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# TOWARDS A NEW FRAMEWORK IN THE LAW OF WAR: INCORPORATING TRANSNATIONAL ORGANISED CRIME

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*This article will focus on why transnational organised criminal groups need to be incorporated into the law of war paradigm. States work under the continued assumption that wars are fought only between two parties. This 'us versus them' mentality obscures multiple parties that truly participate in war. This article will suggest that transnational organised crime groups participate in war thereby creating a third party on the battlefield because of their contributions before, during and after conflict. This article will explore how transnational organised criminal groups have positioned themselves to be allies to terrorists during conflict and how they benefit from regime changes in order to gain control at a later stage. This article will conclude with a discussion on how transnational organised crime groups could be classified as combatants in international humanitarian law, so that efforts to counteract their impact can be handled under more than one framework.*

## I INTRODUCTION

Terrorism and organised crime are considered two distinct categories within criminal law. Terrorism is addressed both in international criminal law and in international humanitarian law ('IHL') because most terrorist attacks are considered 'armed attacks'.<sup>1</sup> This is different from organised crime which is analysed through domestic criminal law or transnational criminal law.<sup>2</sup> The changing portrait of organised crime in the 21<sup>st</sup> century has led to a growing amount of scholarship which has started to explore whether terrorism and organised crime networks have potential links. While Hübschle argues that there is a lack of empirical evidence to determine whether this relationship exists and how this alliance would function,<sup>3</sup> there is a growing concern that these groups are in fact working together and are even adopting each

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<sup>1</sup> Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An Introduction to International Law and Criminal Procedure* (Cambridge University Press, 2<sup>nd</sup> ed, 2007) 337.

<sup>2</sup> Tom Obokata, *Transnational Organised Crime in International Law* (Hart, 2010) 31.

<sup>3</sup> Annette Hübschle, 'From Theory to Practice: Exploring the Organized Crime-Terror Nexus in Sub-Saharan Africa' (2011) 5(3-4) *Perspectives on Terrorism* 81.

other's motives to achieve multiple aims.<sup>4</sup> With this in mind, it is clear that IHL would invoke potential military responses towards terrorists, the same should hold true for organised criminal groups who willingly participate in war.

This article critiques the rigid framework that is applied to handling organised crime. This article examines situations where organised criminal networks contribute to war. Since nation-states have been willing to apply IHL to terrorists and classify them as unlawful or enemy combatants, can the same analysis hold true for organised criminal groups? This article will explore these questions by first examining the rise of global crime then detailing situations in which terrorists and organised criminals have and are working together. Finally, this article will discuss why it is necessary to consider the true role of organised crime within IHL by moving beyond the traditional criminal law framework.

## II GLOBALISATION OF CRIME

The global crime agenda emerged 'more than 50 years ago within United Nations rhetoric as a social issue.'<sup>5</sup> Since garnering the attention of the global community, various bilateral treaties have been formed to address global criminal activity, which culminated in the two largest multilateral treaties to address crime: the *United Nations Convention against Corruption* ('UNCAC') and the *United Nations Convention against Transnational Organized Crime* ('UNTOC').<sup>6</sup> While organised crime is not a new phenomenon,<sup>7</sup> the reaction by the international community towards organised crime is not unfounded. The projected trend between now and the year 2025 is that the power of non-state actors,<sup>8</sup>

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<sup>4</sup> US Department of Defence, 'Link Grows Between Terrorism, Organized Crime, Officials Say' (American Forces Press Service, 28 March 2012) <<http://www.defense.gov/News/NewsArticle.aspx?ID=67721>>.

<sup>5</sup> Paul Knepper, *The Invention of International Crime: A Global Issue in the Making 1881-1941* (Palgrave Macmillan, 2009) 1.

<sup>6</sup> *United Nations Convention against Corruption*, opened for signature 3 October 2003, 2349 UNTS 41 (entered into force 14 December 2005); *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

<sup>7</sup> Carrie Lyn Donigon Guymon, 'International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention' (2000) 18 *Berkeley Journal of International Law* 53.

