PALERMO IN THE PACIFIC:

ORGANISED CRIME OFFENCES IN THE ASIA PACIFIC REGION

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Note:

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This preliminary report does not include analyses of the organised crime offences in Cambodia, Lao PDR, the Republic of Korea, and the United States. This preliminary report also does not include a conclusion and it makes no recommendations. These chapters will be included in the final report.

It is anticipated that the final report will be released in August 2009. Please contact the author for further details.

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Abbreviations

ACC	Australian Crime Commission
ACT	Australian Capital Territory
AFP	Australian Federal Police
AUD	Australian Dollar
CAD	Canadian Dollar
China	People's Republic of China (PRC)
CISC	Criminal Intelligence Service Canada
Cth	Commonwealth of Australia
FBI	United States Federal Bureau of Investigations
HKD	Hong Kong Dollar
MYR	Malaysian Ringgit
NSW	New South Wales
NT	Northern Territory
NZ	New Zealand
NZD	New Zealand Dollar
OMCG	Outlaw motorcycle gang
Qld	Queensland
QPS	Queensland Police Service
MOP	Macau Pataca
PRC	People's Republic of China (China)
RCMP	Royal Canadian Mounted Police – Gendarmerie Royale du Canada
SA	South Australia
SAR	Special Administrative Region of China
SGD	Singapore Dollar
Taiwan	Republic of China
Tas	Tasmania
TWD	New Taiwan Dollar
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
USD	United States Dollar
Vic	Victoria
WA	Western Australia

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The views expressed in this document are those of the author. In particular, they do not reflect the position or opinion of the Australian Institute of Criminology, the Australian Federal Police, the Australian Government, the United Nations, and the United Nations Office on Drugs and Crime.

Publications & Presentations

This study has formed the basis of a number of publications and presentations, including:

Publications

"Taming the Triads: Organised Crime Offences in PR China, Hong Kong and Macau" (2008) 38(3) *Hong Kong Law Journal*

"Transnational Organized Crime" in M Cherif Bassiouni (ed), *International Criminal Law, volume I: Sources, Subjects, and Contents*, Boston (MA): Brill, 3rd ed 2008

"Transnational Organized Crime and International Criminal Law (2008) 10 *Waseda Proceedings of Comparative Law* (Waseda University, Tokyo) 311-334

"Mafias and Motorbikes: New Organised Crime Offences in Australia" (2008) 19(3) *Current Issues in Criminal Justice* (University of Sydney) 259-282

Presentations and Conference Proceedings

"Palermo in the Pacific. Organised Crime Offences in the Asia Pacific Region", presentation at the United Nations Office on Drugs and Crime (UNODC), Vienna, December 18, 2009

"Guilt by association? New ways to fight organised crime" paper presented at the conference *Canada and the Changing Strategic Environment*, Security and Defence Forum, Vancouver (BC), October 24, 2008

"Organised Crime in Australia: Trends and Developments" presentation to the Department of Foreign Affairs and International Trade, Ottawa, July 29, 2008

"Mafias and Motorbikes: New Organised Crime Offences in Australia", paper presented at the Attorney General's Department (Cth), Canberra, March, 14 2008

"Mafias and Motorbikes: New Organised Crime Offences in Australia", paper presented at the Australian Federal Police, Canberra, March 14, 2008

"Mafias and Motorbikes: Fighting Organised Crime in Canada and Australia" presentation at the Liu Institute for Global Issues, University of British Columbia, Vancouver, November 6, 2007 (with Dr Allan Castle, RCMP)

"Transnational Organised Crime and International Criminal Law" paper presented at Waseda University, Tokyo, November 1, 2007

"Mafias and Motorbikes: Organised Crime Laws in Australia and New Zealand" paper presented at The University of Auckland, September 3, 2007

Other

Submission to the Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliament of Australia, April 2008, available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

PART 1 INTRODUCTION AND BACKGROUND: CRIMINALISING ORGANISED CRIME

1. Introduction

This study analyses organised crime legislation in the Asia Pacific region. It examines offences criminalising the participation in criminal organisations and equivalent provisions penalising the existence and operation of organised crime under domestic laws. The study also explores the adoption of relevant international treaties, in particular the *Convention against Transnational Organised Crime*, and examines efforts by the international community to promote wider implementation of this Convention in the region. The aim of this project is to assess the adequacy and efficiency of the existing provisions under domestic and international laws, and to develop recommendations for law reform to prevent and suppress organised crime more effectively in the region.

1.1 Background and Significance

Organised crime is a phenomenon that has emerged in different cultures and countries around the world. Organised crime is ubiquitous; it is global in scale and not exclusive to certain geographical areas, to singular ethnic groups, or to particular social systems. Criminal organisations exist in dynamic environments, both as a function of the illegal markets in which they operate and as a result of the changing nature of law enforcement activities and government policies.

Organised crime has a long history in the Asia Pacific region. Triads and the Yakuza have existed in Chinese and Japanese societies for centuries and have also spread to other countries in the region. Many criminal organisations, including outlaw motorcycle gangs (OMCGs), Colombian drug cartels, Italian and Russian mafias and the like, are well established in Australia, Canada, New Zealand, and the United States. Vietnamese organised crime operates throughout Southeast Asia, and West African criminal groups are increasing their presence in Indonesia and elsewhere in the region.

Despite the omnipresence of criminal organisations in the region, the concept of organised crime remains contested and there is widespread disagreement about what organised crime is and what it is not. Generalisations about organised crime are difficult to make. Defining organised crime has been a long-standing problem for criminologists, legislators, law enforcement agencies, and others in the field — not just in this corner of the world. Many attempts have been undertaken to develop comprehensive definitions and explanations that recognise the many facets and manifestations of organised crime. The spectrum of approaches to organised crime is very broad as governments, law enforcement agencies, and researchers have different objectives when fighting, sanctioning, and analysing organised crime.

The United States and Italy — two countries with a notorious organised crime history, especially in relation to the Mafia — were among the first countries to respond to organised crime by amending their substantive criminal law with the introduction of the US *Racketeer and Corrupt Organisations* Act of 1970[1] and art 416bis "mafia-type associations" in Italy in 1982. Since that time, many other countries — including some in the Asia Pacific region — have followed the same trend by criminalising the

[1] 18 USCA § 1961.

enterprise structure of organised crime and/or prohibiting the participation in criminal organisations. Some experts, like Edward Wise, describe these laws as "the most important substantive and procedural tool in the history of organised crime control". Citing James Jacobs, Wise further notes:

> It is particularly important because it changed the way in which cases involving organised crime are investigated and prosecuted: it encourages investigators 'to think in terms of gathering evidence and obtaining indictments against entire 'enterprises' like each organised crime family', and it allows prosecutors to present at trial 'a complete picture of what the defendant was doing and why — instead of the artificially fragmented picture that traditional criminal law demands.'[2]

In addition to these domestic efforts, the United Nations developed the *Convention against Transnational Organised Crime*, which opened for signature in Palermo, Italy, in December 2000. This international treaty seeks to reconcile differences about the meaning of organised crime and provide Signatories with a set of legislative and practical tools to prevent and suppress organised crime more effectively. Today, the Convention has 147 Signatories.[3] The *Palermo Convention* has two main goals: one is to eliminate differences among national legal systems. The second is to set standards for domestic laws so that they can effectively combat transnational organised crime. The Convention is intended to encourage countries that do not have provisions against organised crime to adopt comprehensive countermeasures, and to provide these nations with some guidance for the legislative and policy processes involved. It is also intended to eliminate safe havens for criminal organisations by providing greater standardisation and coordination of national legislative, administrative, and enforcement approaches to the problem of organised crime, and to ensure a more efficient and effective global effort to combat and prevent it. The United Nations Office on Drugs and Crime (UNODC) actively promotes the universal adoption of the *Palermo Convention* and assists State Parties with the implementation into domestic law.

While the *Palermo Convention* has widespread support in the Asia Pacific region, few countries have so far implemented the obligations arising from the Convention in particular the offence relating to participation in an organised crime group. At the domestic level, countries, such as the Philippines have legislation modelled after the US *RICO* statute. Jurisdictions such as China, Hong Kong, Macau, and Taiwan have laws that are tailored specifically to combat local criminal syndicates, namely Chinese triads. Similarly, in the 1990s, Canada and New Zealand created special offences to ban associations with outlaw motorcycle gangs (OMCGs or 'bikies'). Some of these provisions, however, differ greatly from the international model and many jurisdictions remain without any specific offences for criminal organisations.

The offence proposed by the *Palermo Convention* and the various provisions adopted in domestic laws are designed to prevent the formation, expansion, and activities of criminal organisations and suppress any association with and support of these entities. These laws raise concerns about extensions to criminal liability and many critics argue they create guilt by association. Questions remain about where criminal liability for involvement in organised crime begins and where it ends, and about how remotely or how closely a person has to be connected to a criminal organisation to be responsible for its activities.

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2 Eduard Wise, "RICO and its Analogues: A Comparative Perspective" (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 304.

3 UNODC, www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 12 Nov 2008).

1.2 Purpose and Structure

The principal purpose of this study is to identify and review offences dealing with the incrimination of organised crime activity and related provisions under international and domestic law in the Asia Pacific region and to develop recommendations to improve existing and proposed laws. The study serves to frame the arguments for and against offences such as "participation in an organised crime group" or "racketeering" and to critically examine the rationale, elements, and application of existing and proposed organised crime offence in this region.

Specifically, this study

(1) Outlines and analyses the evolution and rationale of organised crime offences;
(2) Explores the framework relating to organised crime under the *Convention against Transnational Organised Crime*;
(3) examines existing organised crime offences (and similar provisions) under domestic laws in Asia Pacific nations including Australia, Brunei Darussalam, Canada, China and Hong Kong and Macau, Japan, Malaysia, New Zealand, Philippines, Singapore, Taiwan, United States, and the Pacific Islands;
(4) Investigates the legislative and policy frameworks in jurisdictions without specific organised crime offences, such as Indonesia, Thailand, and Vietnam;
(5) Promotes wider implementation of the *Convention against Transnational Organised* Crime; and
(5) Develops a set of strategies and practical recommendations to enhance existing and proposed organised crime offences in the region.

This study is divided into four main parts. Following this introduction in Part 1, Chapter 1, the next Chapter examines the need for and rationale of organised crime offences in light of the existing knowledge and scholarship. Part 2 analyses international frameworks to criminalise organised crime, namely the model developed by the *Convention against Transnational Organised Crime*. Part 3 explores existing and proposed offences under domestic statues, also including a brief outline of those jurisdictions currently without any such offences. Part 4 summarises the main conclusions of this study and develops a comprehensive set of recommendations to criminalise organise crime more effectively throughout the region.

The aim of this study is to highlight the application and effectiveness of existing offences and generate some suggestions for law reform and policy change in the fight against organised crime in Australia and the Asia Pacific region.

Specific offences frequently associated with organised crime, such as narcotrafficking, firearms trafficking, migrant smuggling, trafficking in persons, illegal gambling, loan sharking et cetera are not explored separately in this review. Furthermore, issues arising from measures to seize proceeds of crime are outside the scope of this study.

1.3 Methodology

The study of organised crime and of relevant legislation for this project involves open source material, collaboration and personal interviews with policy and lawmakers and law enforcement agencies, and case examinations. The project involves a comprehensive review of existing academic scholarship, analysis of legislative material, official publications by government sources and international organisations, close examination of reported case law, as well as systematic consultation with

justice and attorneys-general departments, law enforcement agencies, and regional and international organisations in this field.

2. Criminalising Organised Crime – The Need for Special Laws

> The criminal law is the first line of defence against organised crime.[4]

Organised crime poses significant challenges to the criminal justice system. Criminal law and law enforcement are traditionally designed to prosecute and punish isolated crimes committed by individuals. Investigations and prosecutions are usually set up to hold a person criminally responsible for his/her acts and case files are closed once a conviction is made.

The structure and modi operandi of criminal associations, however, do not fit well into the usual concept and limits of criminal liability. For example, it is difficult to hold directors and financiers of organised crime responsible if they have no physical involvement in the execution of the organisation's criminal activities. Equally, those who are only loosely associated with a criminal gang and provide support on an ad hoc basis often fall outside existing concepts of accessorial liability. Organised crime operates on a sustained basis and larger organisations operate independently from individual members. But the traditional confines of criminal law are ill-suited to deal with collective behaviour. Thus, even if arrests of gang members are made, criminal organisations frequently continue to operate. Furthermore, there is a widely held view that "group enterprises are more worthy of punishment than acts committed by individuals" and thus require special attention.[5]

The following Sections explore the scope of contemporary criminal law and discuss the need — if any — to extend criminal liability further in order to prevent and suppress organised crime more effectively.

2.1 Existing Extensions of Criminal Liability

For criminal liability to arise, it is necessary that an accused committed an offence. In very basic terms this requires proof that the accused completed all the elements of the offence he or she is charged with. Absence of one or more elements of an offence does, however, not automatically void criminal responsibility. In all criminal jurisdictions around the world, liability is not limited to completed offences. In some circumstances criminal liability may also arise if an offence remains incomplete, if a person makes a contribution to an offence without being its main executor, or if a person perpetuates a situation created by an offence already committed. So-called inchoate liability and secondary liability have been developed as avenues to extend criminal responsibility beyond the paradigm of individual commission of completed offences, see Figure 1 below. David Brown et al observe:

> This extension occurs along two dimensions: a time dimension and a group dimension. Along the time dimension, the offences of attempt and incitement criminalise conduct occurring before the offence that the accused planned to commit. Along the group dimension, the law of complicity provides for the criminalisation of conduct engaged in by more than one person. The law of conspiracy extends liability along the group dimension

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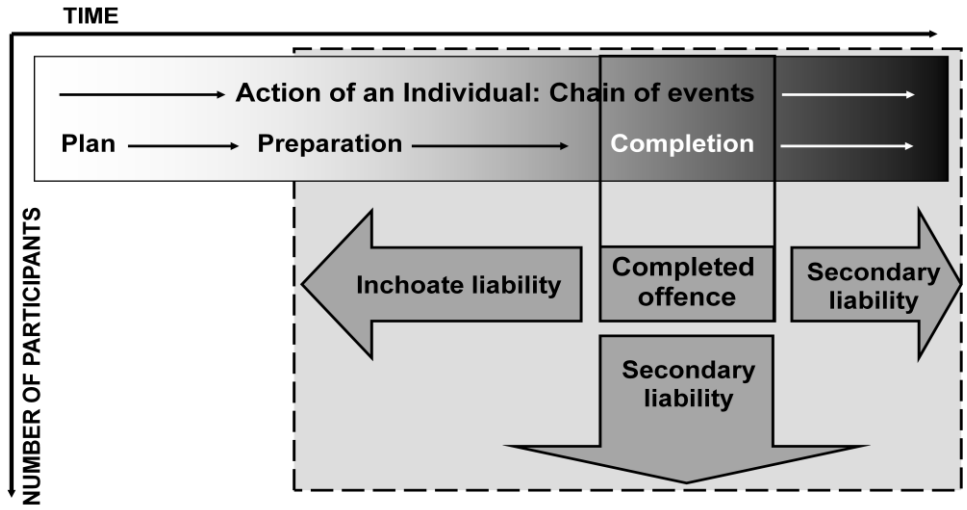
4 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 94.

5 Fred Abbate, "The Conspiracy Doctrine: A Critique" in M Gorr & S Harwood (eds), *Controversies in Criminal Law* (1992) 55 at 55.

by criminalising agreements by two or more people to commit a crime (or other unlawful act).[6]

Figure 1 Extensions of criminal liability[7]



These extensions of criminal liability are not without difficulties and controversies. In particular, it is questionable why punishment is justified and warranted for inchoate offences if no crime is completed and no harm occurs. In relation to secondary liability it is also debatable just how remotely a person can be connected to a criminal offence and still be liable for his/her connection to it.[8]

In essence, extensions to criminal liability serve to prevent and deter crime and to punish the 'guilty mind'.

- First, attaching liability to preparatory crimes such as attempt, conspiracy, and incitement and to persons who support and contribute to the preparation and planning of criminal offences, reduces the risk that the offences will ever be completed. Inchoate offences and secondary liability are — for the most part — aimed at criminalising conduct engaged in by persons possessing the intention to accomplish substantive criminal harm and their conduct has the potential to culminate in or contribute to that harm.
- Second, extending criminal liability enables law enforcement to intervene earlier without having to wait until harm is done. Inchoate offences and secondary liability afford law enforcement agencies a basis for early intervention and restraint and allows them to arrest a person before he or she can go on and complete the crime. Punishment for inchoate offences and secondary liability may also deter others from doing the same.
- Third, it is argued that criminal law should focus on culpability rather than outcome.[9] In relation to inchoate offences it is held that the person who tries to commit a crime but fails is not very different from a person who tries and succeeds. Peter Gillies also points out that criminalising attempts "satisfies the

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6 David Brown et al, *Criminal Laws* (4th edn, 2006) 1076; cf Peter Gillies, *Criminal Law* (4th edn, 1997); Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd edn, 2005) 399–400.

7 Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008).

8 See further Section 2.3.3 below.

9 HLA Hart, "The House of Lords on Attempting the Impossible", in C Tapper (ed), *Crime, Proof and Punishment; Essays in Memory of Sir Rupert Cross* (1981).

community instinct to see justice is done to the person who has gone very close to committing substantive harm".[10]

2.1.1 Inchoate liability

Attempt and other inchoate offences such as incitement and conspiracy[11] criminalise preparatory crimes. Generally, liability for preparatory crimes arises when a completed offence cannot be established because a physical circumstance or consequence specified in the definition of the offence is absent. The accused, however, believed the circumstance to be present and intended the consequences. In summary, the offence of attempt combines the mental element of intention with a loosely defined physical element (usually referred to as 'proximity').[12] Generally, no harm or damage will have occurred in relation to an attempt. Although the accused did not actually commit the completed offence, the fact that he or she tried to do so is seen as warranting punishment.

The commission of a crime can be regarded as a series of events that lead to its completion. Between the formation of the criminal plan and the commission of the complete offence that is the object of this plan numerous acts may in a particular case be committed. Liability for attempt generally requires that the accused took some initial steps towards the completion of the offence. This requirement seeks to separate actual attempts from mere wishful thinking. 'Proximity' is the term used to mark the point along this continuum to which an accused must progress until he or she can be regarded as having attempted the substantive offence. Only conduct that is "sufficiently proximate" and not "merely preparatory" is considered punishable.[13] The difficulty in establishing the precise point at which liability for attempts arises stems from the fact that the term 'proximity' does not specify a distinct act of tangible harm that marks the beginning of attempt. Instead, liability for attempt and also for incitement is concerned with potential (rather than actual) harm.[14]

The distinction between preparation and proximity is important as criminal responsibility must be confined to conduct that really endangers the community or another person. A person engaging in mere planning or preparation may be doing no more than wishful thinking. It is only when the accused's activities begin to approach the completion of an offence that the law treats the accused as guilty of an attempt: *R v Smith* [1975] AC 476.

In relation to organised crime, the proximity requirement means that persons who are only planning and perhaps directing a criminal offence cannot be held liable for an attempt. Furthermore, the law of attempt and incitement requires that the accused's intention is directed at a specifiable criminal offence; it does not suffice if a person only engages in planning and preparation of criminal offences generally. For example, directing a criminal organisation in the absence of identifiable criminal activities does not create liability for an inchoate offence.

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10 Peter Gillies, *Criminal Law* (4th edn, 1997) 670. See further Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008).

11 Conspiracy is discussed separately in Section 2.1.3 below.

12 See further, Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008) with further references.

13 *Britten v Alpogut* [1987] VR 929 at 939 per Murphy J.

14 See further, Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008); Simon Bronitt & Berandette McSherry, *Principles of Criminal Law* (2nd edn, 2005) 404–408; Peter Gillies, *Criminal Law* (4th edn, 1997) 673–679.

The threshold for inchoate liability is even higher in those jurisdictions that require proof of an overt act which manifests the intention to commit a specific offence.[15] To be immune from prosecutions, senior members of criminal organisations, however, rarely, if ever, engage in overt physical acts, which are left for low-ranking members to carry out.

2.1.2 Secondary Liability

Secondary liability provides for the criminalisation of conduct engaged in by more than one person. It refers to an extension of responsibility to criminalise participants who commit offences jointly or who contribute to the commission of a criminal offence: so-called accessories. Secondary liability arises for persons who are parties to the principal offence but who themselves are not criminally responsible as principal offenders.[16] The rationale for extending liability beyond the principal offender(s) is "that a person who promotes or assists in the commission of a crime is just as blameworthy as the person who actually commits the crime".[17]

Secondary liability may arise for conduct that occurred before or during the commission of the principal offence: so-called accessorial liability (accessories). Secondary liability may also arise for conduct that occurs after the principal offence, by so-called accessories after the fact. Secondary liability may only arise in connection with a principal offence; it is derivative, thus there can be no criminal responsibility for an accessory in the absence of a principal offence.[18]

To establish accessorial liability it must generally be shown that the accused (physically) enabled, aided, counselled, or procured another person to commit an offence. The prosecution must show that the accused "is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission".[19] In relation to criminal organisations, these requirements are broad enough to capture many of the 'soldiers' that carry out the criminal activities of the organisation, but it is more difficult — and often impossible — to establish liability for those more to distant from the principal offence, including those persons who direct and mastermind the criminal network but who have no physical involvement in the execution of specific offences.[20]

Accessorial liability further requires proof that the accused (1) knew all of the essential facts which make the principal offence a crime, and (2) intentionally enabled, aided, counselled, or procured the conduct of the principal offender.[21] These mental elements ensure that persons who unwittingly support or participate in the principal offence are not criminally responsible as accessories. The elements also ensure that an accessory can only be held responsible for principal offences that he or she contemplated and not for conduct by the principal offender that are outside the scope of the accused's contemplation.[22] These requirements create some

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15 See, for example, s 4(1) *Criminal Code* (Qld).

16 Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd edn, 2005) 341–344; David Lanham et al, *Criminal Laws in Australia* (2006) 480–482.

17 Bernadette McSherry & Bronwyn Naylor, *Australian Criminal Laws* (2004) 426.

18 Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008).

19 *R v Russell* [1933] VR 59 at 67 per Cussen ACJ. See further Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd edn, 2004) 349–358; David Lanham et al, *Criminal Laws in Australia* (2006) 492–499.

20 Cf Louis Waller & CR Williams, *Criminal Law* (10th ed, 2005) para 10.67.

21 *Giorgianni v R* (1985) 156 CLR 473 at 487–488 per Gibbs CJ.

22 RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (7th edn, 2008) paras 9.12–9.13. Cf Simon Bronitt & McSherry, *Principles of Criminal Law*

difficulties for offences in which criminal organisations are involved. In the case of larger syndicates some people may make contributions to the group generally, and may well be aware that the group regularly engages in criminal activities, but they have no specific knowledge about individual offences. A person may, for instance, deliberately provide a criminal organisation with firearms, other equipment or money, but may not be aware of the specific individual offences this material will be used for. Participants of this kind do not meet the threshold of the mental elements required for accessorial liability.

In establishing accessorial liability, there is no requirement to show that the accessory acted in agreement with the principal or that the principal acknowledged the support or contribution by the accessory in any way. Accessorial liability may arise even if the principal offender is completely unaware of the accessory's conduct. Thus accessorial liability is established, for the most part, on the basis of the physical collaboration of multiple persons and, unlike conspiracy, not on their 'mental' cooperation.[23]

2.1.3 Conspiracy

In many jurisdictions, especially common law countries, the doctrine of conspiracy is currently the most suitable — and often the only available — tool to create liability for people involved in criminal organisations,[24] especially those "who plan and organise crimes but take no part in their actual commissions".[25] Put simply, conspiracy criminalises agreements between two or more persons to commit an unlawful act where there is an intention to commit that unlawful act.[26]

As with other inchoate offences, conspiracy extends criminal liability beyond the completion of a crime (see Figure 1 above). Conspiracy extends liability 'backwards' beyond attempts by criminalising the planning (or 'agreement') stage of a criminal offence. "Conspiracy is a more 'preliminary' crime than is attempt",[27] it exists even without preparation of the contemplated offence.[28] As such, conspiracy serves the purpose of preventing crime and it allows law enforcement agencies to intervene (and enables charges to be laid) long before the actual attempt or commission of an offence.[29] Conspiracy has a further dimension in that it allows for the criminalisation of multiple persons involved in a criminal enterprise. Conspiracy attaches liability to agreements to commit crime. This enables the prosecution of persons who organise and plan crime, rather than execute it.[30]

(2nd edn, 2005) 358–364; David Lanham et al, *Criminal Laws in Australia* (2006) 499–509.

23 Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008).

24 Cf Clay M Powell, "Conspiracy Prosecutions" (1970) *Criminal Law Quarterly* 34 at 42.

25 Louis Waller & CR Williams, *Criminal Law* (10th ed, 2005) para 10.66.

26 Section 465 *Criminal Code* (Canada), s 310 *Crimes Act* 1961 (NZ); s 11.5(1) *Criminal Code* (Cth); s 48(1) *Criminal Code* (ACT); s 282 *Criminal Code* (NT); ss 541, 542 *Criminal Code* (Qld); s 321(1), (2) *Crimes Act* 1958 (Vic); ss 558, 560 *Criminal Code* (WA), and at common law.

27 David Watt & Michelle Fuerst, *2008 Tremeear's Criminal Code* (2007) 422. "Thus, the law of conspiracy pushes inchoate liability back towards what would usually be regarded as a mere preparatory act in the law of attempt." Eric Colvin & John McKechnie, *Criminal Law in Queensland and Western Australia* (5th edn, 2008) para 19.22.

28 *R v Trudel* (1984) 12 CCC (3d) 342.

29 Peter Gillies, *The Law of Criminal Conspiracy* (2nd ed, 1990) 4-13. Cf *DPP v Nock* (1978) 67 Cr App R 116 at 126-127.

30 Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008).

In essence, liability for conspiracy arises when two or more persons enter into an agreement to commit an unlawful act[31] with the intention to commit that unlawful act.[32] Unlike attempt, there is no requirement to demonstrate that the accused came close ('proximate') to the completion of the substantive offence.[33]

At the heart of liability for conspiracy is the agreement to commit a criminal offence or effect an unlawful purpose.[34] The agreement must be made between at least two people, or, in other words, between the accused and another person. An agreement with oneself is not possible.[35] While the agreement cannot exist without communication between the conspirators, there is no requirement that the parties to the agreement know each other. All that is required is that each conspirator is committed to the agreed objective. There is no requirement regarding the level of involvement of a conspirator in the agreement. The agreement may envisage that all conspirators equally take some action towards the agreed goal, but a conspirator may also be part of the agreement without carrying out any conduct towards the common objective.[36]

The agreement between the conspirators imports an intention that the unlawful act or purpose of the agreement be done.[37] "To prove the existence of a conspiracy, it must be shown that the alleged conspirators were acting in pursuance of a criminal purpose held in common between them".[38]

Jurisdictions are divided over the requirement to prove some overt physical manifestation to take place after the agreement. This requirement seeks to ensure that the conspirators actually put their plans into action, thus eliminating liability for agreements that may be no more than bare intent or wishful thinking.[39] Most US jurisdictions and also Australian federal criminal law, and the Australian Capital Territory require that at least one of the parties to the agreement commit an overt act pursuant to the agreement.[40] At common law,[41] in Canada,[42] New Zealand,[43]

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31 *R v O'Connell* [1912] QWN 36; *Day and Simon v R* (1995) 81 A Crim R 60; *R v Gudgeon* (1995) 133 ALR 379 at 389.

32 Australia: *R v Rogerson* (1992) 174 CLR 268; *R v Thompson* (1965) 50 Cr App R 1; *Giorgianni v R* (1985) 156 CLR 473 at 506; *DPP v Nock* [1978] 2 All ER 654 at 558. Canada: *Chapman* (1972) 20 C.R.N.S. 141 at 142; *R v O'Brien* (1954) 110 C.C.C. 1 at 3, 6, 9; *Mulcahy* (1868) L.R. 3 H.L. 306.

33 Glanville Williams, *Criminal Law: the general part* (2nd ed, 1961) 710.

34 "When two agree to carry [the agreement] into effect, the very plot is an act in itself": *Mulcahy v R* (1868) L.R. 3 H.L. 306 at 317 per Willes J, also cited in *R v O'Brien* (1954) 110 C.C.C. 1 at 9 per Estey J.

35 *R v O'Brien* (1954) 110 C.C.C. 1; *Peters v R* (1998) 192 CLR 49. Cf s 11.5(2) *Criminal Code* (Cth).

36 Cf Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd edn, 2005) 416–424; David Brown et al, *Criminal Laws* (4th edn, 2006) 1092–1103; Eric Colvin & John McKechnie, *Criminal Law in Queensland and Western Australia* (5th edn, 2008) para 19.22; David Lanham et al, *Criminal Laws in Australia* (2006) 469–470, 471–475.

37 *R v Rogerson* (1992) 174 CLR 268; *R v O'Brien* (1954) 110 C.C.C. 1

38 MJ Shanahan et al, *Carter's Criminal Law of Queensland* (16th edn, 2006) s 541.20; cf *Gerakiteys v R* (1984) 153 CLR 317

39 Donald Stuart, *Canadian Criminal Law* (5th ed, 2007) 705.

40 Sections 11.5(2)(c) *Criminal Code* (Cth), 48(2)(c) *Criminal Code* (ACT), and s 107 *Penal Code* (Singapore). See also David McClean, *Transnational Organized Crime* (2007) 67.

41 "It is not necessary in order to complete the offence that any one thing should be done beyond the agreement": *R v Aspinall* (1876) 2 QBD 48 at 58 per Brett JA.

42 See *Belyea v R* (1932) 57 CCC 318; *Cameron* (1935) 64 C.C.C. 224 at 230; *Harris* [1947] O.R. 461 at 466; *Deal* (1956) 114 C.C.C. 325 at 331. "[I]t is immaterial that there was no effort towards achieving the common purpose once agreement is proved." Donald Stuart, *Canadian Criminal Law* (5th ed, 2007) 688-689.

43 *R v Gemmell* [1985] 2 NZLR 740 at 743. Cf *R v Johnston* (1986) 2 CRNZ 289; *R v*

Queensland, Victoria,[44] and Western Australia,[45] however, this 'overt act' is not a formal requirement of conspiracy. Consequently, liability for conspiracy may also arise without any physical manifestation of the agreement between the conspirators. In practice, however, some overt act usually has occurred before conspiracy is charged.[46] It "may be difficult for the prosecution to prove what occurred in a private meeting between conspirators"[47] and "the authorities generally do not learn of the conspiracy until it has been transacted, wholly or partly."[48] Justices McPherson and Thomas remarked in *R v Gudgeon* (1995) 133 ALR 379 that:

> The essence of the offence of conspiracy lies in the 'agreement of minds' and performance of the agreement is not a requisite of the offence. Evidence of acts following the agreement may be the only available proof that the agreement was made, but it is the agreement and not the evidence that constitutes the offence.[49]

One of the practical advantages of conspiracy is that it allows merging the prosecution of several charges against multiple persons,[50] thus recognising the connection between different individuals and different crimes. Conspiracy offers an avenue to target the masterplan (i.e. the agreement) rather than the isolated substantive offences.[51] "The conspiracy prosecution", remarks Clay Powell, "has the great advantage of combining all the isolated acts to put together the full picture."[52] The difficulty in this combining of offences and offenders is the unavoidable complexity of conspiracy prosecutions and trials. Douglas Meagher notes: "Where the number charged exceeds five or six, the trial tends to become unmanageable".[53]

In practice, conspiracy charges frequently involve criminal rings involved in the trafficking, supply, or sale of illicit drugs.[54] The charges are generally used against persons who are involved in the planning and organisation of the crimes and in most cases there is also evidence of the accused having possession of or immediate access to the illicit drugs. While the essence and rationale of conspiracy captures many features of organised crime, proving the elements can be difficult for certain people involved in criminal organisations.[55]

First, conspiracy cannot be used as a charge against persons that are not part of the agreement. "Each defendant in a single conspiracy indictment has to be shown to be party of the same agreement and its terms is usually indirect. It is thus often difficult

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Sanders [1984] 1 NZLR 636.

44 Section 321(1), (2) *Crimes Act* 1958 (Vic).

45 *Poulters' Case* (1611) 77 ER 813. Eric Colvin & John McKechnie, *Criminal Law in Queensland and Western Australia* (5th edn, 2008) para 19.22.

46 "The overt acts taken to carry out the agreement are merely evidence going to prove the agreement": *R v Douglas* (1991) 63 CCC (3d) 29; *Kouftis v R* [1941] SCR 481 at 488.

47 Bernadette McSherry & Bronwyn Naylor, *Australian Criminal Laws* (2004) 390. Cf *R v Gassyt* (1998) 127 CCC (3d) 546; AP Simester & WJ Brookbanks, *Principles of Criminal Law* (2nd ed, 2002) 265.

48 Peter Gillies, "Secondary Offences and Conspiracy" (1991) 15 *Criminal Law Journal* 157 at 161.

49 MJ Shanahan et al, *Carter's Criminal Law of Queensland* (16th edn, 2006) s 541.20.

50 Cf Peter Gillies, "Secondary Offences and Conspiracy" (1991) 15 *Criminal Law Journal* 157 at 162.

51 Cf *R v Shepherd* (1988) 37 A Crim R 303 at 309-310.

52 Clay M Powell, "Conspiracy Prosecutions" (1970) *Criminal Law Quarterly* 34 at 43.

53 Douglas Meagher, *Organised Crime* (1983) 65; cf Barbara Hocking, *The Law of Criminal Conspiracy* (1998) 377.

54 See, for example, *R v Sorby* [1986] VR 753; *R v Shepherd* (1988) 37 A Crim R 202; *R v Gudgeon* (1995) 133 ALR 379; *R v Pericic* [2000] QCA 431; *R v X and Y* (2001) 130 A Crim R 153; *Mauceri v R* [2007] NSWCCA 262.

55 Cf Sabrina Adamoli et al, *Organised Crime around the World* (1998) 132.

to distinguish related or sub-conspiracies."[56] This excludes from liability low ranking members of criminal organisations that are not privy to the agreement and are not involved in the planning of criminal activities.[57] Mere knowledge or recklessness of the agreement does not suffice to establish liability for conspiracy.[58]

Second, in those jurisdictions that require proof of an overt act it becomes difficult, if not impossible, to target high ranking members of criminal organisations that mastermind and finance the criminal activities, but that are not involved in executing their plans and thus do not engage in any overt acts. "Agreement, in the sense of meeting of two or more minds, does not accord with the common experience and how people actually associate in a criminal endeavour."[59] Peter Hill remarked:

> Typically, those at the higher end of the hierarchy will attempt to dissociate themselves from direct participation in criminal activity, especially crimes which carry a high risk of arrest. As these higher-echelon figures often receive much of their income from taxes, tribute, or dues paid by their subordinates, they are effectively insulated from indictment.[60]

Third, senior members of criminal organisation may give instructions about the general type and nature of criminal activity to be carried out, but their planning and organisation may not, or not always, involve specific details about individual operations. In this context, Michael Levi and Alaster Smith noted that "[c]onspiracy contemplates an agreement to engage in conduct which relates to one or a series of closely related crimes, it does not contemplate the activities of a multi-faceted criminal enterprise."[61]

Fourth, conspiracy charges often fail because the law is so overly complex and because some jurisdictions have created procedural obstacles (such as approval by Attorneys-General) to limit the use of conspiracy charges.[62]

2.2 Case examples

The difficulties of criminalising certain members of criminal organisations and the roles they occupy within the criminal hierarchy are well illustrated in a number of prominent cases.

2.2.1 Alphonese Capone

The first case example — and perhaps the most notorious one — is that of Alphonse (Al) Capone (nicknamed 'Scarface'), who was born to Italian immigrant parents on January 17, 1899 in Brooklyn (NY). Al Capone, who later moved to Chicago (IL), was extensively involved in illegal prostitution, gambling, and in smuggling and bootlegging during the prohibition of liquor in the United States between 1920 and

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56 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 16; cf Peter Hill, *The Japanese Mafia* (2003) 148.

57 Cf Douglas Meagher, *Organised Crime* (1983) 64.

58 *R v Alexander* (2005) 206 CCC (3d) 233; *R v Roche* (2004) 192 CCC (3d) 557.

59 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 16.

60 Peter Hill, *The Japanese Mafia* (2003) 148–149. See Section 2.2 below for case examples.

61 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 16.

62 Barbara Hocking, *The Law of Criminal Conspiracy* (1998) 377.

1933.[63] The planning of the so-called Valentine's Day massacre of 1929, in which seven members of a rival gang were brutally murdered in a machine gun fire, has also been attributed to Al Capone.[64] However, it was never possible to prove any link between him and the shooting or any of his other crimes. In fact, Al Capone was so removed from the criminal activities carried out by his gangs that he could never be held criminally responsible for any of his racketeering activities. It is alleged that he even admitted to the media of violating prohibition laws and bragged about never having been convicted for a crime.[65] Capone positioned himself at the top of a strictly hierarchical organisation involving hundreds, perhaps thousands of associates, ranging from "lieutenants" and managers at the top to specialists, technicians, bodyguards, and bombers at the bottom.[66] This hierarchy effectively insulated Capone from prosecutions. "The difficulty, after all," observes Mark Osler,

> in charging him with a crime was catching him doing something illegal. Because he did not carry the beer, shoot the gun, or extort the money directly, the laws which prohibited those actions did not easily apply to him. What he did was make money off all of these activities, and provided the management acumen to continue their work.[67]

The only crime Al Capone was ever convicted for was tax evasion as his unlawful income was subject to income tax.[68] He was later imprisoned for this offence for seven years between 1932 and 1939, first in Atlanta and from 1934 in Alcatraz, San Francisco (CA).[69] Al Capone died in Miami, Florida on January 25, 1947.

2.2.2 Pablo Escobar

Pablo Emilia Escobar Gavira was one of the most notorious Colombian drug dealers in the 1980s — and, as is often alleged, also one of the most brutal, ruthless, and wealthiest. Despite criminal activities in his adolescence and arrests for drug running, he was able to avoid trial and in 1982 was elected deputy representative in the Colombian Congress. Around the same time, his criminal syndicate, known as the Medellin Cartel, gained notoriety for controlling a substantial part of the cocaine trade in central America. According to some sources, at the peak of its operations the cartel controlled 80 percent of the cocaine trade generating some US$ 30 billion. His cartel and Escobar himself engaged in the corruption of many government officials and in the execution of business rivals, officials, and others who stood in their way; a method often referred to as 'plato o plomo', 'money or bullets'.

Unlike Al Capone, Escobar personally carried out many killings, including that of presidential candidate Louis Carlos Calán Samiento in August 1989. In order to avoid extradition to the United States, Escobar surrendered to the authorities in 1991 and began a period of home detention in his luxurious residence. When he was

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63 Anecdotally, the term money laundering is often attributed to Al Capone as he used a number of laundrettes to disguise the true origin of his funds and also worked with associates who would transfer proceeds of his crime to Switzerland and to other offshore banks. The term money laundering was, however, not used during the Prohibition era and appears to originate in newspaper articles published in relation to the Watergate scandal during Richard Nixon's US presidency.

64 Lauren Bergreen, *Capone, The Man and the Era* (1996) 308-309.

65 John Kobler, *Capone: The Life and World of Al Capone* (1971) 214-215.

66 Mark Osler, "Capone and Bin Laden: The Failure of Government at the Cusp of War and Crime" (2003) 55 *Baylor Law Review* 603 at 607.

67 Mark Osler, "Capone and Bin Laden: The Failure of Government at the Cusp of War and Crime" (2003) 55 *Baylor Law Review* 603 at 610.

68 *United States v Sullivan* (274 US 259); *Capone v US* (1932) 56 F.2d 927; cf Lauren Bergreen, *Capone, The Man and the Era* (1996) 440-492.

69 For further reading see Howard Abadinsky, *Organized Crime* (8th ed, 2007) 85-94.

transferred to a jail in 1992 he soon escaped and a massive manhunt, supported by the US Government and rival drug cartels, began. The search ended with a massive shootout in a middle-class suburb of Medellin on December 2, 1993 in which Escobar died, one day after his 44th birthday.

The principal reasons why Escobar never had to face charges for any crimes he directed or himself committed are that he was protected by a massive criminal organisation which effectively prevented law enforcement agencies finding and arresting him. Further, he influenced official decisions at all levels of Government through bribery, threats, intimidation, and assassinations. It is alleged his cartel and its associates were behind the constitutional amendment in 1991 that prohibits the extradition of Colombian nationals to foreign countries; an amendment that effectively protected Escobar from facing charges in the United States.

2.2.3 Nicolo Rizzuto

A more recent example that illustrates the difficulties of holding key leaders of large criminal organisations accountable is that of Mr Nicolo (Nick) Rizzuto. Rizzuto was born in 1924 in Sicily before emigrating to Canada in the 1950s.[70] In Montreal, he became involved with the Cotroni family that controlled much of the local illicit drug market, and he also established ties with Italian crime families in New York, the Cosa Nostra in Italy, and various offshoots in the Caribbean.[71] Gradually, Rizutto rose to become the patriarch of Montreal's Sicilian Mafia, making millions of dollars from the illicit drug trade, loan-sharking, illegal gambling, fraud, and also contract killings.

Despite many years of investigations by Canadian authorities, including more than a million hours of wiretapping, prosecutors have not been able to directly implicate Rizzuto (though he did serve a sentence for a drug trafficking conviction in Venezuela in the 1980s). In October 2008, he eventually pleaded guilty to proceeds of crime offences and for his role in the criminal organisation but due to the limited evidence he only received a short suspended sentence.[72] His son Vito Rizzuto, who has been described as the most powerful Mafioso in Canada, was not so lucky, as he is currently serving prison time in the United States for his involvement in a triple murder and is expected to face further charges.[73]

2.2.4 Foot-soldiers

The debate about extending criminal liability to better capture criminal organisations and their members has not only focused on prominent key leaders and on the top levels of the organisational hierarchy. Many believe that the most effective way to suppress organised crime is to target its base and the many associates, supporters, and suppliers that facilitate the day to day operations of criminal organisations. It is argued that the consistent and comprehensive prohibition and punishment of any contribution to, and association with, criminal organisations deters people from becoming involved and thus attacks the very existence of organised crime. The basis of this approach is the view that no criminal syndicate can exist with a large number of so-called foot-soldiers. The advantage of criminalising these lower-ranking participants in criminal organisations is that these persons generally operate

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70 See further Lee Lamothe & Adrian Humphreys, *The Sixth Family* (2006) 2–9.

71 Tom Blickman, "The Rothschilds of the Mafia on Aruba" (1997) 3(2) *Transnational Organized Crime* 50 at 52, 53, 60, 63; Lee Lamothe & Adrian Humphreys, *The Sixth Family* (2006) 9-20.

72 Ingrid Peritz, "Reputed patriarch of Canadian crime family walks free" (17 Oct 2008) *The Globe and Mail*, A5.

73 See further Lee Lamothe & Adrian Humphreys, *The Sixth Family* (2006) 29–362.

more visibly, and are thus easier to detect and arrest than the core directors and financiers of the organisation.

The literature provides a number of examples that illustrate the types and nature of low-ranking associates and rudimentary supporters of criminal organisations. These include:

- A provider of food or lodging to criminal organisations whose business has quadrupled since the crime group began to use his services.[74]
- A motor mechanic who fixes motorbikes for an outlaw motorcycle gang, being aware of the criminal activities the gang is involved in.[75]
- A person buying (or selling) t-shirts bearing the symbols of a Chinese triad.[76]
- A high school that hires the clubhouse of a known biker gang as the venue for their annual prom night.
- "A martial arts teacher [who] socialises with and gives regular martial arts lessons to members of a known criminal gang who, the teacher knows, use the learned techniques in their beatings of non-compliant gang members."[77]

These hypotheticals raise obvious questions about the limits of criminal liability. How remotely can a person be connected with an organised crime group and still be criminally liable for that association? While some advocate the idea that only a complete criminalisation of any involvement with criminal gangs — however minor — can effectively prevent and suppress organised crime, others warn that this approach creates guilt by association and does nothing to dismantle criminal syndicates as long as it leaves the key leaders untouched.

The following section explores some of the general reservations toward organised crime offences. Detailed analyses of the provisions in international and domestic law and their scope of criminal liability follow in Parts 2 and 3 of this study.

2.3 Reservations and observations

The object of this study is criminal offences designed to better capture persons associated with criminal organisations. The previous discussion has shown that there is a need for special laws specifically designed to combat organised crime.

These laws constitute an extension of the traditional limits of criminal liability outlined in this Chapter. This extension challenges existing notions of inchoate and secondary liability and raises fundamental questions about the scope of criminal responsibility. Christopher Blakesley notes:

> A major problem with addressing organised crime is to criminalise conduct sufficiently to reach far enough into the organised criminal hierarchy to implicate leadership and the 'soldiers' of organised crime — those engaged in the day-to-day 'crime wars' (the robbers, pushers, 'hit-men', pimps) without endangering human rights.[78]

Parts 2 and 3 of this study provide a detailed analysis of the various ways in which international and domestic law systems have adopted this extension to criminal

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74 Christopher Blakesley, "The Criminal Justice System Facing the Challenge of Organized Crime" (1998) 69 *International Review of Penal Law* 69 at 79.

75 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) paras 23-25, 29; see Section 5.2.2 below.

76 See Section 8.3.2 below.

77 *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 111 per Holmes J.

78 Christopher Blakesley, "The Criminal Justice System Facing the Challenge of Organized Crime" (1998) 69 *International Review of Penal Law* 69 at 78.

liability. Each Section explores the background and identifies the elements of relevant provisions, and also critically examines actual and perceived advantages and disadvantages.

From the outset, a number of recurring concerns about the organised crime offences can be identified. The literature has been particularly critical about criminalising membership in organised crime groups, thus creating guilt by association. The following statements by some of the leading scholars in the field are reflective of the broader concerns (which will be explored further in the following Parts).

For example, Edward Wise succinctly summarises common concerns by stating:

> In all countries, even in those that do not formally accept the concept, there has been similar internal debate about the desirability and the contours of a crime based on membership in a criminal association. Concern has been expressed about the compatibility of such a crime with the principle of freedom of association, and with traditional principles of criminal law which are supposed to require focusing attention on the concrete specific act of a specific individual at a specific moment in time and on that individual's own personal guilt, not on that of associates. […] Every system of law has to grapple with the problem of defining the appropriate limits to doing so which derive from a common fund of basic ideas about what is entailed in designating conduct as criminal — the requirements of an act, of harm, of personal individual culpability.[79]

Canadian scholar Kent Roach also argues that outlawing membership in an organisation infringes on the freedom of association.[80] An unidentified colleague remarked that "a person does not become guilty by merely thinking about it." Christopher Blakesley asks whether "those who provide food or lodging to the 'mob' be considered (and punished) as members of the organised crime group?"[81]

Many critics argue that existing extensions of criminal liability are sufficient to capture the core of organised crime and that any further broadening of the principles of criminal liability or of specific offences is dangerous and unwarranted. "With targeted organised crime laws", states David Freedman, "we move […] closer, some might say, to guilt by association."[82]

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79 Edward Wise, "RICO and its Analogues: A Comparative Perspective" (2000) 27 *Syracuse Journal of Internal Law & Commerce* 303 at 321.

80 Kent Roach, "Panicking over Criminal Organizations: We Don't Need Another Offence" (2000) 44(1) *Criminal Law Quarterly* 1 at 2.

81 Christopher Blakesley, "The Criminal Justice System Facing the Challenge of Organized Crime" (1998) 69 *International Review of Penal Law* 69 at 79.

82 David Freedman, "The New Law on Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 173.

PART 2: INTERNATIONAL LAW

3 Convention against Transnational Organised Crime (Palermo Convention)

The *Convention against Transnational Organised Crime* was approved by the United Nations (UN) General Assembly on November, 15 2000,[83] and was made available for governments to sign at a conference in Palermo, Italy, December 12-15, 2000, hence the name *Palermo Convention*. 132 of the UN's 191 Member Nations signed the *Convention against Transnational Organised Crime* in Palermo in December 2000.[84] Today, the Convention has 147 Signatories and all 147 countries have ratified it.[85] The Convention entered into force on September 29, 2003[86] and has been described as "a giant step toward closing the gap that existed in international cooperation in an area generally regarded as one of the top priorities of the international community in the 21st century."[87]

The *Palermo Convention* has two main goals:[88] One is to eliminate differences among national legal systems. The second is to set standards for domestic laws so that they can effectively combat transnational organised crime. The Convention is intended to encourage countries that do not have provisions against organised crime to adopt comprehensive countermeasures, and to provide these nations with some guidance in approaching the legislative and policy questions involved. It also seeks to eliminate safe havens for criminal organisations by providing greater standardisation and coordination of national legislative, administrative, and enforcement measures relating to transnational organised crime, and to ensure a more efficient and effective global effort to prevent and suppress it.

3.1 Background

3.1.1 Giovanni Falcone

Among the first advocates for an international treaty against transnational organised crime was the Italian Judge Giovanni Falcone, who was involved in the prosecution and conviction of many leaders of the Italian Mafia. Just two months before his death in 1992, he attended the inaugural session of the UN Commission on Crime Prevention and Criminal Justice where he advocated closer international cooperation against organised crime and suggested a high-level international conference to initiate work in this field.[89]

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83 UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov 2000).

84 See UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov 2000) Annex I for the full text of the Convention in its final form. The text has also been reprinted in (2001) 40 ILM 335.

85 UNODC, www.unodc.org/unodc/en/treaties/CTOC/signatures.html (accessed 22 Nov 2008).

86 Cf Article 38 *Convention against Transnational Organised Crime*.

87 Dimitri Vlassis, "The United Nations Convention against Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (2002) 75 at 75.

88 See further, Andreas Schloenhardt, "Transnational Organised Crime and International Law: The Palermo Convention" (2005) 29 *Criminal Law Journal* 350-364.

89 Dimitri Vlassis, "The United Nations Convbention against Transnational Organized Crime and its Protocols", in *The Changing Face of International Criminal Law* (2002) 75 at 77-

Falcone, his wife, and three police officers escorting them, were assassinated on May 23, 1992 near Capaci, Sicily, on their way to Palermo airport. This assassination occurred within weeks of the killing of Judge Paolo Bosselini who, like Falcone, was responsible for convicting a number of key Mafia leaders.[90]

Following Falcone's assassination, the Italian Government strengthened its commitment to fight organised crime and submitted proposals for international cooperation against transnational organised crime to the United Nations. In 1993, the UN Commission on Crime Prevention and Criminal Justice, followed by the UN General Assembly, endorsed the idea of a first international conference on organised transnational crime, to be hosted by Italy in 1994.[91] The specific objective of this international conference was "to consider whether it would be feasible to elaborate international instruments, including conventions, against organised transnational crime".[92]

3.1.2 Naples Conference on Organised Transnational Crime, 1994

The *World Ministerial Conference on Organised Transnational Crime* met on November 21-23, 1994 in Naples, Italy. The principal features of the conference were the recognition of the global growth of organised transnational crime[93] and the elaboration of appropriate countermeasures.[94] The conference called, inter alia, for the universal criminalisation of participation in criminal organisations, measures for confiscation and forfeiture of assets, and enhanced efforts to combat money laundering and corruption.[95]

The conference concluded the *Naples Political Declaration and Global Action Plan against Organised Transnational Crime* (hereinafter the *Naples Declaration*)[96] which provides a set of elements for an international convention against organised crime. The scope of any new convention was said to be limited to forms of organised transnational crime that are not already covered by other international conventions and initiatives (such as drug trafficking).[97] In December 1994, the UN General

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90 Tom Blickman, "The Rothschilds of the Mafia on Aruba" (1997) 3(2) *Transnational Organized Crime* 50 at 55.

91 UN General Assembly, *Crime Prevention and Criminal Justice*, UN Doc A/RES/48/103 (20 Dec 1993).

92 UN Economic and Social Council (ECOSOC), *World Ministerial Conference on Organized Transnational Crime*, UN Doc E/RES/1993/29 at [1](e) (27 July 1993).

93 See UN ECOSOC, World Ministerial Conference against Organized Transnational Crime, *Problems and Dangers Posed by Organized Transnational Crime in the Various Regions of the World*, UN Doc E/CONF.88/2 (18 Aug 1994).

