentation and in-group fighting for illegal market control. Similarly, for Kalyvas, the fact that “criminal organizations lack both an ideological profile and an explicit political agenda” would explain differences in the characters and dynamics of criminal versus political violence, including the onset and termination of such violence, the sources of group cohesion and loyalty, and the strategic use of violence.¹⁸

Motives also serve to define the scope of application of the United Nations (UN) regime for combating transnational organized crime. The UN Convention against Transnational Organized Crime defines organized crime on the basis of motives and in contrast to political organizations. As it states in Article 2(a):

17 Brian Phillips, “How Does Leadership Decapitation Affect Violence?”, *Journal of Politics*, Vol. 77, No. 2, 2015, p. 327.

18 Stathis Kalyvas, “How Civil Wars Help Explain Organized Crime – and How They Do Not”, *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015.

“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* [emphasis added].

As Hauck and Peterke report, this definition was driven by “the dominant view that organized crime is not driven by political motives but is primarily out to make a profit”; in particular, it was meant to exclude terrorist and insurgent organizations from the Convention’s purview in order to avoid it becoming “overly politicized”.¹⁹ The UN regime against organized crime focuses only on those transnational groups that are driven by material interests, not on those which pursue political agendas.

While seemingly natural, there are two important sets of reasons to question the practical viability and empirical validity of distinguishing between criminal and political violence on the basis of subjective motives.

The first set is associated with the well-documented existence of mixed motives in ostensibly political violence. As the empirical literature on civil wars has long debated, insurgent groups often engage in illicit business, which makes it hard to characterize accurately whether, or to what extent, “greed or grievance” is their driving motivation.²⁰ While armed groups do have strategic interests in earning legitimacy and support by presenting themselves as being driven primarily by political ideals, their motivations can in fact be largely private and material, as the “new wars” literature has emphasized.²¹ Kalyvas’s path-breaking work on civil wars revealed how private motives often drive the use of violence at the micro level; political macro-narratives and ideologies, which publicly frame violence, may have less causal impact on the dynamics of violence than their public visibility would lead one to believe.²² In fact, complex arrays of micro- and macro-motives, oriented by both private and public interests and by both genuine and strategically professed ideologies, drive the use of violence during civil wars.²³

The second set of reasons why motives do not make a sound basis for distinction is related to the also well-documented fact that large-scale criminal organizations also have an interest in power and influence as instruments for preserving or enlarging their illicit business, very much like their licit counterparts do. This is arguably the key difference between petty and organized crime.²⁴ Specifically, large-scale criminal organizations have an interest in

19 Pierre Hauck and Sven Peterke, “Organized Crime and Gang Violence in National and International Law”, *International Review of the Red Cross*, Vol. 92, No. 878, 2010, p. 422.

20 P. Collier and A. Hoeffler, above note 14; Christopher Blattman and Edward Miguel, “Civil War”, *Journal of Economic Literature*, Vol. 48, No. 1, 2010.

21 M. Kaldor, above note 15.

22 Stathis Kalyvas, *The Logic of Violence in Civil War*, Cambridge University Press, Cambridge, 2006.

23 Francisco Gutierrez Sanin and Elisabeth Jean Wood, “Ideology in Civil War: Instrumental Adoption and Beyond”, *Journal of Peace Research*, Vol. 51, No. 2, 2014.

24 Thomas Schelling, “What Is the Business of Organized Crime?”, in Thomas Schelling (ed.), *Choice and Consequence*, Harvard University Press, Cambridge, MA, 1984.

influencing political processes in order to facilitate their business, in particular by dampening law enforcement against themselves and redirecting it against their rivals.²⁵ Given the prospects of crippling law enforcement, political influence can be vital for the success of illicit business, and as such has to be counted among the goals and drivers of illegal entrepreneurs. Furthermore, while a great deal of illicit business activity takes place in the peripheries of the State, criminal organizations also need to infiltrate public infrastructure and authorities in seaports and airports, the banking and financial systems, and more.²⁶

In addition to investing in political influence, organized criminal organizations are also known to seek territorial control in ways instrumental to their business, in particular for the production and trafficking of illegal substances.²⁷ This includes securing corridors for the transportation of such substances, and safe areas for their cultivation and production. In order to secure territorial control, large criminal organizations often engage in distinct forms of legitimization that allow them to recruit local informants, exclude rivals, and rule local illicit economies more efficiently. In some cases, criminal organizations have developed forms of governance and public service provision comparable to those provided by insurgent groups and even State authorities, including security provision, dispute settlement mechanisms and basic social assistance.²⁸ Conquering and managing territory through the strategic use of legitimization and coercion are, of course, eminently political enterprises.

