

Negotiating with organized crime groups: Questions of law, policy and imagination

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Abstract

Negotiations with organized crime groups occur more often than realized, and raise complex questions of ethics, practice and policy. Currently, law provides few incentives for States to choose the path of negotiation, and thus the political costs and moral hazards remain very high and a mano dura (“firm hand”) approach prevails. This paper examines some of the challenges faced by those who in good faith might initiate or participate in negotiations with such groups, offering an assessment of how those challenges can be mitigated and an inquiry, in particular, into how law and policy might be improved or reimaged to make such negotiation more feasible and effective in contexts of armed conflict or other situations of violence.

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Introduction

The option of peace negotiation with violent organized crime groups – whether intended to reduce or end widespread violence – is not a theoretical proposition. It is a reality of practice, and it is global.

Those who in good faith initiate or participate in such negotiations can nevertheless expect to face immense obstacles and risks. These include not only matters of personal safety, reputational integrity and psychological stress, but also legal uncertainty and malicious prosecution.

This paper examines key parameters of the challenge from the perspective of an imagined good-faith negotiator or facilitator, offering an overview of the most common risks and obstacles and an inquiry into how law and policy might be improved or reimagined to make the option of negotiation with organized crime groups – including in the context of armed conflicts – more feasible and effective. The article draws directly on prior original work published by the Institute for Integrated Transitions (IFIT),¹ including case studies on Bangladesh (pirates of the Sundarbans), Colombia (Pablo Escobar and the “Extraditables”), Denmark (motorcycle gang truce), Ecuador (gang legalization), El Salvador (*mara* truce), Honduras (*mara* truce), Haiti (bargaining with gangs), Italy (the *trattativa Stato-mafia*), Jamaica (August Town truce), Norway (Oslo police dialogue model), Pakistan (gang boss truce), South Africa (COVID-19 gang truce), Spain (gang legalization), Timor-Leste (martial arts groups negotiations) and Trinidad and Tobago (local and national gang negotiations).²

The paper begins with a discussion of relevant features of organized crime groups that must be considered during a negotiation process, and of the continued public preference for a *mano dura* (“firm hand”) approach in dealing with these groups. Next, it delves into questions of law and policy, underscoring not only a hidden bias in international law which complicates conflict prevention and resolution, but also organized crime’s ambiguous position under international law. The article concludes by considering certain realities of negotiating with organized crime groups and proposes a reimagined legal framework to facilitate potential good-faith efforts at dialogue with them.

1 See, in particular, Mark Freeman and Vanda Felbab-Brown, *Negotiating with Violent Criminal Groups: Lessons and Guidelines from Global Practice*, IFIT, Barcelona, March 2021, available at: <https://ifit-transitions.org/wp-content/uploads/2021/03/001-Negotiating-with-Violent-Criminal-Groups-v4.pdf> (all internet references were accessed in August 2022).

2 *Ibid.*, pp. 7–11.

Organized crime groups

It is often imagined that organized crime groups all fall within a single narrow archetype, according to which their presumed overriding function is committing crimes in pursuit of financial or material benefits. While self-enrichment is a fundamental characteristic of organized crime groups, so too are issues such as identity, dignity and social exclusion. The latter are very relevant to the prospect of any serious negotiation effort with organized crime groups, especially in the context of the brutal violence they often perpetrate and the frequently weak institutional response.

The following section discusses characteristics of organized crime relevant to the prospect of negotiation, the threat that organized crime poses to national peace and security, and the obstacles that routinely prevent or complicate successful negotiations.

Group features of relevance to negotiation possibilities

The assumption that organized crime exists solely for the pursuit of illicit self-enrichment is misguided. While the pursuit of self-enrichment is a central feature of these groups – one that is programmed into their corporate DNA – organized crime groups are, in fact, highly diverse in their origin, nature, size, structure, sophistication, aspirations and identity, as well as in the scope of their territorial and social control. Varying from martial arts gangs in Timor-Leste to the *maras* in El Salvador, and from pirates in Bangladesh to Mexican cartels or Italian mafia, the spectrum of organized crime is eclectic.