94 The background papers to the conference (UN Docs E/CONF.88/1-6) have also been reprinted in M Cherif Bassioni & Eduardo Vetere (eds), *Organized Crime: A Compilation of UN Documents 1975-1998* (1998) 450-585, and also in Phil William & Ernesto Savona, *The United Nations and Transnational Organized Crime* (1996) 1-160.

95 See *Convention against Transnational Organized Crime* 40 ILM 353 at [5] (2001); and UN ECOSOC, *World Ministerial Conference against Organized Transnational Crime*, "National Legislation and its Adequacy to Deal with the Various Forms of Organized Transnational Crime", UN Doc E/CONF.88/3 (25 Aug 1994), and UN Office at Vienna, "The World Ministerial Conference on Organized Transnational Crime" (1995) 26/27 *UN Crime Prevention and Criminal Justice Newsletter* 7-8.

96 *Naples Political Declaration and Global Action Plan against Organized Transnational Crime* reprinted in UN General Assembly, *Crime Prevention and Criminal Justice: Report of the World Ministerial Conference on Organized Transnational Crime*, UN Doc A/RES/49/748 Annex (2 Dec 1994).

97 See further Dimitri Vlassis, "The United Nations Convention against Transnational

Assembly endorsed the *Naples Declaration*,[98] thus opening the way for the elaboration of an international convention against transnational organised crime under the auspices of the UN.[99]

3.1.3 Development of the Palermo Convention

On December 12, 1996, the Government of Poland proposed a first draft UN framework convention against transnational organised crime.[100] This document was further discussed at an *Informal Meeting on the Question of the Elaboration of an International Convention*, held in Palermo, April 6-8, 1997.[101] Pursuant to the recommendations of this meeting, the Economic and Social Council, followed by the UN Secretary-General, decided to establish an inter-sessional open-ended intergovernmental group of experts to prepare a preliminary draft convention.[102] The expert group met in Warsaw, February 2-6, 1998 and presented its report together with an outline of options for contents of a convention to the UN Commission on Crime Prevention and Criminal Justice at its Seventh Session in April 1998.[103] The Commission then decided to establish an in-sessional working group to implement the *Naples Declaration* and further discuss the draft convention. The working group met in Buenos Aires from August 31 to September 4, 1998 and produced a new consolidated draft to serve as a basis for future formal consultations.[104] The findings of the Buenos Aires meeting were then put to the UN Commission and subsequently to the General Assembly.

On December 9, 1998, the UN General Assembly decided to establish an open-ended intergovernmental ad hoc committee to draft the main text of:

(a) a new comprehensive international convention against transnational organised crime, and
(b) three additional international legal instruments on:

i. trafficking in women and children;

Organized Crime and its Protocols", in *The Changing Face of International Criminal Law* (2002) 75 at 78-80; David McClean, *Transnational Organized Crime* (2007) 3–4.

98 UN General Assembly, *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc A/RES/49/159 (23 Dec 1994) [3].

99 See further David McClean, *Transnational Organized Crime* (2007) 6–8.

100 UN Doc A/C.3/51/7, reprinted in UN ECOSOC, *Follow-up to the Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Annex III. See further Dimitri Vlassis, "The United Nations Convention against Transnational Organized Crime and its Protocols", in *The Changing Face of International Criminal Law* (2002) 75 at 80-82; David McClean, *Transnational Organized Crime* (2007) 6–7.

101 See further David McClean, *Transnational Organized Crime* (2007) 7–8.

102 UN ECOSOC, *Follow-up to the Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) para 14; UN General Assembly, *Follow-up to the Naples Political Declaration and Global action Plan against Organized Transnational Crime*, UN Doc A/RES/52/85 (30 Jan 1998) para 14. See further, David McClean, *Transnational Organized Crime* (2007) 8–9.

103 UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime: Question of the elaboration of an International Convention against organized transnational crime and other international instruments*, UN Doc E/CN.15/1998/5 (18 Feb 1998).

104 Dimitri Vlassis, "The United Nations Convention against Transnational Organized Crime and its Protocols", in *The Changing Face of International Criminal Law* (2002) 75 at 82-85.

ii. illicit manufacturing and trafficking in firearms, their parts and components, and
iii. illegal trafficking in and transporting of migrants, including by sea.[105]

Between January 1999 and October 2000, the Ad Hoc Committee held eleven sessions in Vienna to discuss and finalise the text of the Convention and the three supplementing Protocols. Consultations about the main Convention (sometimes referred to as the 'mother convention') and the Protocols against trafficking in women and children and against the smuggling of migrants finished at the eleventh session in October 2001. An additional twelfth session to conclude the Firearms Protocol was held in March 2001.[106] In retrospect — and in comparison to other international treaties — the development of the *Palermo Convention* only took a short time, which "reflects the urgency of the needs faced by all States, developed and developing alike, for new tools to prevent and control transnational organised crime."[107]

The *Palermo Convention* is roughly divided into four parts: criminalisation, international cooperation, technical cooperation, and implementation. Of particular interest to this study are those parts of the Convention that deal with the criminalisation of organised crime. To that end, the Convention introduces four new offences: participation in an organised criminal group (art 5), money laundering (art 6),[108] corruption (art 8),[109] and obstruction of justice (art 23). The *Legislative Guides* to the Convention stresses:

> The activities covered by these offences are vital to the success of sophisticated criminal operations and to the ability of offenders to operate efficiently, to generate substantial profits and to protect themselves as well as their illicit gains from law enforcement authorities. They constitute, therefore, the cornerstone of a global and coordinated effort to counter serious and well-organised criminal markets, enterprises, and activities.[110]

The following sections explore the definition of organised criminal group in art 2(a) of the Convention, followed by an analysis of the participation offence in art 5. Not further examined here are the other offences and the enforcement measures under the Convention.

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105 UN General Assembly, *Transnational Organized Crime*, UN Doc A/RES/53/111 (20 Jan 1999) [10]; UN General Assembly, *Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in Particular its Technical Cooperation Capacity*, UN Doc A/RES/53/114 (20 Jan 1999) [13].

106 Cf UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov 2000) [77], [102], [108], [120]. See further Dimitri Vlassis, "The United Nations Convention against Transnational Organized Crime and its Protocols", in *The Changing Face of International Criminal Law* (2002) 75 at 87-88; David McClean, *Transnational Organized Crime* (2007) 9–13.

107 Dimitri Vlassis, "The United Nations Convention against Transnational Organized Crime and its Protocols", in *The Changing Face of International Criminal Law* (2002) 75 at 76, 88.

108 See further, Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 174-175.

109 Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 175-176.

110 UNODC, Division for Treaty Affairs, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* (2004) [hereinafter *Legislative Guides*] 17.

3.2 Definition of Organised Criminal Group

Article 2(a) of the Convention defines 'organised criminal group' as

> [a] structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.[111]

In summary, the definition of organised criminal group in art 2(a) of the *Convention against Transnational Organised Crime* combines elements relating to the structure of criminal organisations with those relating to the objectives of the group. The definition does not require proof of any actual criminal activities carried out by the organised crime group, see Figure 2 below.

Figure 2 "Organised criminal group", art 2(a) *Convention against Transnational Organised Crime*

Terminology Elements	**Organised Criminal Group**
Structure	• Structured group, art 2(c) • Three or more persons; • Existing for a period of time and acting in concert.
Activities	• [no element]
Objectives	• Aim of committing serious crimes (art 2(b)) or Convention offences (arts 5, 6, 8, 23); • In order to obtain a financial or material benefit.

The following paragraphs explore the individual elements of this definition in more detail.[112]

Structured Group of three or more persons

The definition in art 2(a) focuses specifically on sophisticated criminal organisations and the people that constitute that organisation, rather than the activities they engage in.[113] Only "structured groups" of three or more persons can be the subject of the measures under this Convention.

The term "structured group" is further defined in art 2(c) to exclude from the definition of "organised criminal group" randomly formed associations for the immediate commission of an offence without any prior conspiracy, and associations that do not need to have formally defined roles for its members, continuity of its membership or a developed structure.[114] Acts committed by individuals or less than three persons,[115]

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111 For more on the development and history of this definition see David McClean, *Transnational Organized Crime* (2007) 38–40.

112 See also David McClean, *Transnational Organized Crime* (2007) 41–42.

113 Cf David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 192.

114 Article 2(c) *Convention against Transnational Organised Crime*: 'structured group'. See further Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 282; David McClean, *Transnational Organized Crime* (2007) 43.

115 It is noteworthy that the requirement of three members is higher than the two persons

or acts done by three persons not "acting in concert" also fall outside the scope of the Convention.[116] Signatories to the Convention are, however, free to modify the number of members required by this definition.[117]

The concept of organised criminal group under the Convention recognises the structural and managerial features of sophisticated criminal enterprises. On the one hand, the definition under art 2(a), (c) is wide enough to encompass a great variety of structural models. This is also confirmed in the *Travaux Préparatoires* which — contrary to art 2(c) — indicate that "the term 'structured group' is to be used in a broad sense so as to include both groups with hierarchical or other elaborate structures and non-hierarchical groups where the role of members of the group need not be formally defined."[118] On the other hand, the definition is limited to formal, developed organisations, thus avoiding criminalisation of informal and random associations such as youth groups and one-off criminal enterprises.[119]

Existence for some period of time

It is further required that the organised criminal group "exists for a period of time" thus excluding single, ad hoc operations from the definition.[120] The Convention recognises that the ongoing existence of criminal organisations is generally independent from individual criminal activities; organised crime is characterised by criminal activities on a sustained, repeated basis. Furthermore, the continued existence of large criminal organisations is largely independent from individual members; their operations generally continue after individuals are arrested, die, or otherwise leave the organisation.[121]

Aim to commit serious crime

Only structured associations that "act in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention" are considered organised criminal groups. Accordingly, the group must have one of two

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required for a conspiracy, see Section 2.1.3 above. See also M Cherif Bassiouni, 'Organised Crime and Terrorist Criminal Activities' (1990) 4 *Emery Int'l Law Review* 9 at 10: 'By definition, organised crime cannot be committed by a single individual'.

116 David McClean, *Transnational Organized Crime* (2007) 41, suggests that it is not necessary that "all members must join the activity" but "that this must be a group activity, not merely the simultaneous acts of some of its members each acting on his or her own account."

117 UN General Assembly, *Interpretative notes for the official records (Travaux préparatoires) of the negotiations of the United Nations Convention against Transnational Organised Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 [hereinafter *Travaux Préparatoires*] para 2.

118 *Travaux Préparatoires*, para 4. Cf Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 282; David McClean, *Transnational Organized Crime* (2007) 43.

119 *Legislative Guides*, 14.

120 Cf G Fiorentini G and S Peltzman, 'Introduction' in Fiorentini G and Peltzman S (eds), *The Economics of Organised Crime* (1995) 3; G Fitzgerald (1989) in P Dickie and P Wilson, 'Defining Organised Crime — An Operational Perspective', 4(3) *Current Issues in Criminal Justice* (1993) 215 at 217.

121 Cf M Cherif Bassiouni, 'Organised Crime and Terrorist Criminal Activities' (1990) 4 *Emery Int'l Law Review* 9 at 11; David McClean, *Transnational Organized Crime* (2007) 41; Peter Hill, *The Japanese Mafia* (2003) 149.

aims: either (1) to commit one or more Convention offences (arts 5, 6, 8, 23), such as corruption and money laundering; or (2) to commit one or more serious crimes.

Under art 2(b) "'serious crime' shall mean a conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years of imprisonment or a more serious penalty."[122] Seriousness is thus determined solely by reference to a maximum penalty, not by reference to any type of conduct or to any actual harm or damage caused by the criminal organisations' activities. Roger Clark refers to this point as the "specific-content-free definition of serious crime" and remarks that "[t]he scope of the Convention's application turns ultimately on the seriousness of the particular activities (judged in a rough and ready way by the penalty) rather than on substantive content."[123] Consequently, even if an organised criminal group engages in exceptionally violent, heinous or detrimental conduct, the group will not fall within the definition of the Convention unless such conduct attracts a penalty of four years imprisonment or more.

The definition of "serious crime" is seen as one of the main weaknesses of the concept of organised crime under the *Palermo Convention*. It is ultimately left to individual State Parties to decide which offences to bring within the ambit of the Convention and which ones to leave out, thus making discrepancies between countries unavoidable. David Freedman notes that:

> Ultimately, countries themselves define the activities that fall within the rubric of serious crime, given that the definition is linked to punishment rather than a list of predicate offences specifically enumerated. However, since offences and their punishment vary from country to country, the four-year threshold has the potential to raise doubt about which offences should be prosecuted as organised criminal activity.[124]

This issue may lead some countries to raise minimum penalties on some offences to bring them within the ambit of the Convention, while others may opt to lower penalties in order to avoid Convention obligations.[125]

Concerns have also been expressed about the fact that criminal groups aiming to commit only a single serious crime are equally covered by this definition. It was mentioned earlier that the ongoing nature of its activities is one of the characteristics of organised crime, thus raising questions whether "the commission of just one crime (unless the crime is ongoing), no matter how grave, [is] enough to view an entity as part of organised crime".[126]

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122 Cf UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Analytical study on serious crime*, UN Doc A/AC.254/22 (30 Nov 1999); David McClean, *Transnational Organized Crime* (2007) 42.

123 Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 169.

124 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 196. See also Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 284.

125 Cf *Legislative Guides*, 14.

126 Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 283. See also David McClean, *Transnational Organized Crime* (2007) 41.

Financial or material benefit

The definition under art 2(a) requires that the purpose of the group's activity is "to obtain, directly or indirectly, a financial or other material benefit". Here, the Convention recognises the profit-oriented business dimension of organised crime. Furthermore, the *Travaux Préparatoires* establish that "other material benefit" may also include non-material gratification such as sexual services.[127] The *Legislative Guides* specifically state that "[t]his is to ensure that organsations trafficking in human beings or child pornography for sexual and not monetary reasons are not excluded".[128]

As the definition is limited to "material benefit", concerns that the "term has potential of being interpreted very broadly to include non-economically motivated crimes such as environmental or politically motivated offences"[129] seem unwarranted. Indeed, the *Legislative Guides* to the Convention note that the definition is intended to exclude groups with purely political or social motives:

> This would not, in principle, include groups such as some terrorist or insurgent groups, provided that their goals were purely non-material. However, the Convention may still apply to crimes committed by those groups in the event that they commit crimes covered by the Convention (for example, by committing robbery in order to raise financial or material benefits).[130]

Countries such as Algeria, Egypt, Morocco, and Turkey expressed regret that the phrase "financial or material benefit" excludes terrorism from the definition of organised crime, which these countries fought hard to have included.[131]

In summary, the definition of organised criminal group under the *Palermo Convention* captures some of the established characteristics of criminal organisations and allows enough flexibility to target a diverse range of associations and to respond to the ever changing features and structures of organised crime. On the other hand, the definition in art 2 is seen by many as no more than the lowest common denominator, "referring to almost every kind of formation, thus rendering it almost meaningless".[132] Alexandra Orlova and James Moore have described the definition as "a conceptually weak compromise definition that is, at once, overly broad and under inclusive."[133] Others have argued that the definition of organised crime in the *Palermo Convention* is only a secondary issue "as the Convention was not designed to tell the Signatories what organised crime was."[134]

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127 *Travaux Préparatoires*, para 3.

128 *Legislative Guides*, 13 (with reference to the *Travaux Préparatoires*).

129 Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 283

130 *Legislative Guides*, 13.

131 David McClean, *Transnational Organized Crime* (2007) 40.

132 Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 283.

133 Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 304.

134 Keith Morrell, Director, United Nations, Criminal Law and Treaty Division, Department of Foreign Affairs and International Trade, Canada (23 Oct 2003) cited in Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 285.

3.3 Organised Crime Offence, article 5(1)(a)

Under art 5(1)(a) of the *Convention against Transnational Organised Crime*

> [e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
> (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
> (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organised criminal group;
> (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, takes an active part in:
> a. Criminal activities of the organised criminal group;
> b. Other activities of the organised criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.
>
> […]

The article applies only "to the prevention, investigation and prosecution" of "serious crime" "where the offence is transnational in nature and involves an organised criminal group", art 3(1).[135] By definition, the application of the offences under art 5 is thus limited to 'transnational organised crime', ie to offences that occur across international borders, art 3(2).[136] It does not encompass purely domestic organised crime, though State Parties are at liberty to extend the application of their domestic provisions accordingly.

Article 5(1)(a) of the *Palermo Convention* offers Signatories a choice between two different organised crime offences:
(1) a conspiracy offence, and
(2) an offence for participating in an organised criminal group (also referred to as 'associations de malfaiteurs' law).

It has been argued that the two different offences are designed for implementation by different legal traditions: The conspiracy offence contained in paragraph (i) is seen as more suitable for adoption in common law jurisdictions,[137] while the participation offence under (ii) may be more palatable for continental, civil law countries (some of which do not permit simple criminalisation of an agreement[138]).[139] The later parts of this study, however, show that several common law jurisdictions have also opted for the second mode, thus using both models simultaneously.

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135 See further, David McClean, *Transnational Organized Crime* (2007) 51–52.
136 See further, David McClean, *Transnational Organized Crime* (2007) 52–56.
137 See the discussion of conspiracy in Section 2.1.3 above.
138 See, for example, art 115 *Penal Code* (Italy).
139 Dimitri Vlassis, "The United Nations Convention against Transnational Organized Crime and its Protocols", in *The Changing Face of International Criminal Law* (2002) 75 at 92; David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 197; Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 170-171; Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 286-287; *Legislative Guides*, 21–22.

3.3.1 Article 5(1)(a)(i): the conspiracy model

The first model contained in art 5(1)(a)(i) combines elements of conspiracy ("agreement to commit a serious crime") with the additional requirement that the conspiracy is done for the purpose of obtaining a financial or other benefit.

Figure 3 Elements of art 5(1)(a)(i) *Convention against Transnational Organised Crime*

Art 5(1)(a)(i)	Elements of the offence
(Physical) elements	• Agreement to commit a serious crime (art 2(b)); • Between two or more persons [accused with one or more other persons] • (where required by domestic law: (overt) act in furtherance of the agreement)
Mental elements	• Purpose of agreement/crime: obtaining financial or other material benefit; • Intention to enter the agreement (art 5(1), chapeau).
Procedural matters	Purpose and intent may be inferred from objective factual circumstances, art 5(2).

The first model of the organised crime offence under the *Palermo Convention* is, for the most part, identical with the conspiracy offence discussed in Section 2.1.3 above (though it does not use the term conspiracy). The Convention also accommodates those jurisdictions, like Australia, that under their domestic law require proof of an overt act in furtherance of the agreement.[140]

There is one noticeable difference to traditional concepts of conspiracy which is the requirement that the purpose of the agreement is directed at obtaining financial or material benefits. This eliminates from art 5(1)(a)(i) those conspiracies that are aimed at committing non-profitable crimes. Material benefits, as discussed earlier, may also include non-financial advantages such as sexual gratification.[141]

A second and more subtle difference of procedural significance can be found in art 5(2) which facilitates the proof of the mental elements.[142] The purpose and intention required under art 5(1)(a)(i) may be inferred from objective factual circumstances, thus lowering the threshold of the burden of proof placed on the prosecution.

In summary, the first of the two types of organised crime offences in the *Palermo Convention* advocates the universal adoption of the conspiracy offence specifically in relation to conspiracies aimed at offences that may generate material benefits for the accused. The shortcomings of conspiracy in relation to organised prosecutions have already been discussed in earlier parts of this study.[143] Article 5(1)(a)(i) does not resolve these issues, but the Convention included the conspiracy model in recognition of the fact that some countries would oppose legislation (and thus the treaty) that creates liability for mere participation in, or association with a criminal group.[144]

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140 See Section 2.1.3 above. See also art 5(3) *Convention against Transnational Organised Crime*. Cf *Legislative Guides*, 23; Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 171; David McClean, *Transnational Organized Crime* (2007) 62–63, 66–67.

141 See also *Legislative Guides*, 24.

142 See also art 3(3) *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*.

143 See Section 2.1.3 above.

144 David McClean, *Transnational Organized Crime* (2007) 60.

3.3.2 Article 5(1)(a)(ii): the participation model

The *Convention against Transnational Organised Crime* offers a second, different type of organised crime offence in art 5(1)(a)(ii) which is based on the association de malfaiteurs laws in countries such as France and Italy.[145] In contrast to paragraph (i), the offence under art 5(1)(a)(ii) adopts a model that makes the participation in a criminal organisation a separate offence. State Parties may implement this second type as an alternative to the offence under paragraph (i), or they may — as has been done in some jurisdictions — implement both types cumulatively (art 5(1)(a) "either or both").

Figure 4 Elements of art 5(1)(a)(ii) *Convention against Transnational Organised Crime*

Art 5(1)(a)(ii)	Elements of the offence
Physical elements	• Taking an active part in a) Criminal activities of the organised criminal group (art 2(a)); [or] b) Other activities of the organised criminal group [with special knowledge, see below].
Mental elements	• Intention [to actively participate] (art 5(1) châpeau); • Knowledge of o Aim and general criminal activity of the organised criminal group, or o The organised criminal group's intention to commit crimes. • If (b) above: knowledge that participation will contribute to achieving the criminal aim.
Procedural matters	Intention and knowledge may be inferred from objective factual circumstances, art 5(2).

Liability under art 5(1)(a)(ii) requires that an accused "takes active part in" certain activities of an organised criminal group (as defined in art 2(a)).[146] The participation has to be "active" in the sense that it makes an actual contribution to the group's activities and is not completely unrelated to them. The accused's participation may be (a) in the group's criminal activities or also (b) in other, non-criminal activities if the accused knows that his/her contribution will contribute to achieving a criminal aim.[147] The physical elements of the offence thus limit liability to conduct that contributes to the criminal activities or criminal aims of the group; other participation such as providing food to a criminal group would not be sufficient. It is debatable whether acts such as supplying a firearm or fixing a criminal group's motorbikes, or being a look-out man at a burglary would be enough to meet these requirements.[148]

Liability under art 5(1)(a)(ii) is further restricted to persons who intentionally participate in the above mentioned activities and who have actual knowledge of the aims and activities or the criminal intentions of the organised criminal group.[149] This excludes from liability any person who may unwittingly contribute to a criminal organisation or who is recklessly indifferent about the nature and activities of the group. Signatories, are, however, at liberty to lower the mens rea requirement and expand liability to recklessness, negligence, or even strict liability without proof of a fault requirement, art 34(3).[150]

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145 Articles 450–451 *Penal Code* (France); arts 416, 416bis *Penal Code* (Italy). See also arts 140, 265 *Penal Code* (The Netherlands).

146 See Section 3.2 above.

147 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 198; Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 172.

148 David McClean, *Transnational Organized Crime* (2007) 64.

149 See further, *Legislative Guides*, 24.

150 David McClean, *Transnational Organized Crime* (2007) 62.

As with the aforementioned offence, art 5(2) facilitates the proof of the mental elements: The intention and knowledge required under art 5(1)(a)(ii) may be inferred from objective factual circumstances.

The key feature of the second offence under art 5(1)(a) is the involvement of a criminal organisation. In short, this type of organised crime offence attaches liability to deliberate, purposeful contributions to criminal organisations, not on the pursuance of an agreement. It does not require proof of an accused's membership or of any ongoing role in the organisation. Article 5(1)(a)(i), in contrast, requires that the accused is part of the agreement, is a co-conspirator. Unlike conspiracy, the participation offence does not require a "meeting of the minds".[151]

The application of art 5(1)(a)(ii) is significantly broader than existing inchoate offences as it allows for the criminalisation of persons who are more remotely connected with criminal activities. It also extends liability beyond the current regime of secondary (or accessorial) liability (see Figure 5 below). For liability under this offence to arise, it is not always required that any criminal offences have been planned, prepared, or executed. A person may be liable under paragraph (ii) merely for contributing to activities that are ultimately designed to achieve a criminal aim but without being criminal activities themselves. There is also no requirement to show an overt act, which limits the application of the conspiracy offence in some jurisdictions.[152]

Figure 5 Extension of criminal liability under art 5(1)(a)(ii) *Convention against Transnational Organised Crime*

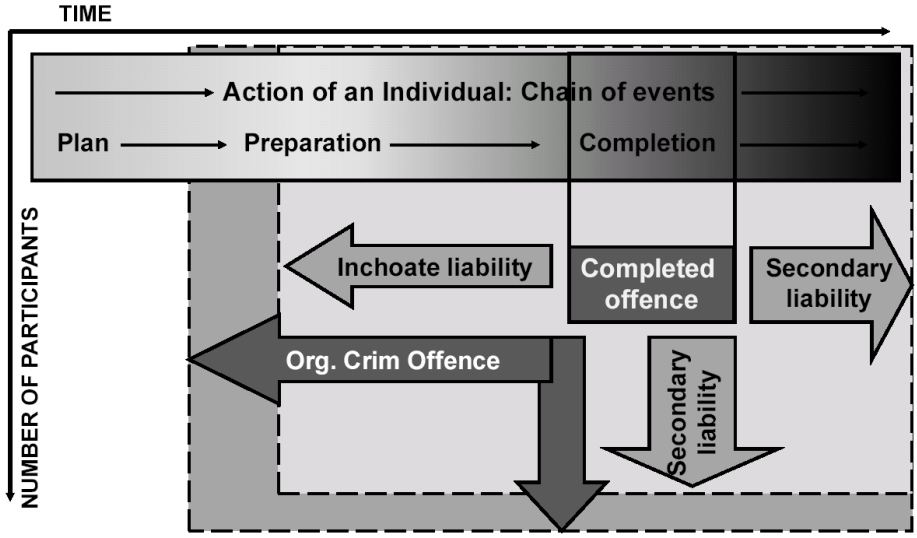

Figure 5 above illustrates that art 5 (1)(a)(ii) extends the spectrum of criminal liability in two ways: First, it can attach criminal responsibility to events that occur well before the preparation (and sometimes before the planning) of specific individual offences. Second, it can create liability for participants that are more remotely connected to individual offences than those accessories liable under existing models of secondary liability. Paragraph (ii) thus creates new avenues to hold low-level 'enhancers' and facilitators of organised crime groups criminally responsible for their contributions. It also renders organisers and financiers of criminal organisations

151 Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 249.

152 See Section 2.1.3 above.

liable who are not physically involved in the organisations' criminal activities, but who control, plan, and 'mastermind' these operations.

3.3.3 Remarks

Both models under art 5(1)(a) — if implemented and enforced properly — are prophylactic and can serve as tools to prevent the commission of criminal offences by organised crime groups. The *Palermo Convention* extends criminal liability beyond existing concepts of attempt and accessorial liability.

A further extension can be found in art 5(1)(b) which requires State Parties to criminalise the "organising, directing, aiding, abetting, facilitating or counselling [of] the commission of serious crime involving an organised criminal group" thus enabling the prosecution of accomplices, organisers, and arrangers as well as lower levels of participants that assist criminal organisations in their activities.[153] Moreover, art 10 of the Convention serves as a tool to hold commercial enterprises responsible for assisting the operations of criminal organisations and for laundering the assets deriving from crime, for corruption, and the obstruction of justice.[154]

The extensions of criminal liability created by the *Convention against Transnational Organised Crime* are significant and, as has been discussed elsewhere in this study, are not without controversy.[155] One of the weaknesses of the international system is that the *Palermo Convention* leaves responsibility for the adoption and design of measures against organised criminal groups to State Parties; it neither predetermines a particular conceptualisation of the offence, nor does it establish an offence under international law, nor does it spell out any limitation for the extensions of criminal liability. From the provisions and definitions in the *Palermo Convention* it is not exactly clear where criminal liability for participation in an organised criminal group ought to begin and where it should stop.

On the other hand, it has to be remembered that the Convention is a milestone in an area where international collaboration is only in its infancy. Criminal justice is seen by many, if not most countries, as a cornerstone of national sovereignty.[156] The fact that the Convention only took two years to be developed by the UN Ad Hoc Committee, together with the fact that the Convention has found widespread support and ratification around the world, demonstrate that most countries are serious about preventing and suppressing transnational organised crime more effectively and collaboratively. "The success of this type of international instrument", notes David McClean, "does not depend on the skill of the drafters, but on the political will of the government of each State Party, and the resources that can be made available."[157]

The following parts of this study examine how countries in the Asia Pacific region have implemented art 5(1)(a)(ii) into their domestic laws and how some jurisdictions

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153 *Legislative Guides*, 25. Cf Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 172-173; David McClean, *Transnational Organized Crime* (2007) 64–65.

154 Cf arts 6, 8, 23 *Convention against Transnational Organised Crime*. See further Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 176; David McClean, *Transnational Organized Crime* (2007) 126–129.

155 See Section 2.3 above.

156 Cf Dimitri Vlassis, "The United Nations Convention against Transnational Organized Crime and its Protocols", in *The Changing Face of International Criminal Law* (2002) 75 at 76.

157 David McClean, *Transnational Organized Crime* (2007) 30.

have expanded the scope of criminal liability even beyond that envisaged by the *Palermo Convention*.

PART 3: DOMESTIC LAWS

4 Canada

Organised crime in Canada "operates in all communities, from major urban centres to rural areas".[158] Canada's main metropolitan areas, including the greater Montreal area, Toronto and southern Ontario, and Vancouver and the lower mainland of British Columbia have been singled out by Canadian authorities as "the primary criminal hubs, with both the largest concentration of criminal groups as well as the most active and dynamic criminal markets."[159] Like most industrialised countries, organised crime in Canada is largely demand driven and criminal organisations are mostly involved in importing and supplying illegal commodities, especially illicit drugs, to local consumer populations. In relation to amphetamine-type stimulants (ATS) and ATS precursors Canada, especially the greater Vancouver area, is also a source and transit point for substances shipped overseas. Criminal organisations in Canada have been found exploiting and infiltrating legitimate businesses to launder proceeds of crime and/or disguise their illicit activities.[160]

The Criminal Intelligence Service Canada (CISC) estimates that in 2008, there were approximately 900 organised crime groups operating in the country. This encompasses a great range of different types of criminal organisations, ranging from hierarchical Mafia-style groups (especially in the eastern provinces), organisations divided into chapters (such as outlaw motorcycle groups, locally referred to as biker gangs), to more loosely associated networks. Several groups maintain strong international linkages especially if they engage in the import and export of contraband.[161]

For Canadian law enforcement agencies, illicit drugs continue to be the number one organised crime problem. Canada is a major consumer of cannabis, cocaine, and synthetic drugs, especially ATS which frequently involve precursor chemicals imported from Asia, especially China.[162] Canada is also a major producer of ecstasy and methamphetamine that is sold in the United States, Japan, Australia, and New Zealand.[163] Human trafficking in Canada remains a very hidden problem and research into this issue is only slowly forthcoming. The CISC recently identified the collection and export of e-waste (such as computers, televisions, etc) against domestic and international regulations as an emerging organised crime type.[164] Other crimes frequently associated with criminal organisations in Canada include financial fraud, tobacco smuggling, migrant smuggling, firearms trafficking, and organised motor-vehicle theft.[165]

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158 Criminal Intelligence Service Canada (CISC), *Report on Organized Crime, 2008* (2008) 12.

159 Criminal Intelligence Service Canada (CISC), *Report on Organized Crime, 2008* (2008) 14.

160 Criminal Intelligence Service Canada (CISC), *Report on Organized Crime, 2008* (2008) 14.

161 UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix B; Criminal Intelligence Service Canada (CISC), *Report on Organized Crime, 2008* (2008) 12, 14. See also Section 4.1 below

162 UNODC, *2008 World Drug Report* (2008) 84–85, 111–113, 156, 166.

163 Criminal Intelligence Service Canada (CISC), *Report on Organized Crime, 2008* (2008) 21, 24–26; UNODC, *2008 World Drug Report* (2008) 128, 141

164 See further Criminal Intelligence Service Canada (CISC), *Report on Organized Crime, 2008* (2008) 20–21.

165 Criminal Intelligence Service Canada (CISC), *Report on Organized Crime, 2008* (2008) 27–31.

4.1 Background of Canada's Organised Crime Laws

In 1997, together with New Zealand,[166] Canada became the first common law jurisdiction in the region to introduce specific offences against criminal organisations. These offences were introduced in response to the activities of outlaw motorcycle gangs (OMCGs). Throughout the 1990s, the province of Québec saw particularly violent clashes, including bombings and killings, between rival biker gangs, frequently involving the Hell's Angels and the Rock Machine gangs that were fighting for control of Montréal's illicit drug trade.[167] The Hell's Angels are said to be Canada's most violent criminal organisation with a presence throughout the country. The group is strictly hierarchical (often violently enforced) based on a division into regional chapters and maintains a strong social and clearly visual identity, using logos, outfits, tattoos, and other emblems. In Canada, but also in Australia and New Zealand, the Hell's Angels are mainly involved in the production and distribution of methamphetamines and in the security industry.[168]

In early 1995, the Liberal Government under then Prime Minister Jean Chrétien began to explore measures to define criminal organisations, identify the characteristics of these groups, and develop methods to objectively determine membership.[169] The explosion of a car bomb in Hochelaga-Maisoneuve in Montréal, in August 1995, which killed an innocent youth,[170] further fuelled public concerns over the levels of organised crime and a petition signed by 65,000 people from Québec demanded the adoption of new legislation against outlaw motorcycle gangs.[171] Québec mayors and the Québec Minister for Justice and the Attorney-General Serge Menard asked the Federal Government to act against biker gangs by criminalising membership in a gang,[172]

4.1.1 Bill C-95 (1997)

A private member's *Bill to amend the Criminal Code (criminal organization)* was introduced in the House of Commons on February 29, 1996 (Bill C-203)

> to provide that every one who, without lawful excuse, lives wholly or in part on any property, benefit or advantage from a criminal organisation is guilty of an indictable offence

166 See Chapter 5 below.

167 See further Paul Cherry, *The Biker Trials* (2005) 1-47.

168 UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix, group 27.

169 Canada, House of Commons, *Debates* (28 March 1995) Hon Allan Rock (Minister for Justice and Attorney-General).

170 In this incident, Daniel Desrochers, an 11 year old boy playing in a schoolyard was killed by flying metal shard from a nearby car bomb explosion; Canada, Senate, *Debate*, issue 94 (23 April 1997), Hon Richard J Stanbury.

171 Canada, Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 48 – Evidence (5 Mar 1997) Senator Roberge.

172 Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue 63 – Evidence (24 Apr 1997) Yvan Roy, Senior General Counsel, Criminal Law Policy Section; Kent Roach, "Panicking over Criminal Organizations: We Don't Need Another Offence" (2000) 44(1) *Criminal Law Quarterly* 1 at 1; Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 247.

> and liable on conviction to a term of imprisonment of not less than one year and not more than ten years.[173]

The Bill lacked sufficient support to pass.[174] It was then modified and tabled as a new private member's Bill in the Senate on June 18, 1996,[175] but this proposal also failed. Both Bills proposed to insert a definition of 'criminal organisations' into the *Criminal Code*,[176] criminalise living in whole or in part off the proceeds of organised crime, and introduce three presumptions for situations in which a person is said to be living off the proceeds of organised crime.[177] Concerns were expressed about the wide-ranging police powers under these proposals and possible violations of Canada's human rights charter. Moreover, the presumptions about organised crime associations under these bills were seen as unduly broad and vague.[178]

A Government-sponsored *National Forum on Organized Crime*, held in Ottawa on September 27-28, 1996, further examined the patterns and levels of organised crime in Canada and made recommendations for legislation on this issue.
This forum led to the preparation of anti-gang legislation that was proposed in 1997 by the then Minister of Justice and Attorney-General Mr Allan Rock, and the Solicitor General of Canada, Mr Herb Gray.[179] Specific provisions relating to criminal organisations were eventually added to the *Criminal Code* on April 17, 1997[180] with the *Bill to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence* (Bill C-95) which received royal assent on April 25, 1997.[181]

This Act was set out as "the government's first step in developing an integrated plan to combat" criminal gang activity.[182] It sought to "provide better means to deal with gang-related violence and crime" by focussing on three specific objectives:[183]

- depriving criminal organizations and their members of the proceeds of their criminal activities and the means to carry out these activities;
- […] deterring those criminal organizations and their members from resorting to violence to further their criminal objects; [and]

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173 Bill C-203, an *Act to amend the Criminal Code (Criminal Organizations)*, summary p 1a.

174 See further Canada, House of Commons, *Debates* (6 May 1996) Mr Réal Ménard (Hochelaga-Maisonneuve, BQ).

175 Bill S-10, an *Act to amend the Criminal Code (Criminal Organizations)*.

176 Proposed s 462.51 *Bill to amend the Criminal Code (criminal organization)* 1996 (Canada).

177 Proposed s 462.52 *Bill to amend the Criminal Code (criminal organization)* 1996 (Canada),

178 Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 48 – Evidence (5 Mar 1997) Senators Bryden, Lewis.

179 Canada, Department of Justice, *Federal Government introduces national anti-gang measures* (17 Apr 1997), available at http://canada.justice.gc.ca/en/nes/nr/1997/prgang.html (accessed 28 June 2007); Don Stuart, *Canadian Criminal Law* (5th edn 2007) 731.

180 Canada, Department of Justice, *Federal Government introduces national anti-gang measures* (17 Apr 1997), available at http://canada.justice.gc.ca/en/nes/nr/1997/prgang.html (accessed 28 June 2007).

181 Chapter 23 (Bill C-95). The legislation has been attacked for not receiving proper consideration by Parliament: Cristin Schmitz, "Anti-gang legislation speeds through Ottawa" (2 May 1997) 16 *The Lawyers Weekly* 48; Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 457-458.

182 Canada, Department of Justice, *Fact Sheet: Bill C-95 – National Anti-Gang Measures* (May 1997), available at http://canada.justice.gc.ca/en/news/fs/c95fs_e.html (accessed 28 June 2007).

183 *Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence* 1997 (Canada), Preamble.

- […] provide law enforcement officials with effective measures to prevent and deter the commission of criminal activity by criminal organizations and their members, […].

To this end, the Act, inter alia, added a definition of the term 'criminal organisation' to s 2 *Criminal Code* (Canada) and inserted a new offence for participating and contributing to the activities of criminal organisations into s 467.1. This offence was partly modelled after §186.22(a) *Street Terrorism Enforcement and Prevention* ("*STEP*") *Act* (California) of 1988.[184]

Figure 6: Elements of former s 467.1 *Criminal Code* (Canada), 1997-2001[185]

Former s467.1(1)	**Elements of the offence**
Physical elements	(1) participation in or substantial contribution to the activities of a criminal organisation; (2) being party to the commission of an indictable offence for the benefit of, at the discretion of or in association with the criminal organisation for which the maximum penalty is imprisonment for five years or more; (3) any or all of the members of the criminal organisation engage in or have, within the preceding five years, engaged in the commission of a series of indictable offences under this or any other Act of Parliament for each of which the maximum punishment is imprisonment for five years or more.
Mental elements	(4) knowledge of (3)
Penalty	Imprisonment for a maximum of 14 years

The elements of this offence (sometimes called "gangsterism"[186]) shown in Figure 6 above have been referred to as a "5-5-5" pattern[187] requiring five members or more, engaging in activities punishable by five years or more, and at least one of the members has engaged in indictable offences in the preceding five years. A British review of the Canadian offence portrayed former s 467.1 *Criminal Code* (Canada) as "a simplified version of statutory conspiracy, [that] contained traditional views about the nature of conspiracy, being essentially the aiding and abetting of crime rather than membership of a criminal organisation."[188]

The threshold of the old definition was thus very high and designed

> so as to be applicable only to serious federal offences and to those who have, as one of their primary activities, the commission of serious indictable offences.

184 The STEP Act provisions are modelled on the US *Racketeer Influenced and Corrupt Organisations* ("RICO") *Act*, 18 USC 1961; see further Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 461-463.

185 Donald Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 *Manitoba Law Journal* 89 at 94.

186 From the French gangstérisme meaning organised crime/criminal organisation.

187 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 202.

188 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 6.

> By limiting the definition in this way, only those people assisting in groups which are engaged in serious crimes that form a pattern of criminal activity will be subject to the increased power of investigations these proposals contemplate.[189]

The essence of the offence under former s 467.1 was that it raised the penalty for serious offences to up to 14 years imprisonment if the offence was committed in some connection to a criminal organisation.[190] At the request of the 1996 Forum, membership in a criminal organisation was not added as a separate criminal offence as it was seen as "unnecessary and perhaps even questionable from a constitutional standpoint."[191] The Act also made specific references to the events of August 1995 which triggered this legislation by recognising that "the use of violence by organised criminal gangs has resulted in death or injury to several persons, including innocent bystanders, and in serious damage to property"[192] and by adding a special offence for unlawful possession of explosive substances in ss 82 and 231 *Criminal Code* (Canada).[193] The introduction of the new offences was accompanied by new powers for the forfeiture of proceeds of crime in ss 490.1-490.9.[194] The new legislation also included a peace bond designed to target gang leadership (s 810),[195] new provisions on consecutive sentencing (s 718.2), and measures to support police surveillance of gang activity, especially by way of wiretapping (ss 183, 186).[196]

The amendments introduced in 1997 were widely seen as a rushed and reactionary measure by the Government in the lead up to a Federal election. As a result, the Bill received little scrutiny in both Houses of Parliament or in any parliamentary committee.[197] The new offence and law enforcement powers were seen as unnecessary, and creating "guilt by association".[198] There have also been concerns about possible violations of the Canadian Constitution, the *Charter of Rights and Freedom*. Many considered the legislation as too vague, grossly disproportionate,

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189 Canada, Senate, *Debate*, issue 94 (23 April 1997), Hon Richard J Stanbury.

190 Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue 63 – Evidence (24 Apr 1997) Yvan Roy, Senior General Counsel, Criminal Law Policy Section.

191 Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue 63 – Evidence (24 Apr 1997) Yvan Roy, Senior General Counsel, Criminal Law Policy Section; Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 48 – Evidence (5 Mar 1997) Senator Carstairs (Chair); Don Stuart, *Canadian Criminal Law* (5th ed 2007) 732.

192 *Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence* 1997 (Canada), Preamble.

193 See further Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 254-255

194 See further Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 255.

195 See further Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 253-254.

196 See further Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 251-253.

197 The Bill received Royal Assent only eight days after it was first introduced in the House of Commons, two days before Parliament was dissolved for a federal election. Cf Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 246 (also reprinted in Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1 Sep 1997) *Alan D Gold Collection of Criminal Law Articles*); Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 458.

198 Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 248; Donald Stuart, *Canadian Criminal Law* (5th edn 2007, 732.

and wider than necessary to achieve its objective,[199] but all challenges of the legislation before the courts remained unsuccessful.[200]

The offence introduced in 1997 was rarely used and had little, if any, effect in preventing or suppressing organised crime in Canada. The high threshold of the 1997 definition meant that few groups qualified as criminal organisations under the statute.[201] Some groups simply reorganised themselves in ways to avoid the requirement that the group include at least one person with a recent serious criminal record.[202]

Only a small number of prosecutions were carried out under former s 467.1 and even fewer convictions have been recorded.[203] In some provinces such as Québec and Manitoba the legislation was more frequently used than elsewhere and led to massive trials of large numbers of people.[204]

4.1.2 Bill C-24 (2001)

The provisions relating to criminal organisations in the Canadian *Criminal Code* were subjected to significant changes in 2001. In November 1999, the House of Commons in Ottawa instructed the Standing Committee on Justice and Human Rights "to conduct a study of organised crime [and] analyse the options available to Parliament to combat the activities of criminal groups".[205] A Sub-Committee on Organised Crime was formed in April 2000 and an interim report was released six months later which made eighteen recommendations to combat criminal groups more effectively.[206]

Some of the recommendations, and the changes to the *Criminal Code* that followed, were once again triggered by organised crime related events in Québec, especially the attempted murder on September 12, 2000 of journalist Michael Auger who had

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199 Section 7 *Charter of Rights and Freedom*;. Cf Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 255-262 with reference to *Heywood* (1994) 34 C.R. (4th); Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 454, 468-470; Christopher Blakesley, "The Criminal Justice System Facing the Challenge of Organized Crime" (1998) 69 *International Review of Penal Law* 69 at 86, 93.

200 *R v Fok* [2001] ABQB 79; *R v Fok* [2001] ABQB 150; *R v Carrier* [2001] QF No 224 (Que SC); *R v Beauchamp* [2002] QJ No 4593 (Que SC); *R v Doucet* (2003) 18 CR (6th) 103 (Que SC).

201 See the discussion in Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 7.

202 Cf *R v Terezakis* [2007] BCCA 384.

203 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 375.

204 The problem of mass trials is further discussed in Section 4.4 below.

205 Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 27 Nov 2008).

206 Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 28 Nov 2008).

exposed criminal organisations in Montréal.[207] Québec ministers asked the Federal Government to step up the fight against outlaw motorcycle gangs. In September 2000, Ministers of Justice from all provinces endorsed a *National Agenda on Organized Crime* and, inter alia, agreed to review legislative and regulatory tools.[208]

Bill C-24 was presented to Parliament in 2001 and entered into force on January 7, 2002.[209] The purpose of the new legislation was to

> [provide] broader measures for investigation and prosecution in connection with organised crime by expanding the concepts of criminal organisation and criminal organisation offence and by creating three new offences relating to participation in the activities – legal and illegal – of criminal organisations, and to the actions of their leaders. (Preamble)

The specific intention of this Bill was to expand the application of the gangsterism offence beyond OMCGs to other criminal organisations in pursuit of profit and to other groups involved in the perpetration of economic crime.[210]

The *Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Act* of December 18, 2001[211] modified the definition of 'criminal organisation' and transferred it from s 2 to s 467.1(1). The Act substituted the former participation offence with three new separate offences for participation in a criminal organisation, s 467.11; commission of offence for a criminal organisation, s 467.12; and instructing the commission of a criminal offence, s 467.13.[212] The legislation also resulted in amendments to the *Proceeds of Crime (Money Laundering) Act*, wider immunity systems for law enforcement officers (ss 25.1, 25.2 *Criminal Code* (Canada)), additional resources for the RCMP (Royal Canadian Mounted Police) to target organised crime, and created new offences for intimidating witnesses, jurors, prosecutors, judges, guards, journalists, and politicians.[213] Moreover, the amendment brought Canada's organised crime provisions in line with the *Convention against Transnational Organised Crime*.[214]

4.2 Criminal organisations

Section 467.1(1) *Criminal Code* (Canada) defines 'criminal organisation' as[215]

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207 A personal story of this event was later published by Michel Auger, *The Biker Who Shot Me: Recollections of a Crime Reporter* (2002).

208 Canada, Department of Justice, *Newsroom: Federal Action against Organized Crime* (5 Apr 2001), available at http://canadajustice.ca/en/news/nr/2001/doc_26098.html (accessed 28 June 2007).

209 Don Stuart, *Canadian Criminal Law* (5th edn 2007) 737.

210 *R v Lindsay* (2004) 182 CCC (3d) 301.

211 Chapter 32 (Bill C-24).

212 The Bloc Québecois opposed these changes and proposed instead that "membership in a criminal organization be made a crime"; Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 27 Nov 2008).

213 Section 423.1 *Criminal Code* (Canada).

214 Canada, Department of Justice, *Newsroom: Federal Action against Organized Crime* (5 Apr 2001), available at http://canadajustice.ca/en/news/nr/2001/doc_26098.html (accessed 28 June 2007). Canada signed the *Convention against Transnational Organised Crime* on 14 Dec 2000 and ratified it on 13 May 2002. The amending Act, however, made no specific reference to the Convention.

215 See also s 2 *Criminal Code* (Canada) 'criminal organization'.

a group, however organised, that

(a) is composed of three or more persons in or outside Canada; and
(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

The current definition under s 467.1 is a modified, "streamlined"[216] version of the definition of criminal organisation introduced into s 2 *Criminal Code* (Canada) in 1997.[217] The 2001 amendment broadened the definition of criminal organisation by removing the 5-5-5 requirement,[218] reducing the minimum number of participants to three,[219] and expanding the scope of offences that define criminal organisations to all serious crimes.[220]

The current definition of criminal organisation in s 467.1(1) combines a structural/organisational element with criteria that relate to the purpose and/or activities of the group.[221] These elements are discussed separately in the following sections.

Figure 7 "Criminal organisation", s 467.1(1) *Criminal Code* (Canada)[222]

Terminology Elements	**Organised Criminal Group**
Structure	• a group composed of three or more persons in or outside Canada.
Activities or objectives	• facilitation or commission of one or more serious offences; • if committed, the offences would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

216 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 375.

217 Former s 2 *Criminal Code* (Canada), inserted in 1997, amended in 2001, defined criminal organization as "any group association or other body consisting of five or more persons, whether formally or informally organized, (a) having as one of its primary activities the commission of an indictable offence under this or any Act of Parliament for which the maximum punishment is imprisonment for five years or more, and (b) any or all of the members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences".

218 Cf Recommendation 5, Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 27 Nov 2008).

219 Cf Recommendation 3, Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 28 Nov 2008).

220 Cf Recommendation 4, Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 28 Nov 2008).

221 Cf *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 56 per Fuerst J.

222 Cf *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.

The decision whether the offences under ss 467.11-467.13 involve a criminal organisation is made on a case by case basis; it is only binding for the parties to the case and there is no in rem judgment, no continuing labelling of any one group and no formal listing of criminal organisations.[223] Groups that have been found by the courts to be criminal organisations include, for example, the Hell's Angels Motorcycle Club,[224] the Bonanno Family of La Cosa Nostra,[225] and also locally operating drug trafficking networks.[226]

4.2.1 A group of three or more persons in or outside Canada, s 467.1(1)(a)

The first element of the definition relates to the constitution of the criminal organisation. The group must comprise at least three people and the definition in s 467.1(1) *Criminal Code* (Canada) requires proof of some association between them. While it is not necessary that the three (or more) persons are formal members to constitute the group ("however organised"), s 467.1(1)(a) is understood to require some internal cohesion between them and more than mere association of the persons with the organisation.[227] "That limitation", argues Justice Holmes, "serves to exclude from the ambit of the definition random groupings or mere classifications of people based on, for example, personal characteristics and attributes."[228] It excludes "persons who are not functionally connected to that criminal purpose or activity, irrespective of their links to organisations with legitimate purposes and activities that include persons in the criminal group."[229] Mackenzie JA in *R v Terezakis* [2007] BCCA 384 noted (at para 34):

> The underlying reality is the criminal organisations have no incentive to conform to any formal structure recognised in law, in part because the law will not assist in enforcing illegal obligations or transactions. That requires a flexible definition that is capable of capturing criminal organisations in all their protean forms. [...] Nonetheless, the persons who constitute 'the group, however, organised' cannot be interpreted so broadly as to ensnare those who do not share its criminal objectives.

Establishing the structural element of the definition involves an inquiry into the persons actually constituting the group. In many cases, it will be difficult to identify three or more persons and establish that they form a criminal group. To facilitate proof of this element, the specific offence under s 467.11 allows the use of certain indicia to prove that an accused is associated with a criminal organisation.[230]

Section 467.1 explicitly excludes those groups from the definition that only form randomly without any ongoing purpose. The definition recognises that "organised crime […] is not isolated; it operates on a sustained basis, seeks control of an area of

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223 *Ciarniello v R* [2006] BCSC 1671 at para 67 per W F Ehrcke J.

224 *R v Stockford* [2001] QJ No 3834; *R v Stadnick* (2004) REJB 2004-70735 (unreported, 27 Sep 2004, Quebec Superior Court of Justice); *R v Lindsay* (2004)182 C.C.C. (3d) 301; *R v Speak* (2005) WL 3360402 (9 Aug 2005, Ont Superior Court of Justice); *R v Myles* (2007) 48 CR (6th) 108 (Ont Superior Ct of Justice).

225 *United States v Rizzuto* (2005) 209 CCC (3d) 325.

226 *R v Trang* [2001] ABQB 623.

227 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 377-378; David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 205.

228 *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 76 per Holmes J.

229 *R v Terezakis* [2007] BCCA 384 at para 33 per Mackenzie JA.