<sup>8</sup> This article incorporates organised crime groups into the category of 'non-state actors' which are generally considered distinctive organizations that are: (1) willing and capable of using violence to pursue objectives, (2) not integrated into formalised institutions (police, armies, etc.), and (3) possess a certain degree of autonomy with regard to politics, military operations, resources and infrastructure: Claudia Hoffman and Ulrich Schneckener, 'Engaging Non State Armed Actors in State and Peace Building: Options

such as businesses and criminal networks, will increase with 'relative certainty'.<sup>9</sup>

The rise of criminal networks can be attributed to the presence of unstable states and resource scarcity, although organised crime does have a presence in stable states.<sup>10</sup> Instability, however, allows organised crime to 'flourish' as they do not have 'solid legal, administrative frameworks to regulate licit and illicit markets.'<sup>11</sup> Further, corruption 'fosters the ideal environment' for organised crime.<sup>12</sup> Corruption tends to allow organised criminals to dictate governance measures and if 'left unchecked organised crime, even at a small scale, can produce long-term negative impacts, particularly in development settings where institutions remain weak and democratic processes are still consolidating.'<sup>13</sup> The ability of organised criminals to exploit weak governance is not necessarily targeted at national governments. In Italy, for example, the state of Calabria is said to be run by 'Ndrangheta, a powerful transnational mafia group, which uses Calabria as its home base to make important decisions regarding its illicit markets.'<sup>14</sup>

The illicit market created by organised crime should not be underestimated. It is projected that there are at least 52 different criminal activities that fall within the illicit market, which range from counterfeit medicine to counterfeit batteries.<sup>15</sup> Globalisation has thus

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and Strategies' (2011) 93(883) *International Review of the Red Cross* 604. 'Transnational organised crime' is not defined under the international conventions. This portion of the debate is examined further in another article, see Regina Menachery Paulose, 'Beyond the Core: Incorporating Transnational Crimes into the Rome Statue' (2012) 21(1) *Cardozo Journal of International and Comparative Law* 77.

<sup>9</sup> Jay Albanese, *Transnational Crime and the 21<sup>st</sup> Century, Criminal Enterprise, Corruption, and Opportunity* (Oxford University Press, 2011) 2.

<sup>10</sup> Ibid.

<sup>11</sup> Obokata, above n 2, 23.

<sup>12</sup> Council on Foreign Relations, *The Global Regime for Transnational Crime* (25 June 2013) <<http://www.cfr.org/transnational-crime/global-regime-transnational-crime/p28656#p1>>.

<sup>13</sup> Camino Kavanagh, 'Getting Smart and Scaling Up Responding to the Impact of Organized Crime in Developing Countries' (June 2013) New York University: Center on International Cooperation, 7 <[http://cic.nyu.edu/sites/default/files/kavanagh\\_crime\\_developing\\_countries\\_report.pdf](http://cic.nyu.edu/sites/default/files/kavanagh_crime_developing_countries_report.pdf)>.

<sup>14</sup> Andreas Ulrich, 'Encounters with the Calabrian Mafia: Inside the World of 'Ndrangheta', *Spiegel International* (online) 4 January 2012 <<http://www.spiegel.de/international/europe/encounters-with-the-calabrian-mafia-inside-the-world-of-the-ndrangheta-a-806233-2.html>>.

<sup>15</sup> Council on Foreign Relations, above n 12.

created a 'growing interconnectedness'<sup>16</sup> in which advanced communication, transportation, and technology allow these networks to expand their influence internationally.<sup>17</sup> This has turned organised criminal groups into *transnational* organised criminals.<sup>18</sup> This ability to become transnational is attributed to the low level barriers that allow for criminal groups to easily travel, use the free market system to sell and produce illicit goods, in addition to the ease of internet banking.<sup>19</sup>

The success of these criminal groups makes them 'fluid', which allows them to create new alliances, engaging in a wider range of illicit activities, including supporting terrorism.<sup>20</sup> Sadly, 'organised criminals don't want to just make money, they want to control something.'<sup>21</sup> The United Nations Office on Drugs and Crime ('UNODC') notes that organised crime poses a threat where the rule of law is already weakened, such as in Syria and Mali, which will be explored later in this article.<sup>22</sup>

Criminal networks are a reality and have taken advantage of globalisation to be successful. Organised crime now 'has an impact on international peace and security.'<sup>23</sup> As will be discussed, it is time to incorporate organised crime into additional frameworks beyond criminal law, specifically IHL, in order to expand our ability to handle organised crime in a flexible manner. Organised crime has taken root within the battlefield in order to benefit from the instability created by war - a place where weak governance and an illicit market create an intersection for illicit success.

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<sup>16</sup> Francis Pakes, 'Globalisation and Criminology: An Agenda for Engagement' in Francis Pakes (ed), *Globalisation and the Challenge to Criminology* (Routledge, 2013) 1, citing D Held, *Democracy and the Global Order* (Stanford University Press, 1995).

<sup>17</sup> Obokata above n 2, 4-5.

<sup>18</sup> Ibid 28-29.

<sup>19</sup> Albanese, above n 9, 1-2.

<sup>20</sup> President Barack Obama, *Strategy to Combat Transnational Organized Crime* (19 July 2011) White House

<[http://www.whitehouse.gov/sites/default/files/Strategy\\_to\\_Combat\\_Transnational\\_Organized\\_Crime\\_July\\_2011.pdf](http://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf)>.