In some cases, criminal activity emerges through necessity and the anarchic void left by the State's absence or dysfunction. Yet, it can also arise as part of a quest for personal survival or protection or for the vindication of a forged group identity – such as the Latin Kings in Spain and Ecuador, and the biker gangs in Denmark and Norway. Moreover, research shows that organized crime groups can offer collective protection in communities rife with poverty, exclusion and stigmatization – including after processes of migration or mass deportation. The role played by organized crime groups in offering local communities various forms of security, in turn, produces complex forms of allegiance and social interaction that must inform any serious effort to negotiate reduced violence.

The familial nature, identity and sense of belonging of these types of organized crime groups can both assist and hinder negotiations with them. Families of the biker gangs of Denmark and Norway, the Italian mafia, and MS-13 and M-18 in El Salvador and Honduras all involve a certain amount of enmeshing of families, sometimes quite strong. For example, in the negotiations between the Oslo Police District and biker chapters in the city in Norway,³ and

3 Interview with former advisor of Oslo Police Department directly involved in the design of the dialogue method with the motorcycle gangs, virtual, December 2020 (on file with the authors).

between the government and the *maras* in El Salvador,⁴ wives and children were influential promoters and trustworthy back channels for negotiation efforts at key junctures. In Bangladesh, rough living conditions in the Sundarbans and the separation of pirates from their families was a key incentive for their engagement with the government.⁵

Identity may also manifest through internal codes, symbols and physical appearance styles. Repressive approaches aiming to undermine the association and the sense of self-identity of organized crime groups with these features tend to worsen the problem; this is a pattern present in many of the cases examined in IFIT's research. By contrast, in Ecuador, the government decided to legalize some gangs – namely, the Sacred Tribe Atahualpa of Ecuador (STAE), the *Netas* and the Masters of the Street – allowing them to keep their identity (including distinctive clothes) and social cohesion, as well as associate with each other in public, producing a significant decline in homicides.⁶

Inter-group violence is another matter. This can reach heightened levels in the face of threats to identity or familial honour, prestige grievances and *lex talionis* (the law of retaliation) – described by a mediator in the Gonzalez gang truce in Trinidad and Tobago as “issues of prior misdeeds”.⁷ In 2012, 90% of deaths in El Salvador were reportedly attributed to inter-gang confrontation;⁸ between 1994 and 1997, a war between motorcycle gangs in Denmark, Finland, Norway and Sweden resulted in the killing and wounding of many, using heavy military weapons such as explosives;⁹ in Belize, inter-gang violence made it one of the most violent countries in terms of homicide rates in 2012;¹⁰ and in Jamaica, war between rival gangs over territorial control involved entire populations being barricaded.¹¹ Such realities are challenging for any effort to negotiate peace or violence reduction, since the reality is that most organized crime groups operate within a larger criminal market.

When organized crime groups proliferate in weak and easily co-opted States where corruption is deep-seated and ubiquitous, they can often achieve surprising levels of social and territorial control, filling governance gaps and achieving competitive advantages *vis-à-vis* the State. In Bangladesh, for example, pirates have imposed taxes on local communities and rules on fishing and

4 Interview with diplomat directly involved in Salvadoran negotiations, virtual, September 2019 (on file with the authors).

5 Interview with former pirate, virtual, October 2020 (on file with the authors).

6 Interview with former gang leader of the Latin Kings involved in the negotiations with the government, virtual, September 2020 (on file with the authors).

7 Interview with researcher involved in the negotiations among the gangs in Gonzalez, virtual, October 2020 (on file with the authors).

8 Interview with ex-El Salvador official involved in the negotiations with the *maras*, virtual, October 2019 (on file with the authors).

9 RCMP Gazette, “Blood Spilled”, in Arthur Veno (ed.), *The Mammoth Book of Bikers*, The Running Press, Philadelphia, PA, 2007, position 7628 (Kindle edition).