230 Cf Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378.

business, and strives for goals beyond the individual criminal act."[231] Thus, three or more persons who "gather in a group for the purpose of organising a single, planned criminal activity on an ad hoc basis such as, for example, a group planning a bank robbery" [232] "would not be considered a criminal organisation."[233]

4.2.2 Facilitating or committing of one or more serious offences, s 467.1(1)(b)

The second element of the definition in s 467.1(1) relates to the purpose and activities of the criminal organisation. The group must have "as one of its main purposes or main activities the facilitation of one or more serious offences", s 467.1(1)(b). The facilitation of serious offences can be one of several purposes of the criminal organisations, it need not be the sole one. The definition thus recognises "that criminal organisations often blend their criminal operations with legitimate operations."[234]

Facilitating or committing serious offences may either be the purpose of the organisation or its main activity.[235] If the organisation actually engages in serious offences this must be a significant and not just incidental part of the organisation's activities. Alternatively, the serious offences may constitute the purpose, the raison d'être, of the organisation (without any requirement that the organisation actually engages in criminal activity).[236]

"Serious offence" is further defined in s 467.1(1) as "an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more". In addition, other offences may be prescribed by regulation; under s 467.1(4) "the Governor in Council may make regulations prescribing offences that are included in the definition of 'serious offence'". The definition of serious crime is flexible enough to cover a great range of criminal activities without identifying specific types of criminal acts. In *R v Lindsay* (2004) 182 CCC (3d) 301 it was held that: "There is no such thing as a 'type' of crime 'normally' committed by criminal organisations. Accordingly, the conduct targeted by the legislation does not lend itself to particularisation of a closed list of offences."

The definition of serious crime excludes groups involved in relatively minor crime from the scope of s 467.1,[237] but the fact that the Governor-General may prescribe other offences opens up an avenue to add crimes without parliamentary review.[238]

According to Mark Levitz & Robert Prior, the definition in s 467.1(1)

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231 Andreas Schloenhardt, *Migrant Smuggling – Illegal Immigration and Organised Crime in Australia* (2003) 98, with reference to M Cherif Bassiouni & Eduardo Vetere, "Organized Crime and its Transnational Manifestations" in M Cherif Bassiouni (ed), *International Criminal Law, Volume I Crimes* (2nd ed, 1999) 883 at 883; Donald Hermann, "Organised Crime and White Collar Crime: Prosecution of Organised Crime Infiltration of Legitimate Business" (1985) 16 *Rutgers Law Journal* 589 at 591.

232 Andreas Schloenhardt, *Migrant Smuggling – Illegal Immigration and Organised Crime in Australia* (2003) 98.

233 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 379.

234 *R v Terezakis* [2007] BCCA 384 at para 56 per Chiasson JA.

235 The terms are understood in their usual meaning: *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 58 per Fuerst CJ.

236 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378, 379.

237 *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 79 per Holmes J

238 Don Stuart, *Canadian Criminal Law* (5th edn 2007) 738.

> contemplates two distinct types of action on the part of the group. The first is where persons who constitute the group commit offences themselves that are for the benefit of the group or for the benefit of any person constituting the group (including, presumably, themselves). […] The second type of conduct involves facilitating the commission of offences.[239]

In practice, most cases that have arisen under s 467.1, involve criminal groups that engage in the trafficking and sale of illicit drugs.[240] An example for the first type of action identified by Levitz & Prior involves syndicates that themselves traffic and sell drugs, benefiting as a group through the profits. The second category includes instances in which a criminal organisation provides protection or security for illegal activities, for instance, illegal gambling, illegal brothels et cetera.[241] Proof of "facilitating or committing" does neither require knowledge of the particular offence that is facilitated nor knowledge that an offence has actually been committed, s 467.1(2).

This second element of the definition characterises the nature of criminal organisations and the activities and purposes that set them apart from other legitimate enterprises.[242] There remains, however, some concern in academic circles that the definition could potentially capture legitimate organisations. One example given involves Aboriginal gangs in western Canada that also engage in legitimate expressive and community activities. The new definition introduced in 2001 is seen by some as a tool to "criminalise legitimate dissent" by these groups[243] if that dissent amounts to a serious offence.

In *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 61 Justice Holmes further held that the definition may also

> include persons who do not personally engage in or support or subscribe to the serious offence of the group, so long as they are part of the 'group' and that the group has as one of its main purposes or activities the facilitation or commission of a serious offence or offences.

He argued that "Parliament intended the most encompassing concept of a 'group'" and that the group is defined by its main purpose and its activities and not by the people who compose it.[244] This view was supported on appeal: *R v Terezakis* [2007] BCCA 384 at para 56 per Chiasson JA.

4.2.3 Material benefit, s 467.1(1)(b)

The third and final element of the definition of criminal organisation in s 467.1 *Criminal Code* (Canada) relates to the possible result of the serious offences. Unlike

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239 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378-379.

240 See, for example, *R v Fok* [2001] ABQB 79; *R v Fok* [2001] ABQB 150; *R v Trang* [2001] ABQB 623; *R v Stadnick* (2004) REJB 2004-70735 (unreported, 27 Sep 2004, Quebec Superior Court of Justice); *R v Speak* (2005) WL 3360402 (9 Aug 2005, Ont Superior Court of Justice)

241 Cf Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378-379.

242 Eileen Skinnider, *Some Recent Criminal Justice Reforms in Canada — Examples of Responding to Global and Domestic Pressures*, (2005) 8 with reference to *Re Lindsay & Bonner v R* (182 C.C.C. (3d) 301).

243 Kent Roach, "Panicking over Criminal Organizations: We Don't Need Another Offence" (2000) 44(1) *Criminal Law Quarterly* 1 at 2.

244 *R v Accused No 1* (2005) 134 CRR (2d) 274 at paras 63, 66 per Holmes J.

the earlier definition of criminal organisation, it is now required that the criminal activities, if committed, result in a material benefit for the organisation. It is necessary to show that the organisation was or would somehow be advantaged by these offences. This includes financial and other material benefit, though the benefit need not be economic. The interpretation of what may constitute a material benefit is left to the courts: *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 58 per Fuerst J. In *R v Leclerc* [2001] JQ No 426 (Court of Québec – Criminal and Penal Division), for instance, it was held that providing a criminal organisation with an increased presence on a particular territory (ie turf in the illicit drug market) can be a benefit. This, third element, remark Levitz & Prior, excludes groups "of the Robin Hood and the Merry Men type", "as neither the group nor its members benefited from [their] offences."[245]

Questions have been raised whether the elements of the criminal organisation definition and its reference to material benefit is overly broad, but the Supreme Court of Ontario confirmed in *R v Lindsay* (2004) 182 C.C.C. (3d) 301 that the objective of the legislation, hindering the organised criminal pursuit of profit, was legitimate and "does not trench on legitimate 'non-regulated' or 'non-criminal conduct" [at para 44 per Fuerst J].[246]

4.3 Relevant offences

Sections 467.11-467.13 create three offences associated with criminal organisations. These provisions are of a peculiar nature in that they are substantive offences but also operate simultaneously as sentence enhancers to other offences.[247]

The three sections are set out in a hierarchy depending on the accused's level of involvement in the organisation. At the bottom of this hierarchy is the "enhancer" or "facilitator" offence which creates liability for mere participation in and contribution to the activities of criminal organisations, s 467.11. This is followed by the more serious offence in s 467.12 which criminalises the commission of an offence for a criminal organisation. Section 467.13 creates the most serious offence for directing criminal organisations. Sections 467.11(2), 467.12(2) and 467.13(2) all exempt certain matters that would otherwise have to be proven by the prosecution.[248]

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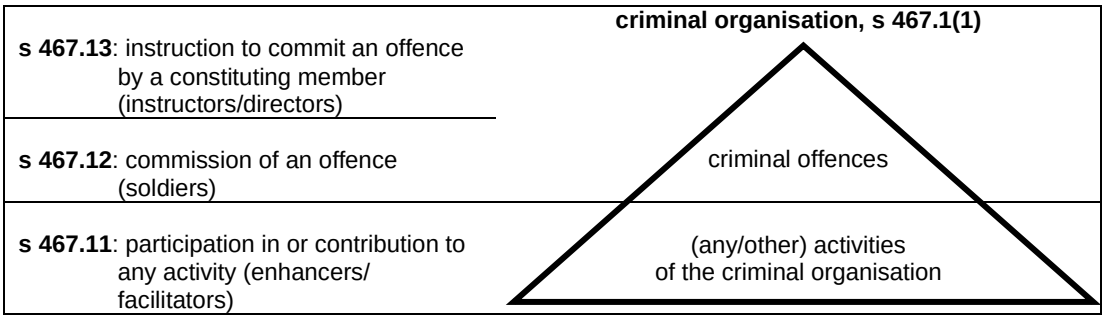
245 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378.

246 Cf Eileen Skinnider, *Some Recent Criminal Justice Reforms in Canada — Examples of Responding to Global and Domestic Pressures* (2005) 8.

247 Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 463. See also Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245, who argues (at 262-263) that "the consecutive penalty provisions in Bill C-95 offend the constitutional requirement of proportional punishment".

248 David Watt & Michelle Fuerst, *Tremeear's Criminal Code* (2007) 830.

Figure 8: criminal organisation offences, ss 467.11-47.13 *Criminal Code* (Canada)



It is noteworthy that membership in a criminal organisation alone is not an offence in Canada; "merely being in the group is not illegal".[249] The offences in ss 467.11 and 467.12 do not even require that the accused is part of the group that constitutes the criminal organisation. Section 467.13, in contrast, requires this link.[250]

A separate definition (which bears no further meaning for s 467) of 'criminal organisation offence' is set out in s 2 *Criminal Code* (Canada), meaning:

> (a) an offence under section 467.11, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organisation, or
> (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, and offence referred to in paragraph (a).

4.3.1 Participation in activities of criminal organisation, s 467.11(1)

Section 467.11(1) makes it an offence to participate in or contribute to the activities of criminal organisations:

> Every person who, for the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organisation is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

The offence under s 467.11(1) — sometimes referred to as the "enhancer" or "facilitator" offence[251] — is the least serious of the three offences. The section substituted former s 467.1(1)(a) *Criminal Code* (Canada) by broadening the application of the participation offence and lowering the requirements for the physical and mental elements (the former 5-5-5 pattern). [252]

Figure 9 below displays the elements of the offence under s 467.11 which are discussed separately in the following Sections. It has to be noted that there is, at present, little decided case law and judicial guidance on this offence.

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249 *R v Terezakis* [2007] BCCA 384 at para 35 per

250 Cf *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.

251 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 201.

252 See Section 4.1 above.

Figure 9: Elements of s 467.11 *Criminal Code* (Canada)

467.11(1)	**Elements of the offence**	
Physical elements	• **participation in/contribution to any activity of a criminal organisation (s 467.1(1))**	
Procedural matters	To determine this element the Court may, inter alia, consider (s 467.11(3)) whether the accused: (a) uses a name word, symbol or other representation that identifies, or is associated with, the criminal organisation; (b) frequently associates with any of the persons who constitute the criminal organisation; (c) receives any benefit from the criminal organisation; or (d) repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organisation	It is not necessary for the prosecution to prove that (s 467.11(2)): (a) the criminal organisation actually facilitated or committed an indictable offence; (b) the participation or contribution of the accused actually enhanced the ability of the criminal organisation to facilitate or commit an indictable offence
Mental elements	• **knowledge** of the nature of the participation/contribution • **purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence**	
Procedural matters	It is not necessary for the prosecution to prove that (s 467.11(2)): (c) the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organisation; the accused knew the identity of any of the persons who constitute the criminal organisation.	
Penalty	Imprisonment for up to 5 years	

Physical element

Participation in or contribution to any activity of a criminal organisation

The physical element of s 467.11 requires that an accused participated in or contributed to the activities of a criminal organisation (as defined in s 467.1(1)). The terms "contribution" and "participation" are not further defined in the *Criminal Code*; they can involve a positive act or an omission, a failure to act.[253] Section 467.11(1)(3) enables the use of certain indicia that assist in establishing the physical element, for instance, by proving the use of symbols and other insignia of the gang. These indicia are, however, not conclusive evidence of any participation or contribution and they cannot be used as a basis for inferring any mental element.[254]

The physical element is designed to capture persons who — in one way or another, and without actually carrying out any criminal offences (see s 467.12) or directing them (s 467.13) — enhance the ability of a criminal organisation to carry out its activities. Liability under s 467.11 may thus involve persons outside the criminal organisation who have some interaction with the group even if they are not a part of the group.[255] Accordingly, it has been remarked that this provision "could target anyone" and not just members of the organisation.[256]

253 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 379.

254 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 381.

255 *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.

256 Don Stuart, *Canadian Criminal Law* (5th edn 2007) 740; David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 206.

Section 467.11 does not require that the accused participates in or contributes to actual criminal activities, s 467.11(2)(b); it can be "any" activity. There is also no requirement that "the criminal organisation actually facilitated or committed an indictable offence", s 467.11(2)(a). The offence applies to low level members of criminal organisations and persons loosely associated with them without being formal members, including persons who may have never been violent or may have not engaged in any prior criminal activity.[257] "The act of participation set out in the Code", remarks David Freedman, "is not linked in any real way with criminality of the group or its constituent elements."[258]

Mental elements

The offence under s 467.11(1) requires proof of two mental elements: (1) knowledge of the nature of the participation or contribution, and (2) a purpose (or an intention) to enhance the ability of a criminal organisation to facilitate or commit an indictable offence.

Knowledge

The knowledge requirement is void of practical relevance as it only relates to the knowledge that participation or contributions are made. It is expressly not required that the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organisation or that the accused knew the identity of any of the persons who constitute the organisation, s 467.11(2)(c), (d). It has been argued that this is an "almost complete erosion of the aspect of knowledge"[259] and essentially creates strict liability (absolute responsibility)[260] for this element.[261] However, suggestions that the offence under s 467.11 (and also under ss 467.12 and 467.13) lack the minimum constitutionally required mental element were dismissed in *R v Lindsay* (2004)182 C.C.C. (3d) 301.[262]

Purpose

Lastly, s 467.11 requires that the accused acted with the specific intent that his or her actions enhance the organisation's ability to carry out its illegal activities. This must have been the purpose, the reason for/goal of the accused's contribution. Whether or not that purpose succeeds or fails is immaterial.[263]

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257 Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 248; cf Donald Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 *Manitoba Law Journal* 89 at 102.

258 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 208. See also Figure # above.

259 William M Trudell, "The Bikers Are Coming… The Bikers Are Coming…" (2001) 22(3) *For the Defence* 28 at .para 7.

260 Strict liability means, essentially, liability without the requirement proof a (subjective) fault element; see further Kent Roach, *Criminal Law* (3rd ed 2004) 186-198.

261 Donald Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 *Manitoba Law Journal* 89 at 102; Don Stuart, *Canadian Criminal Law* (5th edn 2007) 740.

262 Eileen Skinnider, *Some Recent Criminal Justice Reforms in Canada — Examples of Responding to Global and Domestic Pressures* (2005) 8

263 David Watt & Michelle Fuerst, *Tremeear's Criminal Code* (2007) 831; Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 381.

The breadth of the elements of s 467.11 enables the criminalisation of persons that would otherwise not be liable under complicity or conspiracy provisions.[264] Furthermore, a person may be convicted of the offence under s 467.11(1) as a party or counsellor, not merely as a single or co-principal, s 467.1(4). "The flexibility of the criminal organisation concept", notes Freedman, "is twinned with an expansive notion of participation."[265] For example, a person who knowingly lets premises to a biker gang not just to collect rent but also to enable the group to carry out their criminal activities would be liable under s 467.11.[266] A person making a purchase or frequent visits to a shop run by a criminal organisation, knowing the nature of the group, would be liable under this provision if members of the gang are present at the time of purchase.[267]

It is debatable whether criminal liability should be extended in that way. The legislator designed the offence to capture those who support criminal organisations, however minor or rudimentary that support might be. But it has been argued that "a person who supplies hot dogs to a gang for their annual picnic […] would not be guilty of an offence […]."[268] Others have criticised this offence for "leaving the landlord, the accountant, the lawyer in harm's way" especially given the exceptions listed in s 467.11(3).[269] Some authors see this offence as creating 'guilt by association' and suggest that a requirement of "taking an active part in the organisation" as set out in the *Palermo Convention* would be more meaningful.[270]

4.3.2 Commission of offence for criminal organisation, s 467.12(1)

Under s 467.12(1) it is an offence to commit an indictable offence for a criminal organisation:

> Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organisation is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Unlike s 467.11, this second offence is designed to capture people who actually commit criminal offences for a criminal organisation (sometimes referred to as the "soldier" offence)[271]; accordingly the penalty for offences under this section is more severe. An example for a s 467.12 offence would be debt-collection for a criminal organisation by means of threat or violence,[272] or possessing illicit drugs for the

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264 See Sections 2.1.2, 2.1.3 above.

265 David Freedman "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 218.

266 , Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (003) 61(3) *The Advocate* 375 at 381.

267 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 208.

268 Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue 63 – Evidence (24 Apr 1997) Yvan Roy, Senior General Counsel, Criminal Law Policy Section.

269 William M Trudell, "The Bikers Are Coming… The Bikers Are Coming…" (2001) 22(3) *For the Defence* 28 at para 14.

270 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 208. See Section 3.3.2 above.

271 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 209.

272 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 383.

purpose of trafficking for the benefit of or in association with a criminal organisation.[273]

Figure 10: Elements of s 467.12 *Criminal Code* (Canada)

467.12	**Elements of the offence**
Physical elements	• **commission of an indictable offence** • **benefit of/at the direction of/in association with a criminal organisation (s 467.1(1))**
Mental elements	• **intention** to commit the offence for the benefit of, a the direction of, or in association with a group, • **knowledge** about the involvement of the criminal organisation
Procedural matters	It is not necessary for the prosecution to prove that the accused knew the identity of any of the persons who constitute the criminal organization, s 467.12(2)
Penalty	Imprisonment for up to 14 years

Physical elements

The first physical element of s 467.12 requires that the accused has committed an indictable offence — another offence within this offence. This may be any indictable offence; unlike the definition of criminal organisation in s 467.1(1) this is not restricted to serious offences. Thus, s 467.12(1) requires proof of the physical elements of that offence.[274] In *United States v Rizzuto* (2005) 209 CCC (3d) 325, for instance, the indictable offence involved a conspiracy to commit murder for the benefit of, at the discretion of, or in association with the Bonnino Family of La Cosa Nostra. Unless the elements of the other indictable offence can be established, there will be no liability under s 467.12(1): *R v Giles* [2008] BCSC 367 at para [236] per MacKenzie J.

Secondly, it is necessary to establish a nexus between the indictable offence committed by the accused and a criminal organisation. Section 467.12(1) requires that the accused committed the other offence "to the benefit of, at the direction of, or in association with a criminal organisation". *R v Leclerc* [2001] J Q No 426 understood the term "at the direction" as receiving instructions from members in authority. Thus it has to be established that the direction was given on behalf of the group.[275] "In association with" is said to connote a linkage with a criminal organisation or some form of cooperative approach or contemplates where affiliation with the organisation enhances the ability to commit the offence.[276] It is left to the courts to determine the precise nature and parameters of the relationship between the accused and the criminal organisation.[277]

As with s 467.11, an accused under s 467.12 need not be a member of the organisation.[278] Moreover, a person may be convicted of the offence under s 467.12(1) as a party or counsellor, not merely as a single or co-principal, s 467.1(4).

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273 *R v Giles* [2008] BCSC 367.

274 David Watt & Michelle Fuerst, *Tremeear's Criminal Code* (2007) 831.

275 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 384.

276 *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 59 per Fuerst J; Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 384.

277 *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 59 per Fuerst J.

278 *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.

Mental element

The mental element of the offence in s 467.12(1) *Criminal Code* (Canada) requires an intention to commit the offence for the benefit of, at the direction of, or in association with a group with knowledge about the involvement of the criminal organisation.[279] There is explicitly no requirement to show that the accused knew the identity of any of the persons who constitute the criminal organisation. The exclusion under s 467.12(2) has been described as "excluding an essential element of criminal conduct. Mens rea is not an element if organised criminals are your target."[280]

In essence, unlike the other criminal organisation offences in Canada, s 467.12 does not create or expand liability for conduct that would not otherwise be criminal. The purpose and effect of this section is to aggravate liability for an indictable offence committed by the accused if this offence was committed in some connection to a criminal organisation. If liability under s 467.12 can be established, this will result in a significantly higher penalty as the sentence for the offence runs consecutively to that of the predicate offence.[281] The fact that an offence was committed for the benefit or at the direction of, or in association with the criminal organisation is also an aggravating circumstance on sentencing under s 718.2(a)(iv). It has been held that this outcome does not violate the bar on compound criminality (cf *R v Kienapple* [1975] 1 S.C.R. 729 at 747-748) as "the presence of the additional 'criminal organisation' and mens rea requirements differentiates the participation offence from the predicate offence substantially […]"[282] enough. Suggestions that the elements of s 467.12 are impermissibly vague and overly broad were dismissed in *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 60 per Fuerst J.

4.3.3 Instructing commission of offence for criminal organisation, s 467.13(1)

Section 467.13(1) — also referred to as the "instructing offence"[283] — makes specific provisions for directors and other key leaders of criminal organisations:

> Every person who is one of the persons who constitute a criminal organisation and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organisation is guilty of an indictable offence and liable to imprisonment for life.

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279 *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 64 per Fuerst J; cf Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 384.

280 William M Trudell, "The Bikers Are Coming… The Bikers Are Coming…" (2001) 22(3) *For the Defence* 28 at para 11.

281 David7, "The New Law of Criminal Organizations in Canada" (2006) 85(2) *Canadian Bar Review* 171 at 209.

282 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 209 with reference to *R v Creighton* [1993] 3 S.C.R. 3.

283 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 214.

Figure 11: Elements of s 467.13 *Criminal Code* (Canada)[284]

467.13	Elements of the offence
Physical elements	• **instruction to commit an offence for the benefit of, at the direction of, or in association with the criminal organisation** • **person who constitutes the criminal organisation (s 467.1(1))**
Procedural matters	It is not necessary for the prosecution to prove that (s 467.13(2)): (a) an offence other than the offence under subsection (1) was actually committed; (b) the accused instructed a particular person to commit an offence.
Mental elements	• **knowledge** of the nature of the instruction and its underlying purpose; • **knowledge** that the he or she is a member of a criminal organisation**.**
Procedural matters	It is not necessary for the prosecution to prove that the accused knew the identity of all of the persons who constitute the criminal organization, s 467.13(2)(c)
Penalty	Life imprisonment

Physical elements

The offence under s 467.13 first requires the conduct of directly or indirectly instructing another person to commit an offence for the benefit of, at the direction of, or in association with the criminal organisation.[285] The term "instructing" is not further defined in the *Criminal Code*. It has been suggested that the term "connotes some power" and reflects a hierarchy between the accused who instructs and the instructee.[286] The instructions need not be directed at a member of the organisation or at any specific person.[287] There is also no requirement that the instructions specify a particular offence and, unlike ss 467.11 and 467.12, the offence is not limited to indictable offences; "it suffices if they are of a general nature, for instance, instructions to assault rival gang members".[288] It is irrelevant whether or not the predicate offence instructed is actually committed.[289]

The second physical element of s 467.13(1) refers to the status of the accused by requiring that he or she is "one of the persons who constitute the criminal organisation". The legislation is ambiguous whether or not the accused has to be a member of the organisation. In reality, this may frequently be the case, but Freedman notes that the "power to compel the person instructed […] need not emanate from the instructor's membership in a criminal organisation under the statute. As such, any linkage between the instructor and the instructed is left at large".[290] More recent case law and scholarship, however, have held that the offence requires that the accused is a member of the organisation.[291]

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284 Cf *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.

285 For the interpretation of "for the benefit of, at the direction of, or in association with the criminal organisation" ,see Section 4.3.2 above.

286 *R v Accused No 1* (2005) 134 CRR (2d) 274 at paras 91, 93 per Holmes J; David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 216.

287 *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 96 per Holmes J.

288 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 384.

289 *R v Terezakis* [2007] BCCA 384 at para 36 per Mackenzie JA.

290 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 216.

291 *R v Terezakis* [2007] BCCA 384 at paras 62 and 73 per Chiasson JA; David Watt & Michelle Fuerst, *Tremeear's Criminal Code* (2007) 832.

A person may be convicted of the offence under s 467.13(1) as a party or counsellor, not merely as a single or co-principal, s 467.1(4).

Mental elements

The mental elements of this offence require proof that the accused knew the nature and purpose of the instruction. Furthermore, there seems to be consensus that it is also necessary to show that an accused knows his or her role in the organisation. In *R v Accused No 1* (2005) 134 CRR (2d) 274 Justice Holmes held that

> s 467.13 should be read as requiring that the accused knew all of the relevant circumstances comprised in the description of the offence; those include that the accused is one of the persons who constitute a criminal organisation. This conclusion flows from both the common law preference for subjective knowledge as to the key elements of a serious criminal offence, and from the *Charter* requirement for subjective mens rea in relation to offences of significant stigma.

This view was supported in the appeal case, *R v Terezakis* [2007] BCCA 384, where Mackenzie JA held (at para 38) that it would "overstrain the wording to extend it to persons who may share an innocent purpose but who are unaware of and do not share the main purpose or activity of facilitation or commission of serious offences." Freedman also notes that "[a] failure to prove subjective knowledge on the part of an accused that he or she is a member of a criminal organisation is not a flaw in the legislation but a circumstance in which a conviction is inappropriate."[292] "[T]he Crown must prove that the accused knew the facts that by law caused him or her to be one of the persons constituting a criminal organisation." It does, however, "not mean the Crown must prove that the accused knew the group to which he or she belonged was in law a criminal organisation."[293] This additional mental element is important to enable a person to determine whether or not he or she is a person constituting the criminal organisation. It has been held that without this additional requirement, s 467.13 would be overly broad and apply to members of an almost limitless variety of groups.[294]

There is no requirement to prove any additional specific intent. In particular, it is not necessary "to prove that the accused knew the identity of all of the persons who constitute the criminal organisation", s 467.12(2)(c). This facilitates the prosecution of senior executives in very large syndicates who may not know the identity of all constituting members, including those located abroad.

The mental elements of this offence are quite minimal, especially considering the very high penalty attached to this offence. Accordingly, s 467.13 has been criticised for attaching life imprisonment to an offence that does not require proof of a specific intent.[295]

Given the ambiguity over the status of an accused in the criminal organisation and his or her knowledge of that status, Justice Holmes of the Supreme Court of British Columbia held in *R v Accused No 1* (2005) 134 CRR (2d) 274 at 153 that s 467.13 was constitutionally invalid and "that s 467.13 is of no force and effect." In a more recent decision, the Saskatchewan Court of the Queen's Bench distanced itself from

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292 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 217.

293 *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.

294 *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 131 per Holmes J

295 William M Trudell, "The Bikers Are Coming… The Bikers Are Coming…" (2001) 22(3) *For the Defence* 28 at para 16.

that decision, applying (without further analysis) the reasoning by Justice Fuerst in *R v Lindsay* (2004) 182 CCC (3d) 301 to s 467.13 arguing that this section withstands constitutional challenge.[296] The decision in *R v Accused No 1* (2005) has recently been overturned by the British Columbia Court of Appeal in *R v Terezakis* [2007] BCCA 384. Here, the court confirmed that the offence under s 467.13 along with ss 467.11 and 467.12 do not infringe on the freedom of association, are not vague or otherwise constitutionally flawed.

4.4 Observations and remarks

Canada's organised crime provisions are among the most developed in the region. While the definition of criminal organisation is largely identical to similar concepts adopted in New Zealand,[297] some parts of Australia,[298] and international law,[299] the criminal offences are remarkably different and more diversified than those in operation elsewhere. The hierarchy of offences set out in ss 467.11-467.13 captures different types and levels of involvement with criminal organisations and offers higher penalties for those more closely associated with the group. Unlike most other jurisdictions, Canada's offences are more suitable to criminalise core directors of criminal organisations as well as persons who only provide rudimentary support. The Canadian provisions operate simultaneously as new offences for criminal organisations and as aggravations to already existing offences.

The criminal organisation offences initially found modest application given the high threshold of the definition of criminal organisation. The amendments in 2001 allowed for a wider application of the offences though accurate figures for the number of prosecutions and convictions under the offences are not available. Based on the reported case law, it appears that the majority of prosecutions under the criminal organisation offences involve criminal groups that engage in the trafficking and sale of illicit drugs.[300] There are also cases that involved extortion, fraud, and money laundering.[301]

Scope of the offences

Most of the concern about Canada's organised crime offences relates to the breadth of the offences, covering everything from the most serious involvement to the most minor association with criminal organisations. Moreover, the offences under ss 467.11-467.13 can be extended by the conventional principles of criminal liability;[302] ie an accused could be liable for "attempting to participate in a criminal organisation".

The broad scope of the definition of criminal organisation in s 467.1 and of the criminal offences in ss 467.11-467.13 is no accident. The reform in 2001 was

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296 *R v Smith* (2006) 280 Sask R 128 per Zarzeczny J.

297 See Chapter 5 below.

298 See Chapter 6 below.

299 See Chapter 3 above.

300 See, for example, *R v Fok* [2001] ABQB 79; *R v Fok* [2001] ABQB 150; *R v Trang* [2001] ABQB 623; *R v Stadnick* (2004) REJB 2004-70735 (unreported, 27 Sep 2004, Supreme Court of Quebec); *R v Myles* (2007) 48 CR (6th) 108 (Ont Superior Ct of Justice); *R v Smith* [2008] SKCA 20.

301 See, for example, *R v Sbrolla* (2003) WL 23526433 (Ont S.C.J.); *R v Lindsay* (2004) 182 CCC (3d) 301.

302 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 207.

deliberately designed to capture a great range of organisations and criminalise a myriad of ways in which people can associate with criminal gangs. The very high threshold created by the old provisions was too restrictive and was only able to capture very formalised groups which had serious criminals in their ranks.

The elements of the current definition are designed to be more flexible as to allow the criminalisation of a broader range of organisations, not just outlaw motorcycle gangs that wear clearly visible insignia and are structured very systematically. The danger created by the new laws is that all types of organisations with some connection to criminal activities could potentially fall within the definition in s 467.1. It is not surprising that most of the challenges before the courts to date have attacked the legislation for being too broad and overly vague.

The threshold of the mental elements of the new offences is also remarkably low, especially when compared to the high penalties for these offences. Questions remain about the imposition of such severe penalties on offences that do not require proof of any specific intention. It is to be expected that future cases will further challenge the broad application of the offences and continue to test their compatibility with Canada's *Charter of Rights and Freedoms*.

Despite the breadth of the offences and the definition of criminal organisation, some critics argue that the provisions do not seem to capture sophisticated criminal networks loosely based on kinship rather than on firm hierarchical structures. Michael Moon, for instance, remarks: "At best the legislation attacks the symptoms of organised crime, ie the activities of individual gang members, yet ignores the symptoms between them — the organisation within which these individuals commit their acts."[303] Suggestions have been that the legislation only targets the most visible and publicised, the most 'slow and stupid' groups, those using logos and insignia who can easily be identified. Allan Castle noted that "all successful prosecutions in Canada to date have been against gangs with a relatively public structure; other patterns and more clandestine groups have not been explored."[304]

Necessity

In practice, the section 467 offences have found limited application, as was perhaps to be expected. Prosecutors and courts continue to use other substantive offences and there are at present only isolated cases which have been tried under ss 467.11-467.13 and that could not have been tried otherwise. It is perhaps unsurprising that the most prominent cases involved prosecutions under s 467.13 which attracts the highest penalty and deals with the core leaders of criminal organisations.

From the beginning, there have been many doubts about the necessity of the criminal organisation laws in Canada.[305] Freedman, for instance, asks:

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303 Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 466.

304 Allan Castle & Andreas Schloenhardt, "Mafias and Motorbikes: Fighting Organised Crime in Canada and Australia" presentation at the Liu Institute for Global Issues, The University of British Columbia, Vancouver (BC), 6 Nov 2007.

305 Don Stuart, *Canadian Criminal Law* (5th edn 2007) 732; Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue 63 – Evidence (24 Apr 1997) Alan Borovoy, Canadian Civil Liberties Association.

> Is the situation really any different than in the past, or are these laws merely pandering to public hysteria about organised crime? Worse still, are these laws really a rather cynical way of unjustifiably expanding the range of police powers?[306]

Despite the stated goals of the legislation, there has been no noticeable decline in organised crime activities in Canada since the introduction of these laws in 1997, and the biker gangs who were the main target of these laws at the time of their inception continue to thrive and control large parts of the illicit drug market throughout Canada. According to a 2008 report by the Criminal Intelligence Service Canada (CISC) there are approximately 900 organised crime groups operating in Canada" including outlaw motorcycle gangs, Asian criminal groups, Italian crime groups, and several independent groups operating across the country".[307] The prosecution of Montreal Mafia leader Nicolo Rizzuto in October 2008 demonstrates that there are still many problems in holding key leaders accountable for crimes committed by their organisations.[308] The recent spate of gangland killings in Vancouver raises further doubts about the adequacy and effectiveness of organised crime laws in Canada, especially if non-conventional, non-hierarchical syndicates are involved.[309] And in the fall of 2008 renewed concerns about a biker-gang turf war emerged in Quebec after a truck loaded with explosives was driven into a building owned by the Hells Angels.[310] Donald Stuart remarked as early as 1998 that "[i]t is highly unlikely that this blunderbuss set of laws will solve the public safety problem of biker or other gangs committed to rebellion and lawlessness."[311]

Mass trials

Of great practical relevance is the fact that the introduction of the organised crime offences resulted in a number of mass trials that tested the capacity of the criminal justice system. Manitoba and Québec in particular saw several attempts to charge a great number of people at once using the new *Criminal Code* provisions. Cases involving criminal organisations in Alberta and Ontario equally involved a great number of defendants.[312]

The Manitoba trial, for instance, involved an Aboriginal street gang known as the Manitoba Warriors that engaged in low level drug and weapons offences — the group beared little, if any, resemblance to an international crime syndicate. The trial took place in a purpose-built high security courthouse and initially involved 35 accused (who each was confined in a separate cubicle in the courtroom). Two minor

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306 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 176.

307 Criminal Intelligence Service Canada (CISC), *Report on Organized Crime, 2008* (2008) 12; Criminal Intelligence Service Canada, *Organized Crime in Canada, 2006 Annual Report* (2006) 5–6.

308 See, for example, Ingrid Peritz, "Reputed patriarch of Canadian crime family walks free" (17 Oct 2008) *The Globe and Mail*, A5.

309 See, for example, Mike Faille, "The search for a bulletproof solution" (10 Nov 2007) *Globe and Mail* S1-S3; Ian Bailey, "Fatal gunplay strikes again in Vancouver" (23 Jan 2008) *Globe and Mail* 3.

310 CBC, 'Quebec bunker blaze raises spectre of biker war' (20 Oct 2008) *CBC News*, available at www.cbc.ca/canada/montreal/story/2008/10/20/mtl-soreltracy-1020.html (accessed 21 Oct 2008).

311 Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 264.

312 See, for instance, *R v Fok* [2001] ABQB 79; *R v Fok* [2001] ABQB 150; *R v Trang* [2001] ABQB 623; *Chan* (2004) 15 C R (6th) 53; *R v Lindsay* (2004) 182 CCC (3d) 301.

participants entered guilty pleas to participation in a criminal organisation at the early stages of the trial. Over the following twenty months, fifteen others entered into guilty pleas. Five others pleaded guilty later, two persons were acquitted, and the case against one person continued beyond January 2001. Many observers commented that the trial was excessively expensive and lengthy and ultimately only resulted in relatively minor penalties, the longest being a sentence of 4.5 years for drug trafficking.[313]

In Québec, the trial of members of the Hells Angels initially involved charges against 42 accused who were to be tried in a purpose-built court building. The trial was eventually severed into two separate trials. The first, involving 12 members of a biker gang ended on September 11, 2003 with nine accused pleading guilty to charges of murder, conspiracy for murder, drug trafficking, and acts of gangsterism: *R v Stockford* [2001] QJ No 3834; *R v Stadnick* (2004) REJB 2004-70735 (unreported, 27 Sep 2004, Quebec Superior Court of Justice). The accused were later sentenced to terms between 15 and 20 years depending on their role in the criminal gang.[314]

The case law generated thus far also creates some concern that the labelling of a group as a criminal organisation in one case has a flow-on effect and may result in a quasi blacklisting of some groups. For example, the decision in *R v Lindsay* in 2004 which considered the Hells Angels motorcycle group as a criminal organisation has been frequently referred to in other decisions, although this finding ought to be made on a case-by-case basis.

Many critics see these laws as a dangerous extension to criminal liability and to police powers, designed to satisfy the public's demand for action, but ill suited to seriously disrupt organised crime in Canada. "The extensive police powers", notes Donald Stuart, "read like a police wish list."[315] William Trudell views the legislation as the result of a scare campaign and remarks that

> serious organised criminal activity […] should not be used to frighten the public into accepting massive changes to legislation which fundamentally alters the Criminal Law as know it. […]
>
> [T]he attack on 'organised crime' is a 'folk devil', a transitory perhaps cyclical exaggeration by the police and media sparked by one event, and seized by politicians, all for their own purposes without solid foundation. It is akin to the burning of witches in another era.[316]

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313 Donald Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 *Manitoba Law Journal* 89 at 96-97; Don Stuart, *Canadian Criminal Law* (5th edn 2007) 735-736.

314 Anne-Marie Boisvert, "Mega-trials: The Disturbing Situation in Quebec" (2004) 15 *Criminal Reports (Articles) (6th)* 178; see also Paul Cherry, *The Biker Trials: Bringing down the Hells Angels* (2005).

315 Don Stuart, *Canadian Criminal Law* (5th edn 2007) 731. Cf Canada, Senate, *Debate*, issue 94 (23 April 1997), Hon Richard J Stanbury: "Bill C-95 has been enthusiastically received by police organizations from across the country […]."

316 William M Trudell, "The Bikers Are Coming… The Bikers Are Coming…" (2001) 22(3) *For the Defence* 28 at 28.

5 New Zealand

Organised crime in New Zealand shares many characteristics with the situation in Australia and other western countries in the region. Drug trafficking is widely seen as the most significant organised crime problem and New Zealand is simultaneously a transit point for illicit drugs trafficked across the Pacific Ocean and a destination for precursors and substances manufactured overseas. New Zealand has relatively high levels of amphetamine and methamphetamine abuse and some of these substances are manufactured domestically. In recent years, there has been a growing trend of domestic criminal organisation collaborating with Asian crime syndicates to get access to ATS and precursor imports.[317]

Among domestic criminal organisations, outlaw motorcycle gangs are particularly prominent. Particularly in the late 1990s these gangs were very frequently associated with extortion and blackmail of former members or rival gangs, especially in South Auckland. Other significant criminal organisations include gangs of Māori and Pacific Islanders. While many of these groups are no more than street gangs and disenfranchised youth, others, such as the Mongrel Mob and its rival the Black Power Gang, have been found to operate nationally and engage in sophisticated drug running, extortion, and violent crime.

New Zealand first introduced organised crime provisions into its *Crimes Act 1961* in 1997 — in the same year and under very similar circumstances as Canada.[318] The legislation was amended five years later with the *Crimes Amendment Act 2002* (NZ), which significantly broadened the application of the organised crime offence. The following Sections briefly outline the offence as first introduced in 1997 and then explore the current provisions in greater detail.

5.1 Former s 98A *Crimes Act 1961* (NZ), 1997-2002

In 1996, the *Harassment and Criminal Associations Bill* was introduced into the New Zealand Parliament, inter alia, "to place restrictions on the activities of criminal associations or gangs".[319] The legislation was the Government's response to growing concerns over gang crimes in New Zealand. The media in New Zealand reported widely about the activities of outlaw motorcycle gangs and organised criminal groups of Māori and Pacific Islander background, however, no empirical evidence was ever presented to support the perception that organised crime and other gang activity was indeed increasing at that time.[320]

At the heart of this legislative package stood the *Crimes Amendment Act (No 2) 1997* (NZ) which introduced a new offence entitled "participation in [a] criminal gang" in s 98A *Crimes Act 1961* (NZ) Part V— Crimes against Public Order. Like Canada, this offence was originally modelled after §186.22(a) *Street Terrorism Enforcement and Prevention* ("*STEP*") *Act* (California) of 1988.[321]

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317 UNODC, *Amphetamines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 53

318 See Section Chapter 4 above.

319 *Harassment and Criminal Associations Bill 1996* (No 215-1), Explanatory Note, ii.

320 *Harassment and Criminal Associations Bill 1996* (No 215-1), Explanatory Note, ii. Cf Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 833; Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 8.

321 The STEP Act provisions are modelled on the US *Racketeer Influenced and Corrupt*

In its original form, s 98A(1)(a) defined the term "criminal gang" as a formal or informal association of three or more persons where at least three of the members had been convicted (within a specified time frame)[322] of certain serious offences, such as drug offences, money laundering, serious violent offences, or other offences attracting a minimum penalty of 10 years imprisonment or more.[323] The definition thus established a very high threshold and limited the application of the term to criminal groups that are or have been engaged in very serious offences, including those typically associated with organised crime. The elements of former s 98A limited the application to groups and participants in New Zealand and did not encompass activities that occurred across borders or outside New Zealand.[324] In contrast to the definition of "organised criminal group" in the *Palermo Convention*,[325] former s 98A(1) did not have the purpose of the group's criminal activity as an element. It was argued that "the precision of the definition would be lost" if the objective or purpose of the group would be included because "[d]etermining the 'purpose' of an association would involve a variety of factual considerations that are less clear cut […]".[326]

Under s 98A(2) it was an offence, punishable by up to three years imprisonment, to

(a) participate in any criminal gang knowing that it is a criminal group; and
(b) intentionally promote or further any conduct by any member of that group that amounts to an offence or offences punishable by imprisonment.

Compared to the current offence in New Zealand and to other contemporary organised crime offences (such as the one in New South Wales[327]), former s 98A(2) was very narrowly construed. Participation in criminal organisations would only result in criminal liability if it deliberately supported criminal conduct of other gang members. Seen this way, the offence was a further extension to provisions on accessorial, derivative liability.[328] Liability under former s 98A(2) was derivative as the source of liability was not the offence definition;[329] it depended on the commission of a principal offence: "any conduct by any member of that group that amounts to an offence […]", s 98A(2)(b).[330]

The consequence of the very high thresholds of the criminal group definition and of the offence of participating in such a group meant that very few cases qualified for prosecution under these provisions. The offence was very rarely used during the five years of operation in this form. Between 1997 and 2002, only sixteen prosecutions

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Organisations ("RICO") *Act*, 18 USC 1961; see further Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 833.

322 Former s 98A(1)(c) *Crimes Act 1961* (NZ).

323 These requirements resemble the Canadian 5-5-5 rule introduced in 1997, see Section 4.1.1 above.

324 NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3.

325 See Section 3.2 above.

326 Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 836.

327 See Section 6.2 below

328 Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 834.

329 IH Dennis, "The Mental Element for Accessories" in P Smith (ed), *Criminal Law: Essays in Honour of JC Smith* (1987), 40 at 41.

330 Cf Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 9.

and two convictions for participation in an organised criminal group were recorded.[331] The maximum penalty imposed by the courts for offences under former s 98A was a three-year sentence.[332] There was also no evidence that the introduction of the new provisions had any noticeable impact on the actual and perceived levels of organised crime activity in the country.

5.2 Current s 98A Crimes Act 1961 (NZ), 2002-

In 2002, s 98A *Crimes Act 1961* (NZ) was amended to implement the UN *Convention against Transnational Organised Crime* into domestic law, to bring the *Crimes Act* provisions in line with the obligations under the Convention and its Protocols, and to "demonstrate New Zealand's determination to combat transnational organised crime in all its manifestations."[333] The new legislation expanded the application of the participation offence "to align it more closely with the Convention"[334] and also introduced two new offences relating to migrant smuggling and trafficking in persons, ss 98C, 98D *Crimes Act 1961* (NZ).

Furthermore, the legislation extends the application of the offence under s 98A beyond the geographical boundaries of New Zealand to offences that occur extraterritorially, s 7A *Crimes Act 1961* (NZ).[335] Liability under s 98A may arise even if the conduct is lawful in a foreign country.[336]

5.2.1 Organised criminal group

"Organised criminal groups" [337] are defined in s 98A(2) as groups of three or more people who have as one of their objectives to obtain material benefits[338] from offences punishable by at least 4 years imprisonment (s 98A(2)(a) and (b))[339] or to

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331 NZ, House of Representatives, *Debates* (16 Feb 2004), Questions for Written Answer (Hon Phil Goff, Minister for Justice), 899 (2004), available at www.parliament.nz/en-NZ/PB/Debates/QWA/ (accessed December 1, 2008). See Figure 14 below.

332 NZ, House of Representatives, *Debates* (16 Feb 2004), Questions for Written Answer (Hon Phil Goff, Minister for Justice), 901 (2004) available at www.parliament.nz/en-NZ/PB/Debates/QWA/ (accessed 1 Dec 2008).

333 NZ, House of Representatives, *Debates* (30 May 2002), Transnational Organised Crime Bill, Second Reading (Hon Phil Goff, Minister for Justice), available at www.beehive.govt.nz/ViewDocument.aspx?DocumentID=14166 (accessed 1 Dec 2008).

334 *Transnational Organised Crime Bill 2002* (NZ), Explanatory Note, 2.

335 Cf art 15 *Convention against Transnational Organised Crime*; see further NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 1.

336 J Bruce Robertson (ed), *Adams on Criminal Law* (5th student ed, 2007) 253.

337 A separate definition of "organised criminal enterprise" can be found in s 312A *Crimes Act 1961* (NZ). This definition only applies in relation to obtaining of evidence. Section 312A defines 'organised criminal enterprise' as "a continuing association of 3 or more persons having as its object or as 1 of its objects the acquisition of substantial income or assets by means of a continuing course of criminal conduct."

338 The Foreign Affairs, Defence and Trade Committee recommended "substituting the term 'material benefits' for the phrase 'substantial income and assets'", NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 2.

339 The Foreign Affairs, Defence and Trade Committee considered retaining the structure of former s 98A by adding additional specific offences to the list in former s 98A(1) but preferred "a generic provision that defines the offences caught by reference to the maximum penalty." NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3.

commit certain serious violent offences (s 98A(2)(c) and (d)).[340] The new definition applies to both domestic (s 98A(2)(a) and (c)) and transnational organised criminal groups (s 98A(2)(b) and (d)).[341] Similar to the definition in the *Palermo Convention*, the New Zealand definition features elements relating to the structure and objective of criminal organisations and it does not require proof of any actual criminal activity.[342]

Figure 12 "Organised criminal group", s 98A(2) *Crimes Act 1961* (NZ)

Terminology Elements	**Organised Criminal Group**
Structure	• Three or more persons. Irrelevant whether or not (s 98A(3)): o Some of them are subordinates or employees of others; or o Only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or o Its membership changes from time to time.
Activities	• [no element]
Objectives	Either: • Obtaining material benefit from offences punishable by at least 4 years imprisonment (a) in New Zealand or (b) equivalent elsewhere; or • Serious violent offences (s 312A(1)) punishable by ten years imprisonment (c) in New Zealand or (d) equivalent elsewhere.

Structure

The single structural requirement of this definition relates to the number of people involved in the organised criminal group. Unlike international law, New Zealand's definition does not require proof of any structure or the existence of the group for some period of time.[343] Membership is also not a separate element of this definition.

Section 98A(3) states that the internal organisational arrangements of the group are irrelevant and that a hierarchy, division of labour, and continuing membership are not essential ingredients to establish the existence of an organised criminal group. But it has been held that subsection (3) simultaneously recognises that a degree of structure and organisation exists between the persons involved in the group:[344] "[T]he organised criminal group charged involves a degree of organisation for criminal purposes and planning" that is not already a feature of other special offences: *R v Lasike & ORS* [2006] NZHC 1009 para 34 per Asher J.

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340 See art 5 *Convention against Transnational Organised Crime*. Cf *R v K* [1995] 3 NZLR 159 at 193; *R v Matau* [1994] 2 NZLR 631. "Serious violent offence" is defined in s 312A(1) *Crimes Act 1961* (NZ).

341 Article 5 *Convention against Transnational Organised Crime*; NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 2. The Convention does not require application to groups without international connections, cf Christine Grice, New Zealand Law Society, *Submission on the Transnational Organised Crime Bill* (28 Mar 2002), available at www.lawsociety.org.nz/publications_and_submissions/submissions2 (accessed 1 Dec 2008).

342 Cf *S v R*, 13 May 2004, HC Gisborne, T032566, per Paterson J.

343 See Section 3.2 above.

344 Cf *R v Davies* [1995] 3 NZLR 530 at 534-535.

The definition in s 98A(1) encompasses a range of structures, ranging from hierarchical, traditional organisations, to more loosely structured social networks without formal roles for the participants,[345] and without a formal membership system.[346] There has to be some link connecting the members although it is not required that all of them are communicating mutually: *R v Davies* [1995] 3 NZLR 530. It is possible that lawful organisational structures may also be captured by this element of the definition.[347]

While it is generally required to show that the group has some degree of continuity, permanence, or regularity,[348] it has also been held that an organised criminal group under s 98A may be formed for the commission of a single offence; it is not required that the group is aimed at continuing criminal activity: *R v Cara* [2005] 1 NZLR 823 per Potter J.

Proof of offending by members of the group does not suffice to prove the existence of an organised criminal group: *S v R* (13 May 2004, HC Gisborne, T032566, per Paterson J).

Objectives

The central feature of organised criminal groups under New Zealand law is the objective to achieve one of the aims stated in s 98A(2)(a)-(d) is. One or more of these objectives must be the common intention among the group members though it is conceivable that only one person has this objective and subsequently recruits or employs others on a continuing basis to further this goal.[349] The objective(s) of the group may relate to two kinds of offences:

- either offences punishable by four years imprisonment or more from which the group may obtain a material benefit (s 98A(2)(a) and (b)), or
- serious violent offences, punishable by imprisonment for ten years or more (s 98A(2)(c) and (d)).

The first objective in paragraphs (a) and (b) reflect the provisions in the *Palermo Convention*, targeting criminal organisations that aim to commit serious offences in order to make financial or other material profit. The offences must attract a penalty of at least four years imprisonment in New Zealand, or equivalent if committed abroad, thus effectively limiting the scope of this objective to serious property offences and other serious offences which may generate benefits for the organised criminal group, such as drug supply and trafficking, trafficking in persons, et cetera.

The second possible objective of organised criminal groups marks a sharp departure from the requirements in international law. In New Zealand, organised criminal groups can also consist of syndicates aiming to commit serious violent offences which do not generate any economic advantage for them, s 98A(2)(c) and (d). 'Serious violent offences' are further defined in s 312A(a) *Crimes Act* 1961 (NZ) and relate to offences that involve the loss of life, serious bodily injury, serious threats of bodily injury, or the obstruction of justice. The group's objective must relate to

345 *R v Cara* [2005] 1 NZLR 523 per Potter J.

346 *R v Robinson* 23 June 2006, HC Auckland CRI-2004-092-4373, per Asher J.

347 J Bruce Robertson (ed), *Adams on Criminal Law* (5th student ed, 2007) 252.

348 *R v K* [1995] 3 NZLR 159 at 163; *R v Matau* [1994] 2 NZLR 631; *R v Robinson* 23 June 2006, HC Auckland CRI-2004-092-4373, per Asher J, cited in J Bruce Robertson (ed), *Adams on Criminal Law* (5th student ed, 2007) 252.

349 J Bruce Robertson (ed), *Adams on Criminal Law* (5th student ed, 2007) 252, cf *R v Davies* [1995] 3 NZLR 530 at 534-535.

offences punishable by at least ten years imprisonment. This objective expands the definition of organised criminal group beyond the traditional parameters of organised crime and allows this provision and the participation offence in s 98A(1) to be used to criminalise gangs seeking to engage in very violent crimes.

5.2.2 Participation offence

Under s 98A(1) *Crimes Act 1961* (NZ):

> Everyone is liable to imprisonment for a term not exceeding 5 years who participates (whether as a member or an associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group; and—
>
> (a) knowing that his or her participation contributes to the occurrence of criminal activity; or
> (b) reckless as to whether his or her participation may contribute to the occurrence of criminal activity.

The offence under s 98A(1) combines a very loosely termed physical element with two mental elements (see Figure 13 below).