<sup>21</sup> D K 'How has organised crime adapted to globalization?' on The Economist Explains, *The Economist* (online) (15 April 2013) <<http://www.economist.com/blogs/economist-explains/2013/08/economist-explains-9>>.

<sup>22</sup> United Nations Office on Drugs and Crime, *The Globalization of Crime* (United Nations Publications, 2010) 221.

<sup>23</sup> Walter Kemp, Mark Shaw and Arthur Boutellis, *The Elephant in the Room: How can Peace Operations Deal with Organized Crime?* (3 June 2013) International Peace Institute, 4 <[http://www.ipinst.org/images/pdfs/ipi\\_e\\_pub\\_elephant\\_in\\_the\\_room.pdf](http://www.ipinst.org/images/pdfs/ipi_e_pub_elephant_in_the_room.pdf)>.

## III. ORGANISED CRIME TAKES ROOT

Criminal organisations have a tendency to garner success in conditions of war and unrest.<sup>24</sup> When this kind of environment presents itself, various mutations of relationships form between organised criminals and terrorists, making 'peace elusive'<sup>25</sup> and thereby creating the 'crime-terror nexus.'<sup>26</sup> In some circumstances, organised criminals may simply aide terrorist groups with materials and supplies that they need, as will be evident in the example of Mali below. In other circumstances, the criminal or terrorist group may mutate into a 'hybrid organization' that is 'part criminal, part terrorist.'<sup>27</sup> The Tamil Tigers (also known as the Liberation Tigers of Tamil Elam, 'LTTE') is an example of such a hybrid organisation. They are considered one of the most 'effective' and 'brutal' terrorist organisations in the world.<sup>28</sup> Aside from the separatist political agenda that it carries out, the LTTE is also known to procure its finances through human, drug, and arms trafficking.<sup>29</sup> Interestingly, the reason for LTTE's foray into organised crime was the need for a steady stream of finances.<sup>30</sup> In 2009, the death of the LTTE's

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<sup>24</sup> Robert Kelly, Jess Maghan and Joseph Serio, *Illicit Trafficking: A Reference Handbook* (ABC-CLIO, 2005) 14.

<sup>25</sup> *Ibid.*

<sup>26</sup> Wibke Hansen, *The Crime - Terrorism Nexus* (13 September 2012) International Relations and Security Network <<http://www.isn.ethz.ch/Digital-Library/Articles/Special-Feature/Detail/?lng=en&id=152622&contextid774=152622&contextid775=152620&tabid=1453318054>>. Hansen argues that there are three categories that are formed as a result of the crime terror nexus which are co-existence, cooperation, and confluence. Under co-existence, Hansen argues that terrorists and organised criminals do not work together but operate within the same arena. Within the category of cooperation, Hansen argues that terrorism and organised crime fulfill roles of a customer - provider and the relationship between the two is on an ad hoc basis and temporary because their motives are different. Under confluence, Hansen articulates the notion of the same entity completing the tasks of terrorism and organised crime.

<sup>27</sup> Kelly, Maghan and Serio, above n 24, 14.

<sup>28</sup> Kate Pickert, 'The Tamil Tigers' *TIME* (online), 4 January 2009, <<http://www.time.com/time/world/article/0,8599,1869501,00.html>>.

<sup>29</sup> Angel Rabasa, Peter Chalk, Kim Cragin, Sara A Daly, Heather S Gregg, Theodore W Karasik, Kevin A O'Brien and William Rosenau, *Beyond al-Qaeda: Part 2, The Outer Rings of the Terrorist Universe*. (RAND Corporation, 2006) 101-107.

<sup>30</sup> The authors discuss the fact that India, who had once supported the LTTE, withdrew support out of fear of secessionist practices by its own Tamil Nadu state. When India withdrew support the LTTE lost a huge financial base. *Ibid* 108-109.

leader signaled the end of the group,<sup>31</sup> however, it is reported that the LTTE is still actively raising funds for potential attacks in Sri Lanka.<sup>32</sup>

Whatever the mutation of the organised criminal network, the motivation of organised criminals to partake in war may have various reasons. First, since organised criminal groups thrive on weak governance, the eruption of conflict allows them to take advantage of this instability. Another possible reason is that organised criminal networks can be used as runners during conflict because they have the ability to overcome logistical hurdles, such as economic sanctions, which allows them to work for multiple parties.<sup>33</sup> This kind of behaviour is evident in Syria while Syrian leader Bashar al-Assad loses economic options because of sanctions imposed by western powers. As noted by Berman, the regime

is likely to turn to illicit networks to obtain the cash and materials it needs to continue prosecuting the war. As more money and goods flow through these groups in and out of Syria, they will become stronger, increasing the already high levels of corruption in Lebanon. Within Syria, criminals connected to the regime will also see their resources and power increase creating worrying trends for the post-Assad era.<sup>34</sup>