Many organized criminal organizations, in particular those capable of creating and maintaining militias, are unquestionably driven by political agendas – they have an interest in acquiring and managing power. Power, furthermore, is acquired for the sake of business but need not be used exclusively in the pursuit of business. When organizations grow and acquire power, it may become impossible to disentangle political and pecuniary motives. Most Colombian paramilitary groups were originally drug cartels that became politicized, but as the dynamics of insurgent violence and the drug trade changed in the country, so too did the motives of these actors.

Contrasting strategies of violence and organizational goals

From the claim that motives are not a sound criterion for distinguishing between criminal and political violence, it does not follow that there is no distinction to

25 Guillermo Trejo and Sandra Ley, *Votes, Drugs, and Violence*, Cambridge University Press, Cambridge, 2020; Angélica Durán-Martínez, *The Politics of Drug Violence*, Oxford University Press, Oxford, 2018.

26 Gustavo Duncan, *Más que plata o plomo: El poder político del narcotráfico en Colombia y México* Debate, Bogotá, 2014.

27 Nicholas Barnes, “Criminal Politics: An Integrated Approach to the Study of Organized Crime, Politics, and Violence”, *Perspectives on Politics*, Vol. 15, No. 4, 2017.

28 Enrique Desmond Arias, “The Impacts of Differential Armed Dominance of Politics in Rio de Janeiro, Brazil”, *Studies in Comparative Development*, Vol. 48, No. 3, 2013; Vanda Felbab-Brown, “Conceptualizing Crime as Competition in State-Making and Designing an Effective Response”, Brookings Institution, 2010, available at: www.brookings.edu/on-the-record/conceptualizing-crime-as-competition-in-state-making-and-designing-an-effective-response/; N. Barnes, above note 27.

make. Intuitively, it appears clear that Mexican drug cartels are a different kind of organization to the Colombian FARC guerrillas. As the empirical literature on criminal violence has emphasized, even though drug cartels have political agendas, and guerrillas may profitably engage in drug trafficking and other illicit business, the two types of actors pursue diverging strategies, follow different organizational goals and have contrasting relationships with State authorities.

In a nutshell, insurgents are, by constitution, enemies of the State, and their enmity is usually publicly declared and known. We would not call the activities of an armed group a “political insurgency” unless the group used its firepower to oppose and fight State authorities, according of course to its capacities and opportunities, which may be very limited indeed. Criminal organizations, by contrast, tend to avoid direct and large-scale confrontations with State forces; their preference is to bribe and co-opt rather than attack State authorities.

A consistent finding in comparative research on “drug wars” in Latin America is that, when cartels use force against the State, they tend to do so reactively and selectively, either to defend themselves against crackdowns or to intimidate law enforcers and ease their co-optation.²⁹ For the sake of illicit business, the first preference of criminal organizations is typically to lay low, bribe and co-opt rather than to create and fund expensive standing militias, which can undertake large-scale attacks but can also generate public outcry and destructive State counter-responses.³⁰ According to Arias’s characterization of gang control in Rio de Janeiro’s *favelas* (shanty towns), “criminals depend on contacts with politicians and legitimate market actors to undertake certain types of illegal activities and generally have little interest in or ability to cause a system-wide political or institutional crisis”.³¹ Arrangements of joint profit, in particular delivering votes in exchange for law enforcers turning a blind eye to the criminal group’s activities or directing their attention towards its rivals, have been common in Brazil. Even when criminal organizations directly aim their armed capabilities at State forces, they tend to do so in a manner that falls short of “all-out war for territorial hegemony”.³² Their aim is not to defeat and capture the State, but rather to “subvert and co-opt” it in limited areas.³³

29 Angélica Durán-Martínez, “To Kill and Tell? State Power, Criminal Competition, and Drug Violence”, *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015; Javier Osorio, “The Contagion of Drug Violence: Spatiotemporal Dynamics of the Mexican War on Drugs”, *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015; Benjamin Lessing, “Logics of Violence in Criminal War”, *Journal of Conflict Resolution*, Vol. 59, No. 8, 2015.

30 Benjamin Lessing, *Making Peace in Drug Wars*, Cambridge University Press, Cambridge, 2018, pp. 37–81; G. Duncan, above note 26.