10 Geneva Centre for Security Sector Governance, “Belize Country Profile”, Geneva, 2 February 2015, available at: <https://issat.dcaf.ch/Learn/Resource-Library2/Country-Profiles/Belize-Country-Profile>.

11 Amnesty International, “Jamaica: Poor Communities Held Hostage to Gang Violence and Government Neglect”, 25 March 2008, available at: www.amnesty.org/en/latest/news/2008/03/jamaica-poor-communities-held-hostage-gang-violence-and-government-negle/.

trade;¹² in Jamaica, gangs have filled vacuums left by the State and controlled important aspects of the life of inner-city communities, like August Town, involving the collection of “extortion taxes”, allocation of jobs, distribution of food and the punishment of those who transgressed gang rules.¹³ In contexts such as Haiti and Cape Town, South Africa, local and international non-governmental organizations are often obliged to negotiate their entry into certain neighbourhoods to deliver humanitarian aid.

Unlike conventional militant armed groups, organized crime groups do not have grand political aims. They do not seek to advance major social or political transformations based on high-minded ideals. Rather, the political component of organized crime groups’ activity typically amounts to manufacturing the right environment for their illicit activity – for example, by co-opting and colluding with institutional and political sectors to gain territorial control or dividends (as in the case of Latin American *maras* in Honduras and El Salvador) or by trying to shift governmental decisions and public debates in their favour (as in the case of powerful mafia and cartels).

This connection with politics is ripe for exploitation by politicians themselves, who may seek to gain the political dividends of clamping down hard on crime. The result is a vicious cycle that chips away at the perceived legitimacy of any prospect of negotiation – or even interaction – between the two worlds. Efforts are either scorned as vile pacts between self-serving politicians and criminals for mutual gain or offered as evidence that the State has been co-opted by an illicit force.

The seriousness of the threat

Whether organized crime manifests itself as sporadic and opportunistic expressions of violence, or as an entrenched and sophisticated enterprise, the phenomenon poses a substantial threat to peace and security, often in ways that transcend national borders.

Locally, the violence perpetrated by organized crime groups can rip through the fabric of society, destroying national stability and social cohesion in its wake. In the 1990s, the Cosa Nostra targeted State officials and civilians in Italy through bombings and political campaign killings, terrorizing the whole country.¹⁴ Meanwhile, in Colombia the brutal and debilitating violence of Pablo Escobar and his “Extraditables” inflicted similar agony. However, smaller and more local groups can also be devastating for communities. In Jamaica, communities have lived in fear of the actions of comparatively small gangs;¹⁵

12 Interview with local journalist involved in negotiations between the pirates in the Sundarbans and the Government of Bangladesh, virtual, September 2020 (on file with the authors).

13 Interview with former police official involved in the negotiations among gangs and government authorities in August Town, virtual, September 2020 (on file with the authors).

14 Organized Crime and Corruption Reporting Project, “Italian Trial Looks at Mafia–State Pact”, 14 May 2013, available at: www.occrp.org/en/investigations/1955-italian-trial-looks-at-mafia-state-pact.

15 Amnesty International, above note 11.

piracy in the Suburban region of Bangladesh had a devastating impact on local communities where kidnappings once were a weekly occurrence;¹⁶ and in Pakistan, assassinations, shootouts and grenade attacks between rival gangs in Lyari led to thousands of civilian deaths at its peak.

External shocks, such as COVID-19 lockdowns, can make things worse. Ecuador, located on a strategically important drug trafficking route, saw killings nearly double and experienced the deadliest prison gang riots in its history with the onset of the pandemic.¹⁷ Meanwhile, in Colombia, record levels of cocaine production arose, even on reduced acreage, as crime groups developed larger production sites and better extraction techniques.¹⁸ In Mexico, regional and local elections saw organized crime make increased forays into public spaces,¹⁹ and in places like South Africa, Afghanistan and Syria organized crime tightened its grip over certain territories by providing emergency aid to vulnerable communities and taking control of struggling licit businesses.²⁰