Beyond working for Assad, the United Nations High Commissioner for Refugees recently reported that in the largest refugee camp in Jordan, Za'atari, organised criminal rings are operating within the camps, endangering the lives of women and children, causing 'lawlessness', and stealing goods.<sup>35</sup> The impact of organised crime within the refugee

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<sup>31</sup> K Venkataramanan, 'Tigers Extinct, now what lies ahead for Tamils in Lanka?' *The Times of India* (online), 19 May 2009 <<http://timesofindia.indiatimes.com/world/south-asia/tigers-extinct-now-what-lies-ahead-for-tamils-in-lanka-articleshow/4546294.cms>>.

<sup>32</sup> 'Sri Lanka PM says LTTE training centres exist in India' *The Indian Express* (online), 10 March 2011 <<http://www.indianexpress.com/news/sri-lanka-pm-says-ltte-training-centres-exist-in-india/760492/>>.

<sup>33</sup> Philip Gounev, 'Beyond Mafia Stereotypes: Organized Crime's Impact on Security' (12 September 2012) International Relations and Security Network <<http://www.isn.ethz.ch/Digital-Library/Articles/Special-Feature/Detail/?lng=en&id=152525&contextid774=152525&contextid775=152524&tabid=1453317097>>.

<sup>34</sup> Asher Berman, *Criminalization of the Syrian Conflict* (16 May 2012) Small Wars Journal <<http://smallwarsjournal.com/jrnl/art/criminalization-of-the-syrian-conflict>>.

<sup>35</sup> Jeff Crisp, Greg Garras, Jenny McAvoy, Ed Schenkenberg, Paul Spiegel and Frances Voon, *From slow boil to breaking point: a real-time evaluation of UNHCR's response to the Syrian refugee emergency* (July 2013) United Nations High Commissioner for Refugees and Policy Development and Evaluation Services ('PDES'), UN Doc PDES/2013/10, 10 <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=52b83e539>>.

camp is now resulting in people escaping from Za'atari to return to war-torn Syria.<sup>36</sup>

Finally, another reason why organised criminals may partake in war is because it is a source of cash flow. An example of this alliance at work was (and perhaps continues to be) in the African country of Mali, located in the Sahel region of Africa. Located in West Africa, the Sahel is considered one of the poorest regions in Africa.<sup>37</sup> The Sahel is also known for being a popular route for trafficking among organised criminals, which is reported to total approximately \$3.8 billion dollars.<sup>38</sup> Mali's rise to prominence was due to the convergence of radical Islamic groups linked to Al-Qaeda that are operating within the country.<sup>39</sup> The Sahel region has been a hotbed of illicit activity for over two decades but little attention was given to the area until the rise of terrorist groups.<sup>40</sup>

Initially, irregular and corrupt customs policies between corrupt state officials and merchants allowed for various products, such as tobacco, to be smuggled throughout the region.<sup>41</sup> As with all organised criminal activity, a 'low' economic market and the need for organised groups to make a profit intersected in Mali, allowing for various criminal actors to become involved in the arms trade, which created a major arms trafficking hub beginning in the 1990s.<sup>42</sup> The conflict in Libya fueled the trade of illegal arms in Mali.<sup>43</sup> Of course, the trafficking in arms is not the only place where profit was made. As a result of eroded

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<sup>36</sup> Ibid.

<sup>37</sup> 'SAHEL: Backgrounder on Sahel, West Africa's Poorest Region' *IRIN*, 2 June 2008, <<http://www.irinnews.org/report/78514/sahel-backgrounder-on-the-sahel-west-africa-s-poorest-region>>.

<sup>38</sup> UNODC, *Sahel region countries agree to cooperate in response to illicit trafficking, organized crime and terrorism* (19 June, 2013) <<http://www.unodc.org/unodc/en/frontpage/2013/June/sahel-region-countries-agree-to-cooperate-in-response-to-illicit-trafficking-organized-crime-and-terrorism.html>>.

<sup>39</sup> Diakaridia Dembele, 'Thousands Hold Protests in Mali to Demand Military Actions' *Bloomberg Business Week*, 11 October 2012 <<http://www.businessweek.com/news/2012-10-11/thousands-hold-protest-in-mali-to-demand-military-action>>.

<sup>40</sup> Wolfram Lacher, *Organized Crime and Conflict in the Sahel -Sahara Region* (Carnegie Endowment for International Peace, 2012) 3 <[www.CarnegieEndowment.org/pubs](http://www.CarnegieEndowment.org/pubs)>.

<sup>41</sup> Ibid 5.