31 E. D. Arias, above note 28, p. 264.

32 N. Barnes, above note 27, p. 973.

33 Andrea Nill Sánchez, “Mexico’s Drug ‘War’: Drawing a Line between Rhetoric and Reality”, *Yale Journal of International Law*, Vol. 38, No. 2, 2013, p. 488. The *Limaj* case at the ICTY is often cited as a key ruling on the irrelevance of motives for NIAC qualification. As the Tribunal held in para. 170, “the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties[;] the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant”. And yet the ruling continues as follows: “[I]t is not apparent to the Chamber that the immediate purpose of the military apparatus of each side during the relevant period, was not directed to the defeat of the opposing party, even if some further or

Lessing's work has emphasized how rare it is for criminal organizations to attack State authorities, which makes the cases of Mexico and Colombia anomalous within the larger universe of organized crime. A central element in his explanation of this anomaly is that criminal groups use all-out force against States only when they expect the State to use force unconditionally against them. When criminal organizations know that the State will use force against them not in reaction to their own use of force but rather as a policy of elimination based on group membership, criminal violence tends to flare up. Conversely, when States use violence only in reaction to violence, and are relatively tolerant of other illicit conducts, criminal violence tends to remain low or de-escalate.³⁴ Political insurgent groups behave differently. They may avoid confrontation with State forces at certain times and places for strategic reasons, but their defining organizational goal is to attack State forces when feasible, and to outcompete the State vis-à-vis the population's allegiance and support. This is, again, a conceptual point: we would not refer to an organization that preferred a peaceful and lucrative *modus vivendi* with State authorities as an "insurgent" group.

However, and crucially for present purposes, organized criminal violence is generated not only in the context of clashes involving State authorities, but also via "turf wars" among or within criminal organizations – that is, violent competition for the control of illicit markets. In the case of Mexico, the first drug-related private militia was created by the Tijuana cartel in the early 1990s after State-sponsored protection rackets broke down. Rival cartels saw this breakdown as an opportunity to take over the lucrative Tijuana corridor to the United States, which the Tijuana cartel successfully defended with its newly created coercive means.³⁵ State-sponsored protection rackets can generate remarkably peaceful equilibria among criminal groups, and, conversely, their breakdown can lead to shockingly high levels of violence in inter-cartel disputes. In the absence of State-sponsored assurances, cartels may need to resort to highly visible forms of violence in order to signal their toughness and deter non-State rivals.³⁶

In these contexts, studies of criminal violence have identified two forms of coercion used by criminal groups. They may create their own standing militias and deploy them under relatively strict command ("insourcing"), or they may hire youth gangs and hitmen in a less controlled fashion ("outsourcing"). While outsourcing is cheaper, it encourages gang proliferation and can unleash spirals of violence that

ultimate objective may also have existed. *The two forces were substantially engaged in their mutual military struggle*" (emphases added). Arguably, a background assumption in *Limaj* is that the non-State parties in a conflict aim for the defeat of their State opponents, an assumption that may not hold for organized criminal violence. ICTY, *The Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 170.

34 B. Lessing, above note 29; B. Lessing, above note 30.

35 Guillermo Trejo and Sandra Ley, "Why Did Drug Cartels Go to War in Mexico? Subnational Party Alternation, the Breakdown of Criminal Protection, and the Onset of Large-Scale Violence", *Comparative Political Studies*, Vol. 51, No. 7, 2018.

36 R. Snyder and A. Durán-Martínez, above note 16; A. Durán-Martínez, above note 29.

eventually escape the cartels' control.³⁷ The most violent cases of turf war – those which can reach NIAC levels of intensity of violence – occur when criminal organizations fiercely compete for illegal markets and *outsource* violence.³⁸ As Nill Sánchez argues in her study on the qualification of Mexican violence, “even in the deadliest regions of Mexico, an overwhelming majority of the deaths taking place are more properly characterized as discrete criminal murders, not mass casualties inflicted by military onslaughts”.³⁹ By contrast, political insurgencies can be expected largely to refrain from outsourcing coercion, as they are themselves coercive organizations that need to deploy violence in a controlled fashion in order to earn and secure territorial control and some measure of civilian support.⁴⁰

