What Isn't Organised Crime?

How a Vague Label Travels the World, and Why Courts Must Read It Narrowly

Cristián Irarrázaval Zaldívar

04.11.2026 doi: 10.59704/79edc598dc6b8ab5

April 2026, Stammheim Prison in Stuttgart, Germany, where the militant group Red Army Faction ("RAF") was tried in the 1970s. Five defendants without criminal records sit handcuffed behind bulletproof glass, separated from their lawyers, after more than eight months in pre-trial detention. In September 2025 they had broken into a plant of Elbit Systems Deutschland, a subsidiary of an Israeli military technology company, smashed equipment, sprayed "Baby Killers" on the walls and waited for the police. Among the charges: membership of a criminal association under paragraph 129 of the German Criminal Code.[1]

Across the Atlantic, prosecutors in Fulton County in the US state of Georgia offered the rap line "I'm a general" as proof that the rapper and singer-songwriter Young Thug led a criminal army made up of associates of his record label. The 56-count indictment under the Racketeer Influenced and Corrupt Organizations Act (RICO) yielded Georgia's longest criminal trial and not a single murder conviction – murder being the main predicate offence.[2]

In Arica, northern Chile, Joise Alvear Oropeza, a Venezuelan sex worker who paid a weekly extortion fee (*vacuna*) to members of the organisation Tren de Aragua, spent more than two years in a high-security prison awaiting the verdict in Chile's first mega-trial against that organisation. The prosecution sought over one hundred years' imprisonment, criminal association among the counts, largely on the strength of her intimate relationship with a co-defendant. She was acquitted on every count.[3]

What do these cases have in common? In each, the offence that spearheads the fight against organised crime – criminal association or enterprise – turned property damage, cultural expression and sex work into something far graver. The mechanism is always the same: the undeniable danger posed by real criminal organisations justifies offences so elastic that they fit almost any group of people, and whose invocation unlocks consequences bearing no proportion to the conduct. By punishing mere membership, these statutes create what Gerard Lynch called the crime of being a criminal.[4] The vagueness is not a drafting failure. It is by design, as the remaining sections will show. A liberal criminal law – understood as one committed to constraining the state's power to punish – cannot leave that design unanswered. In this post, I argue that the solution lies in a restrictive reading of these offences, and that its key is identifying the wrongfulness specific to the offence: what separates a genuine criminal organisation from a group disliked by a transient majority is that its very existence threatens the state's ability to fulfil its essential functions.

Palermo: A Definition That Excludes Almost Nothing

Article 2 of the United Nations Convention against Transnational Organized Crime (Palermo Convention) defines an "organized criminal group" as three or more persons, existing for "a period of time", acting in concert to commit one (!) or more serious crimes – offences carrying a maximum penalty of at least four years – for a material benefit that may even be indirect.

[1] Philip Oltermann, *Pro-Palestine Activists Face Trial over Attack on Israel Arms Factory in Germany*, The Guardian, 27.04.2026, https://www.theguardian.com/world/2026/apr/27/pro-palestine-activists-face-trial-attack-israel-arms-factory-germany, last accessed 03.09.2026.

[2] *Co-Defendants of Young Thug Acquitted in Georgia's Longest Criminal Trial*, NBC News, 03.12.2024, https://www.nbcnews.com/news/us-news/co-defendants-young-thug-acquitted-rcna180794, last accessed 03.09.2026.

[3] Tribunal de Juicio Oral en lo Penal de Arica (RIT 41–2024), 06.03.2025.

[4] Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, Columbia Law Review, 87 (1987), p. 661.

The same provision then lists what is *not required*: formal roles, continuity of membership, or a developed structure. This is the trademark of "suppression conventions": maximum scope and minimum regard for those affected.[5] The definition thus fits fishermen taking shellfish out of season far better than Tren de Aragua. Nothing in it asks what, if anything, the group threatens. And although the Palermo Convention was designed for "transnational offences", several national legislatures have all but copied its provisions, with far-fetched prosecutions as the result.