<sup>42</sup> Ibid 4. Even more recently the arms trade has allowed both criminal groups and terrorist networks to flourish, see 'Spiking Arms Proliferation, Organized Crime, Terrorism Part of Fallout from Libyan Crisis Afflicting Sahel, Security Council Told' UNSC, 6709<sup>th</sup> mtg, UN Doc SC/10533 (26 January 2012), <<http://www.un.org/News/Press/docs/2012/sc10533.doc.htm>>.

<sup>43</sup> Lacher, above n 40, 5.

customs policies, drug smuggling and kidnapping for ransom continue to be big money makers for criminal networks in this region.<sup>44</sup>

Organised crime was a prevalent part of the governance in Mali. The former Malian Government used 'organised crime as a resource for the exercise of influence in the north by allowing its local allies to engage in criminal activity.'<sup>45</sup> Between 2006 and 2010 the leadership in Mali 'lost control' of this policy and as a result the 'rule of law and legitimacy of state institutions eroded.'<sup>46</sup> Terrorists groups, such as Ansar Dine which is affiliated with Al-Qaeda, joined organised criminals in Mali. Terrorists would participate in activities such as kidnapping by acting as brokers in order to obtain ransoms from western countries that would pay for their nationals.<sup>47</sup> The absence of state power and deep rooted corruption is why criminal networks and terrorist groups found common ground in Mali.<sup>48</sup>

Terrorist organisations in Mali are worrisome because 'it occurs in the context of expanding organized criminal activity and ethnic or social conflicts.'<sup>49</sup> The lines between these groups are 'often blurry, alliances are temporary, and networks overlap.'<sup>50</sup> In Mali, the objective of the terrorist groups and transnational organised criminals is to clearly 'create a safe haven and a coordinating center in the north of Mali for continental terrorist networks.'<sup>51</sup> The impact of this alliance has created many deaths and refugees as a result of the conflict. The two groups

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<sup>44</sup> Ibid 5-9; see also UNODC, *The Role of Organized Crime in the Smuggling of Migrants from West Africa to the European Union* (2011) <<http://www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/the-role-of-organized-crime-in-the-smuggling-of-migrants-from-west-africa-to-the-european-union.html>>; for a general introduction on the role of organised crime and migrant smuggling, see UNODC, *Organized Crime Involvement in the Trafficking in Persons and Smuggling of Migrants* (2010), <[http://www.unodc.org/documents/human-trafficking/FINAL\\_REPORT\\_06052010\\_1.pdf](http://www.unodc.org/documents/human-trafficking/FINAL_REPORT_06052010_1.pdf)> and NATO Review, 'Organised Crime: West Africa: trafficking central station?' (2009) <[http://www.nato.int/docu/review/2009/Organised\\_Crime/EN/index.htm](http://www.nato.int/docu/review/2009/Organised_Crime/EN/index.htm)>.

<sup>45</sup> Lacher, above n 40, 11.

<sup>46</sup> Ibid.

<sup>47</sup> The total profit that would have been made by terrorist groups through kidnappings totaled between \$40 and \$65 million since 2008, see *ibid*, 9-10.

<sup>48</sup> David Lewis and Adama Diarra, 'In the Land of the gangster-jihadists' *Reuters Special Report*, 24 October 2012, 2 <<http://graphics.thomsonreuters.com/12/10/SaharaMali.pdf>>; see also Kemp et al, above n 23, 11.

<sup>49</sup> Wolfram Lacher, *Organized Crime and Terrorism in the Sahel* (January 2011) SWP Comments, 1 <[http://www.swp-berlin.org/fileadmin/contents/products/comments/2011C01\\_lac\\_ks.pdf](http://www.swp-berlin.org/fileadmin/contents/products/comments/2011C01_lac_ks.pdf)>.

<sup>50</sup> Lacher, above n 40, 16.

<sup>51</sup> Salamatu Suleiman quoted in 'UN Chief Urges Sanctions on Mali Rebels' *Aljazeera* (online), 9 August 2012 <<http://www.aljazeera.com/news/africa/2012/08/2012895248385467.html>>; see also, 'Report on Peace and Security in Africa', UN SC 6820<sup>th</sup> mtg, UN Doc S/PV 6820 (8 August 2012).



look out for each other and many witnesses have reported that local politicians throughout the Sahel region cooperate with both groups.<sup>52</sup> In 2013, France militarily intervened in Mali after Taureg rebels allied with Ansar Dine took over Mali.<sup>53</sup> It is important to note that the French military objectives<sup>54</sup> seemed to be narrowed to accomplish the end of instability under the rule of groups such as Ansar Dine and Al-Qeada.<sup>55</sup> While France has presumably accomplished its objective in Mali, and peace seems promising,<sup>56</sup> the question which remains is whether France truly fought one of the largest perpetrators and beneficiaries of the conflict - organised crime. Has the time come for the international community to stop separating organised criminals from IHL? Can organised criminals be classified as direct participants in armed conflict?