Differences between political and organized criminal violence can also be found in contrasting forms of territorial control. While political insurgency is eminently a “process of competitive State-building”,⁴¹ in which insurgents seek to secure exclusive power at least in localized strongholds, criminal organizations prefer to strike arrangements of mutual benefit with State agents. In addition to deflecting and redirecting law enforcement, these arrangements include the use of police surveillance, ports, and financial systems as infrastructures for carrying out illicit business. While drug cartels may often aim to acquire territorial control at the margins of State territory in order to produce and transport drugs, they are also in many ways parasitic on State institutions, particularly when it comes to money laundering, which takes place mostly in the financial centres and not at the peripheries of States.⁴²

By contrast, territorially based insurgent groups typically do not seek cooperation with State authorities but rather dispute territory and aspire to forms of autonomous “rebel governance”.⁴³ The strategic goal of insurgent groups is usually to consolidate exclusive control over populations in more or less well-defined territories, not to bribe and co-opt State authorities in order to sustain parallel systems of illicit market rule.

NIAC qualification and organized crime

Once we recognize the contrasting strategies and goals of organized crime versus political insurgencies, we are in a position to re-evaluate current understandings of the applicability of IHL to organized criminal violence. Subjective motives may be irrelevant for the qualification of violence as a NIAC, but contrasting strategies

37 Eduardo Guerrero Gutiérrez, “Pandillas y cárteles: La gran alianza”, *Revista Nexos*, June 2010; A. Durán-Martínez, above note 25, pp. 14–18.

38 A. Durán-Martínez, above note 25, p. 18.

39 A. Nill Sánchez, above note 33, p. 483.

40 S. Kalyvas, above note 22.

41 *Ibid.*, pp. 218–219.

42 G. Duncan, above note 26.

43 Ana Arjona, Nelson Kasfir and Zachariah Mampilly, *Rebel Governance in Civil War*, Cambridge University Press, Cambridge, 2015.

and organizational goals are not. While it may be simple to establish that the intensity of criminal violence has reached the level of NIACs, the criterion of organization of non-State armed groups is far less clear.

Insofar as the intensity of violence goes, relevant NIAC qualification indicia include the number of violent incidents; the level, duration, and geographical spread of violence; the State's resort to the use of military forces; the mobilization of individuals and distribution of weapons to them; the use of military-level weaponry; the conclusion of ceasefires and peace agreements; and the involvement of third parties, in particular the UN Security Council.⁴⁴ In all but one (Peru) of the Latin American cases mentioned above, most of the intensity indicia have been met. Indeed, the reason why NIAC qualifications have been considered in these cases is the shocking levels of killings, forced disappearances, forced displacements and other gross human rights violations that occur in situations of organized criminal violence.

Regarding the organization of non-State armed groups, relevant indicia include the existence of responsible command, which is necessary for the group to act and speak in a unified manner; the existence of internal regulations and disciplinary procedures that allow non-State groups to comply with IHL; group members receiving military training and having the ability to operate in designated zones; the ability to control territory; the ability to procure, transport and distribute arms; and the ability to recruit new members and to coordinate their actions.⁴⁵

To assess the extent to which these indicia can be satisfied in contexts of criminal violence, it is important to recall the distinction between insourced and outsourced coercion. When criminal organizations outsource coercion, they typically rely on gangs to carry out executions, extortions and more. Mexican cartels have been documented to outsource violence often and to rely extensively on more or less cohesive and small-scale coercive organizations, particularly youth gangs.⁴⁶ Often, enforcement actions are carried out by hitmen and gangs, or by fragments of cartels and “non-aligned freelancers” hired to execute operations of narrow scope.⁴⁷ For this reason, Mexican violence has been described as “multiple incidents of micro-violence at local levels”, rather than “macro-violence at the strategic level” – that is, a confrontation between two or more well-organized and disciplined military structures in a context of hostilities.⁴⁸ Given such atomization of drug violence, and the fragmentation of illegal markets of coercion into multiple small-scale gangs, it is doubtful that when violence is outsourced, there can be responsible command as required by the organization criterion. Instead of command and control hierarchies, there is really a market for violent services, and the ever-present possibility of fragmentation and infighting.

44 S. Sivakumaran, above note 11, pp. 167–170.

45 *Ibid.*, pp. 170–172.

46 E. Guerrero Gutiérrez, above note 37; A. Durán-Martínez, above note 25.

47 Patrick Gallahue, “Mexico’s ‘War on Drugs’: Real or Rhetorical Armed Conflict?”, *Journal of International Law of Peace and Armed Conflict*, Vol. 24, No. 1, 2011, p. 43.