Figure 13 Elements of s 98A(1) *Crimes Act 1961* (NZ)

S 98A(1)	Elements of the offence
Physical elements	• participation (whether as a member or an associate member or prospective member) • in an organised criminal group (s 98A(2)).
Mental elements	• knowledge of the nature of the group; • knowledge or recklessness as to whether the participation may contribute to the occurrence of criminal activity, s 98A(1)(a) or (b).
Penalty	5 years imprisonment[350]

Physical elements

The physical element of the offence in s 98A(1) is the requirement that the accused participated in an organised criminal group as defined in subsection (2). The term "participation" is not further defined and its meaning remains uncertain, though it appears to have been designed to cover conduct not already covered by conspiracy or accessorial liability.[351] Robertson suggests that: "The accused must behave in a way which does, or could, 'contribute to' criminal offending. [...] Conduct actually advancing the interests or activities of the group, or overtly appearing to advance such activities should suffice."[352]

In the literature, the discussion of the participation element has focussed specifically on the example of a mechanic who repairs motorcycyles for (members of) an outlaw motorcycle gang. The question whether that person could (and should) be held liable for 'participation' in that gang has been controversial and cannot be answered definitely on the basis of the legislation.[353] The lack of a definition of the term

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350 On June 19, 2008 the Government introduced legislation to increase the maximum penalty for the offence under s 98A *Crimes Act 1961* (NZ) to ten years: *Organised Crime (Penalties and Sentencing) Bill 2008* (NZ).

351 J Bruce Robertson (ed), *Adams on Criminal Law* (5th student ed, 2007) 254.

352 J Bruce Robertson (ed), *Adams on Criminal Law* (5th student ed, 2007) 254.

353 Cf Section 2.2.4; and NSW Parliament, Legislation Review Committee, *Legislation*

'participation' in organised crime laws — not just in New Zealand[354] — is seen by some as "a grave flaw" because it is unclear to whom the offence applies.[355]

The amendment of the offence under s 98A in 2002 also caused concerns that the term 'participation' may infringe on the freedom of association. It was stated from the outset that the terms 'participation' and 'association' would not be treated as synonymous as to avoid conflict with ss 16 and 18 *Bill of Rights Act 1990* (NZ) and to maintain consistent interpretation.[356] The case law, however, reveals that the application of the participation offence may extend to passive participation or participation by mere presence.[357] It has been suggested to limit the offence to 'active' participation to ensure that the legislation is construed strictly.[358] This would also bring the offence in line with art 5(1)(a)(ii) *Palermo Convention*.[359]

Mental elements

Section 98A(1) requires that the accused knew the nature of the group he or she participated in, ie that it is an organised criminal group pursuing one of the stated objectives in subsection (2). Paragraphs 98A(1)(a) and (b) further require proof that an accused knows or is aware that through his or her conduct he/she does or could contribute to the occurrence of criminal activity. There is no requirement that the participation makes an actual contribution to any criminal offence. Robertson also argues that it is not necessary "that the accused knew with any great particularity either the nature of the intended conduct or the scope of any common purpose at the particular time in question." [360] An "intention to promote or further" criminal conduct (former s 98A) is no longer a mental element of the offence.

"The gist of this offence", notes Justice Baragwanath in *R v Mitford* [2005] 1 NZLR 753 at para 50, "is in knowingly taking part as a member of the group which has come together to commit the proscribed activity, whether or not any substantive offence has been committed." In this case, the act of participation involved reprisal

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Review Digest, No 10 of 2006 (5 Sep 2006) paras 23-25, 29.

354 See also New South Wales, Section 6.2 below.

355 Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 837 (in reference to former s 98A *Crimes Act 1961* (NZ)). Mullins further suggested to apply the Californian interpretation of "participation" under §186.22(a) to former s 98A: "The Californian Appeals Court in *People v Green* held that part of the actus reus for conviction under §186.22(a) consists of a person devoting substantial effort to the activities of the gang. Mere association or passive membership was held to be insufficient for a criminal offence [227 Cal App 3d 69s (1991) citing *Scales v United States* 367 US 203 at 223 (1961)]. This interpretation conforms with the principle that culpable participation is to be construed as conduct rather than mere association, which is the nature of status." (at 837).

356 NZ, Parliament, *Debates* (30 May 2002), Transnational Organised Crime Bill, Second Reading (Hon Phil Goff, Minister for Justice), available at www.beehive.govt.nz/ViewDocument.aspx?DocumentID=14166 (accessed 1 Dec 2008); NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3-4.

357 *R v Mitford* [2005] 1 NZLR 753 at para 59.

358 Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 837 (in reference to former s 98A *Crimes Act 1961* (NZ)); cf NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 4.

359 See Section 3.3.2 above.

360 J Bruce Robertson (ed), *Adams on Criminal Law* (4th student ed, 2005) 210.

violence and demanding with menaces (so-called taxing) on behalf of the Black Power gang in South Auckland.

Criminal responsibility for the offence under s 98A may arise on the basis of mere recklessness. While it is required that an accused knows the nature of the group, it suffices if he or she is reckless, ie has some awareness of the possibility that his or her participation may contribute to the occurrence of criminal activity.[361] The low threshold required to establish recklessness has led to criticism that liability for the offence extends beyond "criminal participation" to "mere participation". On this point, the New Zealand Law Society remarked:

> [T]he provisions may catch law-abiding adult family members or social or business contacts of a participant in an organised criminal group. Such innocent contacts might well be considered to be 'participants' simply because they were aware that the person with whom they had innocent dealings was a participant in an organised criminal group.[362]

Others, in contrast, argue that the recklessness requirement is sufficient to limit liability to accused who

> deliberately run a known risk when it was unreasonable in the circumstance to do so. This is a high threshold. This clearly excludes from liability any unwitting associates, such as a secretary of a company, or those who have good reasons, such as social contacts and family members.[363]

5.3 Observations

Like Canada, New Zealand introduced special provisions for participating in criminal organisations in addition to existing conspiracy provisions some time before the *Convention against Transnational Organised Crime* was drafted. Mirroring the developments in Canada, the thresholds of the original definition of organised criminal group and the associated offence were very high and the provisions found very limited in practical applications.

The amendments to s 98A *Crimes Act 1961* (NZ) in 2002 resulted in a "dramatic increase in the bringing of prosecutions",[364] see Figure 14 below. The number of people prosecuted for the participation offence jumped from only two in 2002, to 70 in 2003, and up to 156 in 2004. The greater number of prosecutions and convictions, beginning in 2003, demonstrates the much greater use of the new offence which was seen as "more applicable to the gang situation in New Zealand."[365]

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361 *R v Cunningham* [1957] 2 QB 396. See further *R v Harney* [1987] 2 NZLR 576 at 579; *R v Tihi* [1989] 2 NZLR 29 at 32; cf *R v Tihi (No 2)* 14 June 2006, HC Tauranga CRI2003-047-00415 per Heath J.

362 Christine Grice, New Zealand Law Society, *Submission on the Transnational Organised Crime Bill* (28 Mar 2002), available at www.lawsociety.org.nz/publications_and_submissions/submissions2 (accessed 1 Dec 2008).

363 NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3.

364 NZ, House of Representatives, *Debates* (16 Feb 2004), Questions for Written Answer (Hon Phil Goff, Minister for Justice), 899 (2004) available at www.parliament.nz/en-NZ/PB/Debates/QWA/ (accessed 1 Dec 2008).

365 NZ, House of Representatives, *Debates* (16 Feb 2004), Questions for Written Answer (Hon Phil Goff, Minister for Justice), 899 (2004), available at www.parliament.nz/en-NZ/PB/Debates/QWA/ (accessed 1 Dec 2008).

Figure 14 Number of people prosecuted and convicted under s 98A *Crimes Act 1961* (NZ), 1997-2006[366]

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
prosecutions	0	0	8	3	2	2	70	156	42	54
convictions	0	0	0	1	1	0	10	19	5	11

The increasing numbers of prosecutions and convictions that followed the amendment in 2002 is unsurprising given the broader scope of the new definition of organised criminal group and of the participation offence in s 98A *Crimes Act* 1961 (NZ). The current provisions are capable of capturing more diverse types and much greater numbers of criminal groups and allow for the criminalisation of persons more remotely connected to the activities of criminal organisations.

Questions about the appropriate limitations of criminal liability for organised crime offences have been discussed in earlier parts of this study.[367] Of particular concern in New Zealand is the inclusion of recklessness as a possible mental element of the participation offence which creates a considerable expansion to the application of the offence. Moreover, lack of any firm structural requirements and the inclusion of groups aiming to commit "serious violence offences" broaden the scope of the offences beyond organised crime committed for economic reasons. It is perhaps comforting to note that New Zealand courts have been reasonably modest and restrictive in interpreting the new laws, though there are few safeguards to prevent more interventionist courts from applying the provisions much more widely in future cases. Despite these concerns, other jurisdictions, such as New South Wales, have adopted provisions similar to that of New Zealand and, as will be shown, have broadened their application even further.[368]

Figure 14 shows that after a considerable increase in the number of prosecutions and convictions between 2002 and 2004, the number of people prosecuted and convicted for offences under s 98A fell again slightly in more recent years. It is unclear what factors contributed to this decline and whether these figures are reflective of any decrease in the level of organised crime activity in New Zealand. There is, at present, no empirical evidence to suggest that the legislation has deterred or otherwise prevented participation in organised crime groups. In May 2007, the New Zealand Government did remark that "the full potential of that legislation has not been realised, and [that] a review of section 98A is under way to find ways of making it more effective."[369] No information about proposed amendments was available at the time of writing.

366 NZ, House of Representatives, *Debates* (21 May 2007), Questions for Written Answer (Hon Phil Goff, Minister for Justice), 8498 (2007), available at www.parliament.nz/en-NZ/PB/Debates/QWA/ (accessed 1 Dec 2008).

367 See Section 2.3 above.

368 See Sections 6.2 below.

369 NZ, House of Representatives, *Debates* (16 May 2007), Questions for Written Answer (Hon Mark Burton, Minister for Justice), 8326 (2007), available at www.parliament.nz/en/NZ/PB/Debated/QWA (accessed 2 July 2007).

6 Australia

6.1 Introduction

6.1.1 Organised crime in Australia: A snapshot

Australia is home to a diverse range of criminal organisations that engage in many different criminal activities. In the 20th Century, organised crime was frequently attributed to successive waves of new immigrants and criminal organisations were usually characterised as syndicates based on ethnicity with ties to their respective home countries. For example, the presence and activities of the Italian Mafia in Australia has been explained by mass migration from Italy in the 1950s, especially to Sydney, Melbourne, and Adelaide.[370] Vietnamese organised crime "arrived" in Australia with the exodus of Indochinese following the fall of Saigon in 1975. Other Asian groups, especially from China, followed in the 1980s.[371] Japanese Yakuza and the Russian Mafia established a presence in Australia in the 80s and 90s, especially on Queensland's Gold Coast, by taking advantage of foreign investment schemes and — up until the late 1980s — lax financial transactions control and casino regulations.[372] More recently, there has been growing attention to Middle Eastern organised crime, especially in Sydney's western suburbs but also in Queensland and Western Australia.[373]

Many contemporary criminal organisations in Australia appear to come together through joint interests or objectives rather than ethnicity, nationality, or language. Today, there are many loosely associated networks that do not share a common identity and that bring together powerful individuals if and when opportunities arise.[374] This is well manifested in the gangland killings that shocked Melbourne in the late 1990s and early 2000s. There is also increasing evidence of greater internationalisation of Australian organised crime, demonstrated in "greater partnerships between domestic (eg outlaw motorcycle gangs) and transnational organised crime groups (eg Asian organised crime groups)".[375] The Lawrence McLean syndicate is a good example for a loosely connected criminal syndicate

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370 Valentin, "Present Issues for Organised Crime Control: The Australian Perspective" (1993) 44 *UNAFEI Resource Materials Series* 92 at 99–100.

371 Australia, Parliamentary Joint Committee on the National Crime Authority, *Asian Organised Crime in Australia*, *Discussion Paper* (1995) paras 4.1–4.42, 5.1–5.19; UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix B; Richard Basham, "Asian Crime – A Challenge for Australia" (1999) 31 *Australian Journal of Forensic Science* 29 at 37–38; John G Valentin, "Present Issues for Organised Crime Control: The Australian Perspective" (1993) 44 *UNAFEI Resource Materials Series* 92 at 93–96.

372 Australia, Parliamentary Joint Committee on the National Crime Authority, *Asian Organised Crime in Australia*, *Discussion Paper* (1995) paras 6.7–6.36; UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix B; Valentin, "Present Issues for Organised Crime Control: The Australian Perspective" (1993) 44 *UNAFEI Resource Materials Series* 92 at 97-98.

373 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society* (2007) 2.24–2.25; See further Section 6.2.1 below.

374 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society* (2007) paras 2.9–2.15.

375 UNODC, *Amphetamines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 51.

involving members from a diverse range of nationalities engaging in opportunistic organised crime and sporadic use of violence.[376]

As in Canada and New Zealand, outlaw motorcycle gangs (locally referred to as bikie gangs or bikies) play a particularly prominent role in Australia's illicit drug market. OMCGs have a strong presence across the country, but are particularly visible on the Gold Coast, in Adelaide, and Perth, where they also exercise control over many nightclubs and the security industry, and where violent clashes between rival gangs are not uncommon.[377] Research conducted in 2002 estimated that outlaw motorcycle gangs in Australia "consist of a cluster of about 30 different gangs with a total number of 3000-5000 full members and around 7000 associate members".[378]

6.1.2 Criminal law in Australia

In Australia, the six States New South Wales (NSW), Queensland (Qld), South Australia (SA), Tasmania (Tas), Victoria (Vic), and Western Australia (WA) have powers to legislate criminal law. Powers to enact criminal laws have also been delegated to the Australian Capital Territory (ACT) (s 22 *Australian Capital Territory (Self-Government) Act 1988* (Cth)) and the Northern Territory (s 6 *Northern Territory (Self-Government) Act 1978* (Cth)).[379]

In late 2006, New South Wales became the first State in Australia to introduce specific offences aimed at criminalising the participation in a criminal organisation. The new provisions under the *Crimes Act 1900* (NSW) mirror similar offences in Canada and New Zealand and reflect some elements of the definition of 'organised crime group' in the *Palermo Convention*. In Queensland, a Bill to criminalise membership in an organised criminal group was introduced in May 2007 but was defeated in Parliament five months later.[380] South Australia introduced sweeping new measures, including offences, against criminal associations in 2008 which are fundamentally different compared to those in operation elsewhere.[381]

6.2. New South Wales

In September 2006, New South Wales (NSW) became the first jurisdiction in Australia with specific offences against criminal organisations. The *Crimes Legislation Amendment (Gangs) Act 2006*[382] introduced several new offences in relation to "participation in criminal groups" into the *Crimes Act 1900* (NSW). This

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376 UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix B.

377 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society* (2007) paras 2.16–2.22; South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (June 2008) 16–19, available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

378 UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix B.

379 See further Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008) 24–32 with further references.

380 *Criminal Code (Organised Criminal Groups) Amendment Bill* 2007; see Section 6.3 below.

381 *Serious and Organised Crime Act 2008* (SA); see Section 6.4 below.

382 No 61 of 2006. The offences were renumbered by the *Crimes Amendment Act 2007* (NSW), No 38 of 2007.

Act also increased law enforcement powers in relation to criminal organisations in a new Part 16A *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The next Sections explore the circumstances that led to the introduction of these provisions, followed by an analysis of the definition of criminal group and the participation offence.

6.2.1 Background

Legislation to criminalise participation in a criminal organisation and related activity was first introduced in the Legislative Assembly on June 30, 2006. The introduction of the *Crimes Legislation Amendment (Gangs) Bill* was seen as a response to increased organised crime activity in New South Wales in order to protect "the citizens of New South Wales […] against gang violence, thuggery and organised criminal activity",[383] to "increase that feeling of safety within our community",[384] and to "prevent Sydney from turning into Chicago or Los Angeles."[385] In his second reading speech, Parliamentary Secretary Tony Steward remarked:

> New South Wales cities are not plagued by violent street gangs such as those found in the United States of America. However, criminal organisations do exist. At the highest level, there are well-developed and hierarchical criminal networks such as the Russian mafia and other ethnically based organised crime groups and outlaw motorcycle gangs, known colloquially as bikies. Those organisations terrorise individuals and businesses, run sophisticated drug and firearm operations, cover their tracks through veiled money laundering operations and make innocent bystanders and businesses their victims.[386]

He noted further that:

> In recent years, there have also emerged significant crime gangs based on common ethnicity. They include Vietnamese and Chinese gangs with a strong involvement in the drug trade, Pacific Islander groups who are specialised in armed robberies, and criminals of Middle Eastern origin who engage in firearms crime, drug trafficking and car rebirthing. […] Many gangs have nothing to do with ethnicity. They are formed rather on the basis of common interest, for example motorbikes, geographical proximity, or, sadly, contacts made in the prison system.[387]

The introduction of this Bill was not triggered by any single, high profile case or incident, and no empirical evidence has been submitted to support the statements that organised crime is increasing significantly in New South Wales. There are, however, other reports documenting the history and levels of organised crime in New South Wales which — like most other Australian jurisdictions — is home to many established criminal organisations, including OMCGs that are particularly prevalent in

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383 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1142.

384 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Chris Hartcher, Gosford), 1517.

385 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Michael Daley, Maroubra), 1535.

386 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1142; NSW, Legislative Council, *Hansard* (19 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (The Hon Eric Roozendaal), 1733. See also NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Kevin Greene, Georges River), 1524.

387 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1142.

the trade of amphetamine, methamphetamine, and MDMA (ecstasy) and the associated nightclub and security industry.[388]

The legislative material contains no references to the *Convention against Transnational Organised Crime*.

In introducing this new legislation against criminal organisations, the Government sought to

> recognise that crimes committed by gangs, whether they be crimes of violence, revenge attacks, systematic property damage, organised motor vehicle theft, protection rackets, armed robberies or the drug and gun trade, are a far greater threat to the safety and wellbeing of the community than most crimes committed by individuals acting alone.[389]

Of particular concern in New South Wales has been a perceived rise in the activities of Middle Eastern criminal syndicates in Sydney, which, according to Opposition member Mr Chris Hatcher, "will have an impact on society unlike anything we have ever seen".[390] He noted that Middle Eastern organised crime has existed in NSW since the mid-1990s and stated that his Party

> has called upon the Government to take action against 200 identified thugs. Those are the 200 whom police have on record at the very least as being ongoing and full-time organisers and principals in criminal activity in western and south-western Sydney.[391]

Earlier attempts by the NSW Opposition to legislate against criminal organisations failed, including a 2005 proposal to make leadership of a criminal group an aggravating offence under the *Crimes (Sentencing Procedure) Act 1999* (NSW).[392]

It should be noted that the measures against organised crime are not the only feature of the *Crimes Legislation Amendment (Gangs) Act 2006* (NSW). The Act simultaneously introduced new provisions relating to public order which were a response to xenophobic riots that occurred in Cronulla in southeastern Sydney on December 11, 2005. The magnitude of these riots and subsequent revenge attacks, and the coverage these incidents gained in the international media, forced the NSW Government to amend existing public order offences (sometimes referred to as 'mob offences'),[393] increase penalties for offences against law enforcement officers,[394] and

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388 See further DGE Caldocott et al, "Clandestine drug laboratories in Australian and the potential for harm" (2005) 29(2) *Australian and New Zealand Journal of Public Health*, 155 at 158; Australian Crime Commission. *Submission to the Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into AOSD* (13 Mar 2006) 8; G Wardlaw. "Supply reduction (law enforcement) strategies pertaining the illicit use of psychostimulants", in D Burrows et al. (eds), *Illicit psychostimulant use in Australia* (1993) 96.

389 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1142; cf NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Kevin Greene, Georges River), 1523.

390 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Chris Hartcher, Gosford), 1517.

391 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Chris Hartcher, Gosford), 1517.

392 *Crimes (Sentencing Procedure) (Gang Leaders) Bill* 2005; cf NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Chris Hartcher, Gosford), 1517.

393 See new ss 60(1A), (2A), (3a), 60A(1), 195(2), 196(2), 197(2), 199(2), 200(2) *Crimes Act 1900* (NSW.

394 See ss 60B, 60C *Crimes Act 1900* (NSW).

enhance related enforcement powers.[395] While these provisions feature prominently in the debates of the *Crimes Legislation Amendment (Gangs) Bill*¸ they are otherwise unrelated to the provisions relating to organised crime.

The *Crimes Legislation Amendment (Gangs) Act* was assented to on September 28, 2006. Prosecutions and case law on the new provisions are only slowly forthcoming and the medium and long-term effects of the legislation have yet to be seen. Critics remain skeptical about the need for this legislation arguing that it is simply another attempt "to grab headlines and win votes [rather] than to address crime rates and community safety."[396]

6.2.2 Definition of "criminal group"

At the heart of the New South Wales amendment stands the definition of the term "criminal group" in s 93S(1) *Crimes Act 1900* which is in many parts identical to the definition of "organised criminal group" in New Zealand.[397] In New South Wales, criminal groups are defined as groups of three or more people who have as one of their objectives to obtain material benefits from serious indictable offences (s 93S(1)(a) and (b)) or to commit serious violence offences (s 93S(1)(c) and (d)). In simple terms, criminal groups in New South Wales include two types of associations of three or more people: (1) those that seek to profit from serious offences, and (2) those that seek to engage in serious violence. The Second Reading speech of the Bill confirms that the legislation "attacks the foundations of two very different types of gangs. It deals with both organised criminal groups and impromptu groups of violent individuals or mobs."[398]

Figure 15 "Criminal group", s 93S(1) *Crimes Act 1900* (NSW)

Terminology Elements	**Criminal Group**
Structure	• Three or more persons. Irrelevant whether or not (s 93SJ(2)): ○ Some of them are subordinates or employees of others; or ○ Only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or ○ Its membership changes from time to time.
Activities	• [no element]
Objectives	Either: • Obtaining material benefit from serious indictable offences (a) in New South Wales or (b) equivalent elsewhere; or • Serious violence offences(s 93S(1)) (c) in New South Wales or (d) equivalent elsewhere.

395 See new s 87MA *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

396 NSW, Legislative Council, *Hansard* (19 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Ms Lee Rhiannon), 1756. See also the comments in Dennis Miralis, "Law & Order 2007-style" (Mar 2007) *NSW Law Society Journal* 54 at 54, 56.

397 See Section 5.2.1 above.

398 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1142.

Structure

The minimum number of people required for a criminal group in New South Wales is three — the same as in most other jurisdictions. Unlike the *Palermo Convention*, in NSW there is no further requirement of any formal structure (such as membership or a division of labour) between these people. It is assumed that there is some association between the people in the criminal group but it is not required that the group existed for any length of time, thus a spontaneous association of people can also be criminal groups. Section 93S(2) confirms that:

> A group is capable of being a criminal group […] whether or not:
>
> (a) any of them are subordinates or employees of others, or
> (b) only some of the people involved in the group are planning, organising or carrying out any particular activity, or
> (c) its membership changes from time to time.

Objectives of the criminal group

The core feature of the criminal group definition in New South Wales is the requirement that the criminal group shares a common objective. As in New Zealand and Canada, there is no requirement of any actual joint activity by the group members — the shared objective is the central feature of this definition and the shared objective need not be the sole objective of this group, s 93S(1). The objectives of criminal groups in New South Wales have been adopted from New Zealand,[399] capturing two types of associations: (1) those that seek to profit from serious offences, and (2) those that seek to engage in serious violence.

The first possible objective of a criminal group is "obtaining material benefit from conduct that constitutes a serious indictable offence" in New South Wales (para (a)) or an equivalent offence outside NSW (para (b)). "Serious indictable offence" is defined in s 4 *Crimes Act 1900* (NSW) as "an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more." There is no limitation in s 93S(1)(a) and (b) as to the nature of the offence; it can be any kind whatsoever. But the requirement that the groups seeks to "obtain material benefit" from that offence suggests this will normally involve serious offences against property, property offences involving violence, as well as drug offences, homicide, and a small number of other felonies.

The second possible objective of criminal groups is "committing serious violence offences" in New South Wales (para (a)) or equivalent offences outside NSW (para (b)). "Serious violence offence" is a new term defined in s 93S(1) as offences punishable by imprisonment of ten years or more that involve either (a) the loss (or risk of loss) of life, (b) serious injury (or risk of serious injury), (c) serious property damage thereby endangering the safety of a person, or (d) perverting the course of justice in relation to a serious violence offence. This second type of criminal group encompasses people who associate in order to commit grave offences against the person, such as homicide, rape, or inflictions of grievous bodily harm. While this second objective is reflective of some crimes committed in New South Wales in recent years, in particular gang-rapes,[400] it marks a sharp departure from general concepts of organised crime. In particular, the second objective does not require any

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399 See Section 5.2.1 above.
400 Cf *R v Bilaf Skaf* [2005] NSWCCA 297.

purpose relating to financial or other benefit. It encompasses situations that may be purely emotional or spontaneous and it does not feature the characteristics of an ongoing criminal enterprise for material gain.

The criminal objective element shares some resemblance to the requirement of "agreement" in the doctrine of conspiracy.[401] To that end, the NSW Legislation Review Committee noted that the concept of a criminal group in s 93S(1) "is akin to a permanent or at least long-term conspiracy, which lasts for as long as three or more people maintain an association in pursuit of at least one of the criminal objectives listed in" s 93S(1).[402] In contrast to conspiracies, however, there is no requirement of any specific agreement among the three or more people to commit particular (identifiable) crimes.[403] The absence of a requirement to establish any specific activity planned by the group is also noticeable in the mental elements of the new offences (see Section 6.2.3 below).

In summary, only one part of the definition of 'criminal group' deals with organised crime while another part deals with groups seeking to engage in serious violence. It is debatable whether the concept of criminal groups adequately captures the characteristics of organised crime. Concerns may arise over the breadth of the NSW definition although the legislator has assured that "the threshold used to define an organised criminal group is quite high".[404] The term "organised" is, however, not used anywhere in the legislation. While it has been stated that "three kids spraying graffiti on a billboard could not be classified as an organised criminal group, but a 10-person car rebirthing operation would be," [405] the legislation offers little guidance to draw this distinction.

The strong emphasis on the objectives of the criminal group rather than on its structure and its activities creates some uncertainty about the scope of application. It is left to the courts to limit the application of this definition and ensure that there are no infringements on the freedom of association and other civil liberties. The current legislation does not contain these safeguards.

6.2.3 Participation in criminal groups

Section 93T *Crimes Act 1900* (NSW) contains four new offences relating to participation in a criminal group. Under subsection (1) it is an offence to knowingly participate in a criminal group. This offence is the basic participation offence; the other offences are aggravations involving some violence. Subsection (2) criminalises assaults relating to criminal group activity and subsection (3) contains a similar offence in relation to property damage. Under subsection (4) it is an offence to assault law enforcement officers whilst intending to participate in a criminal group.

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401 See Section 2.1.3 above.

402 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 19.

403 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 19.

404 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1144.

405 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1144. Cf Ben Saul, The University of Sydney, Sydney Centre for International Law, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, June 2008 Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

Section 93T(1) criminalises (basic) participation in a criminal group. The physical element of this offence requires proof that accused "participated" in a group of people that meets the definition of "criminal group" under s 93S(1) (see above). The offence has two mental (or fault) elements: (a) the accused's knowledge that the group is a criminal group; and (b) knowledge or at least recklessness that the accused's participation in that group may contribute to the occurrence of any criminal activity, see Figure 16 below.[406] Offences under s 93T(1) are punishable by up to five years imprisonment.

Figure 16 Elements of s 93T(1) *Crimes Act 1900* (NSW)

S 98IK(1)	Elements of the offence
Physical elements	• participating in • a criminal group (s 93S(1)).
Mental elements	• knowledge/recklessness as to whether the participation in that group contributes to the occurrence of any criminal activity, s 93T(1)(b); • knowledge that it is a criminal group, s 93T(1)(a).
Penalty	Maximum 5 years imprisonment

Physical Elements

The single physical element of the offence under s 93T(1) is proof of participation in a criminal group as defined in s 93S(1). The term 'participation' is not further defined in the *Crimes Act 1900* (NSW) and its exact meaning is unclear.[407] The term is usually used in the context of complicity and accessorial liability — which are governed by common law in New South Wales — to describe any aiding, enabling, counselling, or procuring of a criminal offence. From the wording of s 93T(1) it is not clear whether the participation must actually have the consequence of contributing to the occurrence of any criminal activity, or whether any participation suffices, including acts unrelated or only remotely related to "any crime, whether complete or incomplete, at any time in the future".[408]

Membership is not a separate element of the new offence and the legislator confirmed that the legislation "does not make membership of a criminal organisation an offence per se, nor does it make every transaction with a criminal organisation an offence. A person can be a member of the gang and not a criminal participant."[409] In the eyes of the legislator, participation is more than simple membership, but the distinction between participation and membership is not an easy one to make and the mental elements for this offence further blur this division. It has been noted elsewhere, that "[i]f a person need not be a member to be liable, then the group of possible offenders is broader than that of gang members alone."[410]

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406 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 15.

407 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Andrew Tink, Epping), 1525.

408 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 16, 30-32.

409 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1144; cf NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 26.

410 Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 837.

The new offence has also been criticised, especially in opposition circles, for not adequately targeting the organisers and financiers of organised criminal activity. The offence under s 93T criminalises any participation in a criminal group and, unlike similar provisions in Canada,[411] does not differentiate between different levels of involvement or between the roles people occupy within a criminal organisation. In particular there are no references, no aggravating elements, and no higher penalties provided for gang leaders.[412] This is seen by some as major weakness of the new offence:

> It is time that leadership of a gang, by virtue of that leadership without anything else, puts the activities of the person involved as leader in the worst category of that crime. Gangs form around leaders; a key condition precedent to a gang forming is that there is a leader. Gangs comprise leaders and followers, and most members are followers. There may be one or two leaders, but nothing in this legislation tackles leaders.[413]

> In the corporate world a hierarchy exists between chairmen, directors, company secretaries and other office bearers, and the same exists within the criminal realm. Some recognition should be give to these distinctions.[414]

The omission of leadership from the concept of criminal group and the participation offence was deliberate. As stated earlier, the legislator designed the new offences to target a diverse spectrum of criminal groups and participants, not just those organisations with clear internal hierarchies. From the legislative material it appears that the legislator sought to criminalise a great range of people who are directly and indirectly associated with criminal groups:

> That offence targets a range of activities and people who work with criminal organisations, and obviously some of them will be members. They will wear the colours and have the tattoos. Others will wear tailored suits and appear to be the pinnacle of respectability. The offence targets those hiding in the background of a criminal enterprise and those who facilitate organised criminal activity. They may be accountants, bookkeepers, executives, or even lawyers who fudge records, launder money, construct sham corporate structures and hide assets. It also targets the front men.

> These are the so-called cleanskins, people with no criminal record who give criminals a legal front behind which to commit their crimes and minimise the risk of detection by law enforcement. They may be licensed hoteliers, real estate agents, smash repairers, pharmacists or public officials, who, in various ways, aid and abet ongoing criminal activity. And, of course, the bill targets the heavies—the people who actively commit ongoing criminal acts: the drug runners, the gun traffickers, the car rebirthers, the armed robbers and the standover men.[415]

But the possible application of the participation offence is much wider than that. It has been noted that a criminal group can equally be constituted by "a number of youths with no particular leader — with a lot of alcohol induced bravado […] going

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411 See Section 4.3 above.

412 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Andrew Tink, Epping), 1525; NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Malcolm Kerr, Cronulla) 1529.

413 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Andrew Tink, Epping), 1525.

414 NSW, Legislative Council, *Hansard* (19 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (The Hon Gordon Moyes), 1753.

415 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1144.

around pulling out sprinklers and street signs and causing nuisance."[416] There is, however, a fundamental difference between this type of juvenile delinquency and multinational drug cartels. The legislation does not recognise this important distinction in any way.

Mental elements

Section 93T(1)(a) *Crimes Act 1900* (NSW) requires that an accused has knowledge of the criminal nature of the group. This means that the person must positively know of the three or more people involved in that group and must also know that the group is pursuing one of the stated objectives. There is no separate requirement that the accused himself or herself pursues these objectives independently and there is no element requiring that he or she intended to provide assistance or encouragement to others.[417]

Further, a person must be at least reckless — ie must be at least aware of the possibility — that his or her participation in the group could or might contribute to the occurrence of any criminal activity, s 93T(1)(b). Recklessness is an alternative to knowledge, thus it is not necessary that an accused is virtually certain that his or participation will actually make such a contribution. Proof of foresight that there might or could be a contribution will suffice.[418] It is not necessary to show that this mental element relates to the commission of a specific criminal activity; the statute states that foresight of "any criminal activity" will suffice.[419]

It has been argued that the inclusion of recklessness as an alternative mental element to knowledge in s 93T(b) assists in the deterrence of criminal activity by criminal groups. "The message, particularly to young people," stated Mr Michael Daley MP, "is: When in doubt stay away. It places a responsibility for their own actions. […] It will no longer be a defence to claim ignorance."[420] On the other hand, the mental elements for the offence under s 93T(1) have been criticised for being too broad and lacking clarity.[421] Including recklessness as a mental element is seen as displacing "the common law threshold of a knowledge of essential matters as a basis of liability."[422] Dennis Miralis remarked that:

> Under this Act there is no requirement that the accused must have intended to provide assistance or encouragement to a criminal group. Additional it isn't necessary for the prosecution to prove that the accused knowingly or recklessly contributed to the commission of a specific crime. These are fundamental departures from the requirement

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416 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mrs Dawn Fardell, Dubbo) 1534.

417 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 21.

418 *La Fontaine v R* (1976) 136 CLR 62; *R v Crabbe* (1985) 156 CLR 464; *Boughey v R* (1986) 161 CLR 10 at 21.

419 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 21.

420 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Michael Daley, Moroubra) 1537.

421 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 33.

422 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Paul Pearce, Coogee) 1533.

> in criminal law that an accused is guilty only if they had a guilty mind and intended to commit an offence.[423]

Concerns have been expressed that the new offence can potentially target people who are only rudimentarily associated with criminal groups if they are reckless that their participation might contribute to criminal activity,[424] such as "businesspeople who are trying to make a living being out in harm's way and falling victim to the Government in relation to gangs."[425] During the parliamentary debates Ms Lee Rhiannon raised the questions:

> Does this mean that someone who catches a lift with friends who have committed a crime will be caught by the provision? Can that person be sent to gaol for a car ride? […] How does someone know whether he or she is associating with a gang, which is not allowed, or a group, which is allowed. It seems inevitable that innocent people will be caught in the wide net of this legislation.[426]

Ben Saul also remarked:

> Setting the threshold definition for criminal group-based offences so low, and framing overly-broad participation offences (including on the basis of recklessness) raises concerns about the inappropriate criminalisation of conduct which is too remote from the commission of serious organised criminal harm, and raises related concerns about the adequate protection of individual liberties and freedom of association.[427]

In summary, it is not fully possible "to predict, with reasonable confidence and on the basis of reasonably accessible legal materials, the circumstances in which a power will be used so as to interfere with one's rights."[428]

6.2.4 Aggravations

The new provisions relating to participation in a criminal group also include three aggravated offences in subsections 93T (2), (3), and (4), punishable by 10 and 14 years imprisonment. These offences include assaulting another person (subs (2)), destroying or damaging property (3), and assaulting a law enforcement officer (4).

These new offences are aggravations to existing offences in the *Crimes Act 1900* (NSW) and at common law, such as assault, property damage, and assaults of law enforcement officers. The aggravating feature of the new offences is the additional mental element requiring an intention of participating in a criminal activity of a criminal group by that action. The stated purpose of these aggravations is to recognise "that crimes committed by gangs, whether they be crimes of violence,

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423 Dennis Miralis, "Law & Order 2007-style" (Mar 2007) *NSW Law Society Journal* 54 at 55.

424 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) paras 33-34.

425 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Malcolm Kerr, Cronulla) 1532.

426 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Ms Lee Rhiannon) 1757.

427 Ben Saul, The University of Sydney, Sydney Centre for International Law, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, June 2008 Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

428 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 35.

revenge attacks, systematic property damage […] are a far greater threat to the safety and wellbeing of the community than most crimes committed by individuals alone."[429]

Assault with intent to participate in a criminal group

The first of the aggravations involves assaults of another person with the intention to participate in a criminal group, s 93T(2). The single physical element of this offence is the assault of another person. The term assault is understood in the same way as elsewhere in the *Crimes Act 1900* (NSW) and at common law: "An assault is any act which […] causes another person to apprehend immediate and unlawful personal violence […] and the actual intended use of unlawful force to another person without his [or her] consent".[430]

Participation is not a separate physical element of this offence; in contrast to s 93T(1), it must be established that by the assault the person intended "to participate in the criminal activity of a criminal group". In other words, it needs to be shown that the assault was accompanied by an intention to participate. Actual participation is not required and there is also no requirement that the criminal group approves or is aware of the assault.

Property damage with intent to participate in a criminal group

The aggravation in s 93T(3) relates to actual or threatened damage or destruction of property.[431] It requires proof that the person damaged or destroyed another person's property or threatened to do so. The physical acts need to be accompanied by an intention to participate in criminal activities of a criminal group. The structure of physical and mental elements is identical to subsection (2). As with the other aggravations, it suffices to show that the intention relates to "any" criminal activity. It is not necessary to demonstrate that the intention (or the actions) is aimed at a specific criminal enterprise, but the intention must relate to criminal activities, not to other, legitimate conduct of the group.

Assaulting a law enforcement officer with intent to participate in a criminal group

The third and final aggravation in s 93T(4) mirrors the offence in subsection (2) with an additional physical element relating to the status of the person assaulted. Subsection (4) criminalises assaults of law enforcement officers whilst they are executing their duties intending by that action to participate in any criminal activity of a criminal group. The meaning of law enforcement officers and their relevant duties are set out in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The offence also extends to assaults of officers who are off-duty in the situations specified in s 93T(5). These situations relate to instances in which the assault is deliberately targeting law enforcement officers.

One of the difficulties associated with the aggravating offences in s 93T(2)-(4) *Crimes Act 1900* (NSW) is again the uncertainty over the meaning of the term 'participation'.

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429 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1143.

430 *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 at 444 per James LJ; cf Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 503–504; Bernadette McSherry & Bronwyn Naylor, *Australian Criminal Laws* (2004) 158.

431 Cf s 195 *Crimes Act 1900* (NSW).

It is also not fully clear what evidence would be required to link the assault or property damage with the intention to participate in a criminal group. It appears that the assault or property damage may be completely unrelated to the criminal activities of a criminal group so long as the accused believes or wants these acts to be participatory in some way. Questions may also be raised about the selection of aggravations. In order to criminalise organised crime more effectively, it may be beneficial to combine the mental element of 'intending to participate in a criminal group' with offences that are closely associated with criminal organisations such as drug trafficking, firearms trafficking, or organised motor vehicle theft.

6.3 Queensland

On May 24, 2007, a Bill was introduced into the Queensland Parliament by the State Opposition "to break up organised crime groups and equip law enforcement agencies with the power to arrest these groups."[432] Supporters of the Bill argued that "Brisbane has more crime gangs than Chicago"[433] and that the proposed legislation will "help this state ensure that it does not become an attractive haven for organised crime."[434]

The *Criminal Code (Organised Criminal Groups) Amendment Bill 2007* (Qld) proposed the introduction of s 545A into the *Criminal Code* (Qld) to make it an offence to participate as a member in an organised criminal group. The proposed legislation was designed to extend the spectrum of criminal liability "beyond parties to offences and break down the group mentality of these organised crime elements."[435] The legislative material also makes brief reference to the *Convention against Transnational Organised Crime*.[436]

The Queensland proposal follows the model adopted in New Zealand and New South Wales by combining a definition of "organised criminal group" with a new offence for participation in such a group.

6.3.1 Organised criminal group

The definition of "organised criminal group" in proposed s 545A(2) is identical to the definition of "organised criminal group" in New Zealand,[437] though there is no acknowledgement of this connection anywhere in the legislative material. "Organised criminal groups" are defined as groups of three or more people who have as one of their objectives to obtain material benefits from offences punishable by at least 4 years imprisonment[438] (s 545A(2)(a) and (b)) or to commit serious violent offences (s 545A(2)(c) and (d)). "Serious violent offence" is defined in s 545A(2) using the same criteria as the equivalent provision in New South Wales.[439] There is no further requirement of any structure, formal association, or any existence of the group for

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432 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 1. Personal communication with Mr Mark McArdle, Shadow Attorney-General, Shadow Minister Justice, Brisbane (Qld), 26 Nov 2007.

433 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4012 (Mr Langbroek).

434 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4011 (Dr B Flegg).

435 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 1.

436 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4015 (Mr M McArdle).

437 See Section 5.2.1 above.

438 "The reasoning behind the reference to the 4 year offence is to capture the stealing type offences": *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 4.

439 See Section 6.2.2 above.

any length of time, and there are no elements relating to the actual activities the group engages in.

Figure 17 "Organised criminal group", proposed s 545A(2) *Criminal Code* (Qld)

Terminology Elements	**Organised Criminal Group**
Structure	• Three or more persons. Irrelevant whether or not (s 545A(2)(e)-(g)): o Some of the persons are subordinates or employees of others; or o Only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or o The group's membership changes from time to time.
Activities	• [no element]
Objectives	Either: • Obtaining material benefit from offences punishable by at least 4 years imprisonment (a) in Queensland or (b) equivalent elsewhere; or • Commission of serious violent offences (s 545A(2)) punishable by ten years imprisonment (c) in Queensland or (d) equivalent elsewhere.

Unlike the equivalent definition in New South Wales, the Queensland proposal does include the additional word "organised". This inclusion may be purely rhetorical but it may also lead to think that random clusters of people without any association between them cannot be regarded as organised criminal groups. However, to constitute an "organised criminal group" it does not matter whether or not membership changes over time, whether different people may be engaged in the planning and execution of the criminal activities, and whether there is a hierarchical structure between persons in the group, s 545A(2)(e)-(g).

As in those jurisdictions with similar legislation, common concerns relate to the breadth of its application and the difficulties of establishing the existence of an organised criminal group. It has been argued that in practice the objectives of the group "would be virtually impossible to prove as crime gangs do not usually have a charter of aims and objectives that includes participation in criminal activity."[440] Concerns were also expressed that the definition

> may in fact target persons who are not themselves engaging in any criminal activity and have no association whatsoever with what members of the public would consider an organised criminal group. Social groups and culturally relevant organisations could be targeted, resulting in prosecution of people based on race, ethnicity or membership of a social group.[441]

6.3.2 Participation in an organised criminal group

The proposed offence of participating in an organised criminal group is similar in structure to the offences in New Zealand and New South Wales though the Queensland proposal contains some subtle yet significant differences. Under s 545A(1) of the proposal:

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440 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4013 (Mr Lawlor).

441 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice).

A person who participates as a member of a group knowing—

(1) that it is an organised criminal group; and
(2) that the person's participation contributes to the occurrence of any criminal activity of the group;

commits a crime.

Maximum penalty — 5 years imprisonment.

Figure 18 Elements of proposed s 545A(1) *Criminal Code* (Qld)

S 545A(1)	Elements of the offence
Physical elements	• participating • as a member (s 545A(2) of a group
Procedural matters	Examples for people identifying themselves as members, s 545A(2).
Mental elements	• knowing that the participation contributes to the occurrence of any criminal activity of the group; • knowing that the group is and organised criminal group (s 545A(2)).
Penalty	5 years imprisonment

The threshold for liability under the proposed offence appears to be higher than in New Zealand and New South Wales. In particular, the Queensland proposal is limited to participation "as a member". Membership is an integral part and a physical element of this proposed offence and includes by definition associate members, prospective members, and those who identify themselves as members, for example by wearing or carrying the group's insignia, cloths et cetera, s 545A(2). Accidental associations with criminal groups thus fall outside the application of this offence. Membership itself, however, is not an offence:

> The Bill does not propose to make membership of a gang a criminal offence. Quite simply, the Bill is all about checks and balances. It is not about identifying who is a card-carrying member of a gang and proving beyond reasonable doubt that the offender is a gang member. Rather, the Bill is about identifying organised and ongoing criminal activity in the name of a gang and punishing people accordingly.[442]

In practice, establishing membership will be difficult as it involves an inquiry into the persons actually constituting the group. In many cases, it will be challenging to either identify three or more persons and establish that they form a criminal group or to find witnesses to testify against other members. To facilitate proof of this element, the proposal under s 545A(2) includes examples of certain indicia to help establish that an accused is associated with a criminal organisation.[443] These include:

- Wearing clothing, patches insignia or symbols relevant to the group;
- Having a tattoo or brand that is an identifying mark, picture or word relevant to the group;
- Making statements about membership of or belonging to the group;
- Having a known association with members of the group.

These examples are not conclusive evidence but are designed to assist the prosecution in establishing whether a person identifies himself/herself as a member, especially in the absence of confessions or other witnesses. There have been some

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442 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4016 (Mr Messenger).

443 Cf Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378.

concerns about the use of insignia as evidence for membership with one critic asking:

> So what would happen to a young man who joins a bikie gang [and wears a tattoo of the criminal gang] but, as he gets older, loses interest in the gang? Unless he removes the tattoo surgically, he would always be walking, talking proof that he was a criminal and, according to this Bill, would be subject to five years jail.[444]

The use of evidence such as insignia, tattoos, and other marks and logos confirms that the legislation is suitable for use against criminal organisations with a clear visual presence and identity, but is not helpful to target organisations that operate less visibly and keep their membership covert. It was noted by the Attorney-General that

> [t]he Bill will not assist in the investigation of organised criminals who operate in secret with a high degree of technological sophistication. In fact, there is a real risk that such a law would be counterproductive by driving gangs and similar organisations further underground.[445]

From the text of the proposal and the parliamentary debates, it remains unclear whether the proposed offence requires a nexus between the participation and any actual criminal activity. The wording of the Bill suggests that there is no additional requirement that the person engages in any criminal activity; participation as a member are the sole physical elements. It is the stated objective of this proposal to make

> group members liable for the criminal activities of others. Group members do not need to participate in the actual crime committed or know that the offence would occur. It is enough to be a member of the gang and have others committing the crime.[446]

Furthermore, "[t]he presence of the defendant, as a group member while another member/s commits an offence renders them guilty. This is seen as passive participation and still contributes to the occurrence of criminal activity."[447]

This, however, would confirm concerns that mere membership in an organised criminal group is indeed a crime.[448] On the other hand, it has been argued that the key requirement of the offence is "that the participation must contribute to the occurrence of any criminal activity. Participation alone is not an offence […]."[449] Sensible interpretation of the legislation suggests that there should be no liability if no criminal activity by the group occurs, but there is nothing in the Bill that creates a requirement that the accused's participation actually makes a contribution to that activity.

The mental elements of the proposed offence require (a) that the person knows that the group in which he or she participates is an organised criminal group (ie he/she

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444 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4013 (Mr Lawlor). See also similar discussion in reference to insignia used by Chinese triads, see Sections 8.1.2 below.

445 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice).

446 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 2.

447 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 2.

448 Kerry Shine, Attorney-General and Minister for Justice (Qld) (pers comm., 5 Feb 2008, on file with author).

449 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4017 (Mr Messenger).

knows the objectives of the group) and (b) also knows that the participation contributes to the occurrence of any criminal activity of that group. Accidental participation and — in contrast to New South Wales — recklessness will not result in criminal liability under the Queensland proposal.

6.3.3 Further remarks

In summary, proposed s 545A *Criminal Code* (Qld) is more carefully drafted and more narrowly construed than the provisions in New South Wales. In comparison to the *Palermo Convention*, the Queensland proposal is broader in that the definition of organised criminal group also applies to groups engaging in serious violent offences and does not require any formal structure of the group.

It has been argued that the main purpose of the Bill is deterrence and prevention:

> I believe that a five-year sentence for associating with organised crime will be a deterrent to a lot of people. Facing being locked away for five years for breaking the law in such a way is something that young people certainly would not want to be confronted with. […]
>
> [W]e introduce these laws in our state so that we can keep more people out of jails and send a message to the drug barons and the law breakers that their activities will not be condoned here. People who had thought of associating with organised crime will think, 'I don't want to be a party to that.' […]
>
> At the end of the day this legislation is about prevention, so that young people are not subjected to prison terms. […] This is about protecting our young people from the organised crime element.[450]

It is very doubtful that the proposed provisions are able to achieve these goals. Higher penalties are rarely, if ever, an effective deterrent and there is no empirical evidence that the participation offence stops people from becoming involved with criminal organisations. Given the broad application of the proposal there is a real danger that the provision could create criminal liability for large numbers of people that would otherwise go unpunished and it seems unlikely that the proposed laws "can keep more people out of jail". In fact, it seems more likely that, if enforced rigorously, the new laws would result in more people going to gaol.

The Queensland Bill failed to pass the second reading in Parliament on October 31, 2007. "The government opposes this bill", stated Attorney-General and Minister for Justice Kerry Shine,

> as it is ill conceived, unnecessary and aims to extend the basic principles of criminal liability to guilt by association. The fundamental right of freedom of association is potentially eroded by this Bill because even innocent participation in an organised criminal group as defined may, in some way, contribute to the occurrence of criminal activity by the group. No specific act or omission by the accused is necessary and no specific criminal act or activity need be contemplated by the accused for the offence to be committed. […]
>
> A one-size-fits-all response is therefore not the answer to this complex problem. In any event, such an approach is unlikely to be effective in targeting organised criminal groups which may operate under the cover of legitimate business enterprises and with a high degree of sophistication.[451]

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450 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4013-4014 (Mr Johnson).

451 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice).

There are currently no further proposals by the State Government in Queensland to add new offences against criminal organisation to the *Criminal Code*. The Opposition expressed that it may re-introduce the failed Bill in 2008,[452] but this has not yet occurred.

6.4 South Australia

In South Australia, new laws against organised crime were first proposed by Premier Mike Rann and the Director of Public Prosecutions in June 2007.[453] On November 20, 2007 the Premier outlined the new provisions before Parliament and introduced the *Serious and Organised Crime Bill 2007* — an instrument specifically designed to suppress the activities of outlaw motorcycle gangs.

The South Australian Government believes that the legislation in the other Australian States and Territories focusing only on the individual criminal acts of gang members "does little more than address the 'symptom' rather than the 'problem'" of serious and organised crime.[454] The Government, referring to undisclosed police evidence, argues that:

> members of criminal groups and networks (in particular OMCG) associate for the purpose of criminal activity and that the strength of OMCG members lies in their close cohesion and ability to congregate together to plan and carry out their illegal activities.
>
> This membership forms the basis of their offending and often includes fear and intimidation tactics under the banner of the gang itself. It is the act of meeting fellow members that facilitates the means to promote these criminal activities and recruit prospect members. The root cause of the problem, arguably, lies in the ability of OMCG members to associate which leads to criminal activity. [...]
>
> [T]he strength of OMCG and other serious and organised crime groups lies in the close cohesion between members and their associates and ability for these members and associates to congregate together to plan and carry out their illegal activities [455]

The Bill introduced radical measures to outlaw criminal organisations and prohibit any deliberate association with them and their members. The legislation is also supported by additional funding for South Australia Police to facilitate the enforcement of the new provisions. The *Serious and Organised Crime Bill* was passed by the House of Assembly on February 26, 2008 and the Legislative Council

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452 Personal communication with Mr Mark McArdle, Shadow Attorney-General, Shadow Minister Justice, Brisbane (Qld), 26 Nov 2007.

453 Brendan Nicholson, "Rann seeks national crackdown on bikie gangs" (20 June 2007) *The Australian* 6; Pia Akerman, "Rann to cut crime by bouncing bikies from pubs and clubs" (22 June 2007) *The Australian* 9.

454 South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (June 2008) 7, available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

455 South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (June 2008) 7, 20, available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

of South Australia on May 8, 2008.[456] The *Serious and Organised Crime (Control) Act 2008* (SA) entered into force on September 4, 2008.[457]

The stated purpose of the legislation are, s 4(1):

> (a) to disrupt and restrict the activities of—
>
> (i) organisations involved in serious crime; and
> (ii) the members and associates of such organisations; and
>
> (b) to protect member of the public from violence associated with such criminal organisations.

The central part of the new law is the Attorney-General's power to "declare a criminal bikie gang an outlaw organisation" on the basis of police intelligence and hold "gang members who engage in acts of violence that threaten and intimidate the public" liable for serious offences.[458]

The legislation in South Australia, which is modelled in part after Hong Kong's *Societies Ordinance 1997*,[459] marks a significant departure from the spirit and concept of organised crime under the *Palermo Convention*. The definition and criminalisation of organised crime groups also differs considerably from the concepts used in New South Wales, New Zealand, and Canada. The following Sections explore the key features of the *Serious and Organised Crime Act 2008* (SA).