The opening examples were not picked at random. Section 129 of the German Criminal Code is the paradigm of the European continental technique of punishing membership as such.[6] Germany, however, has gone further than both the Convention and Framework Decision 2008/841/JHA of the European Union on the fight against organised crime, dropping the material-benefit element and lowering the predicate threshold to offences with a maximum penalty of at least *two* years – so that almost the entire criminal code, shoplifting included, qualifies.[7] RICO, the main US federal instrument regulating organised crime since 1970, punishes a pattern of racketeering carried out through an "enterprise" whose requirements the Supreme Court has kept minimal.[8] Chile, for its part, exemplifies the receiving end: uncritical reception, stripped of the constraints that (very incompletely) tame these offences in the Global North. The Chilean offence of criminal association (Articles 292 and 293 of the Criminal Code) is so wide that it has been used repeatedly against the sale of counterfeit sneakers and the illegal extraction of shellfish.[9]

Not Just a Procedural Door-Opener

Association offences operate primarily as a door-opener whose real function is procedural. Convictions under section 129 of the German Criminal Code run between five and twenty a year; investigations run into the hundreds. The provision unlocks telecommunications and acoustic surveillance, online searches, undercover agents, dragnets, state trojans and IMSI catchers.[10]

The disproportion between a threadbare suspicion and the measures it licenses is dangerous enough. Worse still is the selectivity with which association offences are applied: in Germany, against neo-Nazi music bands, cigarette smugglers, football hooligans, climate activists and leaflet printers; in Chile, under the related anti-terrorism statute, mainly against indigenous leaders, an application the Inter-American Court of Human Rights condemned.[11] On the other hand, only rarely are these provisions applied to white-collar crime. Selectivity, admittedly, cuts across the whole of criminal law,[12] but the fuzzier the offence, the more manipulable its interpretation and the more discretionary its application. The criterion I propose would help here too: a corporate network that captures regulators or courts through systematic bribery does threaten the state's essential functions, and that is precisely when the offence should be invoked.

The Return Leg: Tough-on-Crime Norms Travelling North

Philipp Dann and Florian Jeßberger describe reflexive globalisation as a phase in which legal concepts are renegotiated in dialogue between South and North.[13]

[5] Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2nd ed., 2018), p. 22.
[6] The alternative model is conspiracy, typical of common law systems.
[7] See Martin Heger, § 129, in: Martin Heger *et al.*, *Strafgesetzbuch: StGB*(C.H. Beck, 30th ed., 2023), who calls this restriction "*bloße Kosmetik*".
[8] Supreme Court of the United States, *Boyle v. United States* (556 U.S. 938), 08.06.2009, p. 946.
[9] See e.g. Fiscalía de Chile, *Copiapó: Fiscalía Formalizó Investigación por Lavado de Activos y Asociación Ilícita*, 27.05.2024, https://www.fiscaliadechile.cl/actualidad/noticias/regionales/copiapo-fiscalia-formalizo-investigacion-por-lavado-de-activos-y, last accessed 03.09.2026.
[10] Katrin Höffler *et al.*, *Die "Letzte Generation" als "kriminelle Vereinigung"?*, Neue Kriminalpolitik, 37 (2025), DOI: 10.5771/0934-9200-2025-2-175, p. 175.
[11] Inter-American Court of Human Rights, *Norín Catrimán y otros v. Chile* (Series C No. 279), 29.05.2014.
[12] See e.g., with regard to international criminal law, Kalika Mehta, *International Criminal Law of "the West"?: Why the Eurocentric Critique May Have Reached Its Limits*, Verfassungsblog, 11.02.2026, https://verfassungsblog.de/international-criminal-law-of-the-west/, last accessed 03.09.2026, DOI: 10.59704/42ec9ab2f8753797.

In organised crime legislation, the southward flow is easy to observe: the North exports its suppression conventions (treaties obliging state parties to criminalise certain conduct, such as the Palermo Convention or the UN Convention against Corruption), the South over-implements. Sometimes the process descends into absurdity, as with the US Foreign Corrupt Practices Act: pressed on US competitors through the OECD Anti-Bribery Convention, it was "switched off" in February 2025 by an executive order in the name of US competitiveness.[14] The norm travelled; the discretion to suspend it stayed in the North.

A return leg, i.e. a northward flow, has nonetheless opened, and it carries norms, not only facts – most clearly in the law of terrorism, closely related to that of organised crime.[15] As early as August 2015, the Salvadoran Constitutional Chamber held that the main criminal gangs (MS-13 and Barrio 18) were terrorist organisations, extending the label to members, collaborators, apologists and financiers of the groups.[16] In February 2025 the US followed suit, designating Tren de Aragua, MS-13 and six cartels as "foreign terrorist organisations". The label activates an offense of "material support", which punishes any contribution to a designated group without proof of an enterprise – a threshold even lower than RICO's – and months later supplied the vocabulary for lethal strikes against alleged "narco-terrorists" at sea.[17] Ten years separate San Salvador from Washington. The innovation was not the concept. It was the scale. Nor did the US merely copy the technique; it rented the regime, paying several million dollars to hold 300 Venezuelan deportees in El Salvador's CECOT mega-prison under a state of exception no US court had authorised.[18]

Who Decides, and Who Can Object?