48 A. Nill Sánchez, above note 33, pp. 485–486.

In the case of criminal organizations that insource violence (that is, those which create and maintain their own militias), there may be some sort of command structure, the ability to sustain operations in well-defined areas, and even the ability to control territory. In Mexico, the cases of the Zetas and the CJNG are noteworthy. The former was composed of defectors from the Mexican army who turned into hitmen for the Gulf Cartel in turf wars against rival cartels, but eventually became independent and known for public displays of gruesome violence.⁴⁹ The CJNG originated as a splinter group of the Sinaloa Cartel, and is estimated to have gained presence in every Mexican state over the past ten years. Its military operations are based in a handful of states surrounding the Lázaro Cárdenas seaport in the Pacific, but it has fought rival organizations and police forces fiercely in pursuit of territorial expansion.⁵⁰

It is not the case, however, that paramilitary organizations such as the Zetas and CJNG can be expected to comply with IHL regulations. Indeed, the distinction between civilians and military objectives is alien to their *modus operandi*, particularly with respect to extortive practices. These organizations have neither financial incentives nor strategic reasons to discipline their members into respecting IHL. And if such an expectation can hardly be sustained in the case of the Zetas and CJNG, there is less reason to expect it from smaller militias or youth gangs that are recruited by larger criminal organizations and lack any sort of military training. As Durán-Martínez notes in the case of youth gangs, most of them “are not professional killers who follow the ‘rules’ of violence specialists such as mercenaries, enforcement agents serving traffickers, or privatized security firms”.⁵¹ They can hardly be expected to comply with IHL.

It is no accident that the use of violence by Mexican criminal organizations is largely decentralized and fragmented when outsourced, and alien to the internal disciplinary procedures required by IHL compliance when insourced. Since the objective of criminal organizations is not to confront and substitute the State, it would be inefficient and indeed bad business practice to invest heavily in large standing militias. The level of force that organized crime needs should be enough to dissuade competing organizations and intimidate law enforcers, but it is rarely in the interest of criminal organizations to fund a militia that can engage State forces in sustained military operations.

The contrast with political insurgencies is again revealing. Insurgent groups are known to invest in training and compliance with IHL because they have an interest in earning recognition and political legitimacy – their interest in international legitimacy in particular has been found to be an important self-disciplining mechanism.⁵² Criminal organizations have no equivalent interest.

49 Víctor Manuel Sánchez Valdés and Manuel Pérez Aguirre, *The Origin of the Zetas and Their Expansion in Northern Coahuila*, Colegio de México, Mexico City, 2018.

50 Insight Crime, “Cartel de Jalisco Nueva Generación (CJNG)”, available at: <https://es.insightcrime.org/noticias-crimen-organizado-mexico/cartel-jalisco-nueva-generacion-cjng/>.

51 A. Durán-Martínez, above note 25, p. 16.

52 Hyeran Jo, *Compliant Rebels*, Cambridge University Press, Cambridge, 2015; Jessica Stanton, *Violence and Restraint in Civil War: Civilian Targeting in the Shadow of International Law*, Cambridge University Press, Cambridge, 2016.

They do have an interest in local legitimacy in their areas of control, and that interest may contribute to relative restraint and discrimination in their use of violence against local populations – but this is far from the sort of training, knowledge and internal controls required for compliance with IHL norms.

If we take responsible command and the ability to comply with IHL norms to be necessary features of non-State armed groups in NIACs,⁵³ then we should in principle be sceptical of NIAC qualifications of organized criminal violence. Outliers cannot be ruled out, certainly, but if a criminal organization were to invest in a militia that satisfied the organization criterion for NIACs, its priorities would probably have shifted in a more ideological direction: presumably the point of investing in large paramilitary forces is to directly confront State forces – or insurgent forces jointly with State forces, as in Colombia – in order to gain control over strategic territory.

The *jus ad bellum* case against resort to military force against organized crime

An important implication of the previous discussion of NIAC qualification should now be considered. Policy arguments are often made in favour of militarized responses to organized crime: given the intensity of the violence and the capacity for harm of some organized criminal organizations, in some cases the threats they pose to States and citizenry are as serious, if not more so, than those created by insurgencies in contexts of political violence, and equivalent State responses are therefore warranted.⁵⁴ As Bergal puts it for the case of Mexico, “innocent lives could be saved if the Mexican military undertook the appropriate level of defensive force against the cartels as outlined by the laws of NIAC”.⁵⁵ Along somewhat similar lines, in its 2004 report, the UN High-Level Panel on Threats, Challenges, and Change identified transnational organized crime as a particularly urgent threat to international peace and security, and requested the UN Secretary-General to include organized crime in strategies of conflict prevention and analysis.⁵⁶ While this request did not lead to a UN validation of militarized responses to organized crime – nor were any implications on the applicability of IHL drawn – it does suggest that the kind of threat posed by these organizations could warrant such responses.