#### IV IHL AND ORGANISED CRIME

The application of IHL to non-state actors, in particular terrorists, has garnered much debate in academic and military circles. This debate is divided into many issues (the most popular debate regards the due process rights of enemy combatants) and a subset of that debate is how to properly classify non-state actors on the battlefield. Some scholars consider 'new warfare' to be unlike traditional notions of battle because the lines are blurred and the state is engaged with non-state actors.<sup>57</sup>

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<sup>52</sup> Lewis and Diarra, above n 48, 2.

<sup>53</sup> United Nations Security Council, 'Statement by the President of the Security Council' UN Doc S/PRST/2013/10 16 July 2013) <[http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_prst\\_2013\\_10.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_prst_2013_10.pdf)>; see also Simon Allison, 'Five key facts about the conflict' *The Guardian UK* (online), 22 January 2013 <<http://www.theguardian.com/world/2013/jan/22/mali-war-five-facts>>.

<sup>54</sup> United Nations Security Council, Resolution 2071, UN Security Council Meeting 6846, UN DOC SC/10789 (12 October 2012) <[http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2071.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2071.pdf)>.

<sup>55</sup> Gerald Caplan, 'France's military objectives in Mali make no sense' *Globe and Mail* (online), 1 February 2013, <<http://www.theglobeandmail.com/news/politics/second-reading/frances-military-objectives-in-mali-make-no-sense/article8107744/>>.

<sup>56</sup> See Kemp et al, above n 23; Kemp argues that peacekeeping operations cannot handle the threats posed by organised crime. UN Peacekeepers are expected to arrive in Mali as of July 2013. 'France Begins Mali Withdrawal in North' *Aljazeera* (online), 27 April 2013 <<http://www.aljazeera.com/news/africa/2013/04/20134273102667144.html>>.

<sup>57</sup> Blank and Guiora define 'new warfare' as: 'conflicts generally involve a state engaged in combat with non-state forces, combat characterized by fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects,' Laurie Blank and Amos Guiora, 'Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare' (2010) 1 *Harvard National Security Journal* 45, 48.

This article now focuses on how non-state actors such as *organised criminal networks* can be classified during armed conflict. Organised criminal networks aide opposing parties during conflict and also profit from conflict. They repeatedly prove that they are willing to participate prior, during, and after war in order to obtain control.

Classifying a conflict as a non-international or international conflict is usually a central issue of debate before beginning an analysis in IHL because conflict classification is important to ‘determine applicable law and the rights and obligations of those responsible for, or affected by it.’<sup>58</sup> For the purposes of this article, reference is made to these classifications in passing.

From a broad perspective, there are two principles that are the bedrock of IHL: the principle of protection and the principle of distinction. The first principle protects those who are not taking part in armed conflict, generally classified as ‘civilians’. This principle is outlined in Additional Protocol II and subsequent amendments.<sup>59</sup> The second principle behooves militaries to make distinctions between military and civilian people, objects, and objectives. The main goal is to weaken the military forces of the enemy.<sup>60</sup> It has been held in practice regardless of the type of armed conflict that these principles always apply.<sup>61</sup> It is important that these principles are kept in mind as we classify potential combatants because the principles are meant to protect the innocent and minimise the impact of conflict.

### *A Direct Participation*

First, a discussion on how ‘direct participation in hostilities’ is defined is required in order to better understand the categories which follow.

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<sup>58</sup> Jelena Pejic, ‘Conflict Classification and the Law Applicable to Detention and the Use of Force’ in Elizabeth Wilmschurst (ed), *International Law and the Classification of Conflict* (Oxford University Press, 2012), 80.

<sup>59</sup> International Committee of the Red Cross (‘ICRC’), *Customary IHL Database Rule 1. The Principle of Distinction between Civilians and Combatants* <[http://www.icrc.org/customary-ihl/eng/print/v1\\_cha\\_chapter1\\_rule1](http://www.icrc.org/customary-ihl/eng/print/v1_cha_chapter1_rule1)>, citing Protocol II to the *Convention on Certain Chemical Weapons* (‘CCW’); Article 3(2), Amended Protocol II to the CCW, Article 3(7); Protocol III to the CCW, Article 2(1), *Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (‘Ottawa Convention’), opened for signature 3 December 1997, (entered into force 1 March 1999), Preamble.

<sup>60</sup> Avril McDonald, *The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities* (April 2004) Asser Institute <[http://www.asser.nl/default.aspx?site\\_id=9&level1=13337&level2=13379#\\_Toc158269143](http://www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13379#_Toc158269143)>.