Those designations also answer the question of who decides. When a government determines whether a group is a criminal or terrorist organisation, the decision precedes any trial and, once it takes effect, the law may forbid a defendant from raising "any question concerning the validity of the issuance of such designation as a defence or an objection at any trial or hearing".[19]

In such cases, all that remains for the criminal process to determine is whether the defendant actually belongs to the group – and even that is increasingly settled by administrative fiat. The validation guide of Immigration and Customs Enforcement (ICE) scores indicators such as tattoos, worth four points on their own; anyone reaching eight is deemed a member of Tren de Aragua. CalGang, California's gang database, shows where this leads: a 2016 audit found 42 people entered as under one year old – 28 of them for "admitting to being gang members".[20]

The mutual hardening of North and South, and the shrinking space left to courts for deciding what counts as a criminal organisation and who belongs to it, make a judicial answer – a restrictive reading of association offences – all the more pressing. Otherwise, due process and proportionality are as good as gone.

A Restrictive Reading: What Is the Wrongfulness of Criminal Association?

Constitutional review has proved difficult: the interests these statutes invoke, public order and public security, are what Roland Hefendehl calls *Scheinrechtsgüter*, placeholders lacking the contour a proportionality test needs to bite.[21] Proportionality is far more powerful one level down, as a canon of construction: a source of narrow readings of the offence and even of unwritten elements. And the first question a proportionate reading must ask is what the wrongfulness of this offence actually is.

German case law shows a way forward, if a modest one. The Federal Court of Justice (BGH) requires that the association pose a significant threat to public secu-

[13] Philipp Dann and Florian Jeßberger, *Reflexive Globalisation, Law and Placemaking*, Verfassungsblog, 05.02.2026, https://verfassungsblog.de/reflexive-globalisation-law-and-placemaking/, last accessed 03.09.2026, DOI: 10.59704/f8e7edc0c8a2351b.

[14] The White House, *Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security*, 10.02.2025, https://www.whitehouse.gov/presidential-actions/2025/02/pausing-foreign-corrupt-practices-act-enforcement-to-further-american-economic-and-national-security/, last accessed 03.09.2026.

[15] The two labels are frequently conflated, and organisations pass from one classification to the other arbitrarily. An example is the classification of the PKK in Germany, cf. Matthias Kraus, § 129, in: Gregor Herb *et al.*, *Leipziger Kommentar: StGB* (De Gruyter, 14th ed., 2025).

rity, a requirement found nowhere in the statute and without which three people who repeatedly steal chewing gum satisfy the wording.[22] Obvious as this may seem, several legal orders apply the offence on the bare wording, with no such corrective. The BGH's formula points in the right direction but leaves open what the target of the threat should be.

The criterion can be given more content still. Manuel Cancio Meliá locates the wrongfulness in the arrogation of the state's monopoly of violence, so that only organisations that systematically use or threaten violence are covered – not climate activists or clothing vendors.[23] I would go a step further: the wrongfulness lies in the existence of an organisation that calls into question the state's ability to fulfil its essential functions. Football hooligans who arrange fights with rival supporters resort to violence, yet do not endanger the state's functioning and therefore do not belong here. Conversely, an organisation set up not to kill police officers but to sabotage the computer systems of hospitals or ministries until they can no longer operate uses no violence yet strikes at precisely that ability. This criterion would confine the offence to a list of predicate crimes similar to, though narrower than, the one in section 5 of the German Criminal Code, which codifies the protective principle of jurisdiction: offences against the state's vital interests, punishable wherever committed. None of this means that the conduct of the excluded groups goes unpunished: criminal damage, coercion, assault and trademark offences remain available.

The general part supplies further constraints, once one accepts that the association offence is an exception – to the rules on parties to a crime, on inchoate liability, on merger – and that exceptions should be read narrowly. Accessories should not be reached through the general rules on participation where the offence does not expressly cover their form of conduct; attempt should not give rise to liability unless the statute so provides (otherwise the result is pre-pre-inchoate liability);[24] and offences committed in the context of the association should, as a rule, merge rather than accumulate. The doctrine of objective attribution (*objektive Zurechnung*) would dispose of most supporter cases: the printer who prints leaflets for an anarchist group at the market price performs a socially adequate act, and what he knew is beside the point.