As is well known, when organized violence is qualified as a NIAC, the hostilities paradigm comes into effect to regulate the use of force predominantly on the basis of IHL. In hostilities contexts, States can permissibly resort to levels

53 S. Sivakumaran, above note 11, pp. 174–180. There is some doctrinal debate on this claim: see A. Cullen, above note 11, pp. 155–157.

54 See e.g. P. Hauck and S. Peterke, above note 19, p. 411; C. Bergal, above note 6.

55 C. Bergal, above note 6, p. 1087.

56 Pierre Thielbörger, “The International Law of the Use of Force and Transnational Organised Crime”, in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organized Crime*, Oxford University Press, Oxford, 2016, pp. 377–378.

of force that would be impermissible under the law enforcement paradigm, in which the more restrictive protections of international human rights law in peacetime apply in full. As the ICRC describes this contrast,

the conduct of hostilities does not prohibit the killing of legitimate targets, provided that, among others, the IHL principles of proportionality and precautions are fulfilled. Under law enforcement, lethal force may be used only as [a] last resort in order to protect life.⁵⁷

Under the IHL principle of proportionality, more “incidental loss” of civilian life is permitted than under the proportionality assessment of the law enforcement paradigm, in which lethal State force is proportional only to unlawful imminent lethal threats.⁵⁸ Legitimate targets in hostilities include both civilians directly participating in hostilities and members of non-State armed groups who have a “continuous combat function”, and as such may be lawfully targeted, regardless of the actual level of threat they pose when targeted (assuming, that is, they are neither *hors de combat* nor detained).

The empirical literature on criminal violence has shown that when States implement status-based targeting policies – force used not in reaction to imminent threats of violence by members of non-State groups but on the basis of group membership – collective violence escalates. In the Mexican case, president Calderón’s war declaration in 2006 was, in a sense, a self-fulfilling prophecy: violent deaths and other gross human rights violations skyrocketed after the Mexican armed forces became involved in counter-narcotics and internal security operations, and eventually reached a point that, according to many experts, does constitute a NIAC.

One concerning effect of a NIAC qualification in such contexts is that it makes group-based targeting policies lawful, and in this way enable the escalation of violence. When criminal organizations are treated as non-State parties to a NIAC, at least some of their members come to have a “continuous combat function”, whereby they become lawful targets “on a continuous basis” by virtue of their membership, and regardless of the actual level of immediate threat they pose at the time of targeting.⁵⁹ As the empirical literature on criminal violence has shown, however, status-based targeting policies in militarized counter-narcotics operations usually lead to escalations of violence, which can eventually reach levels of “public emergency” in which military force comes to appear justified.⁶⁰ But the escalation which led to that point, and the logic of criminal violence that propelled the escalation, disappear from view in static and formal

57 ICRC, *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, Geneva, 2013, p. iv.

58 ICRC, *The Use of Force in Law Enforcement Operations*, Geneva, 2022.

59 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 33–34, 72.

60 According to Hauck and Peterke, “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”: P. Hauck and S. Peterke, above note 19, p. 431. As the Mexican case shows, however, organized criminal violence can escalate to levels that are

qualifications of organized criminal violence, and for this reason, such qualifications can ultimately be counterproductive.⁶¹

If the distinctive dynamics of organized criminal violence are taken into account in more nuanced assessments, then the use of military force by States appears in a different light, particularly given the availability of less violent policies that can be more successful in preventing harm.⁶² The fundamental question here is whether resort to military force by the State is *justified in the first place*, rather than whether specific military operations are lawful when organized criminal violence is governed by the hostilities paradigm. This question belongs not to the legal doctrine of *jus in bello* but rather to considerations of sound policy and what may be called the law of “internal *jus ad bellum*”, which should regulate *domestic* resort to military force by States.⁶³ While not an established area of public international law, considerations of internal *jus ad bellum* can strengthen the presumption against NIAC qualifications that will be defended in the next and final section of this article.