6.4.1 Declared organisations

The South Australian Act does not define the term criminal group. Instead, it uses the concept of "declared organisations" and empowers the Attorney-General to declare an organisation if he/she "is satisfied that—

> a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
> b) the organisation represents a risk to public safety and order (s 10(1) *Serious and Organised Crime (Control) Act 2008* (SA)).

The declaration is made on the application of the Commissioner of Police (s 8), and this application must be gazetted and published in a newspaper circulating throughout South Australia, allowing members of the public to make submissions within 28 days of the publication (s 9). Suggestions by the Opposition to allow judicial review of the declarations were rejected by the Attorney-General during the second reading of the Bill as it would "introduce motorcycle gang filibustering of the whole process".[460] Instead, the Act provides that a retired judge will conduct annual reviews of all declaration and make this review available to Parliament, s 37 *Serious and Organised Crime (Control) Act 2008* (SA).

The criteria and methods used by the Attorney-General to determine whether to declare an organisation are not a model of clarity and are a complex mix of evidential

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456 *Serious and Organised Crime (Control) Act 2008* (SA).

457 Unless renewed, the legislation will expire five years after the date it came into operation.

458 South Australia, House of Assembly, *Daily Hansard* (20 Nov 2007) (Hon MD Rann, Premier). Cf s 8 *Societies Ordinance 1997* (Hong Kong).

459 See Section 8.3 below.

460 South Australia, House of Assembly, *Daily Hansard* (26 Feb 2008) (Hon MJ Atkinson, Attorney-General).

indicia and administrative discretion. Figure 19 attempts to visualise the key points required to declare an organisation.

Figure 19 "Declared organisations", s 10 *Serious and Organised Crime (Control) Act 2008* (SA)

Terminology Elements	**Declared organisations**
Structure	• association of members (s 3) of the organisation (s 3)
Activities	• organisation represents a risk to public safety or order
Objectives Determination of purpose, s 10(4)	• organising, planning, facilitating, supporting or engaging in serious criminal activity. AG may be satisfied of the purpose of the association regardless of whether or not (a) all the members or only some members associate for the purpose; (b) members associate for the purpose of organising, planning, facilitating, supporting or engaging in the same serious criminal activities or different ones; and (c) members also associate for other purposes.
Information to be considered when making declaration, s 10(3).	

In simplified terms, the Attorney-General's decision to declare an organisation (and thus criminalise any association with members of the group, s 35) is based on three criteria set out in s 10(1) *Serious and Organised Crime (Control) Act 2008* (SA):

(1) the association of members of the organisation,
(2) the risk posed by that group to public safety and order, and
(3) the purpose of the people associated in that group.

Subsection 10(3) sets out some indicia that may assist the Attorney-General in making the declaration. It has been acknowledged that much of the information on which the Attorney-General bases his/her decision "will include information certified as 'criminal intelligence' by the Commissioner for Police [...] the disclosure of which could reasonably be expected to prejudice criminal investigations, [...]."[461] Accordingly, most organisations will not know the reasons why they have been banned ("declared").

Association of members of the organisation, s 10(1)(a)

The first criterion relates to the structure of the organisation by requiring an association of members of the organisation. The definition of organisation in s 3 makes clear that it is not required that the organisation is incorporated, structured, is based in South Australia, or involves residents of South Australia. This enables the Attorney-General to declare organisations with no physical presence and no members in that State. The definition in s 3 renders the term 'organisation' synonymous with the term 'group' and also includes incorporated bodies (ie legitimate organisations).

Under the Act, it is necessary that the organisation has members. Unlike similar legislation elsewhere, there is no minimum number of members or associates. According to s 3, members also include:

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461 South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (June 2008) 24, available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

(a) in the case of an organisation that is a body corporate—a director or an officer of the body corporate; and
(b) in any case—
  (i) an associate member or prospective member (however described) of the organisation; and
  (ii) a person who identifies himself or herself, in some way, as belonging to the organisation; and
  (iii) a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belongs to the organisation.

This definition of membership is of such breadth to be almost meaningless. Membership does not relate to any formal association with the organisation, it also includes people who believe to be members, take steps to be members, or who are treated as members. The definition does in fact not explain what 'real' membership is. In the context of this Act, the term is void of any real meaning and — in summary — any person with any actual, perceived, or desired association with a group is by virtue of s 3 automatically a member.

The Act does not further define how the word 'associate' is to be understood. Using the common interpretation of the term, it is assumed that the 'members of the organisation' meet, come together, connect or otherwise communicate for one of the purposes stated in s 10(1)(a).[462]

Risk to public safety and order, s 10(1)(b)

The second criterion to declare an organisation relates to the risk that the organisation poses to public safety and order. The Act contains no further guidance about the meaning and interpretation of these terms and the level of risk required. It is also not clear whether the risk has to be actual or perceived, who determines the risk, and what methods and criteria are used in this determination.

Section 10(3) lists some indicia such as serious criminal activity and criminal convictions that assist the Attorney-General in deciding whether or not to declare an organisation. These indicia include, for instance, known links between the organisation and serious criminal activity, criminal convictions of associates, current and former members, and the existence of interstate and overseas branches of the organisation that pursue similar purposes. The points listed in subsection (3) are not conclusive evidence and the connection between these indicia and any "risk to public safety and order" is not always obvious.

The declaration of organisations is specifically designed to outlaw biker gangs and prohibit any association with them. The list of indicia in s 10(3) makes specific references to "interstate and overseas chapters" of the organisation, one of the key characteristic of OMCGs. The provision is, however, wide enough to capture a great range of organisations, especially those that have a history of engaging in serious offences,[463] and those that involve persons with a criminal history (including gangs formed in prisons).[464]

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462 Cf s 35(11)(a) *Serious and Organised Crime (Control) Act 2008* (SA).
463 Cf s 10(3)(a) and (c) *Serious and Organised Crime (Control) Act 2008* (SA).
464 Cf s 10(b) *Serious and Organised Crime (Control) Act 2008* (SA).

Purpose of declared organisations, s 10(1)(a)

Lastly, to declare an organisation the Attorney-General needs to be satisfied that the purpose of the association is the "organising, planning, facilitating, supporting or engaging in serious criminal activity". The purpose of the association must be directed at serious criminal activity (ie the commission of serious offences, including indictable offences and specified summary offences, s 3). It is not necessary that all members of the group associate for that purpose, s 10(4). The objective of the association does not need to relate to criminal activities that generate any benefits for the organisation. In other words, the legislation is not specifically designed to ban only those organisation that engage in criminal activities for the purpose of profit.

6.4.2 Control orders

As stated in s 4, the measures under the *Serious and Organised Crime (Control) Act 2008* (SA) are designed to disrupt and restrict criminal organisations and also the members and associates of these groups. Accordingly, in addition to the declaration of organisations, the Bill also proposes to place current and former members of declared organisations under a control order (s 14(1), (2)) and to criminalise any association with them (s 35(1)(b)). A control order may be sought by the Commissioner of Police and can be issued by the Magistrates Court against a person that

- is a member of a declared organised under s 10, s 14(1); or
- has been a member and continues to associate with members of a declared organisation, s 14(2)(a)1st alt; or
- engages or has engaged in serious criminal activity (s 3) and regularly associates with members of a declared organisation, s 14(2)(a)2nd alt; or
- engages or has engaged in serious criminal activity and regularly associates with persons who, too, engage or have engaged in serious criminal activity, s 14(2)(b).

In his application, the Commissioner will frequently rely on information classified as criminal intelligence that will be taken into consideration by the Court, but cannot be disclosed to defendants, their legal representatives, or any other person during the hearing of a notice of objection.[465] Accordingly, many if not most defendants will not know the reasons why a control order is sought against them.

Section 14 is designed to prohibit the person who is the subject of the control order to communicate with other known offenders, to visit certain premises (such as clubhouses of biker gangs), to associate with members of criminal organisations, and to posses weapons or other dangerous articles, s 14(5). Moreover, s 35 creates criminal liability for persons who associate with someone placed under a control order.

A person under a control order may lodge a notice of objection within two weeks. The Magistrates Court is authorised to vary or revoke the order, and the defendant and the Commissioner of Police have a right to appeal to the Supreme Court against

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[465] South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (June 2008) 27, available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

the Court's decision.[466] But the control order remains in operation during the appeal process and a privative clause protects any decision from further judicial review.[467]

6.4.3 Criminal association offences

Section 35 *Serious and Organised Crime (Control) Act 2008* (SA) creates a new offence entitled "criminal associations". In essence, the section creates criminal liability for persons who frequently associate with members of declared organisations or who associate with known criminals or other persons posing a risk to public safety and order, see Figure 20 below.[468] The legislation exempts certain associations, such as those between close family members, lawful businesses, and those of educational or therapeutical nature from criminal liability, s 35(6).

Figure 20 Elements s 35(1), (2) *Serious and Organised Crime (Control) Act 2008* (SA)

S 35(1), (2)	**Elements of the offence**

Physical elements	• associating with another person;
	• at least six times over a 12-months period;
	• the other person is either
	  ○ a member (s 3) of a declared organisation (s 10); or
	  ○ the subject of a control order (s 14).

Procedural matters	Certain associations to be disregarded, s 35(6).

Mental elements	• knowledge or recklessness that the other person was (s 35(2)):
	  ○ a member (s 3) of a declared organisation (s 10); or
	  ○ the subject of a control order (s 14).

Penalty	5 years imprisonment

Section 35(1)(a) makes it an offence, punishable by imprisonment of five years, to associate on no less than 6 occasions over a 12 months period with members of declared organisations. Associating "includes communicating […] by letter, telephone or facsimile or by email or other electronic means", s 35(11)(a). Membership is further defined in s 3 of the Bill to include prospective members, persons who identify themselves as belonging to the group, and persons treated by the group as belonging to it. It is further required that the accused knew that the other person was a member or was reckless as to that fact, s 35(2)(a).

The Act also criminalises persons who associate (6 times or more over 12 months) with certain known criminal offenders, including those that are the subject of a control order (ss 35(1)(b), 14) or that have a criminal conviction for a prescribed offence (s 35(3)). For liability under these offences, it is required that the accused knew the person was subject of a control order (s 35(2)(b)) or was at least reckless about the other persons previous convictions (s 35(4)).

Unlike the organised crime provisions in Canada, New Zealand, and New South Wales, the offence in South Australia is not directed at participation in criminal organisations or involvement in their criminal activities. "[I]t is not necessary for the prosecution to prove that the defendant associated with another person for any particular purpose or that the association would have led to the commission of any

466 Section 19 *Serious and Organised Crime (Control) Act 2008* (SA).
467 Sections 14, 16,17, 41 *Serious and Organised Crime (Control) Act 2008* (SA)
468 The *Serious and Organised Crime (Control) Act 2008* (SA) repealed the offence of consorting under former s 13 *Summary Offences Act 1953* (SA).

offence."[469] The central focus of the offences in s 35 is solely on associations with certain people. The legislation does not conceal that it seeks to prohibit communication and other forms of associations with certain organisations and their members. The only exemptions apply to certain family or professional associations and to associations that occur less frequently than the required six occasions during a period of 12 months. Persons who unwittingly associate would also not be liable (s 35(2), (4)). However, persons with some awareness that the other person could or might be a member of a declared organisation or the subject of a control order would meet the threshold required to establish recklessness.

In addition to the criminal association offences, the Act introduced two new offences into the *Criminal Law Consolidation Act 1935* (SA) for making threats or reprisals against public officers and persons involved in criminal investigations or judicial proceedings.[470]

6.4.4 Observations

Even a conservative analysis of the measures under the *Serious and Organised Crime (Control) Act 2008* (SA) demonstrates that this legislation goes well beyond criminalising participation in organised crime groups. The scope of application of this Act is much wider and is not limited to outlaw motorcycle gangs. There are no clear boundaries that limit the provisions under this Bill to organised crime; it has the potential — and possibly the purpose — to ban any organisation that, in the eyes of the Attorney-General, is perceived as a "risk to public safety and order".

Further reflection on the proposed declaration of criminal organisations in South Australia reveals remarkable similarities to federal laws relating to terrorist organisations. This is also evident from a recent submission by the South Australian Government to a federal parliamentary inquiry.[471] Division 102 of Australia's *Criminal Code* (Cth) sets out detailed procedures to list terrorist organisations and creates a range of criminal offences relating to membership in and other associations with these organisations. The effect of the South Australian proposal is similar to the federal terrorism laws in that it, first, establishes a mechanism to prohibit certain organisations and, second, criminalises associations with these organisations. Unlike federal laws, the South Australian *Serious and Organised Crime (Control) Act 2008* is of much wider application as it allows the prohibition of any organisation seeking to engage in serious criminal activity. The federal procedures for declaring terrorist organisations, however, have much greater safeguards build into them (such as parliamentary approval etc) while the South Australian Act vests the power to declare organisations in a single person. The proposed legislation raises serious concerns about this concentration of power and the loose criteria used in making declarations.

The offence created under s 35 *Serious and Organised Crime (Control) Act 2008* (SA) is not concerned with participation, membership, or other contributions to

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469 South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (June 2008) 30, available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

470 Sections 248, 250 *Criminal Law Consolidation Act 1935* (SA).

471 South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (June 2008) 15, available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

criminal organisations. Its emphasis is on associations between persons and on "peripheral supporters" of biker gangs. The South Australian Government believes that " the *Serious and Organised Crime (Control) Act 2008* has the capacity to cut off the 'tentacles' of these groups thereby reducing their span of influence and control."[472] But s 35 gives rise to grave concerns about infringements of the freedom of association. It has been argued that even academic researchers conducting interviews with members of biker gangs may be liable under the new offences.[473] Ben Saul shares the

> concerns about the impact on individual liberties in circumstances where the conduct criminalised is too remote from the commission of organised crime. The threshold of a mere 'risk' to public safety and order is vague and ill-defined, as are the concepts of membership and association. The law raises considerable concerns given the potential also to impose control orders on members or former members (s 14) and to criminalise those who regularly associate with them.[474]

The breadth of application and vagueness of the terminology used create a real danger that the legislation can be used excessively and is widely open to abuse against a suite of groups, associations, and individuals that may be seen as undesirable by senior government officials. In the eyes of some, however, the legislation is not tough enough. The Director of Public Prosecutions in South Australia, Mr Stephen Pallaras, for instance, stated that "the legislation wrongly targeted individuals rather than crime groups" and that he would prefer to see a "blanket ban on any bikie gang".[475]

The introduction of the South Australian laws has been closely monitored by neighbouring States and Territories as they fear that the heavy handed approach in Adelaide may lead some criminal organisations to go further underground and/or relocate across the border, especially into Victoria, New South Wales, and the Northern Territory. "The South Australia Government", however, "recognises intended displacement [interstate and underground] as a legitimate outcome."[476]

Among the chief critics of the new South Australian Act is Christine Nixon, Chief Commissioner of Victoria Police. She stated that:

> Victoria Police does not support proposals intended to deal with OMCG members in a similar manner to that of terrorist groups by prohibiting groups and individual associations

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472 South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (June 2008) 46, available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

473 Arthur Veno, "Bikies suffer as politics of fear takes hold in SA" (26 Feb 2008) *The Advertiser* (Adelaide) 20.

474 Ben Saul, The University of Sydney, Sydney Centre for International Law, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, June 2008 Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

475 Jeremy Roberts, 'Bikie laws not tough enough: prosecutor' (9 May 2008) *The Australian* (accessed online).

476 South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (June 2008) 46, available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

> between declared persons. Victoria Police is of the view that such measures are disproportionate and unlikely to be effective [...].[477]

She further remarked that the legislation is likely to increase conflicts between police agencies and OMCGs and will render these groups less visible, but no less powerful and dangerous. As early as 2008, the Australian Crime Commission also noted that

> there are indications that some outlaw groups have already relocated to other jurisdictions. [....] Such developments may or may not be in the community's overall interest. [...] [I]t may be disadvantageous for legislative or other initiatives to effectively pressure a group to move its operations to another jurisdiction or to adopt more effective covert measures.[478]

6.5 Federal initiatives

6.5.1 Australian ratification of the Convention against Transnational Organised Crime

In Australia, the federal Parliament has limited legislative powers. Minor exceptions aside, these powers relate only to the subject matters enumerated in s 51 of the *Australian Constitution.* Crime is not a subject matter of legislative power enumerated by s 51; hence, unlike the States, the Commonwealth Parliament has no general legislative power to make laws on crime. The Commonwealth Government, however, has the power to make criminal law in those areas that are assigned to the Federal Parliament. These include the subject matters enumerated by s 51 *Constitution* and the 'incidental power' as provided for in s 51(xxxix) *Constitution,* for example customs, trade, external affairs, fisheries, quarantine et cetera.[479]

The Commonwealth's external affairs power authorises the Federal Government to enter into international treaties. Australia signed the *Convention against Transnational Organised Crime* in Palermo on December 13, 2000.[480] The Convention entered into force in Australia on June 26, 2004, but it is not certain whether the implementation of the Convention obligations rests with the Commonwealth or the States and Territories. In the past, especially in *Commonwealth v Tasmania* (1983) 46 CLR 625, the High Court applied a very broad reading of the Commonwealth's external affairs powers, suggesting that the Federal Parliament can legislate on any criminal law issue arising out of international treaties signed by the Federal Government.[481]

To date, federal criminal law, contains no specific offences relating to participation in criminal organisations and there appear to be no immediate plans to introduce an

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477 Victoria Police, Chief Commissioner Christine Nixon, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

478 Australian Crime Commission, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

479 See further Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008) 32–35 with further references.

480 [2004] ATS 12.

481 See further David Brown et al, *Criminal Laws* (4th ed, 2006) 956.

offence of this nature into the *Criminal Code* (Cth). From the very limited information available, it appears that Australia's accession to the *Palermo Convention* was primarily driven by a desire to improve international law enforcement and judicial cooperation and other avenues of mutual assistance in criminal matters relating to transnational organised crime. A *National Interest Analysis* published by the Department of Foreign Affairs and Trade in 2003 noted that "[r]atifying the Convention will increase effectiveness of domestic measures by providing a mechanism for cooperation with a wide range of other countries in preventing, detecting, and prosecuting transnational crimes."[482] This document does not address the question how the criminal offences, especially the participation offence in art 5 of the Convention, ought to be implemented into Australian law. Consultation with the States and Territories that preceded Australia's Signature did not reveal any reservations towards the accession to and implementation of the *Palermo Convention*. Australian federal criminal law and the criminal law of all Australian States and Territories contain conspiracy provisions, so the challenges posed by the participation offence may not be of imminent concern to Australian governments.

On the other hand, a federal inquiry held in 2007 expressed grave concern about the lack of a unified response to serious and organised crime in Australia and strongly emphasised the need for greater collaboration and harmonisation between the Australian States, Territories, and federal agencies:

> Although there is limited evidence of jurisdiction-shopping by organised crime groups, such groups undoubtedly operate rationally in the pursuit of profit and in order to minimise their risks. Thus it is almost certain that they select their activities, and the jurisdictions in which they operate, based on assessments of profit, risk, and potential cost — that is, penalty or loss of profit. The effect of disparate regimes across Australia would depend on the quality and extent of difference, but, ideally, implementation of national laws would remove the potential for jurisdiction-shopping within Australia altogether. [...]
>
> The committee is extremely concerned that the current multi-jurisdictional approach to the development and enactment of legislation which deals with serious and organise crime is so fragmented that it works to the advantage of the criminal and the disadvantage of law enforcement agencies.[483]

6.5.2 Parliamentary inquiry into legislative arrangements to outlaw serious and organised crime groups 2008

Background

In 2008, the federal Parliamentary Joint Committee on the Australian Crime Commission launched an *Inquiry into the legislative arrangements to outlaw serious and organised crime groups* that, inter alia, explores the question whether it is feasible and necessary to introduce new offences to criminalise organised crime in Australia. This inquiry is the result of a 2007 inquiry by the same Committee into *The future impact of serious and organised crime on Australian society* which recommended, inter alia, that the Committee "conduct an inquiry into all aspects of international legislative and administrative strategies to disrupt and dismantle serious

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[482] Australia, Department of Foreign Affairs and Trade, "United Nations Convention against Transnational Organised Crime, National Interest Analysis" (3 Dec 2003), available at www.austlii.edu.au/au/other/dfat/nia/2003/33.html (accessed 5 Dec 2008).

[483] Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society* (2007) paras 6.93, 6.101.

and organised crime."[484] But it is also a response to the legislation introduced in South Australia, which has attracted much criticism from other States and Territories — and has the potential to significantly impact on other jurisdictions around Australia.

The 2007 inquiry into organised crime noted that federal agencies, such as the AFP and the Australian Crime Commission (ACC) are generally satisfied with the current laws and do not see any immediate need for legislative change.[485] But this inquiry also discussed the inadequacy of existing criminal offences to suppress organised crime, specifically old 'consorting with criminals' offences that exist in some States and Territories.[486] With regards to offences for participation and membership in criminal organisations, the Committee expressed concern "that such laws could create an incentive for secrecy, which could arguable make such groups more ruthless and ultimately harder to detect."[487]

To avoid major discrepancies between Australian jurisdictions arising from the new laws in New South Wales and South Australia, the Parliamentary Committee recommended "that, as a matter of priority, the Commonwealth, state and territory governments enact complimentary and harmonised legislation for dealing with the activities of organised crime."[488]

Terms of Reference

The terms of reference of the current *Inquiry into the legislative arrangements to outlaw serious and organised crime groups* state that:

> the committee will examine the effectiveness of legislative efforts to disrupt and dismantle serious and organised crime groups and associations with these groups, with particular reference to:
>
> a. international legislative arrangements developed to outlaw serious and organised crime groups and association to those groups, and the effectiveness of these arrangements;
> b. the need in Australia to have legislation to outlaw specific groups known to undertake criminal activities, and membership of and association with those groups;
> c. Australian legislative arrangements developed to target consorting for criminal activity and to outlaw serious and organised crime groups, and membership of and association with those groups, and the effectiveness of these arrangements;
> d. the impact and consequences of legislative attempts to outlaw serious and organised crime groups, and membership of and association with these groups on:
> i. society
> ii. criminal groups and their networks
> iii. law enforcement agencies; and

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484 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society* (2007) Recommendation 6.

485 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society* (2007) para 6.2.

486 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society* (2007) paras 6.64–6.71.

487 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society* (2007) para 6.79.

488 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society* (2007) paras 6.93, 6.101.

iv. the judicial/legal system

e. an assessment of how legislation which outlaws criminal groups and membership of and association with these groups might affect the functions and performance of the ACC.

It is anticipated that this inquiry will carefully analyse both the domestic and international provisions and develop recommendations advocating a more consistent response on the question of criminalising organised crime across the country. At the time of writing, this inquiry was still ongoing.

Submissions received (to December 31, 2008)

The submissions and presentations made to Committee thus far reflect the controversy over outlawing criminal organisations, prohibiting associations with criminal groups, and about the phenomenon of organised crime generally. Among the submission, there is no consensus about the question whether new criminal offences are needed and what shape, if any, these offences should take.

Smaller jurisdictions, such as Tasmania, are in support of developing a national response.[489] Submissions from New South Wales officials, naturally, support their State laws and also voice concern that any move towards a national approach could "weaken or undermine the effectiveness of anti-gang laws in NSW."[490] Not surprisingly, submissions by members of motorcycle clubs express concern over the 'bikie gang laws' and point to the danger of creating guilt by association.[491]

It is interesting to note that many law enforcement agencies, Police Ministers, and Police Commissioners also have reservations towards the introduction of organised crime offences. For example, concern has been expressed about the resources needed to properly enforce offences aimed at criminalising organised crime groups:

> [T]he benefit of such legislation will ultimately be determined by a raft of investigative and enforcement measures accompanying such legislation along with the additional resources.

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489 Tasmania, Minister for Police and Emergency Management, Jim Cox, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

490 NSW, Minister for Police, David Campbell, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (19 May 2008), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

491 See, for example, Edward (Mac) Hayes, Longriders Christian Motorcycle Club, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008); Leslie J Hunter, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008); Edward H Witnell, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (4 July 2008), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

> A potential increase in prosecutions relating to serious and organised crime may create challenges for the judicial/legal system, for example ensuring that witnesses are properly protected. This, in turn, may have resource implications for law enforcement agencies through increased demand for witness protection programs.[492]

The Australian Crime Commission in its submission also noted that there is no single model of criminal organisation in Australia and that proving the requisite elements of the proposed offences will be difficult, if not impossible, especially for those group that do not use insignia or other identifiers:

> The definition of specific criminal groups has become more difficult and proving membership of or participation in a specified organised criminal group would be challenging in this environment. In particular, there is a clear risk that law enforcement effort would be diverted away from intervention and prevention efforts of to the burden of proof required to establish membership of an unlawful organisation. [...]
>
> [M]anaging the threat to the community from specific groups known to undertake criminal activities, and membership of and association with those groups, can not be resolved simply through legislation.[493]

These observations are also reflected in the submission by Queensland's Crime and Misconduct Commission.[494] The Commonwealth Attorney-General's Department, too, notes "that legislation specifically targeting serious and organised crime groups is only one of the possible approaches to combating such groups."[495]

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492 Tasmania, Minister for Police and Emergency Management, Jim Cox, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

493 Australian Crime Commission, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

494 Queensland, Crime and Misconduct Commission, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (May 2008), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

495 Australia, Attorney-General's Department, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (Aug 2008), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 5 Dec 2008).

7 China

7.1 Context and Background

7.1.1 Patterns of organised crime in China

Organised crime has been present in China for many centuries and many Chinese triads are based on traditions and networks that have their origin in imperial times. The word 'triad' means the unity of the three essential elements of existence: heaven, earth, and humanity. Some sources suggest that the triads first emerged as early as the 12th century and were well established throughout China during the Qing dynasty (1644-1911). The triads also exercised significant political influence, during the Mongol occupation in the 1200 and 1300s. In the 1600s, triads sought to oust the Manchu Ching dynasty in order to restore the Ming dynasty rule. More recently, Chinese triads played an active part in the Boxer rebellion of 1899-1901 and the 1911 revolution. China's republican era between 1911 and 1949 saw a rapid growth of secret societies which was often closely connected to the Kuomintang (KMT) government. Dr Sun Yat-Sen, founder of the Republic of China, was himself a triad member, and General Chiang Kai-shek and the KMT nationalist movement were also strongly supported by secret societies, including the so-called 'Green Gang' which later retreated with Chian Kai-shek to Taiwan.[496]

After the Communists seized power in 1949, triads and other criminal syndicates were largely eradicated.[497] Starting in the 1950s, the Government in Beijing launched several campaigns to systematically suppress the triads and their influence. These campaigns frequently involved great numbers of arrests and executions and also forced many syndicates to shift to Hong Kong, and — to a lesser extent — to Macau and Taiwan.[498] At that time, the political momentum of triads ceased and since the Communist takeover the triads have become gradually more associated with organised crime.[499] Few triads remained in mainland and their members were pushed further underground and their activities became more scattered.[500]

The transition from a centralised planned economy to a socialist market economy that began in China in 1978 under Deng Xiaoping brought with it new levels of organised crime involving triad societies but also foreign, transnational criminal organisations. The economic reforms were also accompanied by rising unemployment in some parts of the country and by a breakdown of social-control mechanisms throughout China. These developments led to a resurgence of domestic syndicates and also to a greater influx of criminal organisations from Hong

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496 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 91–92; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 87–88; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 54; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 2–3; Ernst Eitel, *Europe in China* (1895) 227; Ming Xiang, "Assessing and Explaining the Resurgence of China's Criminal Underworld" (2006) 7(2) *Global Crime* 151 at 157.

497 An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 77 at 78*;* Mei Jianming, "China's Social Transition and Organised Crime", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 204 at 207.

498 See further Sections 8.1.2, 9.1.1, and 10.1 below. Cf Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 92; Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 336–337; Ko-lin Chin, *Heijin* (2003) 201–210.

499 John Huey-Long Song & John Dombrink, "Asian Emerging Crime Groups: Examining the Definition of Organized Crime" (1994) 19(2) *Criminal Justice Review* 228 at 235.

500 Ming Xiang, "Assessing and Explaining the Resurgence of China's Criminal Underworld" (2006) 7(2) *Global Crime* 151 at 157–158.

Kong, Macau, Taiwan and abroad that try to infiltrate China and take advantage of its rapid modernisation and economic growth.[501] The illicit drug market in China, for instance, is said to be dominated by transnational criminal groups.[502] Moreover, there are frequent reports of organised crime groups receiving protection or active collaboration from corrupt government officials. This problem is exacerbated by the "political manipulation of the market" where "[m]any officials who hold power in the allocation of resources are ready to sell their power to criminal gangs in exchange for material benefits."[503]

It is said that in the 1980s, organised crime initially emerged in the southern Guangdong, Hainan, and Hu'nan provinces and later gradually spread north and west across the country.[504] Among the most notorious groups are the 14K,[505] Wo Shing Tong, and Sun Yee On groups from Hong Kong and Macau, and the United Bamboo and Four Seas groups that spread their activities from Taiwan into Guangdong, Shanghai, and Fujian province.[506] According to some statistics, during enforcement campaigns in the late 1980s approximately 30,000-40,000 criminal organisations were known to police, and some 150,000 members of criminal organisations were arrested annually. These figures grew dramatically in the mid 1990s when on average 140,000 gangs were uncovered, 530,000 gang members captured, and 390,000 cases dealt with each year.[507] Other sources report that "over the past 20 years, mafia-style gang crime has increased sevenfold".[508] More recent

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501 An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 95–106; Mei Jianming, "China's Social Transition and Organised Crime", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 204 at 207–211; Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 90; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 85; Yiu Kong Chu, "Global Triads: Myth or Reality?", in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 183 at 186; Ming Xiang, "Assessing and Explaining the Resurgence of China's Criminal Underworld" (2006) 7(2) *Global Crime* 151 at 168–171.

502 UNODC, *Amphetamines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 37.

503 An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 77 at 95–96. See also Børke Bakken, "Comparative Perspectives on Crime in China", in Børke Bakken (ed), *Crime, Punishment and Policing in China* (2005) 64 at 88–92; Ming Xiang, "Assessing and Explaining the Resurgence of China's Criminal Underworld" (2006) 7(2) *Global Crime* 151 at 171–173.

504 Zhao Guoling "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 301–302; Xu QingZhang, "Enterprise Crime and Public Order", in Ann Lodl & Zhang Longguan, *Enterprise Crime: Asian and Global Perspectives* (1992) 11 at 16.

505 The 14K, named after their first headquarter at No 14 Po Wah Road in Guangzhou, was established in 1947 by General Kot Sio Qong who fled to Hong Kong with his followers in 1949; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 88.

506 Ko-lin Chin, *Heijin* (2003) 201–210; Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 100 (with reference to original sources in Mandarin); Xu QingZhang, "Enterprise Crime and Public Order", in Ann Lodl & Zhang Longguan, *Enterprise Crime: Asian and Global Perspectives* (1992) 11 at 16.

507 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 265; Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 93 (with reference to primary sources in Mandarin); cf Ming Xiang, "Assessing and Explaining the Resurgence of China's Criminal Underworld" (2006) 7(2) *Global Crime* 151 at 156.

508 Susan Trevaskes, "Severe and Swift Justice in China" (2007) *British Journal of Criminology* 23 at 25 with reference to Chinese primary sources (in Mandarin); Ming Xiang, "Assessing and Explaining the Resurgence of China's Criminal Underworld" (2006) 7(2) *Global Crime* 151 at 156.

reports cite Chinese sources that suggest that in the years between 2000 and 2004 China had over one million members of secret societies. Of those societies, about 4,200 groups are said to be of a syndicate or mafia style and more than 60 groups are transnational criminal organisations engaging in cross-border activities.[509]

This apparent surge in organised crime activity — seen by some observers as "an organisational and potentially political threat to the communist regime"[510] — led to the adoption of a new policy and enforcement campaign in 2001 known a "Yanda zhengzhi douzheng", or "Strike Hard and Rectification Struggle". This strategy focuses specifically on three categories of criminal activity including crimes committed by large mafia-style criminal syndicates and other organised criminal groups. The two key features of the 'Yanda' policy are severity of punishment (including heavy mandatory punishment) and swiftness in the criminal process dealing with criminals.[511]

7.1.2 Criminal Law in China

China's current criminal law shares many similarities to the tradition and pattern of Continental and Russian penal codes. The *Criminal Law of the People's Republic of China*, China's principal criminal law statute, was first introduced in 1979, following a period that had no comprehensive codification of the criminal law. The current *Criminal Law* was introduced in 1997 and was part of an extensive reform of China's criminal justice system, substituting the *Criminal Law 1979* which had become largely obsolete.[512]

Prior to the reforms of 1997, China's criminal law only contained provisions that rudimentary dealt with organised crime. Article 22 of the *Criminal Law 1979* (China) followed European and particularly Soviet criminal laws by creating liability for complicity, ie "a crime committed jointly and intentionally by two or more persons". This general provision was ill-suited to criminalise organised crime. The reference to ringleaders "who perform the role of organising, planning and leading criminal groups or criminal assemblies" in former article 86 applied only to counterrevolutionary offences. Chinese scholars remarked that

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509 Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 176; Ming Xiang, "Assessing and Explaining the Resurgence of China's Criminal Underworld" (2006) 7(2) *Global Crime* 151 at 166..

510 An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 77 at 79.

511 Susan Trevaskes, "Severe and Swift Justice in China" (2007) *British Journal of Criminology* 23 at 23–26; Murray Tanner, "Campaign Style Policing in China and its Critics", in Børke Bakken (ed), *Crime, Punishment and Policing in China* (2005) 171–181; Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 251; Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 95; Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 175.

512 See further, Cai DingJian, "China's Major Reform in Criminal Law" (1997) 11 *Columbia Journal of Asian Law* 213–218.

> these provisions could not be effectively used to punish offenders, who either actively participated in or led and actively organised a criminal organisation, but who could not be proven to have carried out specific criminal acts.[513]

China's current criminal law differentiates between two types of criminal association: criminal groups and criminal organisations of a triad/syndicate nature. Since the amendment in 1997, the *Criminal Law* contains two provisions relating to these two types of organised crime: The first one, art 26 is a general extension of criminal liability for cases involving "criminal groups" (see Section 7.2 below). The second provision, art 294, is a specific offence for large criminal syndicates ("criminal organisations with an underworld character"; see Section 7.3).[514]

China also signed the *Convention against Transnational Organised Crime* on December, 12 2000; it was adopted by the Standing Committee of the National People's Congress on August 27, 2003. China's Signature to the convention also extends to Macau and, since September 7, 2006, to Hong Kong.[515]

7.2. Extension of criminal liability, Article 26

Article 26 *Criminal Law 1997* (PRC) extends liability for principal offences to certain members, associates, and leaders of criminal groups. This provision is part of Chapter III, Section 2 which sets out the general principles of criminal liability for so-called joint crimes; in contrast to art 294, the principles in art 26 are not a specific offence; they apply to all offences under the *Criminal Law 1997* (China).

> Article 26 *Criminal Law 1997* (China)
>
> A principal criminal refers to any person who organises and leads a criminal group in carrying out criminal activities or plays a principal role in a joint crime.
>
> A criminal group refers to a relatively stable criminal organisation formed by three or more persons for the purpose of committing crimes jointly.
>
> Any ringleader who organises or leads a criminal group shall be punished on the basis of all the crimes that the criminal group has committed.
>
> Any principal criminal not included in Paragraph 3 shall be punished on the basis of all the crimes that he participates in or that he organises or directs.

Paragraph 2 of this article defines the term 'criminal group' as an organisation of three or members with a "relatively" firm structure and with the purpose to jointly commit criminal offences (see Figure 21 below). Some observers equate this definition as the Chinese equivalent to the *Palermo's Convention* 'organised crime group'.[516]

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513 Yu Zhigang, Chinese People's University, cited in Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 94.

514 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 269; Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 97.

515 Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 175.

516 Ming Xiang, "Assessing and Explaining the Resurgence of China's Criminal Underworld"

Figure 21 "Criminal group", art 26[2] *Criminal Law 1997* (PRC)[517]

Terminology Elements	**Criminal Group**
Structure	• three or more persons; • relatively stable organisation.
Activities	• [no element]
Objectives	• committing joint crimes.

The concept of criminal group in art 26 is very simple: the only requirements are three or more persons who are somewhat organised and who plan to jointly commit criminal offences. The definition is not limited to a specific nature of the planned offences and there is no requirement that any offences are actually committed. Unlike the definition in the *Convention against Transnational Organised Crime*, art 26 "does not require that the crime at issue be of a certain level severity, nor does it specify that the goal be to obtain a financial or other material benefit."[518] In comparison to other definitions of criminal group and criminal organisation, the Chinese model is much looser and broader. It has been observed that

> [m]any ordinary crimes committed by more than two offenders, which are not considered criminal in the Western context, are regarded in China as organised crime, and such crime has often attracted severe punishment under the *Criminal Law* 1997.[519]

It needs to be noted, however, that leading, organising, participating in or being a member of a criminal group (within the meaning of art 26) are on their own not criminal offences. The chief purpose of art 26 is to hold organisers and other ringleaders criminally responsible as principals for any actual offences committed by a criminal group.[520] This article thus extends liability beyond the usual parameters of secondary liability and conspiracy. But more importantly, art 26[3] and [4] ensure that ringleaders and other directors of criminal groups face the same penalty as those actually carrying out the crimes. Ronald Keith and Zihiqui Lin note that "the underlying intention of art 26 was to punish severely all of the individuals involved in criminal organisations."[521]

7.3. Offence for Criminal Syndicates, Article 294

Article 294 *Criminal Law 1997* (China) was introduced in 1997 as part of China's systematic campaign to suppress organised crime.[522] The article contains a special offence relating to criminal syndicates.

(2006) 7(2) *Global Crime* 151 at 153.

517 Cf Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 269.

518 Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 180.

519 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 98. Cf An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 77 at 83.

520 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102; Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 180.

521 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 97.

522 Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against

Article 294 *Criminal Law 1997* (China)

> Whoever organises, leads, or takes an active part in organisations in the nature of criminal syndicate to commit organised illegal or criminal acts through violence, threat or other means, such as lording it over the people in an area ['plays the tyrant in a locality'], perpetrating outrages, bullies and oppresses or cruelly injures or kills people, thus seriously disrupting economic or social order shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years; other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights.
>
> Members of foreign criminal organisations ['the mafia abroad'] who recruit members within the territory of the People's Republic of China shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.
>
> Whoever, in addition to the offences mentioned in the preceding two paragraphs, commits any other offences shall be punished in accordance with the provisions for several crimes.
>
> Any functionary of a State organ who harbours an organisation in the nature of criminal syndicate or connives at such an organisation to conduct criminal activities shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or deprivation of political rights; if the circumstances are serious, the person shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.

7.3.1 Criminal organisations of a syndicate/triad nature

The offence under art 294 *Criminal Law 1997* (China) applies only to large criminal organisations with a syndicate, triad or "underworld" character. Article 294 does not further define the meaning of "organisation in the nature of criminal syndicate." In the literature, the term has found a variety of translations such as 'underworld character', 'mafia-style', and 'triad types'.

From an outside perspective, it is difficult to draw a clear line between the term "criminal group" used in art 26 and the criminal syndicates referred to in art 294. It is perhaps more useful to see this as a continuum of criminal organisation in which the latter type is generally understood as the more serious and more powerful organisation: "In China the criminal syndicate is seen as the ultimate representation of organised crime."[523] Chinese authors have explained the type of organisation referred to in art 294 as "underworld crime",[524] "the union of criminal organisation or an organised criminal network". Underworld crimes are seen "as the most serious organised crime [that] have a larger scale of organisation and cause more serious harm than the formal organised crime organisation."[525] Ding Mu-Ying & Shan Chang Zong define underworld crimes as:

Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 249.

523 Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* 249 at 249.

524 Zhao Guoling "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 301 further separates criminal syndicates from a Mafia-type "underworld society". He argues: "The criminal syndicate is a proper legal concept in PR China, indicating those criminal groups with the nature and characteristics of underworld society but smaller in scale and degree. The syndicate stands between the criminal group and the underworld society. [...] The 'underworld society' is an English term referring to those criminal organisations that have the capacity to exercise an illegal control over people or society on a large scale."

525 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised

> [A] criminal organisation having a long-term target, a hierarchy, rules, and stable members, with the aim of pursuing economic interests, committing crimes by means of intimidation, violence and bribery.[526]

Zhang Xin Feng notes that local criminal groups are generally more loosely structured based on family and kinship (frequently referred to as guanxi[527]) that can often be found in rural areas.[528] Triad syndicates, in contrast,

> usually assign explicit organisers and ringleaders, with stable principals above a huge membership. They are patriarchally bound with stringent rules and discipline and are armed with both weapons and advanced means of communication. They commit crimes such as murder, robbery, hostage-taking, rape, extortion, and trafficking in drugs and merchandise. In certain metropolitan areas, they have gone from such predatory crimes as over robbery, kidnapping and extortion to covert dealings such as producing and trafficking in drugs, snake-heading illegal immigrants, smuggling, fraud, the ownership of casinos, and prostitution.[529]

Scholarly opinion remains divided about the interpretation of the term "criminal syndicate" in art 294. In 2000, the Supreme People's Court offered some direction by issuing a set of "Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature."[530] These explanations are designed to assist courts in the interpretation of art 294, but it is not binding on police, prosecutors, or other authorities.[531] In 2002, the Standing Committee of the National People's Congress issued an additional document for the "Interpretation concerning art 194(1) of the Criminal Law of the People's Republic of China".[532] The key requirements of these documents are set out in the following table.

Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 270; cf Zhao Guoling, "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 301.

526 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 271.

527 Cf An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 77 at 93.

528 Cf Yiu Kong Chu, "Global Triads: Myth or Reality?", in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 183 ay 187.

529 Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 250.

530 See Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102 (with reference to the original source in Mandarin).

531 Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 181.

532 Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 181–182.

Figure 22 Interpretation of "Criminal organisation of a syndicate nature", art 294[1] *Criminal Law 1997* (China)[533]

Terminology Elements	**Criminal organisation with a syndicate/underworld/triad nature**
Structure	• tightly developed organisational structure that comes with internal rules of conduct and discipline, a significant membership, the presence of leaders, and long-standing members;
Activities	• bribery, threatening, inducing or forcing state functionaries to participate in the organisation's illegal activity and to provide illegal protection; • use of violence, or the threat of violence, and disruption as it engages in racketeering and the monopolising if commercial establishments, organising violent brawls, trouble making, physical assault of innocents, and other criminal activities that seriously undermine social and economic order.
Objectives	• Financially independent and the purpose of its criminal activity is financial gain.

The "explanations" provided by the Supreme People's Court combine elements relating to the structure and activities of criminal syndicates with a requirement reflecting their economic objective.

Structure

To fall within the scope of art 294, it is necessary to prove that the criminal syndicate has firm organisational structures, clear hierarchies, a pool of members, and one or more leaders. This reflects the generally held view that "[c]riminal syndicates in PR China normally have a specific leading group with a fixed core, rigorous internal duty division and strict discipline."[534] It also marks a difference to criminal groups within the meaning of art 26 which includes small and loose associations.[535]

According to Mu Ying and Chang Zong, the hierarchical organisation of 'underworld' syndicates "is the most important feature":

> It shows in three aspects: (1) the organising activities and plans are long-term and the members are stable and obstinate; (2) the criminal organisation has a hierarchy in which the subordinates are obedient to superiors, who usually do not commit crimes directly in order to avoid being accused; (3) there are certain rules inside.[536]

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533 Supreme People's Court, *Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature* (2000), in Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102 (with reference to the original source in Mandarin). Standing Committee of the National People's Congress, *Interpretation concerning art 194(1) of the Criminal Law of the People's Republic of China* (2002), in Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 181—182. Cf Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 272; Ming Xiang, "Assessing and Explaining the Resurgence of China's Criminal Underworld" (2006) 7(2) *Global Crime* 151 at 153.

534 Zhao Guoling, "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 302 (with many case examples).

535 See Section 7.2 above.

536 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised

Article 294 has been specifically tailored to suit the organisational model used by Chinese triads. The structural requirements also fit Mafia-type groups and even outlaw motorcycle gangs with strong hierarchies and a clear division of ranks and duties. This model, however, does not accommodate loose networks of individuals that act in concert but are not bound by formal rules and membership.

Activities

According to the Supreme People's Court's explanations, criminal syndicate are characterised by two activities. First, it is required that they engage in one of several violent or coercive activities. Second, it is necessary to show that the syndicates collaborate with government officials by way of corruption or coercion.

The first of these elements refers to activities commonly associated with organised crime, including, for example, threats, violence, monopolising criminal markets, or controlling geographical areas.[537] The use of threats and intimidation are used by criminal organisations as enforcement tools. The creation of fear is a way to maintain order and discipline, to prevent disobedience and also to facilitate the conduct of the organisations' criminal activities. Intimidation and violence are crucial instruments for resolving conflicts, silencing potential witnesses and eliminating business rivals and law enforcement agents who interfere with the criminal organisations' operations.[538]

The second activity of 'criminal organisations of a syndicate nature' is the involvement of government officials ("state functionaries") who are bribed, threatened or otherwise forced to support the criminal organisation. While corruption and bribery are common phenomena associated with organised crime and are also well documented in China, this requirement has often been difficult to prove in cases involving charges under art 294. Keith and Lin note that in some cases it has been impossible to prove the involvement of state officials in the syndicate and accordingly the criminal organisation could not be tried under art 294.[539] On April 28, 2002, in response to some failed prosecutions, the Standing Committee of the National People's Congress issued legislative interpretations stating that "while state functionaries can be members of a criminal organisation, this is not a necessary element that determines the existence of such organisation."[540]

Objectives

The fourth and final element of the Supreme People's Court's explanations relates to the criminal syndicates' objective. As with many other definitions of criminal organisations discussed in this study, the purpose of the criminal syndicate must relate to financial or other material benefit. The court held that criminal syndicates of a triad nature have to be economically resourced, "financially independent and the

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Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 271.

537 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 271.

538 Andreas Schloenhardt, *Migrant Smuggling* (2003) 109.

539 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 103.

540 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 104 (with reference to original source in Mandarin).

purpose of its criminal activity is financial gain" (see Figure 22 above). "The basic object of underworld crime", note Mu-Ying and Chang Zong,

> is to pursue economic interests, but not political aims [...]. In order to meet this [objective], they usually (1) provide illicit goods and services to reap colossal profits such as trafficking drugs and controlling prostitution, etc; (2) commit some plundering activities such as large scale stealing, robbing, blackmailing and collecting '[protection] fees', etc; (3) use the [proceeds of crime] to infiltrate the legal commercial areas with potential profits, but the means they use are usually illegal.[541]

7.3.2 Organising, leading, participating in a criminal syndicate

Article 294 creates three separate offences for persons associated with criminal organisations of a syndicate nature:

- organising, leading or participating in this type of criminal organisation, para [1];
- entering China to develop or spread foreign criminal organisations, para [2]; and
- harbouring or conniving these organisations, para [4].[542]

Article 294[1]

The first and principal offence under art 294 creates criminal liability for key leaders and participants of criminal organisations, punishable by up to ten years imprisonment. Lower ranking members and associates of criminal syndicates face so-called "principal punishments"[543] of up to three years fixed-term imprisonment,[544] criminal detention (of up to six months),[545] public surveillance,[546] or "supplementary punishment"[547] by deprivation of political rights.[548]

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541 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 271.

542 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 269; Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 250.

543 Article 33 *Criminal Law* 1997 (China).

544 Articles 45, 46 *Criminal Law 1997* (China).

545 Articles 42–44 *Criminal Law 1997* (China).

546 Articles 38–41 *Criminal Law 1997* (China)

547 Article 34 *Criminal Law 1997* (China).

548 Articles 54–58 *Criminal Law 1997* (China).

Figure 23 Elements of art 294[1] *Criminal Law 1997* (China)

Art 294[1]	Elements of the offence
(Physical) elements	• Organising, leading or taking active part in; • Criminal organisation of a syndicate/triad nature.
(Mental) elements	• Intention • Purpose: to commit criminal acts through violence, threats or other means [...] thus seriously disrupting economic or social order.
Penalty	○ Organisers, leaders, "active" participants: 3-10 years fixed-term imprisonment; ○ Other participants: up to 3 years fixed-term imprisonment, criminal detention, public surveillance, or deprivation of political rights.

Under art 294[1], it is an offence to organise, lead, or actively participate in a criminal syndicate. In contrast to art 26, leading, organising, participating in — and also being a member of a criminal syndicate ("other participants") — are offences in their own right.[549]

The offence requires proof of (physical) elements relating to the nature of the organisation ("criminal organisation of a triad nature") and to the type of involvement ("organising, leading, taking an active part in"). Further, it is necessary to show that an accused organised or participated in the syndicate in order "to commit organised criminal or illegal acts through violence or other means" which may "seriously disrupt economic or social order". Article 294[1] features as non-exhaustive list of criminal activities including, for example, injuring or killing people, or controlling a geographical area by way of extortion ("playing the tyrant in a locality"). Liability under China's *Criminal Law 1997* is limited to intentional acts (unless liability for negligence is specifically provided).[550]

As mentioned before, higher penalties apply for key organisers, leaders, and active participants, while lower penalties are provided for other participants. The Supreme People's Court further ruled that:

> Ordinary members of criminal organisations with a triad nature who only take part in the criminal organisation due to 'threats or deception' and who have not committed any crime are not deemed guilty of the crime of participating in a criminal organisations with a triad nature. [551]

The Court also held that government officials "who lead, organise, or participate in a criminal organisation with a triad nature will be more severely punished than an ordinary citizen who commits the same crime."[552]

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549 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 103; Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 180.

550 Articles 14-15 *Criminal Law 1997* (China).

551 Supreme People's Court, *Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature*, in Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102 (with reference to the original source in Mandarin).

552 Supreme People's Court, *Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature*, in Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102 (with reference to the original source in Mandarin).

Article 294[2]

In the second paragraph of art 294, Chinese criminal law contains a separate offence for foreign criminal organisations attempting to infiltrate or recruit in China. This paragraph can be seen as a direct response to the growing presence of criminal organisations with roots in Hong Kong, Macau, Taiwan and elsewhere outside the mainland.[553] The Chinese translation of art 294 distinguishes between domestic, triad-style syndicates [para 1] and foreign "mafia-type" organisations [para 2].[554]

Article 294[4]

The fourth paragraph of art 294 *Criminal Law 1997* (China) is specifically designed to suppress the bribery of government officials by creating a separate offence for state functionaries who harbour or connive criminal organisation with a syndicate nature. In serious circumstances, officials may face penalties of up to ten years fixed-term imprisonment.

7.4 Observations

China's criminal offences relating to organised crime are a peculiar mix of general extensions to criminal liability and specific offences. Further, the *Criminal Law 1997* (China) combines domestic phenomena with foreign influences. The relevant offences reflect some elements of the concept of organised crime in the *Convention against Transnational Organised Crime* while also capturing the unique features of Chinese triads. Corruption and bribery — which have plagued China in the last two decades — also feature very prominently in China's organised crime offences and have been a principal target of enforcement action, often resulting in heavy sentences and executions. In fact, some writers have suggested that China's motivation to suppress organised crime is primarily focused on combating domestic and international financial crime, rather than on criminal organisations and the supply of illicit commodities and services.[555]

The similarity between China's organised crime provisions and the *Palermo Convention* is, at least in part, accidental as China's *Criminal Law* was not amended following China's accession to the convention and China failed to fully implement the convention obligations.[556] In combination, arts 26 and 294 cover a much broader spectrum of criminal organisations than international law and Western criminal laws (such as Canada and New Zealand). In part, this has been explained by the fact that organised crime is understood differently in China and is interpreted much broader than similar Western concepts.[557] But on the other hand, the previous discussion has shown that even Chinese scholars remain uncertain about the true boundaries of organised crime and about the distinction between criminal groups (art 26) and

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553 See Section 7.1.1 above.

554 Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 249.

555 Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 177, 183, 190.

556 Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 189.