The situation tends to be even more dire when organized crime interlinks with formal armed conflicts.²¹ Wars provide a golden opportunity to entrench economic, political and social influence through corruption, rent-seeking, predation and criminal governance – ultimately blurring the nature of the conflict itself. On top of this, criminal agendas have a well-known habit of wrecking peace processes, especially at the implementation stage when defections by militants foreseeably arise and security vacuums – at least initially – grow rather than shrink. During efforts to negotiate a truce among the local *maras* in Honduras in 2013, transnational drug cartels reportedly attempted to prevent a truce because they feared it would be bad for their illegal business operations.²²

- 16 Kate Lamb and Ali Ahsan, “The Bangladeshi Crab Farmers Battling Climate Crisis – and Pirates”, *The Guardian*, 18 October 2019, available at: www.theguardian.com/environment/2019/oct/18/the-sundarbans-crab-farmers-battling-climate-crisis-and-pirates-bangladesh.
- 17 El Universo, “Hasta el 30 de diciembre van 2.464 asesinatos en Ecuador; en 2020 fueron 1.362 casos”, 30 December 2021, available at: www.eluniverso.com/noticias/seguridad/hasta-el-30-de-diciembre-van-2464-asesinatos-en-ecuador-en-2020-fueron-1362-casos-nota/; and BBC, “Ecuador Prison Riot: New Fighting at Guayaquil Jail Kills 68”, 14 November 2021, available at: www.bbc.com/news/world-latin-america-59276428.
- 18 Juan Diego Posada and Seth Robbins, “Colombia’s Cocaine Keeps on Reaching New Heights: UNODC Report”, *InSight Crime*, 30 July 2021, available at: <https://insightcrime.org/noticias/colombia-cocaine-keeps-reaching-new-heights-unodc/>.
- 19 Eduardo Moncada and Gabriel Franco, “COVID-19 and Organized Crime: The Politics of Illicit Markets, States, and the Pandemic”, *Georgetown Journal of International Affairs*, 19 May 2021, available at: <https://gija.georgetown.edu/2021/05/19/covid-19-and-organized-crime-the-politics-of-illicit-markets-states-and-the-pandemic/>.
- 20 United Nations Office on Drugs and Crime (UNODC), *The Impact of COVID-19 on Organized Crime*, July 2020, available at: www.unodc.org/documents/data-and-analysis/covid/RB_COVID_organized_crime_july13_web.pdf.
- 21 The 2004 report of the High-Level Panel on Threats, Challenges and Change highlighted the role of organized crime in fuelling violence and financing terrorists and militias. See the Report of the High-Level Panel on Threats, Challenges and Change on a More Secure World: Our Shared Responsibility, UN Doc. A/59/565, 2 December 2004, available at: www.un.org/ruleoflaw/files/gaA.59.565_En.pdf.
- 22 Interview with diplomat directly involved in Honduran negotiations, virtual, September 2019 (on file with the authors).

Organized crime is also sometimes linked with processes of mass deportation and migration, as in the youth gangs from Ecuador and Spain, or the *maras* in El Salvador, Honduras and the United States.²³ More generally, globalization has had the perverse effect of enabling drug trafficking, human smuggling and illegal arms trading to thrive in ever more sophisticated and cooperative global markets. It is estimated that nearly 70% of illicit profits find their way into the global financial system.²⁴

The public preference for *mano dura*

Given the inherently illegal nature of organized crime groups, the public appetite and political bandwidth for constructively engaging or negotiating with them is understandably limited. This is not only because these groups sometimes perpetrate bewildering acts of violence, but also because people suspect that any laxness or compromise will only encourage further crime.

When the State apparatus is weak and steeped in distrust, public aversion to constructive engagement with criminal groups often increases. As described in the prior section, organized crime groups regularly manipulate political situations to their own advantage.

Under these circumstances, State-led negotiations are immediately assumed to reflect collusion, connivance or partisan pursuits that undermine rather than advance security and good governance. This is especially the case when public institutions, including law enforcement, are demonstrably infiltrated by members of the very same criminal groups with which the government is negotiating.