We have seen, in the above section on strategies of violence and organizational goals, that in general, organized criminal organizations prefer to co-opt rather than directly attack State authorities; the best scenario for illicit entrepreneurs is to operate discreetly and carry on their illicit business undisturbed by law enforcement. It is far from clear that these actors pose the kind of threats for which State resort to armed force would be a necessary and proportional response *as a matter of jus ad bellum* – the kind of threat that a well-equipped insurgent group keen on capturing the State could conceivably pose. As Lieblich has argued, it is useful to think about the principles of necessity and proportionality in internal *jus ad bellum* in analogy with the traditional *jus ad bellum* principles for inter-State armed conflicts. By analogy, domestic resort to armed force appears justified only in response to imminent threats or attacks “the scale and effects of [which] must at least mirror that of an ‘armed attack’ – whether against civilians or armed forces – on the international level”.⁶⁴ Of course, by definition organized criminal organizations violate State law, but whether such violation constitutes a form of threat or harm of such a level would have to be shown, not assumed. And given what we know about the dynamics of organized criminal violence, the assumption appears doubtful.

Ultimately, the question is whether an organized criminal organization causes harm – or poses a threat of harm – for which a State’s resort to military force would be a necessary and proportional response. As many academic experts

deeply destabilizing. Militarization and its legal sanction in the form of NIAC qualification are not apt remedies but rather causes of such destabilization.

61 See, further, Alejandro Rodiles, “Law and Violence in the Global South: The Legal Framing of Mexico’s ‘Narco War’”, *Journal of Conflict & Security Law*, Vol. 23, No. 2, 2018.

62 Guillermo Trejo and Sandra Ley, “Federalism, Drugs, and Violence: Why Intergovernmental Partisan Conflict Stimulated Inter-Cartel Violence in Mexico”, *Política y Gobierno*, Vol. 23, No. 1, 2016.

63 Eliav Lieblich, “Internal *Jus ad Bellum*”, *Hastings Law Journal*, Vol. 67, No. 3, 2016. Lieblich makes clear that the doctrine of internal *jus ad bellum* that he sketches remains far from crystallizing in international law.

64 *Ibid.*, p. 742.

have noted in the case of drug trafficking, if States stopped enforcing the prohibition of drug trafficking, the result would probably be far lower levels of death and harm than those unleashed by a militarized “war on drugs”.⁶⁵ For this reason, resort to armed force is not a proportional response. Militarized responses do not appear necessary either, nor are they a fitting means to the end of protecting people from organized criminal harm. States do have alternative and less lethal policy options, including systematic investigation of money laundering and social policies aimed at youth communities, which are vulnerable to recruitment as outsourcers of criminal violence.

An important objection to this analysis is that it does not take into account the manifold types of harm generated by competition among criminal organizations in “turf wars”, which can potentially reach NIAC levels of intensity and organization. While criminal organizations may prefer to avoid confrontation with the State, competition among themselves for illicit markets can become highly conflictive and violent, and can have appalling humanitarian effects on communities living in disputed territories. In turf wars, attacks occur not in reaction to State law enforcement but rather as a consequence of violent competition over territories and communities among non-State groups. States, the objection concludes, should intervene with military means when necessary to overwhelm non-State armed groups and suffocate their violent conflicts, for this is the only way to protect populations from the effects of turf wars.

While there is no question that third parties must be protected from inter-cartel violence, it remains unclear that the deployment of military forces is an apt means to that end. State military interventions that are not matched by sound prosecutorial strategies and social policies that help prevent recruitment into youth gangs may lead either to further escalation or to only temporary suspension, rather than suffocation, of inter-gang conflict.⁶⁶ This is not to deny that criminal organizations may grow to the point of conquering territory and become serious threats to State authorities and populations – the aggressive expansion of the CJNG in Mexico may be a recent case in point – but given what we know about organized criminal violence, such cases are outliers. Ultimately, regaining State control over territories that are *de facto* ruled by criminal organizations, and effectively protecting populations in such territories, requires the hard and long-term work of State institution- and trust-building, and transnationally coordinated law enforcement action against organized crime. The United Nations Convention against Transnational Organized Crime tried to lay down a basic framework for coordinated State responses to transnational organized crime, but it did not go far, as US pressure for militarized counter-narcotics ultimately prevailed.⁶⁷

65 B. Lessing, above note 30; A. Durán-Martínez, above note 25; G. Trejo and S. Ley, above note 25, pp. 143–179; B. Phillips, above note 17. For a high-profile contribution in a similar vein from a policy perspective, see Global Commission on Drug Policy, *War on Drugs: Report of the Global Commission on Drug Policy*, Geneva, 2011.