557 See Section 7.3.1 above.

"criminal organisations of a triad nature" (art 294).[558] One scholar recently remarked that in comparison to the *Palermo Convention*, China's definition of 'criminal group' in art 26 is too broad, and that the definition of 'criminal organisations of a syndicate nature' in art 294 is too narrow.[559]

While official statistics show very high numbers of arrests and prosecutions involving criminal organisations, without further research of the domestic patterns and dimensions of organised crime in China, it is not possible to make conclusive statements about the impact of China's organised crime offences. There is, at present, no evidence to suggest that organised crime in China is declining, but there is equally nothing to support the view that organised crime has been further escalating in recent years. China's strong stand and tough enforcement action against criminal organisations under the Yanda policy is well documented. However, some critics have argued that the criminal offences in the *Criminal Law 1997* are too soft to effectively suppress organised crime. Zhao Guoling, for instance, remarks that

> The maximum penalty of ten years imprisonment is too lenient and is not sufficient for a crime with such huge social consequences. [...] punishment as over ten years imprisonment, life imprisonment and even death should be introduced for serious offenders.[560]

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558 Zhao Guoling, "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 306.

559 Margaret L Lewis, "China's Implementation of the United Nations Convention against Transnational Organized Crime", paper presented at the symposium *Organised Crime in Asia: Governance and Accountability* (2007) 182.

560 Zhao Guoling, "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 306.

8 Hong Kong SAR

Hong Kong, along with Macau,[561] is one of two Special Administrative Regions (SARs) of the People's Republic of China. After over 155 years under British rule, Hong Kong was returned to China on July 1, 1997. This handover was agreed upon in the *Joint Declaration on the Question of Hong Kong* between China and the United Kingdom of December 19, 1984.[562] This declaration sets out Hong Kong's status under Chinese rule and the *Basic Law,* the SAR's quasi-constitution. The *Joint Declaration* creates a "one country, two systems" policy and ensures that Hong Kong maintains a "high degree of autonomy" over all matters except foreign affairs and defence and also stipulates that Hong Kong's laws (referred to as ordinances), including its criminal law, continue operation beyond the 1997 handover.

8.1 Organised Crime in Hong Kong

Organised crime features very prominently in the history of Hong Kong for two principal reasons: first, the former colony has been a major transit point for narcotic drugs and, second, Hong Kong is a major base for a great number of triad societies.

8.1.1 Opium and other illicit drugs

When Hong Kong was established as a British colony in 1841 it "was founded on opium".[563] For almost a century, revenues from the opium trade were among the most important sources of government income and the drug trade was regulated and controlled to protect and ensure this source of revenue.[564] Legislation to prohibit the sale of opium and criminalise other aspects of the drug trade began in 1932 and gradually led to a complete prohibition. But this development coincided with the shift of many triads from mainland China to Hong Kong and the subsequent emergence of a flourishing black market for illicit drugs, both for local consumption and for export to other countries in the region, to North America, and Europe. Karen Joe Laider et al remark that

> the withdrawal of the Hong Kong government from the opium trade had the effect of turning the entire drug trade over to organised crime. From this point onward the drug trade would be more or less free to follow consumer demand as well as the dictates of organised crime.[565]

Today, heroin and other opium based substances continue to be brought into Hong Kong from Myanmar via China, while ketamine (the primary drug of abuse in Hong Kong)[566] and most amphetamine-type stimulants and their precursors (especially ephedrine) usually originate in mainland China.[567]

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561 See Chapter 9 below.

562 Signed at Beijing, Dec 19, 1984, 1399 UNTS 60.

563 The First Opium War lasted from 1839-1842, culminating in the Treaty of Nanking, which opened up China to trade and ceded Hong Kong to the British Empire. See further Ernst Eitel, *Europe in China* (1895) 75–95.

564 Alfred McCoy, "From Free Trade to Prohibition: A Critical History of the Modern Asian Opium Trade" (2000) 28 *Fordham Urban Law Journal* 307 at 317–318; Karen Joe Laidler, *The Hong Kong Drug Market* (2000) 3–4.

565 Karen Joe Laidler, *The Hong Kong Drug Market* (2000) 7.

566 See further, UNODC, *Amphatmines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 34.

567 Alfred McCoy, "From Free Trade to Prohibition: A Critical History of the Modern Asian Opium Trade" (2000) 28 *Fordham Urban Law Journal* 307 at 344; Karen Joe Laidler, *The Hong Kong Drug Market* (2000) 9, 11; Yiu Kong Chu, "Global Triads: Myth or Reality?",

8.1.2 Criminal organisations in Hong Kong

Organised crime in Hong Kong is often synonymous with Chinese triads. A great number of triad societies maintain a presence in the former colony since the 1800s. The victory of the communists in mainland China and the rigid suppression of triads that followed caused many organisations and their members to shift to Hong Kong and take advantage of Hong Kong's booming and liberal market economy.[568] Jon Vagg noted that the economic differential between China and the then British colony (which has been maintained in the 'one country, two systems' policy) accompanied by "an attempt to impose various kinds of border controls can in some circumstances constitute an opportunity for criminal activity."[569] Other writers have described Hong Kong as "the undisputed capital of modern day triads".[570] When Hong Kong returned to Chinese rule in 1997, it was widely expected that the triads would suspend their presence in Hong Kong and relocate elsewhere, especially to the United States.[571] However, most observers agree that "the reverse turned out to be the case".[572]

In 1999, Hong Kong Police reported that it was aware of fifty triad societies operating in the SAR, of which fifteen to twenty regularly come to the attention of local authorities.[573] It has been estimated that "1 out of every 20 persons [in Hong Kong] may be a triad member or affiliate"[574] and that there are between 30,000 and 160,000 triad members in Hong Kong.[575] The 14K, Who Shing Wo (the Wo groups), and Sun Yee On groups are among the most notorious Hong Kong triads.[576] Their activities cover a great range of illegal undertakings including the smuggling of various contraband such as cigarettes, artefacts, and motor vehicles;[577] migrant smuggling

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in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 185.

568 John Huey-Long Song & John Dombrink, "Asian Emerging Crime Groups: Examining the Definition of Organized Crime" (1994) 19(2) *Criminal Justice Review* 228 at 235. See further Section 7.1.1 above.

569 Jon Vagg, "The Borders of Crime: Hong Kong-China Cross-Border Activity" (1992) 32(3) *British Journal of Criminology* 310 at 310.

570 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 178 referring to a US Senate Committee report.

571 See, for example, John Huey-Long Song & John Dombrink, "Asian Emerging Crime Groups: Examining the Definition of Organized Crime" (1994) 19(2) *Criminal Justice Review* 228 at 234.

572 Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 84–85.

573 Ip Pau Fuk, "Organised Crime in Hong Kong", paper presented at the *Organised Crime and the 21st Century Seminar*, The University of Hong Kong, 26 June 1999. For a list of triad societies and other criminal groups in Hong Kong see James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 208; and also Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 49.

574 John Huey-Long Song & John Dombrink, "Asian Emerging Crime Groups: Examining the Definition of Organized Crime" (1994) 19(2) *Criminal Justice Review* 228 at 236.

575 Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 47; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 18. James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 206 cited reports stating that "1 out of every 20 residents of Hong Kong may be a member or affiliate of an organized criminal group".

576 Yiu Kong Chu, "Hong Kong Triads after 1997" (2005) 8(3) *Trends in Organised Crime* 5 at 9-11. Cf James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 207.

577 Jon, "The Borders of Crime: Hong Kong-China Cross-Border Activity" (1992) 32(3) *British*

from China into Hong Kong but also to destinations further afield such as North America, Australia, and Europe;[578] trafficking in persons;[579] prostitution and the brothel industry;[580] illegal gambling, also including online betting and soccer gambling;[581] loan sharking and debt collection;[582] and large-scale credit card and identity card fraud.[583]

Many triad activities are accompanied by threats, extortion, violence, and kidnappings which are used to eliminate or threaten competitors, witnesses, members of the triads, but also business and political figures.[584] To increase profits, raise funds, and to conceal their criminal activities and proceeds of crime, the larger criminal organisations also operate multiple legitimate enterprises.[585] Legal activities of triad societies in Hong Kong frequently involve local transport companies and the film industry.[586]

In the literature and among law enforcement agencies, there is some disagreement about the structure and organisation of triads. Chinese triad societies are traditionally portrayed as strictly hierarchical organisations with firm membership structures, clear assignments of roles and duties, and strict codes of discipline. Lo Shiu-Hing, for instance, found that triads are generally

> led by a dragon head with the assistance of incense masters who are responsible for rituals and initiation, red poles who are fighters, straw sandals who deal with liaison and

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Journal of Criminology 310 at 311–319.

578 Andreas Schloenhardt, *Migrant Smuggling* (2003) 141–142; Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 183–184; Yiu Kong Chu, "Global Triads: Myth or Reality?", in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 183 at 190–191.

579 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 188.

580 Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 52; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 89; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 7.

581 Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 361–362; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 89; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 53; Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 177; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 7/

582 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 187; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 6–7.

583 HKSAR v Lee Tsung Lin [2002] 2 HKLRD H9; Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 186.

584 Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 4–5; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 53; Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 176; James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 210.

585 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 178; Ip Pau Fuk, "Organised Crime in Hong Kong", paper presented at the *Organised Crime and the 21st Century Seminar*, The University of Hong Kong, 26 June 1999; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 57.

586 James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 209–210.

> communication work, white fans who are the planners and administrators, and ordinary members.[587]

One characteristic of triad societies is the use of visual or audible identifiers. Triads traditionally use initiation rituals, insignia, symbols, and tattoos. Procedures such as slitting fingertips and mingling or sucking blood, pricking the middle fingers or marking the finger with red dots are used to initiate members and create a sense of belonging. Triads also use youth and street gangs as a pool for new recruits.[588] Historically, triad membership cannot be terminated and is based on the premise 'once a member, always a member'. The rituals employed by triads visually label new and existing members, and mark them for life. Triads also use hand signals and group jargon — sometimes referred to as 'triad language' — to communicate.[589]

But not all criminal organisations in Hong Kong are of the same design and structure as traditional triad societies and some reports suggest that many groups have adopted more flexible structures and are better described as non-hierarchical, decentralised collections of multiple criminal groups[590] (similar perhaps to the chapter-structure of outlaw motorcycle gangs). The Big Circle Gang (or Big Circle Boys), for instance, is Hong Kong's biggest non-triad group and is based on a non-hierarchical network of many mainland Chinese who reside in Hong Kong illegally, but the name of this triad has also been used by gangs in Macao and North America with no obvious connection to the Hong Kong based syndicate.[591] Profits usually remain with local gangs and are not collected centrally.[592] It has been found that especially in the illicit drug trade and also in the migrant smuggling business, many organisations are based on loose, informal connections between people that collaborate if and when opportunities — legitimate and illegitimate — arise. For these groups, the triad system may only be relevant in order to establish connections between individuals. Sheldon Zhang and Ko-lin Chin, for instance, believe that

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587 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 177. See also Ip Pau Fuk, "Organised Crime in Hong Kong", paper presented at the *Organised Crime and the 21st Century Seminar*, The University of Hong Kong, 26 June 1999.

588 Cf Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 522; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 87, 89–90; Karen Joe Laidler, *The Hong Kong Drug Market* (2000) 10; Ip Pau Fuk, "Organised Crime in Hong Kong", paper presented at the *Organised Crime and the 21st Century Seminar*, The University of Hong Kong, 26 June 1999; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 6.

589 Kingsley Bolton et al, "The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong" (1996) 16(3) *Language & Communication* 263 at 263, 279–281; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 87; Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 178.

590 Sheldon Zhang & Ko-lin Chin, "The Declining Significance of Triad Societies in Transnational Illegal Activities" (2003) 43 *British Journal of Criminology* 469 at 476–486; James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 207; Yiu Kong Chu, "Global Triads: Myth or Reality?", in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 184; Ip Pau Fuk, "Organised Crime in Hong Kong", paper presented at the *Organised Crime and the 21st Century Seminar*, The University of Hong Kong, 26 June 1999.

591 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 177; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 91; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 51.

592 Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 51.

> The market conditions and operational requirements of human smuggling and heroin trafficking are vastly different from those of the entrenched triad societies or other established Chinese crime groups. Their lack of involvement in these transnational activities is not coincidental; rather, it is determined by the deficiencies inherent in their traditional organisational structure.[593]

Many triad societies are also closely connected to the business sector, senior administrators, and corrupt government officials in Hong Kong and now also in mainland China. Bertil Lintner remarked that: "While the criminals live outside the law, they have never been outside society."[594]

8.2 Organised and Serious Crime Ordinance

In Hong Kong, criminal law is a mixture of common law and statutes. The general principles of criminal liability are largely based on English common law while most of the special offences are set out in the *Crimes Ordinance* which came into operation on December 31, 1972. The *Crimes Ordinance* also contains provisions for attempts (s 159G) and conspiracy (s 159A) which are for the most part based on English models. Since September 7, 2006, the *Convention against Transnational Crime*, which has been signed by China, also applies to Hong Kong.

In addition to the *Crimes Ordinance*, Hong Kong has specific provisions for organised crime, especially triad groups, in the *Organised and Serious Crime Ordinance*[595] and the *Societies Ordinance*.[596] The *Organised and Serious Crime Ordinance* was enacted in 1994

> to create new powers of investigation into organised crimes and certain other offences and into the proceeds of crime of certain offenders; provide for the confiscation of proceeds of crime; make provisions in respect of the sentencing of certain offenders; create an offence of assisting a person to retain proceeds of crime; and for ancillary and connected matters.[597]

The principal purpose of this Ordinance is to enable law enforcement agencies to combat organised crime more effectively by using special powers of investigation.[598] Secondly, the Ordinance facilitates forfeiture and the seizure of illegitimate assets[599] and contains special provisions regarding criminal procedure and the prosecution and sentencing of offenders.[600] Unlike the *Societies Ordinance*, the *Organised and Serious Crime Ordinance* does not create new offences, it does not establish membership in a criminal organisation as a crime, and it does not place penalties on the organisation itself. The following sections analyse the definition of organised crime under this ordinance and outline other relevant provisions.[601]

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593 Sheldon Zhang & Ko-lin Chin, "The Declining Significance of Triad Societies in Transnational Illegal Activities" (2003) 43 *British Journal of Criminology* 469 at 478.

594 Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 89.

595 Chapter 455, No 82 of 1994, reprinted in Hong Kong SAR, Department of Justice, *Bilingual Laws Information System*, www.justice.gov.hk (14 Mar 2001).

596 See Section 8.3 below.

597 Long title *Organised and Serious Crime Ordinance 1994* (Hong Kong)

598 Sections 2-7, 24E *Organised and Serious Crime Ordinance 1994* (Hong Kong). Cf Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 10.

599 Sections 8-24D, 25-26 *Organised and Serious Crime Ordinance 1994* (Hog Kong).

600 Sections 27-30 *Organised and Serious Crime Ordinance 1994* (Hong Kong).

601 The analysis is based on the official English versions of Hong Kong law provided by the Hong Kong Department of Justice.

8.2.1 Definition of organised crime

The interpretation of relevant terms used in the *Organised and Serious Crime Ordinance* is set out in s 2:

> "organised crime" (有組織罪行) means a Schedule 1 offence that-
> (a) is connected with the activities of a particular triad society;
> (b) is related to the activities of 2 or more persons associated together solely or partly for the purpose of committing 2 or more acts, each of which is a Schedule 1 offence and involves substantial planning and organisation; or
> (c) is committed by 2 or more persons, involves substantial planning and organisation and involves-
> (i) loss of the life of any person, or a substantial risk of such a loss;
> (ii) serious bodily or psychological harm to any person, or a substantial risk of such harm; or
> (iii) serious loss of liberty of any person;

This definition of organised crime captures three separate types of associations:
(a) triad societies,
(b) associations planning to commit certain (serious) offences, and
(c) associations committing certain serious offences.

All three types require some connection to one of the offences set out in Schedule 1 of the *Organised and Serious Crime Ordinance*. This schedule contains a list of offences found in nineteen different statutes and at common law ranging from murder, assault, kidnapping, importation, immigration and drug offences, to gambling offences, triad offences, loan sharking, and offences involving firearms or other weapons. In general, the Schedule 1 offences are serious offences which are frequently carried out by criminal organisations to gain material profit or to facilitate their illegal operations. Parts (a) and (b) of the definition of organised crime do not require that these offences have actually been committed. The list effectively limits the application of the Ordinance — and the powers available to law enforcement under that ordinance — to certain serious offences if these are carried out by certain criminal groups.

The following sections discuss the three types separately although there is significant overlap between them.

(a) Triad societies

Triad societies (三合會) are further defined in s 2 *Organised and Serious Crime Ordinance 1994* (Hong Kong) as

> any society which-
> (a) uses any ritual commonly used by triad societies, any ritual closely resembling any such ritual or any part of any such ritual; or
> (b) adopts or makes use of any triad title or nomenclature.

This first type of organised crime is designed to cover traditional Chinese triad societies which are based on shared rituals or triad rules and whose activities are connected with one of the offences under Schedule 1 of the Ordinance. Triads unconnected with these particular kinds of crimes do not fall within the scope of the Ordinance, but may be covered by the *Societies Ordinance*.[602]

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[602] See Section 8.3 below.

(b) Two or more persons planning certain offences

The second type of organised crime under Hong Kong's *Organised and Serious Crime Ordinance* captures associations of two or more people for the purpose of committing two or more Schedule 1 offences. It is not required that the persons involved actually carry out any of these offences, but it is necessary to show that their activities "involves substantial planning and organisation" thus excluding random and spontaneous associations from the definition.

Figure 24 Definition of organised crime, s 2 *Organised and Serious Crime Ordinance* (Hong Kong), (b)

Terminology Elements	**Organised crime**
Structure	• association of two or more persons • Substantial planning and organisations
Activities	[none required]
Objectives	• Solely pr partly in purpose of committing two or more Schedule 1 offences.

(c) Two or more persons committing certain offences

Only the third type of organised crime requires the actual commission of a Schedule 1 offence. The threshold under (c) is higher than that of type (b) as it is necessary to show that the offence also resulted in the actual or potential loss of life (i), in actual or potential serious bodily or psychological harm (ii), or in serious loss of liberty of any person (iii). As with (b) it is necessary to show that the association involved at least two or more persons and substantial planning and organisation. In comparison, there appears to be significant overlap between (b) and (c) and any organised crime activity covered under (c) is also automatically covered by (b).

Figure 25 Definition of organised crime, s 2 *Organised and Serious Crime Ordinance* (Hong Kong), (c)

Terminology Elements	**Organised crime**
Structure	• Association of two or more persons • Substantial planning and organisations
Activities	• Commission of a Schedule 1 offence; • Offence involves (i) Loss of the life of any person, or a substantial risk of such a loss; (ii) Serious bodily or psychological harm to any person, or a substantial risk of such a harm; or (iii) Serious loss of liberty of any person.
Objectives	[none required]

8.2.2 Other provisions

It was mentioned earlier that the *Organised and Serious Crime Ordinance* (Hong Kong) does not create any specific offences for criminal organisations or for the persons associated with organised crime. The ordinance only contains an offence for dealing with proceeds of crime, s 25.[603]

[603] See further Alain Sham, "Money laundering laws and regulations: China and Hong Kong"

The remaining sections of the Ordinance, ss 3-32, almost exclusively create law enforcement powers that may be utilised in the investigation of 'organised crime' as defined in s 2. These include powers to conduct searches and obtain information,[604] powers relating to the confiscation of property and proceeds of crime,[605] restraining orders,[606] and provisions for remittance agents and money chargers.[607]

8.3 Societies Ordinance

Hong Kong's *Societies Ordinance* is the SAR's chief legal instrument against triads and other unlawful societies and it creates a myriad of criminal offences for persons involved in and associated with these groups. The origins of this Ordinance can be traced back to the very early days of British colonial rule in Hong Kong. A first Ordinance "for the suppression of the Triad and Other Secret Societies" was enacted as early as 1845.[608] This ordinance criminalised membership in these societies and also provided that persons found to be members were to be branded on the right cheek after they served their sentence and then deported to China (where many of the deportees were arrested, tortured, and executed). At that time, it was estimated that 75 percent of Hong Kong's Chinese population were triad members and accordingly the application of the ordinance was limited to persons of Chinese origin.[609]

Nine months after its enactment, the Ordinance was amended to limit the application to triads only and exclude other secret societies. The offences were also limited to persons intending to be involved in triads and exempting those who were forced or coerced to be involved or who had no knowledge about the nature of the society.[610] A new *Triad and Unlawful Societies Ordinance* was introduced in 1887, substituting the earlier laws and, again, expanding the application to include triads as well as other societies that pursue purposes "incompatible with the peace and good order of the Colony", s 1. This Ordinance was in operation for 24 years and was replaced in 1911 by a new ordinance against unlawful societies which introduced a registration system to separate legitimate, registered societies from unlawful ones. This system was substituted by the *Societies Ordinance* in 1920, which used a model similar to that now found in the *Organised and Serious Crime Ordinance*. It differentiated between three kinds of unlawful societies: triads, societies using triad rituals, and other societies pursuing unlawful purposes, s 3(a)-(c).[611]

92006) 9(4) *Journal of Money Laundering Control* 379 at 390–391.

604 Sections 3-6 *Organised Crime Ordinance 1994* (Hong Kong).

605 Sections 8-13, 16-23 *Organised Crime Ordinance 1994* (Hong Kong).

606 Sections 14, 15 *Organised Crime Ordinance 1994* (Hong Kong).

607 Sections 24A–24E *Organised Crime Ordinance 1994* (Hong Kong).

608 *An Ordinance for the suppression of the Triad and other Secret Societies within the Island of Hongkong and its Dependencies*, No 1 of 1945. Cf Ernst Eitel, *Europe in China* (1895) 227–228; Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 23, 38; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 58.

609 Kingsley Bolton et al, "The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong" (1996) 16(3) *Language & Communication* 263 at 264; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 3.

610 No 12 of 1845. See further Ernst Eitel, *Europe in China* (1895) 228.

611 See further Kingsley Bolton et al, "The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong" (1996) 16(3) *Language & Communication* 263 at 265.

The current *Societies Ordinance* was first introduced in 1949[612] and up until today remains of great practical relevance insofar as criminal offences for triad organisations and certain other "unlawful societies" are concerned. The purpose of this Ordinance is the creation of a registration system for all Hong Kong societies, including "any club, company, partnership or association of persons".[613] "The *Societies Ordinance*", notes A Chen,

> requires all persons who want to form any association of any kind other than certain excepted categories to apply to the Registrar of Societies (who is in practice the Commissioner for Police) for registration and to submit the proposed constitution of the organisation for scrutiny and approval.[614]

Registered societies are the subject of extensive control and monitoring requirements while associations that fail to gain registration are considered to be "unlawful societies". The Ordinance also contains extensive provisions for the prohibition of certain societies and the criminalisation of persons establishing, directing, recruiting for, associating with, or otherwise supporting triad or unlawful societies.

8.3.1 Unlawful societies

The offences and prohibitions under the Ordinance apply to triad societies and unlawful societies as defined in s 18:

(1) For the purposes of this Ordinance, "unlawful society" (非法社團) means-
  (a) a triad society, whether or not such society is a registered society or an exempted society and whether or not such society is a local society; or
  (b) a society in respect of which, or in respect of whose branch, an order made under section 8 is in force.
(2) (Repealed 75 of 1992 s. 11)
(3) Every society which uses any triad ritual or which adopts or makes use of any triad title or nomenclature shall be deemed to be a triad society.

This definition differentiates between two types of illegal societies. The first type involves triad societies which are not further defined in the ordinance. Groups using triad rituals et cetera are by virtue of subs (3) also treated as triads.[615] The second type refers to societies that have been prohibited by virtue of s 8 of the Ordinance because they are seen as a threat to national security, public safety, public order, or to the protection of rights and freedoms of others and failed to gain registration.[616] The prohibition may also be applied to political organisations.[617] The power to prohibit organisations is vested in the Secretary for Security who acts on the recommendation of the Societies Officer appointed under the Ordinance.[618]

The distinction between unlawful societies and triad societies is a significant one as higher penalties apply for offences associated with triads. The distinction reflects the concern of Hong Kong authorities over the local triad problem which is seen as more

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612 No 28 of 1949. Relevant amendments were made in 1964 (Ordinance No 36 of 1964), 1992 (No 75 of 1992), and 1997 (No 118 of 1997).
613 Section 2(1) *Societies Ordinance 1997* (Hong Kong).
614 A Chen, "Editorial: Civil liberties in Hong Kong: freedoms of expression and association" (1989) 19 *Hong Kong Law Journal* 4 at 5_6.
615 "Triad ritual means any ritual commonly used by triad societies, any ritual closely resembling any such ritual and any part of any such ritual"; s 2(1) *Societies Ordinance 1997* (Hong Kong).
616 Section 8(1)(a) *Societies Ordinance 1997* (Hong Kong).
617 Section 8(1)(b) *Societies Ordinance 1997* (Hong Kong).
618 Section 8(1)-(4) *Societies Ordinance 1997* (Hong Kong).

dangerous compared to other types of criminal organisations, including foreign organised crime groups.

8.3.2 Offences associated with unlawful societies

Sections 19-23 *Societies Ordinance 1997* (Hong Kong) set out a range of offences for persons associated with unlawful societies. The main objective of these offences is to deter people from joining or supporting criminal organisations.[619] Each offence is divided into two subsections which provide different penalties for 'unlawful societies', subsections (1), and higher penalties for triad societies, subsections (2). The offences cover a range of different roles a person may occupy within the organisation and criminalises various forms of associations with unlawful societies and triads. Figure 26 provides a summary of the existing offences which are discussed separately in the following sections.

Figure 26 Offences and penalties under the *Societies Ordinance 1997* (Hong Kong)

Offences	Unlawful societies	Triad societies
Managers, assistant managers, office bearers	S 19(1) 3yrs | HKD100,000	S 19(2) 15yrs |HKD100,000
Members, acting as members, attending meetings	S 20(1) 1yr |HKD20,000 (1st offence)	S 20(2) 3yrs | HKD100,000 (1st offence)
Paying money, giving aid, control of books, accounts, seals, lists of members etc	-	S 20(2) 3yrs | HKD100,000 (1st offence)
Allowing premises to be used	S 21(1) 1yr | HKD50,000 (1st offence)	S 21(2) 3yrs | HKD100,000
Recruitment of members	S 22(1) 2yrs | HKD50,0000	S 22(2) 5yrs | HKD250,000
Procuring aid/support	S 23(1) 2yrs | HKD50,000	S 23(2) 5yrs | HKD 250,000

Managing unlawful societies

The first and most serious of these offences applies to persons involved in the management of triads and unlawful societies, s 19 *Societies Ordinance*.

> (1) Save as is provided in subsection (2), any office-bearer or any person professing or claiming to be an office-bearer and any person managing or assistant in the management of any unlawful society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of HKD 100,000 and to imprisonment for 3 years.
> (2) Any office-bearer or any person professing or claiming to be an office-bearer and any person managing or assisting in the management of any triad society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of HKG 100,000 and to imprisonment for 15 years.

Under subsection (1) "any office-bearer[620] or any person professing or claiming to be an office-bearer and any person managing or assisting in the management of any

619 Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9.

620 The term 'office bearer' is further defined in s 2 *Societies Ordinance 1994* to include "any person who is the president, vice president, or secretary or treasurer [...] or who is a member of the committee or governing body of such society [...]" or who holds an

unlawful society shall be guilty of an offence". A higher penalty of up to fifteen years imprisonment or a fine of HKD100,000 applies if the unlawful society is a triad society, s 19(2). Section 28(2) *Societies Ordinance* establishes a presumption (rebuttable by the defendant) that any person found in possession of "any books, accounts, writings, lists of members, seals, banners or insignia of or relating to any triad society" is considered to assist in the management of a triad society.

This offence is specifically designed for the core directors and leaders of criminal organisations and accordingly provides the highest penalties. The offence also extends to persons "professing or claiming" to be an office bearer, though it has been held that such conduct need to involve more than mere admissions to police.[621] Persons convicted for the offence under s 19 may also be barred from becoming an office bearer in any (legitimate) society for up to five years, s 24 *Societies Ordinance*.

Membership in an unlawful society

Section 20(1) criminalises membership in unlawful societies as well as persons who act as members, who attend meetings of these societies, or who deliberately give money or other aid to these societies. Persons recruiting members or seeking contributions and other support for unlawful societies and triads are criminalised separately in ss 22, 23 *Societies Ordinance*.

> (1) Save as is provided in subsection (2), any person who is or acts as a member of an unlawful society or attends a meeting of an unlawful society or who pays money or gives any aid to or for the purposes of an unlawful society shall be guilty of an offence and shall be liable on conviction on indictment-
>
> (a) in the case of a first conviction for that offence to a fine of HKD 20,000 and to imprisonment for 12 months; and
>
> (b) in the case of a second or subsequent conviction for that offence to a fine of HKD 50,000 and to imprisonment for 2 years.

Subsection (2) provides an aggravated offence for members and other supporters of triad societies.

> (2) Any person who is or acts as a member of a triad society or professes or claims to be a member of a triad society or attends a meeting of a triad society or who pays money or gives any aid to or for the purposes of the triad society or is found in possession of or has the custody or control of any books, accounts, writing, lists of members, seals, banners or insignia of or relating to any triad society or to any branch of a triad society whether or not such society or branch is established in Hong Kong, shall be guilty of an offence and shall be liable on conviction on indictment-
>
> (a) in the case of a first conviction for that offence to a fine of HKD 100,000 and to imprisonment for 3 years; and
>
> (b) in the case of a second or subsequent conviction for that offence to a fine of HKD 250,000 and to imprisonment for 7 years.

The offence in s 20 is aimed a criminalising mere membership in any unlawful society or triad. There is no additional requirement that an accused under this section also needs to engage in the criminal activities of the society; these activities may be taken into account to raise the sentence: *Kam Moon et al v R* [1964] 614 at 623-624 per

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analogous positon.

621 *Chung-Wai v R* [1980] HKLR 593 at 601 per Addison J.

Hogan CJ. It is also possible to participate in the offence under s 20(2) by way of aiding, abetting, or procuring: *HKSAR v Wong Fuk Tak & Others* [2000] HKLRD (Yrbk) 189.

Membership is not further defined in the Ordinance and it remains unclear just how formal a person has to be accepted into the group to be seen as a member. Liability is extended to cover informal associations with the group such as persons "acting as members" and persons giving aid or money to the organisation. This also includes persons attending meetings of unlawful societies and s 28(3) establishes a rebuttable presumption that any person found in a place used for triad meetings is considered to have been attending meetings.[622]

For cases involving unlawful societies, subsection (1) provides a penalty of HKD 20,000 or one year imprisonment for first offenders and imprisonment for 2 years or a fine of HKD 50,000 for second or subsequent convictions. Higher penalties apply if triad societies are involved: HKD 100,000 or three years imprisonment for first offenders; HKD 250,000 or seven years imprisonment on second and subsequent convictions. Persons convicted for the offence under s 20 may also be barred from becoming an office bearer in any (legitimate) society for up to five years, s 24 *Societies Ordinance 1997*.

In determining the severity of the penalty for any offence under ss 19-23 the court or magistrate has to consider whether or not the accused has discontinued her or his membership of the triad society. There have been extensive debates about the question if and how membership in a triad society ends. Many cases have relied on the traditional notion that triad membership is inextinguishable,[623] while more modern interpretations suggest that members can terminate their membership.[624] Some triad members have deliberately made admissions to the police in order to break their oath and thus trying to break their connection to the society.[625]

A triad renunciation scheme was established in 1988 to allow non-active members to formally renounce their membership.[626] The *Societies Ordinance* sets out a process that involves a formal application to the Renunciation Tribunal, ss 26A-26N.

Claiming or professing to be a triad member

The offence in s 20(2) also extends to persons "claiming to be members" of triads. It is not uncommon for some individuals to claim or otherwise pretend to be a triad member without actually participating in any group.[627] The purpose of this offence is "the condemnation and prevention of overt and positive claims made to members of the public with the intention of obtaining an advantage by the person who utters such a claim by intimidating the person to whom the claim is made": *Ngchi-Wah v R* [1978] HKLR 101 at 103.

The offence in s 20(2) and a similar provision in s 19(2) have caused considerable controversy in a number of judicial decisions. In summary, the case law seems to suggest that a charge of "being a member" prevails as the more serious charge over

622 In *R v Wong Sik Ming* [1996] HKLY 289 the High Court held that there is no requirement to have formality about the meeting of a triad society but that meetings on a street (eg discussing matters outside a bar) does not suffice.

623 See Section 8.1.2 above.

624 H Litton, "Editorial: So-called 'Triad Experts'" (1986) 16 *Hong Kong Law Journal* 3 at 4-5.

625 *Cheng Chung-Wai v R* [1980] HKLR 593 at 600.

626 Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 501.

627 Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9.

"claiming to be a member". Prosecutorial practice has been to lay charges of claiming only if there is insufficient evidence to support a charge of being a member. As claiming does not require proof of actual membership, the courts have developed high thresholds for convictions. In particular, mere admissions to police,[628] wrongful beliefs by the accused that he/she is a member,[629] or the use of triad language alone do not suffice to establish liability, though this may be used as supporting evidence.[630] The claiming or professing must be accompanied by a specific state of mind. In *Cheng Chung-Wai v R* [1980] HKLR 593 it has been argued that

> the utterer must intend to cause or at least foresee the probability of causing some impact or reaction on the part of the person addressed. Such would arise if the utterer intended or hoped the addressee would be intimidated in some way or caused him to act to his detriment or sought some advantage.

A further peculiar case arose in 2007, which involved the Hong Kong-based designer retailer G.O.D. In September 2007 the company released t-shirts for sale that carried a Chinese emblem related to the 14K triad. On November 1, 2007, Hong Kong Police searched the premises of G.O.D. and arrested 18 people for producing and selling triad-related merchandise in violation of the *Societies Ordinance.*[631]

Liability under subsection 20(2) is also extended to criminalise bookkeepers, accountants, and persons who "have custody or control of any [...] lists of members, seals, banners or insignia of or relating to any triad society or to any branch of a triad society". In *R v Sit Yat Keung* [1986] HKLR 434 it was held that it is necessary to show that the accused is in conscious possession of any of the items listed, that these items relate to triad societies, and that the accused knows "full well their nature and import". It is not necessary to show that the accused possessed the items for a criminal purpose. Under s 28(s) any person found in possession of these items is presumed to be a triad member.

Allowing premises to be used by unlawful societies

Section 21 *Societies Ordinance* contains a special offence for owners and occupiers who knowingly provide meeting space for unlawful societies and triads or who otherwise allow these groups to use such a space. As with all other offences, higher penalties apply if triad societies are involved and also if the accused is facing a second or subsequent conviction.

> (1) Save as is proved in subsection (2), any person who knowingly allows a meeting of an unlawful society, or of members of an unlawful society, to be held in any house, building or place belonging to or occupied by him, or over which he has control, shall be guilty of an offence and shall be liable on conviction on indictment in the case of a first conviction for that offence, to a fine of HKD 50,000 and to imprisonment for 12 months and in the case of a second or subsequent conviction for that offence, to a fine of HKD 100,000 and to imprisonment for 2 years.

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628 *Ngchi-Wah v R* [1978] HKLR 101 at 103; *Cheng Chung-Wai v R* [1980] HKLR 593.

629 *Cheng Chung-Wai v R* [1980] HKLR 593.

630 Kingsley Bolton et al, "The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong" (1996) 16(3) *Language & Communication* 263 at 272; H Litton, "Editorial: So-called 'Triad Experts'" (1986) 16 *Hong Kong Law Journal* 3 at 4.

631 Anita Liam & Clifford Lo, "Top store raided for selling triad t-shirt; sales staff suspected of breaking anti-gang law" (2 Nov 2007) *South China Morning Post* (Hong Kong) 1; [Editorial], "Time to consider scope of triad law after raid" (2 Nov 2007) *South China Morning Post* (Hong Kong) 16.

> (2) Any person who knowingly allows a meeting of a triad society, or of members of a triad society, to be held in any house, building or place belonging to or occupied by him, or over which he has control, shall be guilty of an offence and shall be liable on conviction on indictment in the case of a first conviction for that offence, to a fine of HKD 100,000 and to imprisonment for 3 years and in the case of a second or subsequent conviction for that offence, to a fine of HKD 200,000 and to imprisonment for 5 years.

Recruiting for unlawful societies

In order to dismantle criminal organisations and reduce their membership base, the *Societies Ordinance* contains a separate offence for persons recruiting members for unlawful societies. Under s 22(1),

> any person who incites, induces or invites another person to become a member of or assist in the management of an unlawful society and any person who uses any violence, threat or intimidation towards any other person in order to induce him to become a member or to assist in the management of an unlawful society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of HKD 50,000 and to imprisonment for 2 years.

Section 22(2) contains an aggravated offence if the recruitment is made on behalf of a triad society:

> (2) Any person who incites, induces or invites another person to become a member of or assist in the management of a triad society and any person who uses any violence, threat or intimidation towards any other person in order to induce him to become a member or to assist in the management of a triad society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of HKD 250,000 and to imprisonment for 5 years.

Collecting funds or seeking other support for unlawful societies

The offence in s 23 *Societies Ordinance* is designed for persons collecting funds or seeking other forms of support for unlawful societies and triads. Subsection (1) provides a penalty of HKD 50,000 or two years imprisonment if the support is sought for unlawful societies. Higher penalties of up to five years imprisonment of a fine of HKD 250,000 apply to cases involving triad societies.

> (1) Save as is provided in subsection (2), any person who procures or attempts to procure from any other person any subscription or aid for the purposes of an unlawful society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of HKD 50,000 and to imprisonment for 2 years.
>
> (2) Any person who procures or attempts to procure from any other person any subscription or aid for the purposes of a triad society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of HKD 250,000 and to imprisonment for 5 years.

8.4 Remarks

Hong Kong maintains a very complex and sophisticated system to control associations in its territory, prohibit criminal organisations, and punish the activities of their members. In comparison to most other organised crime laws reviewed in this report, Hong Kong's legislation is much more established, tracing back over 150 years, and supported by extensive judicial interpretation and academic scholarship.

In many ways, Hong Kong's organised crime offences are local responses to a local problem. The key offences under the *Societies Ordinance* are specifically designed to prevent associations with triad societies and to suppress their activities. Many of the criteria used to define triads, such a triad initiation rituals and triad language, are unsuited for other criminal organisations. The *Societies Ordinance* reserves the highest penalties for persons participating in, associating with, or otherwise supporting triads. Other criminal organisations may classify as 'unlawful societies' which are the subject of significantly lower sanctions.[632]

Official statistics and the extensive case law demonstrate that the offences under the *Societies Ordinance* are frequently used and that a considerable number of triad members are prosecuted and convicted each year. Some critics have argued that the offences under the *Societies Ordinance* are used too frequently and that especially during the 1980s these offences were the preferred charge in many prosecutions.[633] Moreover, the presumptions about the existence of triad societies and triad membership in s 28 facilitate the work of police and prosecutors and may contribute to the high number of cases.

In the 1980s and 90s, a great number of cases involved charges of membership in a triad and many convictions were based on evidence given by undercover police operatives[634] or by so-called police triad experts who simply confirmed the accused's membership.[635] This practice further fuelled concerns about the powerful role the Hong Kong Police occupies in relation to triad control and suppression. Critics have pointed to the collusion between police and societies registration authority: the Registrar of Societies and the Commissioner of Police used to be the same person.[636] This essentially gave police the authority to ban any association in Hong Kong, though appeals against a refusal of registration are possible, s 12 *Societies Ordinance*.

Unlike many other jurisdictions, Hong Kong criminalises mere membership in triads and other unlawful societies and also extends liability to persons "claiming or professing" to be a member or office-bearer in a triad. This raises concerns about the freedom of association. Moreover, many questions remain about the ways in which to renounce triad membership. In order to avoid the concerns about the membership offence, H Litton suggested "to abandon [the] over-reliance on the amorphous statutory charge of 'being a triad member" and instead use charges under ss 22, 23 *Societies Ordinance* or lay charges for the actual offences committed.[637]

The legislation in operation in Hong Kong antedates the *Convention against Transnational Organised Crime* and adopts a different concept of organised crime. There is some similarity between Hong Kong's *Societies Ordinance*, Singapore's *Societies Act 1967*, and the systems recently proposed in places like South Australia and Queensland. Many provisions in these jurisdictions rely heavily on the use of insignia and other visual identifiers as evidence for the existence of criminal groups and to establish membership in them.

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632 A Chen, "Editorial: Civil liberties in Hong Kong: freedoms of expression and association" (1989) 19 *Hong Kong Law Journal* 4 at 5.

633 See also Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9.

634 See, for example, *HKSAR v Fu Ming Yung & Others* [2001] HKEC 1428; *HKSAR v Lam Yan Ming* [2004] HKEC 254.

635 See also Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9. See, for example, *HKSAR v Mak Chi Hing* [2001] HKEC 140.

636 A Chen, "Editorial: Civil liberties in Hong Kong: freedoms of expression and association" (1989) 19 *Hong Kong Law Journal* 4 at 6.

637 H Litton, "Editorial: So-called 'Triad Experts'" (1986) 16 *Hong Kong Law Journal* 3 at 7.

9 Macau SAR

9.1 Context and overview

9.1.1 Organised crime in Macau

In Macau, organised crime has been closely associated with the gambling industry since the Portuguese colonial Government legalised gambling in 1847. Today, Macau has the biggest casino industry in the world, valued at over USD 10 billion/year, even surpassing the revenue made by Las Vegas casinos.[638] Chinese triads, secret societies, and other criminal organisations have operated in Macau under Portuguese rule and continue to do so following Macau's return to China as a Special Administrative Region (SAR) in 1999. Since the first casino franchise was granted in 1937, several criminal organisations saw the gambling industry as an easy way to launder illicit money,[639] including embezzled funds from mainland China.[640] In recent years, there have been several reports about Macau's banking and finance sector being used for money laundering and offshore investment of funds from North Korea.[641] There have also been frequent allegations about prostitution, loan sharking, extortion, and the collection of protection money from people associated with the casino industry.[642] The 14K, Wo On Lok, and the Big Circle Gang (Dai Huen Chai), have been identified as the most important triad societies in Macau, especially in the 1980s and 90s.[643]

Further fuelling the influence of organised crime in Macau has been the fact that up until a reform in 2001-2 the casino industry was highly concentrated. In 1962, the Government decided to grant a monopoly to a single private organisation, STDM, the Sociedade de Turismo e Diversoes de Macau, which had exclusive control of all gambling. Because Macau's economy largely depends on revenue from gambling and associated tourism, the STDM and its owner Stanley Ho, became extremely influential, including in administrative and legislative circles. Allegations of corruption have been widespread and the regulation of the casino industry and its finances remained marginal, also to attract foreign visitors and compete with other gaming centres in the region and elsewhere.[644] Triad members, too, have allegedly participated in regional elections or have otherwise attempted to influence political processes.[645]

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638 Mary-Anne Toy, "A bet bigger than Vegas" (1 Apr 2006) *The Age*.

639 Angela Veng Mei Leong, "Macau Casinos and Organised Crime" (2004) 74 *Journal of Money Laundering* 298 at 300.

640 Mary-Anne Toy, "A bet bigger than Vegas" (1 Apr 2006) *The Age*.

641 Lo Shiu-Hing, "Cross-border Organized Crime in Greater South China" (1999) 5(2) *Transnational Organized Crime* 176 at 176.

642 Veng Mei Long, Angela, "The 'Bate-Ficha' Business and Triads in Macau Casinos" (2002) 2 *Queensland University of Technology Law & Justice Journal* 83 at 89–90; Lo Shiu-Hing, "Cross-border Organized Crime in Greater South China" (1999) 5(2) *Transnational Organized Crime* 176 at 187–188.

643 Lo Shiu-Hing, "Cross-border Organized Crime in Greater South China" (1999) 5(2) *Transnational Organized Crime* 176 at 180–182.

644 Veng Mei Long, Angela, "The 'Bate-Ficha' Business and Triads in Macau Casinos" (2002) 2 *Queensland University of Technology Law & Justice Journal* 83 at 83-84; Angela Veng Mei Leong, "Macau Casinos and Organised Crime" (2004) 74 *Journal of Money Laundering* 298 at 298, 301; Mary-Anne Toy, "A bet bigger than Vegas" (1 Apr 2006) *The Age*.

645 Lo Shiu-Hing, "Cross-border Organized Crime in Greater South China" (1999) 5(2) *Transnational Organized Crime* 176 at 189.

9.1.2 Criminal law in Macau

Together with Hong Kong, Macau is one of two Special Administrative Regions (SARs) of the People's Republic of China. Macau, the oldest colony in Asia, was under Portuguese rule until it was returned to China on December 20, 1999. This handover was agreed upon in the 1987 *Joint Declaration of the Government of the People's Republic of China and the Government of Portugal on the Question of Macau*.[646] This declaration sets out Macau's status under Chinese rule and Macau's *Basic Law,* the SARs quasi-constitution. The *Joint Declaration* creates a "one country, two systems" policy and ensures that Macau maintains a "high degree of autonomy" over all matters except foreign affairs and defence and also stipulates that Macau's laws, including its criminal law, continue operation beyond the 1999 handover.[647] In accordance with Macau's *Basic Law*, China has extended the application of the *Convention against Transnational Organised Crime* to Macau.[648]

Macau's criminal law, including its general principles, are guided by the *Penal Code* (Macau) (*Código Penal*)[649] which follows the tradition of Continental European criminal codes, especially Portugal's *Penal Code*. The *Penal Code* (Macau) of 1995 contains relevant provisions relating to complicity[650] and attempts,[651] but has no separate offence for conspiracy. The Code does, however, contain a special offence entitled "criminal associations" (associação criminosa) in art 288.[652]

In addition to the *Penal Code*, Macau has a separate organised crime statute. The *Law on Secret Societies* was originally introduced on February 4, 1978 by the Legislative Assembly,[653] but it was never rigorously enforced.[654] Following a wave of violent turf wars between rival triads and political assassinations in the mid 1990s,[655] this Law was eventually repealed. It has been substituted on July 30, 1997 with a more comprehensive *Organised Crime Law* (*Lei da Criminalidade Organizada*) which continues to apply today.[656] The *Organised Crime Law 1997* (Macau) is divided into four chapters: (I) penal provisions, (II) criminal procedure, (III) additional matters, and (IV) final and transitional provisions. At the heart of the legislation is the definition of 'association or secret society' in art 1, which is further discussed below in Section 9.3.1. This definition is followed in art 2 by an offence for directing, promoting or otherwise associating with secret societies/associations.[657] Articles 3 to 13 contain a range of other specific offences relating to organised crime.[658]

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646 Signed at Beijing, 13 Apr 1987, 1498 UNTS 228.

647 See further Frances Luke, "The Imminent Threat of China's Intervention in Macau's Autonomy" (2000) 15 *American University International Law Review* 717 at 721–725.

648 Macau SAR, *Advise of the Chief Executive No 30/2004* (31 Aug 2004).

649 No 11 of 1995.

650 See arts 20-24 *Penal Code* (Macau).

651 See arts 20-24 *Penal Code* (Macau).

652 See Section 9.2 below.

653 No 5 of 1978.

654 Angela Veng Mei Leong, "Macau Casinos and Organised Crime" (2004) 74 *Journal of Money Laundering* 298 at 301; Sabrina Adamoli et al, *Organised Crime around the World* (1998) 142.

655 Sabrina Adamoli et al, *Organised Crime around the World* (1998) 141; Frances Luke, "The Imminent Threat of China's Intervention in Macau's Autonomy" (2000) 15 *American University International Law Review* 717 at 740, 747; Lo Shiu-Hing, "Cross-border Organized Crime in Greater South China" (1999) 5(2) *Transnational Organized Crime* 176 at 182.

656 No 6 of 1997.

657 See Section 9.3.2 below.

658 See Section 9.3.3 below.

It has to be noted that there are, at present, no official English translations of Macau laws; the following analysis is based on unofficial translations of the official Portuguese version of the *Código Penal* and the *Lei da Criminalidade Organizada.*

9.2 Criminal associations, *Penal Code* (Macau)

Macau's *Penal Code* contains a specific offence for criminal associations (associação criminosa) in art 288. The term 'criminal association' has no separate definition in the legislation. Under art 288(1) it is an offence, punishable by three to ten years imprisonment, to establish or promote an "organisation or association designed to or engaging in criminal conduct". The same penalty applies under art 288(2) to persons who supply these organisations with arms, ammunition, or other weapons, or who provide them with a meeting place, or facilitate these groups to recruit new members. Organisers and directors of criminal associations are liable to imprisonment between five and twelve years under art 288(3).

9.3 Secret society/associations, *Organised Crime Law 1997* (Macau)

In addition to the offence in the *Penal Code*, Macau has a separate *Organised Crime Law* which contains specific provisions for so-called "associations or secret societies".

9.3.1 Definition of secret society/associations

Article 1 *Organised Crime Law 1997* (Macau) defines "associations or secret societies" as organisations constituted for the purpose of obtaining illegal advantages or other benefits. Further, it is required that the "existence of the association is manifested in an accord, agreement or in other ways" aimed at committing one or more of the 21 different crime types set out in art 1(1)(a)-(v). Article 1(2) stipulates that in order to prove the existence of a secret society or association it does not matter whether or not (a) the organisation has a designated seat or meeting place; (b) the members know each other and meet periodically (regularly), (c) the organisation's command, leadership or organisational hierarchy is ad hoc and not ongoing, or (d) the organisation has a written agreement (convention) setting out its constitution, activities, division of duties, and distribution of profits.

Figure 27 Definition of secret societies/associations, art 1(1) *Organised Crime Law 1997* (Macau)

Terminology Elements	**Association or secret society (associação ou sociedade secreta)**
Structure	• "constituted organisation" Irrelevant whether or not (art 1(2)): (a) the organisation has a designated seat or meeting place; (b) the members know each other and meet periodically; (c) the organisation's command, leadership or organisational hierarchy is ad hoc and not ongoing; (d) the organisation has a written agreement (convention) setting out its constitution, activities, division of duties, and distribution of profits.
Activities	[none required]
Objectives	• agreement (or other) to commit one or more of the offences specified in subparas (a)-(v); • obtaining advantages or [other] illicit benefits.

In the absence of accurate translations, it is difficult to offer a thorough analysis of the definition in art 1 and discuss the interpretation of relevant terms. It is, however, possible to make some general observations about the structure and contents of this definition. In particular, it is noteworthy that the general concept of 'associations and secret societies' does not differ greatly from other models of criminal organisations discussed in this study. The definition in art 1(1) combines a basic structural element with two requirements relating to the purpose and aims of the organisation.

The structural element is, for the most part, limited to the word "constituted" (organização constituída) and the explanations in art 1(2) which render a number of indicia irrelevant. In particular, there is no requirement that the organisation is formally structured, organised, or incorporated, or that all members know each other (and thus operate as a team). It appears, however, that completely random, informal clusters of people engaging or planning to engage in criminal activities cannot constitute a secret society or association.

The Macau definition does not require proof of the commission of any actual criminal offences. As with similar definitions elsewhere, the emphasis is on the objectives of the criminal group. It is necessary to show that the organisation seeks to gain illicit profits ("advantages or benefits") through the commission of certain criminal offences. In Macau — contrary to many other jurisdictions — the *Organised Crime Law 1997* sets out a specific range of criminal offences envisaged by the association. This includes 21 subparagraphs (a) to (v) that contains many offences commonly associated with organised crime, such as, homicide,[659] offences against the person,[660] abduction and kidnapping,[661] rape,[662] trafficking in persons, extortion,[663] exploitation of the prostitution of others, loan sharking (usury),[664] robbery,[665] illegal immigration, illegal gambling, trafficking in fauna, artefacts, explosives and firearms, document and credit card fraud, and corruption.

In some ways, the concept of criminal organisations under Macau law reflects the specific organised crime problem of this city state. This is demonstrated, for instance, in the terminology 'secret society' and in some of the offences listed in art 1(1)(a)-(v) such as loan sharking, extortion, and illegal gambling. On the other hand, the definition is broad enough to capture a great range of criminal organisations. Unlike its predecessor, the *Law on Secret Societies 1978*, the application of the current law is not limited to Chinese triads or secret societies. In comparison to other definitions, there is also no minimum requirement relating the number of members comprising the organisation.

The scope of application is, however, limited by the types of offences that the organisation aims to carry out. The list in art 1(1)(a)-(v) is exhaustive and associations seeking to commit offences not included in this list are not covered by the provisions of the *Organised Crime Law 1997*. While this list contains very many offence typically associated with organised crime, legislating an exhaustive list of offences allows no flexibility to respond to new types of organised crime if and when these arise.

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659 Articles 128–134 *Penal Code* (Macau).
660 Articles 137–142 *Penal Code* (Macau)
661 Articles 147–149 *Penal Code* (Macau).
662 Article 154 *Penal Code* (Macau).
663 Article 216 *Penal Code* (Macau).
664 Article 219 *Penal Code* (Macau).
665 Article 204 *Penal Code* (Macau).