<sup>61</sup> See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

The phrase is undefined in IHL.<sup>62</sup> However, the terms 'active' and 'direct' are considered synonymous as interpreted by international legal doctrine.<sup>63</sup> The International Committee of the Red Cross ('ICRC')<sup>64</sup> has defined 'direct participation' to mean, 'acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.'<sup>65</sup> The question of whether one party is directly participating, according to IHL, is determined on a case by case basis.<sup>66</sup> Direct participation is an ambiguous phrase and of course, conjures much debate between parties involved in conflict because the very definition of direct participation dictates the way in which a party in conflict is treated under IHL by opposing forces.

As McDonald noted,

it is generally and increasingly considered that there are many activities which involve a more indirect role for civilians, where the civilian is one or more steps (geographically or temporally) away from the actual application of violence (which may be virtual rather than physical) and may not even consider him or herself to be a direct participant in hostilities, and which do not actually involve attacks in the literal or kinetic sense, or where the causality relationship is more indirect, yet which are also considered as direct participation in hostilities.<sup>67</sup>

Based on these interpretations, there are examples which could be considered direct participation by organised criminals. A notable example is the sale/transfer of Weapons of Mass Destruction by

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<sup>62</sup> Schmitt reiterates the common rule in international law that the phrase must be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1); Michael Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1(5 May) *Harvard Law School National Security Journal* <<http://harvardnsj.org/2010/05/the-interpretive-guidance-on-the-notion-of-direct-participation-in-hostilities-a-critical-analysis/>>.

<sup>63</sup> Schmidt, above n 62.

<sup>64</sup> The International Committee of the Red Cross ('ICRC') is a neutral organisation whose mandate stems from the Geneva Conventions of 1949. One of its missions is to aide states in the interpretation of IHL so as to limit suffering. <[www.icrc.org](http://www.icrc.org)>.

<sup>65</sup> Schmitt, above n 62, citing ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 ¶ 1945 (Yves Sandoz et al, eds, 1987).

<sup>66</sup> *Prosecutor v. Tadic (Opinion and Judgment)*, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1-T, 7 May 1997) 616.

<sup>67</sup> McDonald, above n 60.

organised criminals to terrorists.<sup>68</sup> These weapons could be used by terrorists to advance their violent agenda. A more obvious example is the use of organised criminal networks to use their illicit cash flow to fund or support terrorist activities.<sup>69</sup>

There is a distinction between direct and indirect participation. The ICRC suggests that a person who is 'indirectly' participating in conflict is one who,

contributes to the general war effort of a party, but does not directly cause harm and, therefore, does not lead to a loss of protection against direct attack. This would include, for example, the production and shipment of weapons, the construction of roads and other infrastructure, and financial, administrative and political support.<sup>70</sup>

These examples show that the range for interpreting what constitutes 'indirect' participation is extremely broad. Of course, organised criminal networks seem to have a broad role in conflict, from financing to providing weapons, like their terrorist counterparts. As observed by Berman,

organized crime played a major role in creating nearly insolvable insurgencies in both Iraq and Afghanistan, as the governments became hopelessly corrupt, and insurgents secured regular sources of weapons and cash. As time went on, it became difficult to differentiate between insurgents, criminals, and government officials, as the profit motive became at least as salient as political motives, creating a volatile mix of war, crime, and corruption.<sup>71</sup>

As jurists of IHL rightfully articulate that direct participation should be determined on a case by case basis, the classification of organised criminals as civilians or combatants within IHL is the next line of discussion.

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<sup>68</sup> Homeland Security Today, Interview with Guy Roberts, 'The Nexus of Organized Crime: WMD' *Homeland Security Today* (online), 9 April 2013 <<http://www.hstoday.us/briefings/correspondents-watch/single-article/the-nexus-of-organized-crime-wmd/a1067ecb6b530670467e78e4b2d5cff7.html>>.

<sup>69</sup> See Jermyn Brooks, 'Terrorism, Organized Crime, and Money Laundering', *New York Times* (online), 30 October 2001, <[http://www.nytimes.com/2001/10/30/opinion/30iht-edbrooks\\_ed3\\_.html](http://www.nytimes.com/2001/10/30/opinion/30iht-edbrooks_ed3_.html)>.

<sup>70</sup> ICRC, *Direct Participation in Hostilities: questions and answers* (2 June 2009) ICRC Resource Centre <<http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>>.

<sup>71</sup> Berman, above n 34.