66 G. Trejo and S. Ley, above note 62; J. Osorio, above note 29; B. Lessing, above note 29.

67 Sven Peterke and Joachim Wolf, “International Humanitarian Law and Transnational Organised Crime”, in P. Hauck and S. Peterke (eds), above note 56, pp. 400–402.

Presumption against NIAC qualifications of organized criminal violence

To see how the preceding discussion can motivate a presumption against the qualification of organized criminal violence as NIAC, it is important to note, firstly, that the organizational goals of a group are not subjective or dependent on the mental state of group members, but rather are observable and detectable in collective behaviour. Allegations of political motives are only one element in a broader constellation of observable elements, against which they can be contrasted, verified or refuted. These further elements include actual practices of violence, documented relationships with State authorities, the training and indoctrination received by group members, and the strategic priorities revealed in conduct. Secondly, for any given group, determining its organizational goals can take time. While some groups may be easily catalogued as either organized criminal organizations or insurgents, others may fall in a grey area that resists classification – FARC “dissidents” in Colombia and “terrorist remnants” in Peru come to mind in this regard.

There are two sets of reasons that motivate the presumption against a NIAC qualification. The first follows from the empirical literature on organized criminal violence, which generates doubts as to the capacity of criminal organizations to satisfy the IHL conditions of responsible command and capacity to comply with IHL norms. The second set of reasons follows from considerations of sound policy and internal *jus ad bellum*. Drawing on the empirical literature on criminal violence, it has been argued that State military interventions tend to exacerbate violence rather than protect people from harm. Furthermore, unlike in the case of political insurgencies, where military inaction can lead to State capture and violent regime change, military inaction in the case of illicit business may lead to unlawful enrichment, particularly from the traffic of illicit substances, but not necessarily to increasing violence or threats of harm. For this reason, resort to military force appears to be neither necessary nor proportional, as a matter of internal *jus ad bellum*, in the case of violent organized crime. There are no pre-existent threats to the State or populations that would justify resort to military force, and the alternative of the law enforcement paradigm – possibly combined with regulation of some illicit markets – is feasible and far less destructive than military force.

Like any presumption, this one may be defeated. There is no logical impossibility in criminal organizations becoming aggressive, developing and maintaining paramilitary forces under responsible command, and becoming capable of complying with IHL norms (for example, in order to expand and legitimize their territorial control, or in order to signal a change in organizational goals). But the preceding arguments have shown that this situation is unlikely, and that we should take a hard look at each individual case before reaching a NIAC qualification – particularly with regard to the existence of command structures and the capacity to comply with IHL norms. As long as these have not

been well established, we should presume that the applicable paradigm is law enforcement, not hostilities.

An important effect of this presumption is the avoidance of opportunistic invocations of IHL by States. The cases of Peru after the capture of Abigael Guzmán and Colombia after the 2016 peace accords should give legal and security policy experts pause when assessing the legal nature of organized violence. It can be tempting for States to follow the popular but ineffective road of militarized “iron fist” policies, instead of the harder and longer road of dismantling illicit businesses, preventing youth recruitment for outsourced violence, prosecuting money laundering, and so forth. It is important that IHL preserves its humanitarian vocation and does not lend itself to such opportunistic uses; the values of due process of law, presumption of innocence, and life protection should also be protected from this temptation.

It may be replied that a presumption against NIAC qualifications of organized criminal violence would come at the prohibitive cost of undermining humanitarian action. This is a fair rejoinder, for organized criminal violence, like political insurgencies and international wars, can produce forms of threat and harm that require urgent humanitarian protection. But there is also no logical necessity tying imperatives of humanitarian protection to NIAC qualifications; on the contrary, the distinctive dynamics of organized criminal violence require novel approaches to humanitarian protection. The old connection between humanitarian relief and IHL needs to be updated in light of new forms of violence. The ICRC’s concept of “situations of violence below the threshold of armed conflict” has great potential in this regard.⁶⁸ While we should be careful not to give the impression that being “below the threshold of armed conflict” makes a situation of violence less intense, threatening or in need of humanitarian action, organized criminal violence, particularly in Latin America, calls for new international legal understandings and conceptualizations of humanitarian work. Detaching humanitarian imperatives of protection from IHL may be a necessary step.

68 ICRC, “The ICRC’s Role in Situations of Violence below the Threshold of Armed Conflict”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014.