9.3.2 Offences relating to secret societies/associations,

Article 2(1)-(3) *Organised Crime Law* 1997 (Macau) stipulates a number of offences relating to secret societies/associations. The offences and their penalties differ depending on the level of involvement in/with the criminal group. Article 2(4) and (5) set out a number of aggravations and sentence enhancers.

Funding or promoting a secret society/association, art 2(1)

Under art 2(1) it is an offence to establish or promote an association or secret society. The offence is punishable by imprisonment between 5 and 12 years.

Supporting a secret society/association, art 2(2)

Paragraph (2) of art 2 criminalises participation in a secret society/association as well as a range of activities that are carried out in support of these associations. These activities include:

(a) supplying arms, ammunition, or other weapons to members of criminal associations;
(b) providing or collecting funds in order to recruit or entice new members, or promote the organisation;
(c) accounting and bookkeeping for criminal associations, for their members, or for their "ritual ceremonies" (cerimónias rituais);
(d) participating in meetings or ritual ceremonies of the association;
(e) wearing or using signs and codes of a criminal association.

Offences under art 2(2) are punishable by imprisonment for 5 to 12 years.

Directing a secret society/association, art 2(3)

Article 2(3) provides the most serious offence for persons who "exercise the functions of a director or leader" of a secret/society association, regardless whether or not they use the symbols, codes, or other characteristics of the group. This offence is punishable by 8 to 15 years imprisonment.

9.3.3 Specific Offences, arts 3–13 *Organised Crime Law 1997* (Macau)

In addition to the general offences in art 2, Macau's *Organised Crime Law 1997* contains a series of specific offences relating to organised crime. These offences can be committed by individuals, but also by corporate organisations ("collective persons"), art 14.

The offences under arts 3 and 4 apply only if they are carried out by secret socities/associations (as defined in art 1). They include:

- Article 3: extortion and collection of protection money for a secret society/association, punishable by two to ten years imprisonment;
- Article 4: maintaining membership in or other relationships with ("invoking to belong") a secret society or association or "its elements" , punishable by imprisonment of one to three years.

The remaining offences in arts 6 to 13 are commonly associated with organised crime, but these offences do not require proof of a secret society or association. The

aim of these offences is to criminalise conduct that may aid the criminal organisation in its operation and to punish offences frequently carried out by criminal associations. These offences include:

- Article 6: using identity documents to obtain illicit benefits, cause a detriment, or enable or obstruct an activity, punishable by one to five years imprisonment;
- Article 7: trafficking in persons, punishable by imprisonment of two to eight years; trafficking in minors aged 14 years or younger is punishable by five to fifteen years imprisonment (art 7(3));
- Article 8: exploitation of the prostitution of others, punishable by one to three years imprisonment. Prostitution itself is a separate offence under art 35, punishable by a fine of MOP 5,000.
- Article 9: molestation, exposure, and other illegal conduct in public, punishable by imprisonment of up to one year;
- Article 10: conversion, transfer, or dissemination of illegal goods, punishable (depending on the circumstances, art 10(1)(a), (b), and (c)) by one to twelve years imprisonment;
- Article 11: illegal gambling, punishable by imprisonment of one to five years;
- Article 12: possession of explosives and inflammable substances;
- Article 13: obstruction of justice.

The penalties specified in arts 2, 3, 7, 10(1)(a) and (b) may be accompanied by special penalties set out in art 18 which include, for instance, prohibitions to exercise public functions, work in public office, contact specific persons, frequent specified places, expulsion from the territory of Macau[666] et cetera. If these offences are carried out repeatedly, penalties may be increased by an additional five years, art 20.

9.4 Observations

In summary, Macau has very comprehensive organised crime legislation including a suite of criminal offences along with specific procedural and enforcement measures. The legislation reflects the specific features and dimensions of traditional, local criminal organisations, but also captures the wider aspects of organised crime.

The *Organised Crime Law 1997* in particular contains many interesting elements specifically designed to address the problem of Chinese triads and secret societies. This is reflected in the terminology of this statute, but also in the types of conduct it criminalises. References to “secret societies”, “ritual ceremonies”, and “signs and codes”, for example, target very unique features of Chinese organised crime. Many of the specific offences referred to, such as loan sharking, illegal gambling, extortion, and payment of protection money are aimed at activities local triads and secret societies traditionally engage in.

On the other hand, the scope of Macau’s *Organised Crime Law 1997* is broad enough to capture a diverse range of criminal organisations. The application of the statute is largely determined by the objectives of the association and thus applies to any “constituted organisation” seeking to gain illicit profit or other benefits from a range of criminal activities.

It is, however, this list of criminal activities set out in art 1(1)(a)-(v) that also severely restricts the application of the *Organised Crime Law*. The statute singles out an exhaustive list of crime types and only applies to organisations seeking to engage in one of these offences. The legislator has thus set clear boundaries for the

[666] See also art 33 *Organised Crime Law 1997* (Macau).

application of the law. A group of youth spraying graffiti on a wall or engaging in some other property damage is thus outside the scope of this statute. On the other hand, any new and emerging crime types engaged in by associations or secret societies will require statutory amendment which may involve a lengthy bureaucratic process and may prevent flexible law enforcement responses.

A second, albeit minor problem stems from the apparent overlap between the offence for criminal associations in art 288 *Penal Code* (Macau) and the provisions under the *Organised Crime Law 1997*. The distinction between criminal associations (art 288 *Penal Code*) and associations or secret societies (art 1 *Organised Crime Law 1997*) is not fully clear and there is some uncertainty whether or not the two terms are mutually exclusive. It appears that in comparison, secret societies/associations are treated as the more serious, perhaps more dangerous type of criminal organisation; the offences for directing, establishing, promoting, and supporting secret societies/associations attract higher penalties than the same conduct in relation to criminal associations. Moreover, the requirements under the *Organised Crime Law 1997* are designed for organisations seeking to engage in specific offences and thus gain benefits, while art 288 *Penal Code* applies to groups engaged in or seeking to engage in any type of crime.

10 Taiwan

10.1 Organised Crime in Taiwan

The evolution and patterns of organised crime in Taiwan are closely associated with developments in mainland China, and, to a lesser extent, in Hong Kong, and Macau. In particular, the island has witnessed a great influx of triads and their members from the mainland after the Communist victory and the proclamation of the People's Republic of China in 1947. Moreover, it is well documented that Dr Sun Yat-Sen, founder of the Republic of China, was himself associated with triads, and that General Chiang Kai-shek and the Kuomintang (KMT) nationalist movement were also strongly supported by secret societies.[667] As the KMT leadership retreated to Taiwan and established an independent Republic of China, they were followed by many supporters, including the Green Gang.[668]

After the break-away of Taiwan from the mainland in 1949, the ruling KMT party placed the island under martial law to prevent any communist uprising and tightly control the borders especially insofar as any trade across the Strait of Taiwan was concerned. The rigid control that was exercised over Taiwan during that period kept the activities of criminal organisations and crime rates generally very low. The lifting of martial law and the democratisation starting in 1987, accompanied by the reduction of border controls, were followed by a rapid rise of organised crime in Taiwan and a influx of firearms and other contraband.[669]

The Government of Taiwan responded to the surge in organised crime activity with several enforcement campaigns. The first major and perhaps most ambitious operation was carried out in 1984 under the name Yi-ching or 'cleansweep' in order to wipe out gang members. It has been reported that:

> During the operation, thousands of law enforcement and military personnel raided the strongholds of various crime groups. Within days, more than 1,000 leaders or senior members of the sixty-two prominent jiaotou groups and gangs were arrested.[670]

Many of the people arrested at that time were later found to be innocent. The scale of the operation also caused a major displacement of the problem as it forced many of island's criminal organisations to other countries, especially Japan, the Philippines, and Thailand.[671] Those that were rightfully arrested and detained were frequently placed in the same prisons where many underground figures met and formed new associations, such as the so-called Celestial Alliance group.[672]

The crack-down on organised crime around the time of Operation Cleansweep faded as quickly as it began and during the late 1980s and early 1990s many groups resurface or appeared under new names. Another significant campaign under the name Chih-ping was launched on August 30, 1996 which resulted in the arrest of almost 500 key gang members, most of whom were swiftly transported to a

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667 See further Section 7.1.1 above.

668 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 91–92; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 87–88; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 54; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 2–3; Ernst Eitel, *Europe in China* (1895) 227.

669 Ko-lin Chin, *Heijin* (2003) 3, 6.

670 Ko-lin Chin, *Heijin* (2003) 168.

671 Ko-lin Chin, *Heijin* (2003) 194-197. See further Sections 14.1, 18.1 below.

672 Ko-lin Chin, *Heijin* (2003) 169.

maximum security prison on a remote island.[673] The Chih-ping initiative again forced many of Taiwan's group to relocate. Many gangs retreated to other countries in Southeast Asia such as Cambodia and Vietnam and also to Macau.[674] Many more, however, took advantage of China's new open-door policy towards visitors from Taiwan and sought new opportunities from the opening of the economy in mainland China. Initially, groups like the United Bamboo Gang established operations and businesses in Guangdong, Shenzen, and the Pearl River Delta, and later spread to Shanghai and across mainland China.[675] Other Taiwanese groups such as the Four Sea gang, the Celestial Alliance and the Tian Dao Mun have also moved into eastern parts of the mainland, especially Shanghai and Fujian province.[676]

The late 1980s and 1990s are also seen as the beginning of 'heijin', or 'black-gold politics', a term used to describe the penetration of Taiwan's politics and administration by underworld figures and organised crime. In order to avoid investigation and prosecution under the campaigns designed to suppress the activities of criminal organisations, many individuals saw the best way of protecting themselves and their interests by moving into public office or becoming elected officials.[677] During the mid 1990s the situation appeared to escalate and several reports confirm that at that time the activities of criminal organisations had

> permeated almost every aspect of Taiwanese economic and political life, from various unions to the judiciary and all levels of the legislature. Public office and organised crime were closely connected. Money obtained from organised crimes leads to winning elections and public offices reinforces the power of criminal organisation in a vicious cycle. Statistics from 1994 also indicate that about 35 percent of the more than 800 deputies elected to city and county councils have obvious links to organised crime.[678]

Concerns over the level of organised crime and the violence used by criminal organisations were fuelled further by a shooting in Taoyuan on November 22, 1996 in which eight people, including a local magistrate, were killed. The response to this incident was very swift and within days the Vice President of Taiwan and the Premier announced new legislative measures. Within three weeks, the *Organised Crime Control Act* was introduced into the Legislative Yuan and the Act entered into force on December 11, 1996.[679]

Despite concerted government action to prevent and suppress organised crime, criminal organisations continue to thrive in Taiwan. According to confidential official figures cited by Ko-lin Chin, there were 1208 organised gangs, local 'jiatoao' groups, and loosely knit groups active in Taiwan in 1996, and 1274 groups in 1998. However, it was found that only 117 of the groups are formally organised and involved in "serious" crime. In 1996, there were 10,346 members in criminal groups. Most of the groups were found operating in or around the capital Taipei.[680] The

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673 Ko-lin Chin, *Heijin* (2003) 171–172.

674 Ko-lin Chin, *Heijin* (2003) 197-201. See further Section 15.1 below.

675 Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 92; Ko-lin Chin, *Heijin* (2003) 204–209.

676 Yiu Kong Chu, "Global Triads: Myth or Reality?", in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 183 ay 187; Ko-lin Chin, *Heijin* (2003) 203–204, 209–210.

677 Ko-lin Chin, *Heijin* (2003) 5, 13–20; Sheldon Zhang & Ko-lin Chin, "The Declining Significance of Triad Societies in Transnational Illegal Activities" (2003) 43 *British Journal of Criminology* 469 at 481.

678 "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1020. See further, Ko-lin Chin, *Heijin* (2003) 84–157.

679 See further Section 10.3 below; cf "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1020–1021.

680 Ko-lin Chin, *Heijin* (2003) 11, 21-22.

United Bamboo gang (or 'Bamboo United'), the Four Seas group, and the Celestial Alliance have been identified as the three largest and most influential criminal organisations in Taiwan, all with strong links to mainland China, other parts of the region, and around the world.[681]

Criminal organisations in Taiwan are involved in a myriad of criminal activities commonly associated with organised crime such as illegal gambling, illegal prostitution, extortion, migrant smuggling, arms trafficking, and drug trafficking.[682] Furthermore, many organisations have infiltrated legitimate enterprises or have set up legal businesses to raise funds, conceal their criminal activities, or to launder the proceeds of their crime. Members of criminal organisation are known to be involved in the stock market, restaurants and nightclubs, and also in the tv, movie, and publishing industries.[683]

10.2 Criminal Code (Taiwan)

Taiwan's criminal law and criminal justice system is based for the most part on pre-Communist Chinese models. The criminal law is set out in the *Criminal Code* of 1935 which follows the system of continental European penal codes. The *Code* contains general provisions relating to attempts and complicity.[684] While Taiwan's *Criminal Code* does not provide any specific offences for conspiracy, Taiwanese courts have developed a doctrine of co-conspiracy which expands accessorial liability if it can be proven that a "conspirational agreement or task roles" among multiple offenders existed at the time of committing a criminal offence.[685]

Taiwan's *Criminal Code* contains one notable provision relating to criminal organisations in article 154. This provision stipulates:

> [1] A person who joins an organisation formed with the purpose of committing an offence shall be punished with imprisonment for not more than three years, detention, or a fine of not more that 500 yuan; a ringleader shall be punished with imprisonment for not less than one and not more than seven years.
>
> [2] A person who, having committed an offence specified in the preceding paragraph, voluntarily surrenders shall have his punishment reduced or remitted.

Article 154[1] creates an offence for persons who join criminal organisations and for those that lead and direct these organisations. The term criminal organisation is not itself defined; the article covers any organisation that has been formed for the purpose of committing criminal offences. The terms "joining" and "leading" are also not further defined in the *Criminal Code* (Taiwan).

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681 Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 89; Ko-lin Chin, *Heijin* (2003) 33–43, 178. See further Section 7.1.1 above.

682 Sheldon Zhang & Ko-lin Chin, "The Declining Significance of Triad Societies in Transnational Illegal Activities" (2003) 43 *British Journal of Criminology* 469 at 471; Ko-lin Chin, *Heijin* (2003) 46–59.

683 Sheldon Zhang & Ko-lin Chin, "The Declining Significance of Triad Societies in Transnational Illegal Activities" (2003) 43 *British Journal of Criminology* 469 at 471. See further, Ko-lin Chin, *Heijin* (2003) 63–83.

684 Articles 25–31 *Criminal Code* (Taiwan).

685 "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 2016–1027.

Under art 154[2] the *Criminal Code* offers leniency to those who cooperate with law enforcement agencies by surrendering voluntarily; their punishment may be reduced or dismissed altogether.

Although article 154 *Criminal Code* (Taiwan) appears to criminalise specifically membership in and leadership of criminal organisations, the offence has not found widespread application and some critics have argued that the *Criminal Code* is "insufficient to cope with organised crime".[686] More specifically, the penalties under art 154[1] have been regarded as too low, and there has been criticism that the article does not criminalise mere membership, and that the *Criminal Code* contains no provisions or sanctions relating to corporate criminal liability.[687]

10.3 Organised Crime Control Act 1996

In addition to the *Criminal Code*, Taiwan has had special anti-organised laws. In 1965, when Taiwan was under martial law, the Government introduced the *Anti-Gangster Act* (or *Anti-hoodlum Law*) as a special tool to suppress the operation of triads, other secret societies, and their members. The Act was amended in 1985 and again in 1992, after the transition to democratic rule. In 1995, Taiwan's Superior Court found that some provisions of the Act violated constitutional rights relating to freedom of association and due process, thus making some parts of this Act obsolete.[688]

Growing concern over an apparent escalation of organised crime and the influence of criminal organisations in judicial, legislative, and administrative circles led to the introduction of a new *Organised Crime Control Act* on December 11, 1996 (sometimes referred to as *Organised Crime Prevention Act 1996*). As mentioned earlier,[689] the Act was written and enacted within three weeks of a massacre in Taoyuan that was linked to organised crime.

The purpose of this Act is "to prevent organised criminal activities and maintain social order and protect the interest of the public", art 1. The measures under the Act were designed to focus specifically on five objectives: (1) aggravated punishment, (2) confiscation and seizure of criminal assets, (3) compulsory labor, (4) deprivation of the right to hold public office, and (5) the use of informers.[690] To that end, the Act stipulates a definition of criminal organisation (art 2) and sets out a suite of criminal offences and sentencing enhancers for persons involved in or otherwise supporting criminal organisations.[691] Further, the *Organised Crime Control Act 1996* includes special sanctions for persons liable under the Act[692] and contains some enhanced enforcement powers in relation to tracing and confiscation of property.[693]

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686 "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1020.

687 "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1023, 1027.

688 "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1020; Ko-lin Chin, *Heijin* (2003) 163.

689 See Section 10.1 above.

690 "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1023–1026.

691 Articles 4, 5, 8, 13, 14 *Organised Crime Control Act 1996* (Taiwan).

692 Articles 4, 5, 8, 13, 14 *Organised Crime Control Act 1996* (Taiwan).

693 Article 7 *Organised Crime Control Act 1996* (Taiwan). See further "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1024.

10.3.1. Definition of Criminal Organisation

Article 2 of the Act defines the term ‘criminal organisation’ as

> [a]n enterprise involved in racketeering, consisting of an internal management system of three or more persons, sharing a common purpose of committing criminal activities or inciting its member(s) to commit criminal activities, and is collective, habitual, and forcible or violent in nature.

The elements of this definition reflect in many ways the components used in other definitions of organised crime, combining structural elements with requirements relating to purpose and activity (see Figure 28 below).

Figure 28 Definition of “Criminal organisation”, art 2 *Organised Crime Control Act 1996* (Taiwan)

Terminology Elements	**Criminal organisation**
Structure	• Internal management system; • Three or more persons; • Collective, habitual, and forcible or violent in nature.
Activities	• Involved in racketeering;
Objectives	• Common purpose of • Committing criminal activities; or • Inciting its member(s) to commit criminal activities.

Article 2 *Organised Crime Control Act 1996* (Taiwan) requires a minimum number of three persons to constitute a criminal organisation. Among them, they need to maintain some internal management system or, in other words, a division of duties (a “hierarchical structure”[694]), thus eliminating random associations from the definition. Moreover, it is necessary that the group is “collective, habitual, and forcible or violent in nature” though it remains unclear whether these characteristics need to relate to actual activities of the organisation. It has been argued that street gangs are covered by these elements, but it is unclear whether they also extend to “corporations, associations, partnerships, societies, and labor unions”.[695]

The purpose of criminal organisations has to relate — exclusively or predominantly — to criminal activities;[696] it is not limited to specific criminal acts or to activities that are economic or violent in nature. This purpose may be directed at committing criminal activities or at inciting others to carry out criminal activities. The definition thus also captures situations in which a group of persons instructs individuals who are not members or not associated with the group to carry out criminal acts. Because the criminal purpose does not have to be the sole objective or the organisation, it is also possible to capture legitimate organisations (or their members) that engage in illicit activities. For example, it has been argued that a group of people “that are high-ranking employees of a legal construction corporation whose objective is to corruptly control and influence construction of public works” could fall within the definition under art 2.[697]

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694 “Taiwan: Introduction to the ‘Organized Crime Control Act’” (1997) 68 *International Review of Penal Law* 1019 at 1021.

695 “Taiwan: Introduction to the ‘Organized Crime Control Act’” (1997) 68 *International Review of Penal Law* 1019 at 1021.

696 “Taiwan: Introduction to the ‘Organized Crime Control Act’” (1997) 68 *International Review of Penal Law* 1019 at 1022.

697 “Taiwan: Introduction to the ‘Organized Crime Control Act’” (1997) 68 *International Review of Penal Law* 1019 at 1022.

Lastly, it is necessary that the organisation is involved in racketeering. From the definition it appears that the organisation must actually be engaged in this activity, mere planning will not suffice. There is, however, no further interpretation of the term racketeering and it is not clear what type and levels of evidence of intimidation, threats, violence, extortion, et cetera are required to proof the racketeering activity.

The definition in art 2 *Organised Crime Control Act 1996* reflects many familiar attributes of criminal organisations discussed in other parts of this study. There is some uncertainty about the interpretation of certain words, though this may be a result of translation difficulties rather than of conceptual faults. Significantly, the Taiwanese definition follows concepts of organised crime that are prevalent in other Western countries, such as Canada and New Zealand. It is remarkable that unlike its immediate neighbours Hong Kong and mainland China, Taiwan's organised crime law does not contain specific reference to triad societies. In comparison, the the *Organised Crime Control Act 1996* (Taiwanese) is able to capture a great variety of criminal groups from different cultural backgrounds. It is also not limited to organisation operating for financial and other material purposes.

10.3.2 Creating/controlling criminal organisations

The most serious offence under the *Organised Crime Control Act 1996* (Taiwan) is reserved for "instigators, principals, controllers, and commanders" criminal organisations, art 3[1] 1st alternative. It is an offence punishable by up to ten years imprisonment and a fine of no less TWD 100 million to establish or command a criminal organisation.

Article 3[2] stipulates that a higher penalty of no less than five years imprisonment and a fine of no less than TWD 200 million applies to repeat offenders, ie persons who have previously been sentenced or prosecuted for an offence under art 3[1].

In addition to any jail sentence, any person found guilty for an offence under art 3[1] is also required to perform compulsory labour "in a public service establishment" for a term of three years, or five years if the accused is a repeat offender, art 3[3]. The purpose of compulsory labour as an additional punishment has been described as a way

> to help the convicted person to a new mode of life by compulsory work. Further, by this provision, the Act aims to reform the convicted by improving their character and by allowing for rehabilitation by acquiring job or other legitimate skills to aid the legal functioning of the individual in society.[698]

Under art 4, the punishment shall be increased by "up to one half" if the offender (1) is a civil servant or elected official, or (2) has coerced or threatened other to participate or remain in a criminal organisation, or (3) has encouraged or assisted minors to participate in a criminal organisation.

The criminal sanctions under art 3 may be reduced or avoided altogether by cooperating with law enforcement agencies and severing ties with (or dissolving) the criminal organisation, art 8[1] *Organised Crime Control Act 1996* (Taiwan). The rationale of this provision is similar to that employed by Hong Kong's triad renunciation scheme[699] in that it seeks to encourage members of criminal groups to

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698 "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1025.

699 See Section 8.3 above.

come forward and collaborate with investigative authorities, assist in the prosecution of other members and directors, and, in return, avoid punishment.

10.3.3 Participating in a criminal organisation

The second alternative of art 3[1] *Organised Crime Control Act 1996* (Taiwan) makes it an offence to participate in a criminal organisation. The term participation is not further defined. The offence is punishable by imprisonment of no more than five years and a minimum fine of TWD 10 million.

While there is no express requirement of formal membership, the offence is generally seen as creating liability for membership in a criminal organisation. This has raised concerns about possible infringements of the freedom of association which is protected under Taiwan's Constitution.[700] Official government reports and explanations given by the Minister of Justice, however, state that:

> It is not mere association with others, but rather association with others for the purpose of committing a crime, where the association's existence was founded upon commission of crimes, that is prohibited. ... [T]he Act does not apply to employees in concerted activities for their mutual benefit and protection, or [to] the activities of labor organisations or their members or agents.[701]

Under art 3[2], repeat offenders who are found participating in a criminal organisation are liable to a penalty of at least TWD 20 million and imprisonment between one and seven years. Any person found guilty for an offence under art 3[1] is also required to perform compulsory labour "in a public service establishment" for a term of three years, or five years if the accused is a repeat offender, art 3[3]. Under art 4, the punishment shall be increased by "up to one half" if the offender (1) is a civil servant or elected official, or (2) has coerced or threatened other to participate or remain in a criminal organisation, or (3) has encouraged or assisted minors to participate in a criminal organisation.

10.3.4 Financing criminal organisations

Article 6 makes it a criminal offence to provide financial assistance to criminal organisations and their members. This offence is punishable by imprisonment of up to five years and a fine of no less that TWD 10 million.

The criminal sanctions under art 3 may be reduced or avoided altogether by cooperating with law enforcement agencies and severing ties with (or dissolving) the criminal organisation, art 8[1] *Organised Crime Control Act 1996* (Taiwan).

10.3.5 Offences for public officials

A special offence for civil servants and elected officials can be found in art 9 *Organised Crime Control Act 1996* (Taiwan) if they "provide cover" for a criminal organisation, knowing of its existence or operations. Persons liable under this article may face imprisonment of between five and twelve years.

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700 "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1028.

701 "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1029.

Article 4 also provides that public officials found establishing, directing, or participating in criminal organisations (art 3[1] and [2]) will face increased sentences.

10.3.6 Other provisions

In addition to the provisions outlined in the previous sections, Taiwan's *Organised Crime Control Act 1996* also provides a number of accessory penalties such as prohibiting offenders from registering for public office.[702]

The Act also includes several provisions relating to informers and witness protection. Article 10 stipulates a reward system for persons assisting with information that lead to the conviction of offenders. Articles 11 and 12 set out a range of measures to protect the identity of informers, witnesses, and victims of organised crime.

10.4 Remarks

Taiwan's *Organised Crime Control Act* is seen by many as a failure and reports published in Taiwan and by outside observers generally agree that the Act is not much more than a toothless statute. It has been observed that in 2001, after five years of operation, "only a few little-known crime groups had been indicted under the new provision, and most of them were either acquitted for lack of evidence or received lenient sentences."[703]

So far, the criticism has centred specifically on the absence of a permanent, specialised enforcement agency, the lack of powers to conduct undercover investigations, and the Act's "failure to create new conspiracy and accomplice doctrines, and regulate criminal activities by imposing criminal penalties on organisations."[704]

Other concerns have been expressed over the harsh punishment inflicted on persons convicted in relation to criminal organisations and their activities, including imprisonment, heavy fines, and forced labour. Moreover, rehabilitation and reintegration programs are rarely available, and many former members of criminal gangs are unable to ever lose the stigma associated with their punishment.[705] Police, prosecutorial and judicial authorities have also been accused of operating inefficiently, corruptly, and often targeting individuals or specific groups selectively and failing to engage in inter-departmental dialogue and cooperation.[706]

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[702] Articles 13, 14 *Organised Crime Control Act 1996* (Taiwan). See further, Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1025–1026.

[703] Ko-lin Chin, *Heijin* (2003) 179 with further references.

[704] "Taiwan: Introduction to the 'Organized Crime Control Act'" (1997) 68 *International Review of Penal Law* 1019 at 1030; Ko-lin Chin, *Heijin* (2003) 179–180.

[705] Ko-lin Chin, *Heijin* (2003)182–184.

[706] Ko-lin Chin, *Heijin* (2003) 185–188.

11 Singapore

11.1 Organised Crime in Singapore

[organised crime in Singapore]

11.2 Conspiracy Provisions

Singapore's domestic criminal law (like that of Malaysia and Brunei Darussalam)[707] is modelled after the Indian *Penal Code* which was first drafted by Lord Macaulay and subsequently introduced in a number of British colonies in the late 1800s. The Code reflects many English common law principles and codifies general principles of criminal liability and specific offences. The *Penal Code* (Singapore) also contains two provisions on "criminal conspiracies" in ss 120A and 120B.

Singapore signed the *Convention against Transnational Organised Crime* on December 13, 2000 and ratified it on August 28, 2007.[708] To comply with the obligation under the Convention, Singapore introduced specific legislation with the *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 2007*[709] to equip its law enforcement agencies with powers to freeze and seize the assets from organised criminal activity and corruption. The *Penal Code (Amendment) Act 2007* was passed on October 23, 2007, inter alia, to bring the conspiracy provisions in line with the Convention requirements.[710] In addition to these provisions, Singapore's *Societies Act 1967* contains offences for associations with so-called "unlawful societies", including triads.[711]

11.2.1 Criminal Conspiracy

Section 120A *Penal Code* (Singapore) defines the meaning of criminal conspiracy:

> (1) When two or more persons agree to do, or cause to be done —
> (a) an illegal act; or
> (b) an act, which is not illegal, by illegal means,
> such an agreement is designated a criminal conspiracy:
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.
>
> Explanation: It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.
>
> (2) A person may be a party to a criminal conspiracy notwithstanding the existence of facts of which he is unaware which make the commission of the illegal act, or the act which is not illegal, by illegal means, impossible.

This offence, which is similar to s 120A *Penal Code* (India), is loosely based on common law concepts of criminal conspiracies in that it targets an agreement

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707 See Chapters 12 and 13 below.

708 UNODC, *United Nations Convention against Transnational Organized Crime*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 15 Dec 2008).

709 Bill No 33 of 2007.

710 Bill No 38 of 2007.

711 See Section 11.3 below.

between two or more persons to do illegal acts or use illegal means to carry out legal acts.[712]

Physical elements

The principal physical element of s 120A is the agreement between two or more persons, a meeting of the minds. As long as the persons reach a mutual understanding about what is to be done, it is not necessary that they meet physically in person.[713] The agreement only needs to be reached in principle and not in detail.[714] It is also possible for a person to join the agreement at a later stage.[715]

The agreement may be aimed at the commission of an offence or may involve an illegal act (that is not an offence) or a legal act that is to be carried out by illegal means. If the agreement involves an offence, then proof of an overt act in furtherance of the agreement is not required. If the agreement involves doing other illegal acts or legal acts by illegal means, it is necessary that "some act besides the agreement is done by one or more parties to such agreement in pursuance thereof", s 120A(1).[716]

Fault element

The fault element of criminal conspiracy requires that any party to the agreement has the intention to carry out the agreement.[717]

The penalty for criminal conspiracies is the same as that for the offence that the conspirators agreed to undertake, s 120B(1) *Penal Code* (Singapore).

11.2.2. Abetment by conspiracy

In addition to ss 120A and 120B, Singapore's *Penal Code* has a separate provision relating to abetment in s 107. This provision includes the common law complicity concepts of aiding and abetting but also extends further to so-called "abetment by conspiracy" which stems from the *Penal Code* (India).[718] Section 107 is essentially a special variety of conspiracy in which a deliberate act or omission follows the conspiracy. In *Lim Teck Chye v Public Prosecutor* [2004] 2 SLR 525 the High Court of Singapore held that the elements of s 107 *Penal Code* include (at 530):

1. The abettor must engage in a conspiracy within the meaning of section 120A;
2. The conspiracy must be for the doing of the thing abetted; and
3. An act or illegal omission must take place in pursuance of the conspiracy.

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712 See Section 2.1.3 above.

713 Cf *Ang Ser Kuang v Public Prosecutor* [1998] 2 SLR 209.

714 Cf *Nomura Taiji & Ors v Public Prosecutor* [1998] 2 SLR 173 para 110.

715 *R v Chew Chong Jin* [1956] MLJ 185.

716 See further Stanley Yeo et al, *Criminal Law in Malaysia and Singapore* (2007) paras 34.54–34.60; Chan Wing Cheong et al, *Fundamental Principles of Criminal Law* (2005) 533–537.

717 See further Stanley Yeo et al, *Criminal Law in Malaysia and Singapore* (2007) paras 34.61–34.67; Chan Wing Cheong et al, *Fundamental Principles of Criminal Law* (2005) 537–541.

718 *Er Joo Nguang & Anor v Public Prosecutor* [2000] 2 SLR 645 at 656.

Liability under s 107 is dependent on an act or omission that follows the conspiracy; a mere agreement does not suffice. Accordingly, the provision does not criminalise persons that are not involved in the physical execution of the conspiracy.[719]

The penalty for offences under s 107 is determined by the offence so abetted unless the abetted offence has not actually been completed, s 109 *Penal Code* (Singapore). In practice, the introduction of s 120A made the offence of abetment by conspiracy largely redundant.[720]

11.2.3 Observations

The scope of Singapore's conspiracy provision is significantly broader than the criminal organisation offences found in other jurisdictions and also wider than the conspiracy model in art 5(1) of the *Convention against Transnational Organised Crime*. In particular, s 120A *Penal Code* makes no reference to any purpose of the conspiracy, such as the gaining or obtaining of a financial or other material benefit. The section thus has a much wider application while also maintaining the ability to capture conspiracies envisaged by the *Palermo Convention*. While art 5(1)(a)(i) of the *Convention against Transnational Organised Crime* permits a construction by a State Party that does not refer to organised crime groups, Singapore's conspiracy laws does not bring into focus and deal with the seriousness of organised crime.

Stanley Yeo et al expressed concern that s 120A

> goes beyond the other inchoate offences of attempt and abetment where the result aimed at must be an offence. [...] [L]iability for criminal conspiracy attaches at a very early stage — no acts of preparation need to take place in pursuance of the criminal conspiracy in the case of an agreement to commit an offence. [...] [T]he potential for abuse of the law by the State is great.[721]

Yeo et al also question how much or how little a person must know about the objective of the agreement to be criminally liable for criminal conspiracy:

> For example, a person who goes to a store to buy a knife states that he wants to purchase a really sharp knife to kill his unfaithful wife. The store-keeper agrees to sell him the sharp knife even though he knows its intended use but does not really care whether the crime is committed. Is the store-keeper liable for criminal conspiracy to commit murder?[722]

These concerns reflect observations made by the Law Commission of India in 1971 in relation to the identical provision in the Indian *Penal Code*:

> One is struck by the wide sweep of the definition of criminal conspiracy in section 120A. [...]
>
> The stage at which a person becomes liable to be punished for a criminal conspiracy is much earlier that the stage when an attempt to commit an offence becomes punishable under the *[Penal] Code.* A mere agreement to commit an offence is enough. No physical act need take place. No consummation of the crime need be achieved or even attempted. In fact, even preparation, in the sense of devising and arranging means for the commission of the offence is not required. In this sense, conspiracy is an incomplete or inchoate crime. And when one considers a conspiracy to commit an illegal act which is

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719 See further Secttion 2.1.3 above, and Stanley Yeo et al, *Criminal Law in Malaysia and Singapore* (2007) paras 34.13–34.17.

720 Stanley Yeo et al, *Criminal Law in Malaysia and Singapore* (2007) para 34.50.

721 Stanley Yeo et al, *Criminal Law in Malaysia and Singapore* (2007) para 34.52.

722 Stanley Yeo et al, *Criminal Law in Malaysia and Singapore* (2007) para 34.67.

not a crime, it is not even classifiable as an inchoate crime. The question arises whether it is proper for the law to intervene and use criminal sanctions at such an early stage.[723]

11.3 Societies Act

In addition to the conspiracy provisions in the *Penal Code*, Singapore's *Societies Act 1967*[724] contains a range of criminal offences that apply to persons associated with triads and "unlawful societies". Similar to the *Societies Ordinance* in Hong Kong,[725] the Act creates a registration system for all societies in Singapore and criminalises the creating, directing, membership and participation in, and other association with societies that are not registered.

11.3.1 Meaning of Societies

Section 2 *Societies Act 1967* (Singapore) defines societies as "any club, company, partnership or association of 10 or more persons, whatever its nature or object". The Act does not apply to various forms of corporate entities, partnerships and associations registered under other laws in Singapore, trade unions, and some educational and school committees.[726]

The Act requires that all societies meeting the criteria set out in s 2 apply for registration to the Registrar or Assistant Registrars of Societies that are appointed by the designated Minister, ss 3, 4(1) *Societies Act 1967* (Singapore). Registration of 'specified societies'[727] must be refused, inter alia, if the registrars are satisfied that "the specified society is likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare or good order in Singapore," or if "it would be contrary to the national interest for the specified society to be registered", s 4(2)(b), (d). Accordingly, (to state the obvious) criminal organisations cannot be registered.

Under s 14(1) *Societies Act 1967* (Singapore), every society that is not registered (but meets the other criteria of the definition in s 2) is deemed to be an unlawful society. Societies operating completely outside Singapore with no presence in the country are not unlawful. Furthermore, under s 23(1) any society using "triad rituals" is deemed to be an unlawful society.

11.3.2 Criminal Offences for Unlawful Societies and Triads

Sections 14-18 *Societies Act 1967* (Singapore) create a range of criminal offences relating to unlawful societies in addition to a special offences for triads in s 23 (see Figure 29 below). The term 'triad' is not further defined in the statute. For charges to be laid, it is necessary to obtain the prior approval of the Registrar or an Assistant Registrar.[728] Any property belonging to unlawful societies may be seized and forfeited.[729]

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723 Cited in Chan Wing Cheong et al, *Fundamental Principles of Criminal Law* (2005) 532.
724 Chapter 311.
725 See Section 8.3 above.
726 Section 2(a)–(g) *Societies Act 1967* (Singapore).
727 Schedule B *Societies Act 1967* (Singapore).
728 Section 30(1) *Societies Act 1967* (Singapore).
729 Section 32 *Societies Act 1967* (Singapore)

Figure 29 Offences and penalties under the *Societies Act 1967* (Singapore)

Section	Offence	Penalty
S 14(2)	Managing/assisting in managing unlawful societies	5 years
S 14(3)	Membership in/attending meetings of unlawful societies	3 years | SGD 5,000
S 15(1)	Allowing assembly in premises	3 years | SGD 5,000
S 16(1) **S 16(2)**	Inciting, inducing, inviting another to become a member Using violence, threats etc to induce another	3 years | SGD 5,000 4 years | SGD 5,000
S 17	Procuring aid or subscription for unlawful society	2 years | SGD 5,000
S 18	Publishing, displaying etc documents of/for unlawful society	2 years | SGD 5,000
S 23(2)	Possessing books, accounts, etc relating to triads	3 years | SGD 5,000

Presumptions

Section 21 sets out a number of presumptions to assist the prosecution to establish the existence of a society for the purposes of these offences. Practically, these presumptions reverse the onus of proof and charge the defendant with the task to establish that the group was not a society. Specifically, s 21(1) *Societies Act 1967* (Singapore) states:

> In any prosecution for an offence under this Act where it is proved that a club, company, partnership or association exists —
> (a) it shall be presumed, until the contrary is proved, that the club, company, partnership or association is a society within the meaning of this Act;
> (b) it shall not be necessary to prove that the society possesses a name or that it has been constituted or is usually known under a particular name; and
> (c) it shall be presumed until the contrary is proved that it consists of and has at all material times consisted of 10 or more persons.

In essence, these presumptions make any group of people a society, unless the contrary is proven. Of particular importance is the fact that for the offences under the *Societies Act 1967* (Singapore) the prosecution need not prove that the group had ten or more members.

Managing an unlawful society

The highest penalties for persons associated with unlawful societies are reserved for managers of an unlawful society and any person assisting in their management. Section 14(2) provides a penalty of up to five years imprisonment for this offence. Under s 22(2) persons in possession of books, accounts, lists of members or seals of or relating to any society are presumed to be assisting in the management of that society.

Membership

Under s 14(3) *Societies Act 1967* (Singapore), it is an offence to be a member of an unlawful society and to attend meetings of unlawful societies. Section 22(1) contains a rebuttable presumption that any person in possession of “any books, accounts, writings, seals, banners or insignia of or relating to or purporting to relate to any society” is a member.

Recruiting

It is an offence, to "incite, induce or invite another person" to become a member or assist in the management of an unlawful society, s 16(1). This offence is aggravated if the recruiter "uses any violence, threat or intimidation" towards the other person, s 16(2).

Providing premises

Any person allowing meetings of an unlawful society or its members on premises owned by him/her or under his/her control is liable for the offence under s 15(1).

Promoting and aiding unlawful societies

Section 17 provides an offence for procuring from another person any subscription or aid for the purposes of an unlawful society. It is an offence under s 18 to print, publish, display, sell, or transmit any document or writing which is or appears to be issued by or on behalf of an unlawful society.

Offences relating to triads

Under s 23(2) *Societies Act 1967* (Singapore) it is an offence to be "in possession of or having the custody or control of any books, accounts, writings, seals, banners or insignia of or relating to any triad society or branch of a triad society". For this offence, it does not matter "whether the society or branch is established in Singapore or not".

11.3.3 Remarks

The *Societies Act 1967* of Singapore is designed to prevent and suppress the formation and operation of unlawful societies. Unlike similar laws in Hong Kong, the Act does not specifically mention criminal organisations; it applies to all unregistered societies regardless of their purpose. The Act bans the possession of certain triad-related material, but it does not create separate offences and does not provide higher penalties if the unlawful society is a triad or some other kind of criminal organisation.

In the absence of further documentation, it is not possible to explore how commonly the *Societies Act* offences are used against criminal organisations and their associates and to comment on the effectiveness of these laws.

12 Malaysia

12.1 Organised crime in Malaysia

Organised crime in Malaysia is a phenomenon poorly documented and not well researched. The literature and open-source information on organised crime in Malaysia is extremely limited, especially in comparison to most other jurisdictions explored in this report. For the most part, organised crime in Malaysia is most frequently associated with piracy in the Malakka Strait and elsewhere in Southeast Asian waters,[730] though most piratical attacks in the region are opportunistic and not part of systematic, organised criminal enterprises.[731] There are also some reports linking the illicit trafficking in timber in Malaysia to criminal elements, including criminal organisations.[732]

There is, to date, no systematic analysis of the levels and patterns of organised crime in Malaysia and no examination of the criminal organisations active in this country. For the most part, Malaysian scholars and government agencies have regarded organised crime as criminal activities linked with minority ethnic groups, including, in particular, Chinese and Indian communities and other new immigrant groups in Malaysia.[733] While there have been some reports linking political corruption and nepotism to criminal groups,[734] there is to this day no comprehensive report on the manifestations of organised crime and the activities of criminal organisations.

12.2 Criminal conspiracy laws

Malaysia's criminal law is in many ways identical to that of Singapore as its *Penal Code* is also based on the old *Penal Code* of India that was introduced into the British colonies in the late 1800s.

Malaysia signed the *Convention against Transnational Organised Crime* on September 26, 2002 and ratified it on September 24, 2004.[735] Like Singapore, Malaysia's domestic adoption of the treaty obligations can be found in the provisions relating to criminal conspiracies, ss 120A and 120B *Penal Code*[736] which were

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730 For recent publication on piracy in Malaysia and Southeast Asia, see, for example,; Derek Johnson & Mark Valencia, *Piracy in Southeast Asia: status, issues, and responses* (2005); Adam J Young, *Contemporary Maritime Piracy in Southeast Asia: history, causes, and remedies* (2007); C Liss, "Maritime Piracy in Southeast Asia" (2003) *Southeast Asian Affairs* 52; D M Ong, "Contemporary Maritime Piracy in Southeast Asia" (2007) 22 *International Journal of Marine and Coastal Law* 633.

731 Stefan Eklöf, *Pirates in Paradise: A Modern History of Southeast Asia's Maritime Marauders* (2006) 44–51.

732 Andreas Schloenhardt, *The Illegal Trade in Timber and Timber Products in the Asia Pacific Region* (2008) 59.

733 Teh Yik Koon, "Redefining Organised Crime in Malaysia", paper presented at the symposium, *Organised Crime in Asia: Governance and Accountability*, Brisbane, June 2007, 276 at 279.

734 Teh Yik Koon, "Redefining Organised Crime in Malaysia", paper presented at the symposium, *Organised Crime in Asia: Governance and Accountability*, Brisbane, June 2007, 276 at 279-285.

735 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed July 7, 2008).

736 Act No 574.

originally introduced on December 18, 1948.[737] No amendments to these provisions were made following Malaysia's accession to the *Palermo Convention*.

The definition of criminal conspiracy in s 120A(1) and (2) *Penal Code* (Malaysia) is identical to the same definition in Singapore's *Penal Code*:[738]

> When two or more persons agree to do, or cause to be done-
> (a) an illegal act; or
> (b) an act, which is not illegal, by illegal means,
> such an agreement is designated a criminal conspiracy.
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.
>
> Explanation: It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object

Section 120B determines the penalty for criminal conspiracies:

> (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
> (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment for a term not exceeding six months, or with fine, or with both.

Malaysia has no special provisions relating to participation in criminal organisations. No further information is available about the number of prosecution against criminal organisations and the application and use of ss 120A, 120B in relation to organised crime.

12.3 Societies Act 1966

Malaysia's *Societies Act 1966* follows the same principles as similar legislation in Singapore and Hong Kong,[739] though Malaysia's laws are less elaborate. The Act establishes a national registration system for all societies in Malaysia, bans unlawful societies, and prohibits membership in and support of unlawful societies.

Under s 41(1) *Societies Act 1966* (Malaysia), any society that is not registered, that has been declared unlawful by the Minister, or that had its registration cancelled is an unlawful society. Any branches of an unlawful society are also unlawful, s 41(2).

Section 43 criminalises support of and associations with unlawful societies, including:

- Being a member of an unlawful society;
- Attending a meeting of an unlawful society; and
- Paying money or giving any aid to or for the purposes of an unlawful society.

Offences under s 43 are punishable by imprisonment of up to three years and/or a fine not exceeding MYR 5,000.

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737 F.M. Ord 32/1948.
738 See Section 11.1 above.
739 See Sections 8.3 and 11.3 above.

13 Brunei Darussalam

According to Government officials, organised crime in Brunei Darussalam (Brunei) is extremely limited if not non-existent. Activities such as drug trafficking, trafficking in persons, and illegal gambling are frequently attributed to migrant workers in Brunei.[740] The small geographical size of Brunei and its unique demographic and socio-economic make up may indeed support the view that organised crime is not widespread in this country,[741] but there has been no systematic analysis of organised crime and the activities of criminal organisations in Brunei to make any conclusive statements.

Brunei Darussalam acceded to the *Convention against Transnational Organised Crime* as recently as March 25, 2008.[742] Brunei's *Penal Code* of 1951 is largely identical to that of Malaysia and Singapore. An offence for criminal conspiracies can be found in ss 120A and 120B.[743] The wording of these provisions is identical to ss 120A, 120B of the Malaysian *Penal Code*, however, the punishment under s 120B(2) is somewhat higher:

> (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punishable with for 10 years and with fine.

Furthermore, Brunei has a *Societies Order 2005* which replaced the former *Societies Act* of 1948. It is assumed that this Order contains criminal provisions relating to membership, other associations with and support of unlawful societies. However, the full text of the legislation is currently not accessible outside Brunei.

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740 Personal communication with members of the Royal Brunei Police Force, Singapore, April 22, 2008.

741 Cf Ernesto Savona et al, *Organised Crime across the Borders* (1995) 23.

742 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 15 Dec 2008).

743 See Sections 11.2 and 12.2 above.

14 Philippines

14.1 Patterns of Organised Crime in the Philippines

Its geographical location and archipelagic coastline make the Philippines particularly vulnerable to the smuggling of contraband and the trafficking of people. Comprehensive enforcement of the long maritime borders is very difficult and explains the relatively high incidence of crimes such as piracy, firearms smuggling, and drug trafficking. There are to date very few systematic reports on the levels of organised crime. The main source of information is the Philippine Center on Transnational Crime which was established by the Government to conduct and disseminate research on this phenomenon.

Much of the available documentation crystallise drug trafficking and trafficking in persons as the chief organised crime problems in the Philippines.[744] For example, the UN Office on Drugs and Crime, citing the Philippines Dangerous Drugs Board, recently reported that in 2007, eight transnational drug trafficking groups were operating in the Philippines, often in concert with one or more of the 249 reported domestic groups.[745] In 2000, it was estimated that 143,611 Filipina women had left the country and ended up working in slavery-like conditions abroad.[746] The smuggling of firearms and other contraband have also been described as "rampant". According to other research papers published by the Center, drug trafficking, motor vehicle theft, illegal gambling, prostitution, piracy of software and other intellectual property, and also robbery, kidnappings for ransom, are the crimes most commonly connected to organised crime groups in the Philippines. The available reports also argue that some criminal organisations are closely connected to separatist and terrorist organisations in the southern parts of the Philippines.[747] This is also manifested in the piracy that occurs in the Southern Philippines. Many of the attacks on ships in the region are carried out by highly armed and sophisticated groups that are associated with the Moro Islamic Liberation Front or the Abu Sayyaf group.[748]

Information about the types and size of criminal organisations is not always consistent. In 2003, the Philippine Center on Transnational Crime found that criminal organisations have only surfaced recently in the Philippines and are not as embedded in society in the same way as they are, for example, in neighbouring Taiwan, Hong Kong, and mainland China.[749] Another paper released by the Center in the same year, however, identified "83 big time drug syndicates operating in the

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744 See generally, James Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime* (2007) 9–10.

745 UNODC, *Amphetamines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 43.

746 Philippine Center on Transnational Crime, "Technical Issues in Regional and Global Cooperation against Organized Crime", paper presented at the *Asia Pacific Ministerial Seminar on 'Building Capacities for Fighting Transnational Organized Crime'*, 20-21 Mar 2000, Bangkok, available at www.pctc.gov.ph/updates/techissu.htm (accessed 11 May 2008).

747 Philippine Center on Transnational Crime, "Organized Crime in the Philippines", paper presented in Tokyo, 27-90 Jan 2003, available at www.pctc.gov.ph/updates/octip.htm (accessed 8 May 2008); cf Ernesto Savona et al, *Organised Crime across the Borders* (1995) 24.

748 Stefan Eklöf, *Pirates in Paradise: A Modern History of Southeast Asia's Maritime Marauders* (2006) 35–44.

749 Philippine Center on Transnational Crime, "Organized Crime in the Philippines", paper presented in Tokyo, 27-90 Jan 2003, available at www.pctc.gov.ph/updates/octip.htm (accessed 8 May 2008).

country with a membership of approximately 560,000 drug pushers". The same report found that transnational crimes in the Philippines "are mainly enterprise crimes perpetrated by transnational organised syndicates that maintain entrepreneurial and opportunistic temporary alliances."[750] In the 2003 report, the Philippine Center on Transnational Crime identified the so-called Pentagon Group as one of the largest criminal organisations in the country. The group is estimated to have about 168 members that frequently engage in kidnappings for ransom and are closely associated with the separatist Moro Islamic Liberation Front in Mindanao. The Franciso Group, named after its leader Mr Manuel Francisco, is a group of 66 armed men that engage in motor vehicle theft, drug trafficking, and robberies throughout the country. The Lexu Group is another known motor vehicle theft gang in the northern Philippines, and the Rex 'Wacky' Salud Group has been associated with illegal gambling in Cebu.[751] There are also several reports linking Japanese criminal organisations to the Philippines, especially in relation to sex trafficking, small arms, and the illicit amphetamine trade.[752]

14.2 Racketeer Influenced and Corrupt Organisation Laws

Philippine criminal law currently has no specific offences relating to organised crime, although the country signed and ratified the *Convention against Transnational Organised Crime*.[753] The *Penal Code* contains a general provision relating to conspiracy in art 8. An analysis of organised crime under Philippine laws released in January 2003 confirmed:

> There is, however, no law that defines organised crime. Organised crime, therefore, is not regarded as a crime per se, likewise, an individual can not be regarded as a criminal by mere association with an OCG [organised crime group].[754]

For nearly a decade, the Philippines has discussed the introduction of a *Racketeer-Influenced and Corrupt Organisations (RICO) Act* modelled after the US legislation with the same name.[755] Since about 1998 there have been a series of Bills before the Philippines' House of Parliament designed

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750 Philippine Center on Transnational Crime, "Technical Issues in Regional and Global Cooperation against Organized Crime", paper presented at the *Asia Pacific Ministerial Seminar on 'Building Capacities for Fighting Transnational Organized Crime'*, 20-21 Mar 2000, Bangkok, available at www.pctc.gov.ph/updates/techissu.htm (accessed 11 May 2008).

751 Philippine Center on Transnational Crime, "Organized Crime in the Philippines", paper presented in Tokyo, 27-90 Jan 2003, available at www.pctc.gov.ph/updates/octip.htm (accessed 8 May 2008).

752 David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 252–255; Ernesto Savona et al, *Organised Crime across the Borders* (1995) 11. See further Section 18.1 below.

753 The Philippines signed the *Palermo Convention* on December 14, 2000 and ratified it on May 28, 2002; UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed July 28, 2008).

754 Philippine Center on Transnational Crime, "Organized Crime in the Philippines", paper presented in Tokyo, 27-90 Jan 2003, available at www.pctc.gov.ph/updates/octip.htm (accessed 8 May 2008).