As a result, negotiations are usually seen as dirty deals, and negotiators accused of conspiracy or criminal association. Members of the Special Operative Forces of the Carabinieri who purportedly negotiated with the Cosa Nostra in a bid to quell mafia violence in Italy have been sentenced for charges of criminal corruption.²⁵ Similarly, in El Salvador, despite Organization of American States and Catholic Church participation, negotiators remain under investigation for conspiracy to commit crimes.

An additional and more subtle challenge is in the realm of the imagination. Officials and members of the public find it difficult to conceive of organized crime groups as reliable interlocutors in a negotiation, and are unclear how any talks could

23 Interview with scholar and lead mediator between the gangs and the Ayuntamiento, virtual, August 2021 (on file with the authors); Interview with scholar directly involved in the gang's legalization process, virtual, September 2020 (on file with the authors); Laila Abu Shihab, Melissa Velásquez Loaiza, Luis Alejandro Amaya and Juan Marra, "Guerra de Trump a las maras en EE.UU. pone en jaque a Centroamérica [Trump's War on US Gangs Puts Central America in Check (IFIT translation)]", *CNN en español*, 28 April 2017, available at: <https://cnnespanol.cnn.com/2017/04/28/guerra-de-trump-a-las-maras-en-ee-uu-pone-en-jaque-a-centroamerica/>.

24 UNODC, *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes*, October 2011, p. 5, available at: www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf.

25 M. Freeman and V. Felbab-Brown, above note 1, p. 9.

create a pathway for them to transform institutionally and legalize operationally into a new form that society can peacefully coexist with.

States have therefore tended to adopt heavily repressive (or *mano dura*) policies, understanding this as a political imperative as well as a practical necessity. In perhaps the best-known example, iron-fist policies – involving the arrest of tens of thousands throughout the Northern Triangle of Central America – have turned prisons into universities for crime, hardened gang members and resulted in appalling conditions in prisons that are effectively controlled by gangs. Likewise, in cities in the United States struggling with organized crime – such as Los Angeles or Chicago – overly repressive approaches often had the effect of enhancing the identity of the gangs.²⁶

International law's relation to negotiating with organized crime groups

In asking how those who in good faith might initiate or participate in negotiations with organized crime groups might do so effectively, one must consider not only the harsh practical challenges and risks associated with such a bold undertaking but also the limitations of current international law.

This section examines the absence of a body of international law governing and guiding peace negotiations. It then assesses international law's overall approach to organized crime, including specific analysis regarding international humanitarian law (IHL).

A hidden bias in international law

When it comes to conflict prevention and resolution, a critical gap in international law is holding back progress. While there is international law to regulate armed conflicts and war, no clear counterpart exists to encourage, support and sustain peace negotiations.

While peace and security are at the heart of the United Nations (UN) Charter, and conflict prevention and resolution are listed as central ideals for all States and peoples, the provisions encouraging the peaceful settlement of disputes are microscopic. They are limited to conflicts that are likely to endanger the maintenance of international peace and security and short on the kind of details that could make recourse to dialogue a more attractive option for governments.²⁷

As things stand, out of the 560-plus multilateral treaties in force today – which cover everything from human rights to disarmament, trade, climate change, and much more – none sets out targeted incentives and benefits to

26 Interview with ex-government official of Los Angeles and a key actor during the Watts Truce, virtual, October 2019 (on file with the authors).

27 Charter of the United Nations of 26 June 1945 (entered into force 24 October 1945), 1 UNTS XVI, Chapter VI: Pacific Settlement of Disputes.

promote the use of negotiation to prevent and resolve non-international armed conflicts or other violent crises.

At first blush, one might think that this gap is deliberate, reflecting a reticence to codify or standardize the format of negotiations to protect much-needed flexibility during peace talks. However, there is no evidence of such intent; only evidence of the omission. The consequence is that confrontation – the less politically risky option for governments in the face of publicly vilified enemies – becomes the default choice.