### B *Civilians and Combatants*

As illustrated so far, IHL creates various categories when it comes to the conflict narrative. One level of categorisation deals with the kind of conflict. The other set of categories deals with the type of people involved in conflict and the rules which protect and govern their behaviour. There are two main categories: civilians and combatants. Civilians are those who are not participants in conflict and enjoy special protections as a result.<sup>72</sup> However, there are times when civilians do engage in hostilities resulting in an interesting military and legal dilemma for all parties involved. If they decide to engage in battle, then they are classified as a Prisoner of War ('POW'), civilian under the Fourth Geneva Convention, or as an 'unlawful combatant'.<sup>73</sup> 'Enemy combatant'<sup>74</sup> or 'unlawful combatants' are 'all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war in falling into the power of the enemy.'<sup>75</sup> This term of art is probably more fitting of transnational criminal networks. These groups which participate in activities, such as the ones outlined in Mali, can be considered to be *direct participants* (without entitlement) in hostilities because their activity is 'hostile to the security of the State/Occupying Power' and/or are considered saboteurs.<sup>76</sup> Typically, these categories are defined under traditional concepts where people in the army may dress up as civilians to trick the opposing army or for those who act as spies.

A second well known category is combatants. IHL states that members of an army (except religious or medical personnel) that are party to an armed conflict, in addition to those who take direct part in hostilities,

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<sup>72</sup> A civilian is any person who does not belong to 'one of the categories of persons referred to in Article 4 (A): (1) members of regular armed forces, (2) members of militia and volunteer corps, (3) members of regular armed forces of a non-recognized government and authority, and (6) levee en masse of the Third Convention and in Article 43 of this Protocol' (i.e. members of the armed forces); Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85(849) *International Review of the Red Cross* 45, 72.

<sup>73</sup> Schmitt, above n 62.

<sup>74</sup> For an overview of the US position on the term, see William Haynes, *Enemy Combatants* (12 December 2002) Council on Foreign Relations <<http://www.cfr.org/international-law/enemy-combatants/p5312>>.

<sup>75</sup> Dörmann, above n 72.

<sup>76</sup> *Ibid*; it should also be noted that if this is the status assigned then they may deserve protections under the Fourth Geneva Convention, as argued by Mr. Dörmann. I dispense with that discussion for the purpose of this article and focus only on whether the classification of the law of war to transnational organised crime remains plausible.

are considered (lawful) combatants.<sup>77</sup> As Sassoli and Olson note, 'an essential feature of combatant status is immunity from punishment for those who respect that law.'<sup>78</sup> It would be hard to argue that on *any* territory organised crime groups would have lawful status, as by their very definition they are bonded together for unlawful reasons. In the United States some cases have shown that the interpretation of who is eligible to be a lawful combatant is strict. In *United States v Arnaout*,<sup>79</sup> the defendant claimed that he was immune from prosecution when he assisted Al-Qaeda, Hezb-e-Islami, or the Sudanese Popular Defense Force, which he considered to be lawful combatants in their respective wars. The Court held that these groups were already determined not to be lawful combatants in previous U.S. cases and further cited the *Convention Relative to the Treatment of Prisoners of War*, which outlines four criteria for this particular status: (1) hierarchical military structure; (2) distinctive military uniforms or emblems recognizable at a distance; (3) carrying arms openly; and (4) operations conducted in accordance with the laws and customs of war.<sup>80</sup>

### C Organised Crime Classification in IHL

Given the current interpretation that has been afforded to the term 'direct participation in hostilities,' it is clear that organised criminal groups, given their level of involvement in conflict, should not be considered to be 'civilians' during armed conflict. Organised criminal groups probably have benefitted from being placed in a different legal framework because nation states do not consider them to be like their terrorist allies. What this has translated into on the ground is that if law enforcement is unable to handle these criminal networks prior to conflict, then they are able to participate during conflict, and have already gained a strong foothold after conflict. This makes it harder for a proper response by law enforcement that also would have to deal with post conflict transition. In contrast, terrorists have been seemingly

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<sup>77</sup> ICRC, *Rule 3. Definition of Combatants*, Customary IHL Database, <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule3](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule3)>, citing Additional Protocol I, Article 43(2).

<sup>78</sup> Marco Sassoli and Laura M. Olson, 'The judgment of the ICTY Appeals Chamber on the merits in the Tadic case' (2000) (839) *International Review of the Red Cross* <<http://www.icrc.org/eng/resources/documents/misc/57jqc.htm>>.

<sup>79</sup> *United States v Arnaout*, 236 F Supp 2d 916 (ND Ill, 2003).

<sup>80</sup> Robert M. Twiss, 'National Security: The Impact on U.S. Foreign Policy Arising from Private Actions Initiated against Foreign Nations from Within the United States' (2012) 3 *Creighton International and Comparative Law Journal* 47 citing *Arnaout*, *ibid*, and *Geneva Convention Relative to the Treatment of Prisoners of War* ('Third Geneva Convention'), opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 4(A)(2).