Keeping the Label Honest

None of this denies that organised criminal activity can seriously threaten a state and its citizens. And although several authors doubt whether so vague a concept is of any analytical utility,[25] I do not propose abandoning it. But if the label is to be used in criminal law, the genuinely dangerous social phenomenon must be kept as clearly apart as possible from its merely symbolic use. A group whose existence leaves the state able to fulfil its essential functions – even if it commits offences, so long as they are not of that kind – is not organised crime, however much a majority may dislike it. A restrictive reading of these offences is the only way to keep the "fight" against organised crime from sliding into authoritarianism. Liberal criminal law, in a world of Bukeles, Dutertes and Trumps, is admittedly an increasingly lonely and marginal commitment. But that is no reason to sacrifice justice and legitimacy to the fears of an anxious majority.

[16] Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, *Inconstitucionalidad* (22–2007AC), 24.08.2015.

[17] Department of State, *Foreign Terrorist Organization Designations of Tren de Aragua, Mara Salvatrucha, Cartel de Sinaloa, Cartel de Jalisco Nueva Generacion, Carteles Unidos, Cartel del Noreste, Cartel del Golfo, and La Nueva Familia Michoacana*, 90 Fed. Reg. 10030, 20.02.2025, https://www.federalregister.gov/documents/2025/02/20/2025-02873/foreign-terrorist-organization-designations-of-tren-de-aragua-mara-salvatrucha-cartel-de-sinaloa, last accessed 02.10.2026.

[18] Dan Gooding, *Trump Admin's $4.7 Million Deal With El Salvador Revealed in Court Filing*, Newsweek, 09.09.2025, https://www.newsweek.com/trump-administration-el-salvador-deal-cecot-alien-enemies-act-lawsuit-2127087, last accessed 03.09.2026.

ABOUT THE AUTHOR

Cristián Irarrázaval Zaldívar
Cristián Irarrázaval Zaldívar (Dr. iur., Freiburg) is a Professor of Criminal Law at the Pontificia Universidad Católica de Chile and a former Fellow at the Centre for Advanced Studies RefLex, Humboldt-Universität zu Berlin.

SUGGESTED CITATION

Zaldívar, Cristián Irarrázaval: What Isn't Organised Crime?: How a Vague Label Travels the World, and Why Courts Must Read It Narrowly, Verfassungsblog, 04.11.2026, doi: 10.59704/79edc598dc6b8ab5.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20261104-133938-0.

[19] As is the case under US federal law with the designation as a Foreign Terrorist Organization: Title 8 of the United States Code, 8 U.S.C. § 1189(a)(8). A similar approach can be found in Chile's recently introduced constitutional reform bill, available in Spanish at https://www.camara.cl/verDoc.aspx?prmID=18828&prmTIPO=INICIATIVA, last accessed 03.09.2026.

[20] The guide became public through the litigation in *J.G.G. v. Trump*; see Dan Gooding, *ICE Using "Points System" to Identify Migrant Gang Members: What to Know*, Newsweek, 31.03.2025, https://www.newsweek.com/tren-de-aragua-membership-ice-points-system-alien-enemies-act-2053165, last accessed 03.09.2026; California State Auditor, *The CalGang Criminal Intelligence System*, 11.08.2016, https://information.auditor.ca.gov/reports/2015-130/auditresults.html, last accessed 03.09.2026.

[21] Roland Hefendehl, *Von der RAF über die PKK bis zur Letzten Generation: Das Strafrecht im Kampf gegen missliebige Organisationen*, Goltdammer's Archiv für Strafrecht, 171 (2024), p. 601.

[22] Höffler *et al.*, *ibid.*, p. 187-192.

[23] Manuel Cancio Meliá, *The Wrongfulness of Crimes of Unlawful Association*, New Criminal Law Review, 11 (2008), p. 563.

[24] Note that in several legal orders, Chile among them, the attempt of almost any offence is punishable.

[25] See e.g. Klaus von Lampe, *Organized Crime: Analyzing Illegal Activities, Criminal Structures, and Extra-Legal Governance* (SAGE, 2016), DOI: 10.4135/9781506305110, p. 30-31.