IHL is a limited exception to this fact because it is the only area of international law that openly recognizes the inherent need of legal concessions and flexibility to end wars. Article 6(5) of Additional Protocol II to the Geneva Conventions (AP II) provides: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”²⁸

Although the International Committee of the Red Cross (ICRC) has sought to narrow the interpretation of this rule in the age of the International Criminal Court, claiming that the provision was never meant to encompass war crimes, the historical record shows otherwise.²⁹ Moreover, the continued use of amnesty by States, together with their categorical reluctance to codify any international prohibition of amnesties, undermines any serious claim that an anti-amnesty norm has become settled law.³⁰

But if Article 6(5) is a useful norm for peace-making, it is not nearly enough on its own to incentivize recourse to dialogue by conflict parties. Peace negotiations are notoriously hard to mount, involving large political risks and controversies for governments and a myriad of complex policy and design questions. To meet the challenge, only an upgraded international law could help de-risk the up-front political costs and complications for any government that announces it will be sitting down with an enemy that the population has come to fear or repudiate after years of violence.

However, negotiations are not only hard to start; they are also hard to sustain. They involve constant ups and downs, interruptions and crises, often over a period lasting many years. It is therefore important for any negotiation-incentivizing international law to give as much stability, support, and political and legal embedding as possible so that at every juncture, the process has a higher chance of advancing to the next stage. Currently, international law does no such thing.

28 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 6(5).

29 Mark Freeman and Louise Mallinder, “Negotiating Amnesties, Peace and Justice: A New Path”, IFIT, 28 February 2022, available at: <https://ifit-transitions.org/commentaries/negotiating-amnesties-peace-and-justice-a-new-path/>.

30 *Ibid.*

Finally, if ultimately a peace agreement is reached – a rare but often transcendental moment – the agreement’s legality and legitimacy under international law cannot be left vague and uncertain. A UN Security Council (UNSC) resolution, though difficult to obtain, may be helpful in this regard.³¹ However, the larger point is that the current lack of a streamlined certification process creates legal uncertainty and disincentivizes the recourse to peaceful conflict resolution mechanisms.³²

The good news is that all of this is fixable and already the object of a global initiative to incentivize conflict prevention and resolution through a purpose-built treaty.³³ Where existing law is unclear, the new international law treaty aims to provide greater clarity (for example, around recurrent questions such as the use of conditional amnesties). Where existing law lacks an institutional framework to ensure structured progress efforts to negotiate the prevention or resolution of non-international armed conflicts, the new treaty seeks to provide one (for example, by creating technical support mechanisms and State obligations of preparedness, education and training). Also, where existing law is absent, the new treaty aims to create modern definitions, norms and procedures that match the changed realities of conflict and the needs of peace-making in the twenty-first century.

International law and organized crime

According to research by the Global Initiative Against Transnational Organized Crime, out of the 1113 UNSC resolutions passed between 2000 and 2017, 387 of them (34.8%) either referenced or discussed organized crime in relation to armed conflict settings.³⁴ By 2021, this climbed to 49% of all resolutions. Yet, this reality is only weakly reflected in international law.

Of the multitude of global and regional legal norms *vis-à-vis* the phenomenon of organized crime, the most significant is the UN Convention Against Transnational Organized Crime (UNOTC).³⁵ States that ratify the UNOTC commit to several measures to fight transnational organized crime,

31 Article 39, in accordance with Article 25 of the UN Charter, confers upon the UNSC the power to make recommendations and adopt binding measures to particular situations or disputes for the maintenance of international peace and security. See, for example, UNSC Resolution 2307, 13 September 2016, through which the UNSC endorsed the Colombian peace agreement. Although this resolution was not binding for all UN Member States, the endorsement lent legitimacy to the Colombian peace process at the international level.

32 By way of example, the transitional justice system included in the 2016 peace agreement between the government of Colombia and the FARC (Fuerzas Armadas Revolucionarias de Colombia; “Revolutionary Armed Forces of Colombia”) is being reviewed by the Inter-American Court of Human Rights. Any decision affecting the substance of the agreement might have difficult implications for the peace agreement in the country.

33 See IFIT, The Peace Treaty Initiative, available at: <https://ifit-transitions.org/peace-treaty-initiative/>.

34 Global Initiative Against Transnational Organized Crime, “From Resolutions to Responses: Organized Crime and the UN Security Council”, 18 June 2019, available at: <https://globalinitiative.net/analysis/toc-unscl/>.

35 United Nations Convention Against Transnational Organized Crime of 15 November 2000, UN General Assembly (UNGA) Resolution 55/25 (entered into force 29 September 2003).

including the criminalization of participation, money laundering, corruption and obstruction of justice by such groups; the adoption of new frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance and cooperation.³⁶ The additional protocols to the UNOTC cover obligations such as the prevention and combat of trafficking in persons;³⁷ and the prevention, combat and eradication of the illicit manufacturing and trafficking of firearms, their parts and components and ammunition.³⁸

Yet, from the vantage point of violence prevention, the UNOTC and its protocols appear one-dimensional. They provide States with a single, often counterproductive option: confrontation and punishment. This leaves very little room for policymakers to think creatively, making the already bedevilling challenge of overcoming organized crime even worse.

By contrast, IHL is more nuanced (as already noted above). According to Article 1(1) of AP II, IHL applies in all situations of armed conflict where a group must demonstrate structural similarities to that of conventional armed forces. In particular, there must be a reasonable degree of coordination, operational coherence and ability “to carry out sustained and concerted military operations”.³⁹

Importantly, through jurisprudence there are more flexible definitions of what armed conflict is. The broadest is found in *Prosecutor v. Tadić*, which states that armed conflicts occur “whenever 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”.⁴⁰ Later decisions (i.e. *Prosecutor v. Haradinaj et al.* and *Prosecutor v. Limaj et al.*)⁴¹ outlined a more detailed definition of armed conflict. Together, these developed a set of factors related to the intensity of violence and the organizational complexity of the armed groups required to establish the existence of an armed conflict.

The implication of all this is that organized crime groups fall under the scope of IHL when they produce violence that reaches a level of intensity and organizational complexity that creates a situation of armed conflict. While any such match is likely to be the exception rather than the rule, the laws of war – like all other bodies of law – must be dynamic and adaptable to new realities.

36 *Ibid.*, Arts 5, 6, 8, 14, 16, 18, 23, 27 and 29.

37 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 15 November 2000, Supplementing the United Nations Convention Against Transnational Organized Crime, UNGA Resolution 55/25 (entered into force 25 December 2003).

38 Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition of 31 May 2001, UNGA Resolution 55/255 (entered into force 3 July 2005).

39 AP II, above note 28, Art. 1(1).

40 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić a/k/a “DULE”*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

41 ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84; ICTY, *The Prosecutor v. Fatmir Limaj, Isak Musliu and Haradin Bala*, Case No. IT-03-66.

It is also noteworthy that the ICRC has been widening its field of action to account for atypical situations of violence which would otherwise fall below the threshold of armed conflict (including those generated by organized crime and terrorism). These “other situations of violence” are characterized by acts of a “definite degree of violence”, “perpetrated collectively” and involving “significant humanitarian consequences”.⁴² The ICRC justifies this departure from the traditional scope of situations governed by IHL on the basis of Article 5(3) of the Statutes of the International Red Cross and Red Crescent Movement. It is now considered a component of customary IHL.⁴³

The realities of negotiating with organized crime groups

We have already described some of the features of organized crime groups, as well as some facts of international law and policy related to the prospect of negotiating with them. We now consider some key lessons from actual negotiations with such groups, whether they were arranged or mediated by the church, community leaders, academics, State agencies, the international community or even organized crime leaders themselves.

First, the brutal violence frequently deployed by organized crime groups, as well as the fact that public institutions in fragile States are so often infiltrated and corrupted by them, means that any attempt to negotiate comes with great moral hazard. Because of this, talks with organized crime groups are often held in secret, which allows them – to some extent – to bypass spoilers and enable a more protected space for confidence-building between the parties. At the same time, secrecy is operationally complex, tends to exclude important actors from direct participation, and produces outcomes that are more likely to be questioned if they ever become public.

A second point about negotiating violence-reduction pacts with organized crime groups is that those who, in good faith – and at great personal and/or institutional risk – initiate or participate in such talks deserve to have the best chance possible in their efforts. The question of ensuring the legal and physical safety of government or third-party representatives who mediate is therefore central. The defence attorney who successfully negotiated the truce between motorcycle gangs in Denmark in the 1990s sought to protect himself by requiring up-front government buy-in for his efforts and arranging for a televised national

42 ICRC, “The International Committee of the Red Cross’s (ICRC’s) Role in Situations of Violence Below the Threshold of Armed Conflict”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014, available at: <https://international-review.icrc.org/sites/default/files/irrc-893-policy.pdf>.

43 François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan, Oxford, 2003, p. 355, in Miriam Bradley, “From Armed Conflict to Urban Violence: Transformations in the International Committee of the Red Cross, International Humanitarianism, and the Laws of War”, *European Journal of International Relations*, Vol. 26, No. 4, 2020, p. 1066, available at: <https://journals.sagepub.com/doi/10.1177/1354066120908637>.

broadcast once an agreement was eventually reached – actions that helped but nevertheless proved insufficient to protect him. The experience is commonplace.

A third issue concerns the scope and sustainability of any negotiation effort. Since a key premise embedded in the archetype of organized crime is the absence of political aims, comprehensive agreements are seldom pursued. Rather, limited-scope agreements are the norm. However, as poverty and exclusion are often drivers of organized crime, and governance is often weak in fragile States, even limited-scope agreements are hard to enforce. Likewise, the implementation of any agreed social measures can prove infeasible, leading to the collapse of the deal and an uptick in violence: a tough but foreseeable risk.

Fourth, as previously noted, organized crime groups exist within a criminal market in which they typically carry out as much violence against competitor groups as they do against State actors or society. As such, engaging all the relevant parties and finding valid interlocutors are not easy tasks. In Gonzalez, a neighbourhood in Trinidad and Tobago, a short-lived truce reached between three out of the seven local gangs was interrupted after the killing of two gang members by non-participating gangs. Inter-gang warfare promptly resumed.⁴⁴

Naturally, adequate conditions for negotiation depend on the existence of a credible threat, without which there is neither the capacity to deter violence nor bargaining power in any negotiation. Yet, sticks (deterrents) are insufficient on their own; carrots (incentives) are also needed. Those incentives must be tailored to the target group's origins, identity, codes, structure, goals and strategies – just as needs to be done when negotiating with conventional guerrillas. These variables, in turn, are closely related to what the groups might expect to attain in the negotiation itself, which might include recognition of their identity; legalization of their right to association; safe passage through rival turf; temporary ceasefire; social inclusion measures; better prison conditions; or legal leniency measures, such as amnesty or a halt to extradition.⁴⁵

Reimagining law and policy to enable good-faith negotiations

International law can and should serve as a powerful tool for de-risking the predictable political costs and complications of negotiations. It should be gearing conflict actors toward dialogue opportunities; providing effective guidance on vital substantive and procedural questions; encouraging governments to bolster their technical readiness for negotiation and mediation; protecting participants in the talks; and stabilizing and legitimating agreements reached.

We are already in an era of new and growing kinds of armed conflict: climate wars, cyber-wars, gang wars, and more. New armed groups keep springing up and morphing in ways that endanger civilians in every region of the

44 M. Freeman and V. Felbab-Brown, above note 1, p. 11.

45 *Ibid.*, p. 18.

world. The fighting no longer occurs on a clearly marked battlefield with a clear separation between combatants and civilians.

As such, we need to be better prepared to face the new realities of armed conflict and violence with the most proven tool that history has provided: the tool of negotiation. It deserves all the protection and incentives that international law can offer. In that regard, the Geneva Conventions and their Additional Protocols, as well as the UN Charter, are best understood as foundations to build upon, not another turf to protect. A new international law of peace negotiation, flexible in its understanding of the complex forms that organized violence can take, can offer just that.