755 See Chapter 20 below.

> to curb organised and sophisticated crimes and the laundering of the proceeds of these crimes into legitimate business and activities by depriving the criminals of the opportunity to enjoy the proceeds of their wrongdoings.[756]

The legislative history and the background of these Bills are not well documented and there is no further update since the most recent proposal for such a bill in April 2008. Based on information provided by the Philippines' Parliament, there have been approximately six or more proposals for a *Racketeer Influenced and Corrupt Organizations (RICO) Act* in recent years and it is understood that these bills were referred to various parliamentary committees for further consideration.

The bills are largely identical,[757] containing extensive provisions directed at the activities of criminal organisations,[758] powers to order the forfeiture and seizure of assets[759] and regulate the restitution of property and compensation of victims of organised crime.[760] The following sections examine the core offences included in the *RICO* bills.

14.2.1 Participation offence

Section 5(1) of the *RICO* bill proposes the introduction of an offence for

> knowingly participating, either directly or indirectly, with or in an enterprise conducting a pattern of racketeering activity.

Figure 30 Elements proposed s 5(1) *Racketeer Influenced and Corrupt Organisations (RICO) Bill* (Philippines)

s 5(1)	Elements of the offence

Physical elements	• participation;
	• enterprise
	• [enterprise] conducting a pattern of racketeering activity
	  ○ Pattern, s 4(d)
	  ○ Racketeering activity, s 4(c)

Mental element	• knowledge
Penalty, s 6	• imprisonment of no less than ten and no more than 20 years; if guilty of a racketeering activity that attracts the death penalty of life imprisonment: • life imprisonment, death, or a fine between 100,000 and 1,000,000 pesos.

Participation

The offence in s 5(1) combines the conduct element of "participation" with the mental element of "knowledge" thus limiting the application of the offence to deliberate

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756 Section 2 *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

757 The following analysis is based on the *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines), reprinted in UNICRI & AIC: *Rapid Assessment: Human Smuggling and Trafficking from the Philippines*, Vienna UNODCCP, November 1999, 82-88 [inconsistent page-numbering]. The text of this bill is identical, for example, to House Bill No 9, *An Act Curtailing the Illegal Activities of Racketeers and Powerful Syndicates in the Philippines*, introduced by Mario mark Jimenez B Cresbo, Twelfth Congress [undated copy held with author]

758 Sections 5, 4(c) *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

759 Sections 7, 9, 13-14 *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

760 Sections 15, 17 *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

and/or conscious undertakings. The term participation is not further defined in the bill but it is understood that the term carries the same meaning as in art 19 *Penal Code* (Philippines) which sets out the general principals of accessorial liability.[761]

Enterprise conducting a pattern of racketeering activity

In the Philippines' offence, the criminal organisation is referred to as an "enterprise conducting a pattern of racketeering activity" thus mirroring the terminology used in the US *RICO Act*. The term 'enterprise' is broadly defined in s 4(b) *Racketeer Influenced and Corrupt Organisations (RICO) Bill* as any formal or informal association of people. This may include, for instance, businesses and corporations as well as any other group of individuals. There is no requirement of any hierarchy, structure, or agreement between the associates and s 4(c) specifically states that it does not matter whether the group has juridical personality.

The enterprise has to be engaged in a 'pattern of racketeering activity'. Under s 4(c) *Racketeer Influenced and Corrupt Organisations (RICO) Bill* racketeering activity simply refers to a long list featuring several hundred offences under the *Penal Code* of the Philippines and several other penal laws relating, for example, to corruption, firearms, illegal gambling, fencing, illegal logging, illegal fishing, illicit drugs, fraud, immigration offences et cetera. The list of specific offences and statutes set out in s 4(c) covers a remarkable spectrum of illicit activity ranging from offences typically associated with organised crime to crimes such as "economic exploitation of the disabled and mendicants." Racketeering may also refer to offences relating to corruption and to offences frequently referred to as white-collar crime, such as bank and insurance fraud and falsification of securities.

The racketeering activity becomes a "pattern" if it is carried our twice or more over a ten year period, s 4(d).

14.2.2 Proceeds of crime and money laundering offences

Section 5 proposes the introduction of two other offences relating to the proceeds of organised crime and to money laundering. Under s 5(2) *Racketeer Influenced and Corrupt Organisations (RICO) Bill* it is an offence to receive, hide, or conceal any money or property that was acquired through/from a pattern of racketeering activity. Section 5(3) criminalises the use or investment of proceeds of racketeering activities.

A further offence for acquiring or maintaining any interest in or control of a business enterprise through a pattern of racketeering activity is proposed in s 5(4). The penalty for these offences is the same as for participation, see proposed s 6.

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761 Article 19 *Penal Code* (Philippines): Accessories are those who, having knowledge of the commission of the crime, and without having participated therein, either as principals or accomplices, take part subsequent to its commission in any of the following manners:
1. By profiting themselves or assisting the offender to profit by the effects of the crime.
2. By concealing or destroying the body of the crime, or the effects or instruments thereof, in order to prevent its discovery.
3. By harbouring, concealing, or assisting in the escape of the principals of the crime, provided the accessory acts with abuse of his public functions or whenever the author of the crime is guilty of treason, parricide, murder, or an attempt to take the life of the Chief Executive, or is known to be habitually guilty of some other crime.

14.2.3 Observations

The *Racketeer Influenced and Corrupt Organisations (RICO) Bill* of the Philippines is a peculiar type of organised crime law that departs considerably from the model of the *Convention against Transnational Organised Crime* and from legislation elsewhere in the region.

At the heart of the proposed Act is the criminalisation of participation in criminal groups and the laundering and obtaining of proceeds of crime. The participation offence is based on a very loose concept of criminal groups. It includes any kind of association that engages in certain criminal offences twice or more over a ten year period. There are no limitations as to the type of organisation and their structure or purpose. The offence does require proof that the group conducts certain criminal offences. Consequently, the proposed section does not introduce a truly new offence which creates liability for conduct not already prohibited and punishable. In essence, s 5(1) may operate as a sentence-enhancer for persons also liable under the principal offence and alternatively the offence may capture persons participating more loosely in the group who would not be criminally liable otherwise.

In the absence of a final draft of this bill it is difficult to make conclusive observations about the proposed legislation. Its main advantage is possibly the provisions relating to proceeds of crime and money laundering. The bill has low potential, however, for flexible responses to new forms of organised crime, as the Act is not based on any definition of organised crime. Instead it uses a concept of “racketeering activity” which is defined by enumerating nearly one hundred offences that are criminalised in the *Penal Code* or under other acts. Many of the offences listed here are not or not directly linked to organised crime.

15 Vietnam

15.1 Organised Crime

15.1.1 Organised crime in Vietnam

In Vietnam, organised crime mostly involves narcotrafficking and trafficking in persons. There are also some reports about the laundering of proceeds of drug crime in the country. Porous land borders, a long coastline, inadequate enforcement capacities, and corruption at many levels of society make Vietnam an easy target for the smuggling of contraband and contribute to the levels of organised crime in the country. According to a UNODC *Country Profile* published in 2005 "[t]ransnational organised crimes account for 2-10 per cent of total criminal cases countrywide."[762]

For some time, Vietnam has been an important transit point for illicit drugs. The country's geographical proximity to some of the main producers of illicit opium in the region, such as Myanmar, Lao PDR, and other parts of the Golden Triangle, explain why large quantities of opium and heroin are smuggled through the country. In recent years, there have also been frequent detections of ATS and ATS-precursors in Vietnam.[763]

The problem of human trafficking in Vietnam is often distinguished between trafficking in (adult) women and trafficking in children. Women are said to be trafficked mostly to brothels or for other sex work into neighbouring countries such as China and Cambodia. The networks involved in this trade are often made up of women who are themselves former victims of trafficking.[764] Over seventy percent of trafficking victims from Vietnam are under the age of twenty and many cases involve children and infants who are either trafficked for sexual purposes or are the victims of illegal adoption arrangements.[765]

15.1.2 Vietnamese organised crime abroad

Ethnic Vietnamese gangs have gained some notoriety in many Western countries, especially in the United States, Canada, and Australia. These groups first formed after the refugee exodus that followed the fall of Saigon on April 30, 1975 and the subsequent resettlement of Indochinese refugees to many countries around the world. Vietnamese enclaves emerged in most of the large cities in North America and Australia and in some Southeast Asian countries. Within those communities, small ethnic groups formed which initially only engaged in protection and extortion activities within their own communities.

The war between China and Vietnam that started in 1978 brought with it a new wave of refugees from Vietnam which was mostly of ethnic Chinese background. As these new settlers took up residence elsewhere, conflicts between native Vietnamese and Chinese Vietnamese gangs began which often resulted in violent clashes.[766]

Vietnamese criminal organisations in the United States have mostly been described as comparatively small, localised networks brought together by family ties. While the

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762 UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 10, citing official Vietnamese sources.

763 UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 8, 23–24.

764 UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 27.

765 UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 28.

766 John Huey-Long Song & John Dombrink, "Asian Emerging Crime Groups: Examining the Definition of Organized Crime" (1994) 19(2) *Criminal Justice Review* 228 at 238–239.

size of individual groups may be small, there is significant networking among the Vietnamese diaspora and between Vietnamese gangs in different cities and different countries around the world. In the US, Vietnamese gangs are most frequently known for extortion an protection, home invasion robberies, and motor vehicle theft,[767] while in Canada and Australia, Vietnamese groups are often associated with large scale cannabis cultivation and distribution.[768]

15.2 Organised Crime in Vietnam's Criminal Law

Vietnam has signed the *Convention against Transnational Organised Crime* on December 13, 2000, but has yet to implement the Convention into domestic law.[769] In 2005, the UNODC Country Office in Hanoi reported that:

> The Ministry of Justice has conducted preliminary studies on the compatibility of national legislation with the TOC [*Transnational Organised Crime Convention*] and has detected gaps in particular with regard to international cooperation on law enforcement and legal matters including mutual legal assistance and extradition.[770]

This report was followed by a comprehensive *Assessment of the Legal System in Viet Nam in Comparison with the United Nations Convention against Transnational Organised Crime* conducted by the Department of Criminal and Administrative Laws of the Ministry of Justice in cooperation with UNODC in 2006.[771]

Vietnam's criminal law currently only fragmentarily creates criminal liability for involvement in criminal organisations. Article 79 *Penal Code 2000* (Vietnam) contains a specific offence relating to groups formed for the purpose of overthrowing the people's administration, though this provision does not focus on organised crime.

Article 20 *Penal Code 2000* (Vietnam) is the principal provision relating to complicity. Subsection 20(2) extends accessorial liability to all "organisers, executors, instigators, and helpers" and further defines these roles as follows:

- The executors are those who actually carry out the crimes.
- The organisers are those who mastermind, lead, and direct the execution of crimes.
- The instigators are those who incite, induce, and encourage other persons to commit crimes.
- The helpers are those who create spiritual or material conditions for the commission of crimes.

The effect of this provision is that conspirators and other "organisers" who plan criminal offences can be held liable for the principal offence even if they have no physical involvement in the execution of the crime. It also extends liability to "helpers" who support and facilitate criminal offences. In addition, subsection 20(3)

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767 John Huey-Long Song & John Dombrink, "Asian Emerging Crime Groups: Examining the Definition of Organized Crime" (1994) 19(2) *Criminal Justice Review* 228 at 239.

768 Personal communication with State Drug Command, Queensland Police Service, Brisbane, July 7, 2006; RCMP-GRC, Ottawa (Ont), July 30, 2008.

769 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 29 Aug 2008).

770 UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 32–33.

771 UNODC & Vietnam, Ministry of Justice, Department of Criminal and Administrative Laws, *Assessment of the Legal System in Viet Nam in Comparison with the United Nations Convention against Transnational Organised Crime* (c2006).

"stipulates a high-level form of complicity"[772] by stating that "the organised commission of a crime is a form of complicity with close collusion among persons who jointly commit the crime". This, however, does not extend liability, for instance, to participants in and associates of criminal organisations. The 2006 Assessment noted that:

> This complicity provision can be applied to punish a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crime in question, takes an active part in any criminal activity of the organised criminal group in the knowledge that his or her participation will contribute to the achievement of the […] criminal aim.[773]

The complicity provision, however, does not create liability for conspiracy based on an agreement. Moreover, neither art 20 nor any other part of the *Penal Code* contains any reference to criminal groups. The 2006 Assessment also noted that the existing law

> does not satisfy the Convention requirement to criminalise the participation in an organised criminal group, as it does not contain a provision to establish a distinct principal offence of either conspiracy or participating in an organised criminal group […]. In order to fulfil this requirement, a separate provision establishing a basic and principal offence that would cover either the first option of in article 5, paragraph 1(a) or the second, should be inserted to the *Penal Code*. In addition, if the second option is selected (taking part in an organised criminal group), there should be an inclusion in the legislation of a definition of the term 'organised criminal group' in accordance with article 2(a) of the Convention.[774]

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772 UNODC & Vietnam, Ministry of Justice, Department of Criminal and Administrative Laws, *Assessment of the Legal System in Viet Nam in Comparison with the United Nations Convention against Transnational Organised Crime* (c2006) 16.

773 UNODC & Vietnam, Ministry of Justice, Department of Criminal and Administrative Laws, *Assessment of the Legal System in Viet Nam in Comparison with the United Nations Convention against Transnational Organised Crime* (c2006) 16.

774 UNODC & Vietnam, Ministry of Justice, Department of Criminal and Administrative Laws, *Assessment of the Legal System in Viet Nam in Comparison with the United Nations Convention against Transnational Organised Crime* (c2006) 16. The relevant Convention provisions are discussed in Section 3.3 above.

16 Cambodia

[to be completed]

17 Lao PDR

[to be completed]

18 Japan

18.1 Yakuza & Boryokudan: Organised Crime in Japan

Organised crime in Japan is frequently associated with the yakuza (ヤクザ or やくざ), the name for criminal syndicates that have evolved in Japanese society over the last 400 years. The word yakuza refers to a traditional cardgame and means as much as 'worthless'. In Japan, the term is used to refer to individual members of criminal organisations while law enforcement agencies prefer the term boryokudan (暴力団, or violence groups) to refer to the groups themselves.[775]

Historically, boryokudan was a group of outsiders including people involved in gambling, low-level crime, or protection rackets.[776] Beginning in the 1800s, boryokudan gradually began to get involved in more sophisticated and organised crime forms, such as prostitution, extortion, illegal supply of liquor, and the sex and gambling industries. To raise further funds and exercise greater power, the boryokudan also set up a range of legitimate businesses and entered into strategic relationships with political figures, often by way of corruption.[777] The boryokudan and its members were largely tolerated by Japanese society and many yakuza portrayed themselves (or were portrayed by others) as heroes, Robin Hoods, and modern-day samurai. Until the introduction of anti-organised crime laws in 1991, it was also common for some groups to use gang emblems and tattoos to openly display membership.[778] Peter Hill notes that "the yakuza apparently enjoyed a position of wealth, security and acceptance, inconceivable for organised crime groups in other advanced democracies."[779] Similarly, Keith Maguire remarks that:

> Although crime rates in Japan are generally lower than in the West, organised crime is a much more serious problem. Organised crime had been given a role in society which on the one hand leads to serious problems of corruption, but on the other hand contributes to keeping down the worst excesses of street crime and the heroin and cocaine problems that are found in the West.[780]

The yakuza benefited greatly from the lack of government control and law enforcement that followed Japan's defeat in the Second World War. During that time, the boryokudan in cooperation with low-level racketeering groups ran much of the black market for food and basic supplies.[781] Over the years, the yakuza became

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775 In this report, the two terms are used interchangeably.

776 Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 97; Keith Maguire, "Crime, Crime Control and the Yakuza in Contemporary Japan" (1997) 21(3) *Criminologist* 131 at 135.

777 Joseph E Ritch, "They'll make you an offer you can't refuse: A comparative analysis of international organised crime" (2002) 9 *Tulsa Journal of Comparative and International Law* 569 at 581–582; Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 2, 3.

778 Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 414. On the early years of the yakuza generally, see David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 3–27.

779 Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 2. See further Peter Hill, *The Japanese Mafia* (2003) 36–42.

780 Keith Maguire, "Crime, Crime Control and the Yakuza in Contemporary Japan" (1997) 21(3) *Criminologist* 131 at 140.

781 Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 98; David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 31–55; Keith Maguire, "Crime, Crime Control and the Yakuza in Contemporary Japan" (1997) 21(3) *Criminologist* 131 at 135–136.

increasingly influential across Japan and —particularly in the decade of Japan's 'bubble economy' — became more and more involved in the stock market, real estate, and politics. John Huey-Song Long and John Dombrink note "an unusual relationship of Japan's organised crime groups to that society and to its legitimate institutions" and observe that boryokudan "evolved into wealthy and sophisticated, even semi-legitimate, societal institutions, with a strong political presence."[782] At that time, the yakuza also became involved in an activity known as sokaiya, a unique form of corporate blackmail,[783] and in corporate crimes such as money lending (sarakin), debt collecting and loss cutting, auction obstruction, and bankruptcy management.[784] The economic boom also allowed Japanese groups to branch out into the Republic of Korea (South Korea), Taiwan, the Philippines, Hong Kong, and the United States.[785]

Boryokudan are generally made up of several smaller entities and sub-groups which — in combination — form a hierarchical, "quasi-feudal",[786] pyramid-style structure. This structure separates senior leaders from lower levels of participants. It also insulates the upper levels from criminal prosecutions as the directors and financiers of big boryokudan generally do not physically engage in criminal activities. The hierarchical structure is often supported by ceremonial rituals, strict codes of discipline, punishments and fine, but also membership fees and mentorship among and between different levels (sometimes referred to as father-son, or brother relationships).[787]

It has been said that membership in boryokudan in Japan peaked with approximately 184,100 members in 1963, prior to the government's 'summit strategy' which resulted in many arrests and prosecutions.[788] Official and unofficial sources suggest that since the mid-1990s, the boryokudan and other criminal organisations have over 80,000 regular members across Japan who are involved in a range of criminal activities.[789]

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782 John Huey-Long Song & John Dombrink, "Asian Emerging Crime Groups: Examining the Definition of Organized Crime" (1994) 19(2) *Criminal Justice Review* 228 at 232. See also Ko Shikata, "Yakuza — organised crime in Japan" (2006) 9(4) *Journal of Money Laundering Control* 416 at 417; David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 56–108, 175–195.

783 See further, David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 159–164; Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 99; Peter Hill, *The Japanese Mafia* (2003) 124–128.

784 Keith Maguire, "Crime, Crime Control and the Yakuza in Contemporary Japan" (1997) 21(3) *Criminologist* 131 at 137; Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 6–8; Peter Hill, *The Japanese Mafia* (2003) 116–136.

785 David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 223–323; Huey-Long Song, John & John Dombrink, "Asian Emerging Crime Groups: Examining the Definition of Organized Crime" (1994) 19(2) *Criminal Justice Review* 228 at 232–233.

786 Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 2.

787 Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 414; Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 2; Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 107; Peter Hill, *The Japanese Mafia* (2003) 64–91.

788 Noriyoshi Takemura, "Recent Trends of Organised Crime around Japan and (South) East Asia", paper presented at the symposium *Organised Crime in Asia*, Brisbane, June 2007, 246 at 246; Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 99.

789 Joseph E Ritch, "They'll make you an offer you can't refuse: A comparative analysis of international organised crime" (2002) 9 *Tulsa Journal of Comparative and International Law* 569 at 583–585; Ko Shikata, "Yakuza — organised crime in Japan" (2006) 9(4)

Figure 31 Organised crime groups and membership in organised crime groups, Japan 2000-2004[790]

	2000	2001	2002	2003	2004
Total number of organised crime group members (as on December 31)	83,600	84,400	85,300	85,800	87,000
Designated organised crime groups[791]	25	24	24	24	24
- incl major groups	3	3	3	3	3

Since 2000, Japan's Ministry of Justice is publishing an annual *White Paper on Crime* which contains extensive data on the number of organised crime groups and their members, and the offences group members are involved in. These reports suggest that the total number of organised crime group members has increased from 79,300 in 1995 to 87,000 at the end of 2004.[792] Over half or 44,300 are seen as regular members. Since 2001, there are 24 "designated organised crime groups" in Japan,[793] and for the past five years the *White Paper* has identified three "major organised crime groups": the Yamaguchi-gumi (六代目山口組, designated since June 1992),[794] Inagawa-kai (稲川会, designated since June 1992),[795] and the Sumiyoshi-kai (住吉会, designated since June 1992).[796] Their members account for over 72 percent of all organised crime group members in Japan.[797]

In 2004, organised crime group members were found to be involved in nearly 30,000 criminal offences (not including traffic violations). Data provided by the Ministry of Justice of Japan shows that members of these groups are particularly dominant, inter alia, in gambling offences (58.9%), illegal confinement (54.3%), drug offences,

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Journal of Money Laundering Control 416 at 416.

790 Japan, Ministry of Justice, *White Paper on Crime 2001*, available at http://hakusyo1.moj.go.jp/en/46/nfm/mokuji.html (accessed 7 Oct 2008); Japan, Ministry of Justice, *White Paper on Crime 2002*, available at http://hakusyo1.moj.go.jp/en/47/nfm/mokuji.html (accessed 7 Oct 2008); Japan, Ministry of Justice, *White Paper on Crime 2003*, available at http://hakusyo1.moj.go.jp/en/49/nfm/mokuji.html (accessed 7 Oct 2008); Japan, Ministry of Justice, *White Paper on Crime 2004*, available at http://hakusyo1.moj.go.jp/en/50/nfm/mokuji.html (accessed 7 Oct 2008); Japan, Ministry of Justice, *White Paper on Crime 2005*, available at http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html (accessed 7 Oct 2008).

791 Designated organised crime groups under the *Law to Prevent Unjust Acts by Organised Crime Group Members 1991* (Japan).

792 See also Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 106.

793 It appears that this number has not changed since the *Law to Prevent Unjust Acts by Organized Crime Group Members* was first introduced in 1991. Hitoshi Saeki ("Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 416) notes that 24 boryokudan groups were designated between 1992 and 1996.

794 For more on the Yamaguchi-gumi see, for example, UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix B; David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 113–123.

795 For more on the Inagawa-kai see, for example, David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 135–143.

796 For more on the Sumiyoshi-kai see, for example, David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 123–135.

797 Japan, Ministry of Justice, *White Paper on Crime 2005*, available at http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html (accessed 7 Oct 2008).

especially those involving methamphetamine (44.5%), and extortion (39.8%).[798] Boryokudan groups also contribute disproportionately to Japan's otherwise very low firearms crimes and control substantial parts of Japan's sex and adult entertainment industries.[799]

Japan's rapidly growing economy in the 1970s and 80s has also been a magnet for foreign criminal organisations that sought to take advantage of local conditions. The available information suggests that for the most part these foreign organisations collaborated rather than competed with local boryokudan. They often supplied commodities, such as narcotics, weapons, or sex workers that are not easily available in Japan.[800] Taiwanese groups, for instance, became very actively involved in supplying women from Taiwan to work in brothels and entertainment venues in Tokyo's Shinjuku district. There are several accounts of criminal organisations from Taiwan working hand in hand with Japanese groups in this industry. During anti-organised crime campaigns in Taiwan, several key figures relocated to Japan, sometimes resulting in violent clashes and gangland killings involving Taiwanese groups operating in Japan.[801]

Some overseas groups began to withdraw from Japan as the economy started to slow in the 1990s. More recently, there have been accounts of criminal organisations from North Korea (DPRK) and Iran being involved in the illicit methamphetamine trade in Japan, sometimes in cooperation with local groups.[802]

18.2 Organised Crime under Japan's Criminal Law

Japan's *Criminal Code* of 1907[803] is modelled after the *Criminal Law* of Germany that was conceived in the late 20th century. Part I of the Japanese Code sets out the general principles of criminal liability which includes standard provisions relating to complicity such as liability of joint principals (art 60), accessorial liability (art 62), and also incitement (art 61). The Code does not contain provisions relating to conspiracy and there are no specific offences for participating in criminal organisations. Outside the *Criminal Code*, there is some sentencing legislation which allows for the imposition of higher penalties on "acts of intimidation, assault, and destruction of property committed by several individuals, or by showing the force of an enterprise or a group".[804]

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798 Japan, Ministry of Justice, *White Paper on Crime 2005*, available at http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html (accessed 7 Oct 2008). Cf Huey-Long Song, John & John Dombrink, "Asian Emerging Crime Groups: Examining the Definition of Organized Crime" (1994) 19(2) *Criminal Justice Review* 228 at 232; Ko Shikata, "Yakuza — organised crime in Japan" (2006) 9(4) *Journal of Money Laundering Control* 416 at 416; Peter Hill, *The Japanese Mafia* (2003)

799 Noriyoshi Takemura, "Recent Trends of Organised Crime around Japan and (South) East Asia", paper presented at the symposium *Organised Crime in Asia*, Brisbane, June 2007, 246 at 246, 249.

800 Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 111–112.

801 Ko-lin Chin, *Heijin — Organized Crime, Business, and Politics in Taiwan* (2003) 194; David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 260–262.

802 UNODC, *Amphetamines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 34; Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 105; Noriyoshi Takemura, "Recent Trends of Organised Crime around Japan and (South) East Asia", paper presented at the symposium *Organised Crime in Asia*, Brisbane, June 2007, 246 at 247.

803 Act No 45 of 1907.

804 Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 419; the title and English translation of this Act were unavailable at the time of writing.

Japan signed the *Convention against Transnational Organised Crime* on December 12, 2000.[805] The *Palermo Convention* was approved during the 156th session of the Diet, the Japanese Parliament, on May 14, 2003.[806]

18.2.1 Law to Prevent Unjust Acts by Organised Crime Group Members 1991

Japan's anti-organised crime laws antedate the *Palermo Convention*. Work on a new anti-boryokudan law began in November 1990[807] and in May 1991 the Diet passed (without much debate) the *Law to Prevent Unjust Acts by Organised Crime Group Members* which came into operation on March 1, 1992 (also referred to as the *Anti-Organised Crime Group Law, Anti-Boryokudan Law,* or bōtaihō).[808]

Several triggers led to the introduction of this law. In the late 1980s, concerns arose over the growing involvement of yakuza groups in legitimate and quasi-legitimate business enterprises. Simultaneously, some groups sought to influence political and administrative decision-making through violent interventions in civil affairs, a practice known as minbō. Furthermore, some high-profile conflicts between several gangs (sometimes killing innocent third parties) and corruption scandals in Japan led to further calls to legislate against criminal organisations. Lastly, pressure from the United States and the international community was growing on Japan to increase its efforts to suppress the illicit drug trade and other forms of organised crime.[809] Since its introduction, the bōtaihō has seen two significant amendments in 1993 and 1997.[810]

The law has been described as "mainly an administrative and regulatory law aimed at the prevention of illegal acts rather than a substantive criminal law."[811] Membership in a criminal organisation is not a criminal offence in Japan. At the heart of the legislation is the proscription (or "designation") of criminal organisations. The power to designate a group is vested in the Public Safety Commissions of Japan's 47 prefectures which are independent administrative panels that supervise local police forces and their activities. The Commissions hold public hearings and, with the consent of Japan's National Public Safety Commission, can declare an organisation that meets the statutory requirements a "designated organised crime group" or an "alliance of designated organised crime group". The organisations under consideration may partake in the hearings and also have the right to have the

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805 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed Aug 29, 2008).

806 Japan, Ministry of Foreign Affairs, *Treaties submitted to the 156th session of the Diet*, available at www.mofa.go.jp/policy/treaty/submit/session156/agree-7.html (accessed aug 28, 2008).

807 The draft of the anti-boryokudan law is discussed in Peter Hill, *The Japanese Mafia* (2003) 155–157.

808 No 77 of 1991. An English (or other) translation of the Act was not available at the time of writing.

809 Peter Hill, *The Japanese Mafia* (2003) 138–146; Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 8–9; David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 210.

810 See further Peter Hill, *The Japanese Mafia* (2003) 163–166.

811 Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 417; Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 102. See also Ko Shikata, "Yakuza — organised crime in Japan" (2006) 9(4) *Journal of Money Laundering Control* 416 at 419, who refers to the Act as "executive law, rather than a justice law".

decision by the Commissions judicially reviewed.[812] As mentioned earlier, Japan's three largest and most notorious groups, the Yamaguchi-gumi, Inagawa-kai, and Sumiyoshi-kai were all designated in June 1992.

Boryokudan are broadly defined in art 2(2) as "a group of which there is a risk that its members (including members of its component groups) will collectively or routinely promote illegal violent behaviour".[813] The Public Safety Commissions may designate boryokudan groups using criteria set out in a definition of 'designated boryokudan' in Article 3 of the *Law to Prevent Unjust Acts by Organised Crime Group Members* which contains elements relating to the purpose, structure, and activities of the organisation:

- Structurally, the law requires that the organisation has a hierarchical structure and is controlled by a leader.
- Further, the group has to have a certain number (percentage) of members with prior convictions. Specifically, the law requires that the ratio of members with a criminal record within the group is higher than that ratio in the general population.[814]
- The objective of the group has to be economic gain by way of intimidation, threats or force.
- The group encourages or facilitates activities of the group members, individually or collectively, involving either "illegal acts typically committed by boryokudan members", such as gambling, drug trafficking, prostitution, or loan sharking, or "illegal violent acts" such as murder, bodily harm, robbery, coercion, extortion et cetera.[815]

The existence of a criminal organisation alone does not create any criminal offences. Liability only arises if orders made under the Law are violated,[816] specifically if a yakuza member makes threatening demands or is otherwise involved in extortion or racketeering activities on behalf of the group. The complete list of activities (which was expanded in the 1993 and 1997 reforms) is set out in art 9.[817] The Law allows for injunction orders to be issued against members of organised crime groups who engage in threatening or coercive activities. These orders may be made at the request of victims.[818] Any violation of an injunction order is a criminal offence and may result in imprisonment or a fine. In 1997, this offence was extended to apply to persons of authority, informal members, and business associates of designated organised crime groups.[819] Additionally, an organised crime group member who is

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812 Japan, Ministry of Justice, *White Paper on Crime 2005*, available at http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html (accessed 7 Oct 2008); Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 415, 416; Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 102; Peter Hill, *The Japanese Mafia* (2003) 159.

813 Peter Hill, *The Japanese Mafia* (2003) 158.

814 Cf similar requirements in s 467.1 *Criminal Code* (Canada) (now amended), see Section 4.1.1 above.

815 Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 416; cf Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 9; Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 102; Peter Hill, *The Japanese Mafia* (2003) 158–159.

816 Ko Shikata, "Yakuza — organised crime in Japan" (2006) 9(4) *Journal of Money Laundering Control* 416 at 419.

817 The complete list of activities is set out in Peter Hill, *The Japanese Mafia* (2003) 160.

818 Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 9; Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 102.

819 Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan*

likely to repeatedly violate provisions under the *Law to Prevent Unjust Acts by Organised Crime Group Members* may be placed under a recurrence preventive order. The law also allows victims of organised crime to recover any lost property and seek compensation from the criminal organisation.[820] In 1997, additional measures were introduced to prevent intra-gang turf wars and to authorise police to close gang offices and prohibit public displays of emblems and insignia. The legislation is also accompanied by a range of measures relating to education, public awareness campaigns, and rehabilitation of former gang members.[821]

18.2.2 Law for Punishment of Organised Crimes, Control of Crime Proceeds and Other Matters 2000

Since the mid 1990s, there have been calls on Japan to improve the anti-organised crime laws and direct enforcement measures more specifically against the profit and other wealth accumulated by large scale criminal enterprises. Demands for law reform in this field were further fuelled by the sarin gas attack on Tokyo's subway by the Aum Sinrikyo sect on March 20, 1995. While not connected to organised crime, this incident raised concerns about the operation of secret organisations in Japan.[822]

In August 1999, Japan further enhanced its organised crime control regime with the enactment of the *Law for Punishment of Organised Crimes, Control of Crime Proceeds and Other Matters*[823] which came into force in February 2000. This legislation is designed to enhance the penalties for persons who commit a criminal offence as part of an organised crime group:

> A person who commits specific penal code offences under the Law will be additionally punished in the case where (i) the offence is committed as a group activity by an organisation that intended to commit an act corresponding to the offense or (ii) the offence is committed for the purpose of obtaining illegal interests for the group.[824]

The Act also contains additional provisions against money laundering and for the confiscation and seizure of proceeds of crime and other assets of criminal organisations.

18.2.3 Remarks

From the outset, it is noteworthy that the criminalisation of boryokudan and yakuza in Japan has not been without difficulty given the way in which the organisations and their members are firmly entrenched in Japanese society. Thus the creation of laws to proscribe boryokudan organisations is a milestone of great symbolic significance, even if their enforcement has sometimes been slowly forthcoming.[825] Peter Hill, for

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Journal 1 at 10; Peter Hill, *The Japanese Mafia* (2003) 165.

820 Japan, Ministry of Justice, *White Paper on Crime 2005*, available at http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html (accessed 7 Oct 2008); Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 416, 417.

821 Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 102; Peter Hill, *The Japanese Mafia* (2003) 161–163.

822 See further David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 206–209; Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 419.

823 No 136 of 1999, 組織的な犯罪の処罰及び犯罪収益の規制等に関する法律.

824 Japan, Ministry of Justice, *White Paper on Crime 2002*, available at http://hakusyo1.moj.go.jp/en/47/nfm/mokuji.html (accessed 7 Oct 2008).

825 Cf Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 418.

instance, describes the bōtaihō as "epoch making" because it is "targeting activities that were hitherto immune from legal intervention". He further remarks that "[t]he bōtaihō was seen as a clear break in that, for the first time, there was a legal definition of boryokudan and a law existed that specifically and explicitly identified these groups as a social evil to subject to special controls."[826]

Japan's organised crime laws adopt a unique model that is partly inspired by the US *RICO Act*[827] but also includes features of laws that proscribe organisations and criminalise activities committed on their behalf.[828] Mere membership and participation in a criminal organisation are, however, not criminalised.

In the absence of complete English translations of the statutes, it is difficult to make comprehensive and critical comments about Japan's anti-organised crime laws and about their practical application using primary sources. The literature remains divided about the fairness, legality, and effectiveness of Japan's *Law to Prevent Unjust Acts by Organised Crime Group Members 1991*.

One criticism of the *Anti-Boryokudan Law 1991* (Japan) has been that it is an administrative statute that "has nothing to do with punishing serious crimes committed by organised crime members".[829] David Kaplan & Alec Dubro note that "[m]uch of what it attacks was already illegal and the law's scope and penalties are relatively limited."[830] The application of the Law is limited to the violent demands set out in art 9 if they are used to exploit a group's reputation in order to secure economic or other benefit. Peter Hill remarks that:

> From the comparative weakness of the penalties and the restriction of the bōtaihō to one area of yakuza activity, it is apparent that, ceteris paribus, the introduction of this law cannot achieve the goal, declared by the police, of eradicating these groups. At best, and assuming that it actually works as described, it will only drive out gang participation in minbō, protection, and those other categories of 'violent demand' covered by Article 9, without reducing the many other overtly criminal, enterprises in which the yakuza are engaged. In fact, there are very good reasons for believing that the bōtaihō will fail to achieve even that.[831]

Japanese scholar Hitoshi Saeki, in contrast, views the fact that the Law does not ban certain organisations per se and does not create a membership offence as major advantage. For any criminal liability to arise, the accused has to engage in a criminal act; there is no guilt by association and no criminal liability arises merely from the status or role held by boryokudan members.[832]

The existing laws do not criminalise the creation of criminal organisations and membership in them. The constituting elements of organised crime groups of set out in art 3 *Law to Prevent Unjust Acts by Organised Crime Group Members 1991* (Japan) require a considerably higher threshold than most other jurisdictions in the region. The deterrent effect of the law may thus be rather limited.[833] Official records

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826 Peter Hill, *The Japanese Mafia* (2003) 168 [emphases removed].

827 See Chapter 20 below [to be completed].

828 Cf Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 9.

829 Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 419.

830 David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 211.

831 Peter Hill, *The Japanese Mafia* (2003) 167.

832 Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 416, 417.

833 Cf Ko Shikata, "Yakuza — organised crime in Japan" (2006) 9(4) *Journal of Money Laundering Control* 416 at 419.

show that after the introduction of the new laws, the number of organised crime members initially dropped, but the number has grown again slightly since the mid 1990s.[834] Some more recent reports suggest that boryokudan have difficulties finding new and younger members.[835] On the other hand, criminalising membership in an organised crime group would also create a practical enforcement problem in country that has well over 80,000 yakuza members.[836] "Would criminalisation result in trebling the overall prison population? Regardless of the cost of such a measure, would it be desirable?", asks Peter Hill.[837]

There have been some concerns that the bōtaihō may violate constitutionally guaranteed rights such as the freedom of association (art 21 *Constitution of Japan*) and the principle of equality of all citizens (art 14).[838] However, public protest against the laws and legal challenges by notorious groups such as the Yamaguchi-gumi, Sumiyoski-kai, and the Aizu Kotetsu, have thus far been unsuccessful.[839] Fears that the Law may be unjustly used against left-wing groups and trade unions have been described as unwarranted, as the Law requires that the group consists of a proportion of members with criminal records.[840]

The process of designating boryokudan has been criticised by some scholars. It has been pointed out that relevant definitions in the *Law to Prevent Unjust Acts by Organised Crime Group Members 1991* (Japan) are very vague and open to subjective interpretation by the Public Safety Commissions and the National Public Safety Commission.[841] Hill also highlighted that the functions of Public Safety Commissions are often carried out by police.[842] He also noted that the Law inadequately deals with corruption and does little to disentangle the close relationship between the yakuza and Japan's political, financial, and law enforcement communities.[843]

While the number of yakuza supporters today is small in comparison to the 1960s, the introduction of the anti-organised crime laws also resulted in a further consolidation of boryokudan. The number of criminal organisations may have dropped, but the existing syndicates are larger and more sophisticated than ever before.[844] It was shown earlier that the three main organisations alone account for nearly ¾ of all yakuza members.

Laws proscribing organisations may reduce their visibility in the short and medium-term and may deter some persons from associating with them. Official figures support the view that the Japanese legislation was able to halt the growth in boryokudan membership and that numbers have levelled since the 1990s.[845] But the

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834 David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 211–212.

835 Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 11.

836 See Section 18.1 above.

837 Peter Hill, *The Japanese Mafia* (2003) 174.

838 See further, Peter Hill, *The Japanese Mafia* (2003) 169.

839 Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 103; Peter Hill, *The Japanese Mafia* (2003) 202–204.

840 Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 416, 417; Peter Hill, *The Japanese Mafia* (2003) 169–170.

841 Peter Hill, *The Japanese Mafia* (2003) 170.

842 Peter Hill, *The Japanese Mafia* (2003) 171. This problem was also noted in the context of Hong Kong's anti-Triad laws, see Sections 8.3 and 8.4 above.

843 Peter Hill, *The Japanese Mafia* (2003) 171.

844 Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 99, 110; David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 212.

845 Noriyoshi Takemura, "Recent Trends of Organised Crime around Japan and (South)

experience of Japan has also shown that the legislation quite immediately pushed the organisations and their members further underground, and reduced the chances of cooperation between gang members and the police. Some organisations have split and regrouped under different names. The Yamaguchi-gumi also instantaneously instructed it members to remove emblems, conceal tattoos, and abandon or hide insignia to conceal membership. Some organisations set up legitimate front companies to conceal their operations or diversify their incomes by engaging in non-traditional yakuza crimes such as fraud, robberies, illegal lending, and theft.[846]. There have also been suggestions that the yakuza is increasingly resorting to violence. Saeki, for instance, expressed concern that

> if people become more resistant to the illegal demands of the boryokudan, boryokudan members may begin to rely on violent acts more often than in the past. Destroying the positive self-image of yakuza members may also lead them to resort to violent acts more easily.[847]

This view is shared by other observers.[848] The new measures may have also led to a displacement of criminal activities and may have contributed to Japanese organisations exploring opportunities abroad.[849] On the other hand, some authors have noted that the laws have significantly reduced the violence used by different gangs against each other.[850]

East Asia", paper presented at the symposium *Organised Crime in Asia*, Brisbane, June 2007, 246 at 246.

846 Ko Shikata, "Yakuza — organised crime in Japan" (2006) 9(4) *Journal of Money Laundering Control* 416 at 417; Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 103–104; Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 10, 15; David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 212; Peter Hill, *The Japanese Mafia* (2003) 196–201.

847 Hitoshi Saeki, "Japan: The Criminal Justice System Facing the Challenge of Organised Crime" (1998) 69 *International Review of Penal Law* 413 at 418.

848 Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 100; Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 3–4.

849 David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 212.

850 Peter Hill, "Heisei Yakuza: Burst Bubble and Bōtaihō" (2003) 6(1) *Social Science Japan Journal* 1 at 10, 12; Peter Hill, "The Changing Face of the Yakuza" (2004) 6(1) *Global Crime* 97 at 109.

19 Pacific Islands

19.1 Patterns of Organised Crime in the South Pacific

Knowledge on actual levels of organised crime in the Pacific Islands is very limited and relevant statistics are, for the most part, non-existent. This is a result of the clandestine nature of organised crime but also of the limited resources available in the region to collect that information. Moreover, this issue has thus far attracted very limited academic interest and much of the existing information is not representative of the true levels and modi operandi of organised crime in the South Pacific.

Despite the lack of systematic research, there is general consensus that organised crime can be found throughout the Pacific Islands and the Police Commissioner of New Zealand has been quoted saying "that criminal enterprises in the Islands account for $300 billion annually".[851] Among the most significant types or organised crime in the South Pacific are narcotrafficking, migrant smuggling, and firearms trafficking.[852] Money laundering is another important phenomenon associated with organised crime and the Pacific Islands have gained some notoriety in that respect. Accordingly, this issue is comparatively well researched and documented elsewhere.[853] Evidence about trafficking in persons, illegal gambling, tobacco-smuggling, and electronic crime is so far only anecdotal and, at this point, does not lend itself to academic research.[854]

Little is known about the types and structure of criminal organisations active in the South Pacific and their level of sophistication. Most available sources point to Asian crime gangs, especially Chinese and Japanese. The Yakuza appears to be particularly influential in Guam, and the former US territories of Micronesia and Northern Marianas. According to reports by the US Federal Bureau of Investigation (FBI), the Yakuza maintains links to local business and politicians in these places and engage in illegal gambling and the smuggling of narcotics and firearms.[855] Elsewhere, Chinese criminal gangs are more prominent and there is growing concern around the region about the increasing influence that ethnic Chinese groups exercise over local drug markets and other forms of organised crime.[856]

19.1.1 Narcotrafficking in the Pacific Islands

The cultivation, trafficking, and consumption of narcotic drugs represent perhaps the longest-standing organised crime problems in the Pacific region. The Pacific Islands

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851 Ron Crocombe, *Asia in the Pacific Islands* (2007) 177.

852 The following analysis is based on Andreas Schloenhardt, "Drugs, Sex and Guns: Organised Crime in the South Pacific" in N Boister & A Costi (eds), *Droit Pénal International dans le Pacifique/Regionalising International Criminal Law in the Pacific*, (2007) 159–184.

853 See, for example, Andreas Schloenhardt "Transnational Crime and Island State Security in the South Pacific" in E Shibuya & J Rolfe (eds), *Security in Oceania in the 21st Century* (2003) 171 at 177-183; Rob McCusker "Transnational Crime in the Pacific Islands: Real or Apparent Danger?" (2006) 308 *Trends & Issues in Crime and Criminal Justice* 1, Jack A Blum et al, *Financial Havens, Banking Secrecy and Money Laundering* (1998); Ernesto U Savona et al, *Organised Crime Around the World* (1998) 90–91; Ron Crocombe, *The South Pacific* (7th ed 2008) 329–333.

854 Pacific Islands Forum Secretariat (Forum Secretariat) *Transnational Crime Strategic Assessment* (2006) 32–34.

855 Ron Crocombe, *Asia in the Pacific Islands* (2007) 178, 180.

856 John Hill, "Transnational crime proves problematic in the Pacific Islands" (Dec 2006) *Jane's Intelligence Review* 50 at 52.

have been considered vulnerable to exploitation by criminal syndicates for some time, especially involving drug trafficking activities by sea and air.[857] In 2001, for instance, the International Narcotic Control Board (INCB) reported that:

> Fiji and Vanuatu are known to be used by drug traffickers as transit points for large consignments of heroin originating in Southeast Asia and destined for Australia […]. Drug traffickers continue to move cocaine from South America to Australia through the Pacific islands.[858]

In recent years, evidence of manufacturing of, and trafficking in, psychotropic substances has added a new dimension to this problem. In the past, much of the local production of illicit drugs involved native kava and betelnut plants. Cannabis, too, was cultivated in the region, especially in the Melanesian islands, and there are some reports about cannabis cultivation in Micronesia, Tonga, and Samoa.[859] In addition to some local production, there is significant evidence of drug trafficking through the Pacific Islands. For example, in 2000, 357kg of heroin from Myanmar were found in Suva, Fiji — one of the world's largest seizures at the time.[860] In 2001, 98kg of cocaine were intercepted in Tonga.[861] Recent seizures of amphetamine-type stimulants (ATS) and ATS precursor chemicals in the region have led to suggestions that there is some production of synthetic drugs in the Pacific islands.[862] For example, in 2002, authorities foiled an apparent attempt to import up to 12 tonnes of the precursor chemicals ephedrine from India and pseudoephedrine from China into PNG.[863] Another significant seizure of ATS was made on June 9, 2004 by Fijian authorities in Laucala Bay, Suva, where five kilograms of crystal methamphetamine and 1000 kilograms of precursor chemicals were found.[864] In 2007, large quantities of stolen pharmaceuticals containing pseudoephedrine were found in Tonga.[865]

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857 UNODC, *Amphetamines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 56; Eric Shibuya & Paul J Smith, "Transnational Criminal Activity in the South Pacific" (2002) 14(9) *Jane's Intelligence Review* 30; Ron Crocombe, *The South Pacific* (7th ed 2008) 63, 336; Pacific Islands Forum Secretariat, *Transnational Crime Strategic Assessment* (2006) 19.

858 UN ECOSOC "Report of the International Narcotics Control board for 2001" E/INCB/2001/1 (United Nations, New York, 2002) para 564, available at www.incb.org/incb/annual_report_2001.html (accessed 16 Nov 2006).

859 Ron Crocombe, *The South Pacific* (7th ed 2008) 61–62; UN ECOSOC "Report of the International Narcotics Control board for 2001" E/INCB/2001/1 (United Nations, New York, 2002) para 564, available at www.incb.org/incb/annual_report_2001.html (accessed 16 Nov 2006).

860 "Operation Palm Beach/Logrunner"; Ron Crocombe, *Asia in the Pacific Islands* (2007) 187; John Hill, "Transnational crime proves problematic in the Pacific Islands" (Dec 2006) *Jane's Intelligence Review* 50 at 51; Sue Windybank, "The Illegal Pacific, part 1: Organised Crime" (2008) 24(2) *Policy* 32 at 33.

861 "Operation Hamstead"; John Hill, "Transnational crime proves problematic in the Pacific Islands" (Dec 2006) *Jane's Intelligence Review* 50 at 51.

862 UN ECOSOC "Report of the International Narcotics Control Board for 2001" E/INCB/2001/1 (United Nations, New York, 2002) paras 622,638, available at www.incb.org/incb/annual_report_2001.html (accessed 16 Nov 2006); UNODC Regional Centre for East Asia and the Pacific, *Regional Profile on Drugs and Crime in the Pacific Islands* (2003) 18-21; Ron Crocombe, *The South Pacific* (7th ed 2008) 63, 336.

863 Pacific Islands Forum Secretariat (Forum Secretariat) *Transnational Crime Strategic Assessment* (2006) 20.

864 "Operation Outrigger/deva"; Ron Crocombe, *Asia in the Pacific Islands* (2007) 187; John Hill, "Transnational crime proves problematic in the Pacific Islands" (Dec 2006) *Jane's Intelligence Review* 50 at Sue Windybank, "The Illegal Pacific, part 1: Organised Crime" (2008) 24(2) *Policy* 32 at 33.

865 UNODC, *Amphetamines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 56.

19.1.2 Migrant Smuggling

US authorities have reported for many years that Guam and other Micronesian islands serve as transit points for the smuggling of migrants from Asia across the Pacific to the United States, frequently involving Chinese nationals from Fujian province. Guam offers the additional advantage of being US territory and having fast and easy access to the US mainland. For example, in 1998-99 the US Coastguard in Guam detected 1,869 unauthorised migrants who have been smuggled by Chinese groups.[866] In the 1990s, Police investigations revealed that illegal migrants heading for Australia, New Zealand, and also Canada transited in Papua New Guinea in response to increased surveillance of the Torres Strait and the Tasman Sea.[867]

Little information is available on the level of migrant smuggling in and between the South Pacific islands. New Caledonia reported the landing of two vessels with 110 undocumented Chinese migrants in 1997.[868] In March 2001, Fijian authorities confirmed the existence of a smuggling ring that shipped mostly Asian migrants through South Pacific nations.[869] A 2006 report suggested that "there are 100,000 illegal Chinese immigrants in Papua New Guinea."[870]

19.1.3 Trafficking in Persons

There have been, as of late, some isolated reports about trafficking in persons, especially women, to and from the Pacific Islands. Much of that information is only rumoured and cannot be verified by official reports or academic research.[871] A transnational crime strategic assessment conducted by the Pacific Islands Forum (PIF) Secretariat in April 2006 found that "regional intelligence does not support high levels of human trafficking in the Pacific."[872]

There is some limited evidence about small levels of trafficking in persons for employment in the garment and sex industries.[873] In 2003, one of the largest cases of "modern day slavery" was uncovered in American Samoa where nearly 250

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866 Data provided by the US Coast Guard, Law Enforcement and Intelligence Branch, Honolulu, (15 Aug 2000) [on file with author]; and Cleo Kung, "Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of 'Refugee'" (2000) 90 *Journal of Criminal Law & Criminology* 1271 at 1281; Ron Crocombe, *Asia in the Pacific Islands* (2007) 189–190.

867 Mick Kelty, "Bilateral Cooperation in Cross-Border Crime: An Australian Perspective" in Beno Boeha & John McFarlane (eds), *Australia and Papua New Guinea: Crime and Bilateral Relationship* (2000) 76 at 78-79; personal communication with Mr Tokam Kamene, Director General, National Intelligence Organisation (Papua New Guinea), Honolulu, 9 Aug 2000. See further, Andreas Schloenhardt, *Migrant Smuggling* (2003) 146.

868 Personal communication with Ms Christine Capron, Chef de la Division Ressources à la Direction de la Police Au Frontières en Nouvelle Caledonie, Canberra, 14 Jan 2001; "New Caledonia still processing Chinese boat people" (19 Sep 2001) *Pacific Islands Report*; Ron Crocombe, *Asia in the Pacific Islands* (2007) 190.

869 "Authorities confirm existence of people smuggling ring" (2001) 5 *UNDCP Eastern Horizons* 15.

870 John Hill, "Transnational crime proves problematic in the Pacific Islands" (Dec 2006) *Jane's Intelligence Review* 50 at 53.

871 UNODC Regional Centre for East Asia and the Pacific, *Regional Profile on Drugs and Crime in the Pacific Islands* (2003) 23.

872 Pacific Islands Forum Secretariat, *Transnational Crime Strategic Assessment* (2006) 28; cf Rob McCusker, "Transnational Crime in the Pacific Islands: Real or Apparent Danger?" (2006) 308 *Trends & Issues in Crime and Criminal Justice* 1, 5.

873 Pacific Islands Forum Secretariat (Forum Secretariat) *Transnational Crime Strategic Assessment* (2006) 28.

persons from China and Vietnam were found working in slavery-like conditions in a garment factory. The factory owner was later sentenced in the United States to a term of 40-year imprisonment.[874]

19.1.4 Firearms Trafficking

The problems associated with firearms and trafficking in firearms in the Pacific islands are long-standing and are comparatively well documented. Despite the small populations, there is a significant demand for small arms and "there is sufficient information to state that firearms smuggling into the region is occurring,"[875] though it may be relatively small in global comparison. The problem of illicit firearms is not evenly spread throughout the Pacific and is much more significant in the Melanesian countries than it is elsewhere in the region. Of particular concern has been the leakage of firearms from military and police holdings where safekeeping is often very poor. In many instances, arms are stolen, armouries raided, but there are also reports of officials engaging in armed violence, handing out guns in return for drugs, bribes or other favours, or in support of rebels. The problems are well manifested in the coup attempts in Fiji, the Bougainville crisis, and the conflict in the Solomon Islands.[876]

The level and sophistication of organised crime involvement in the arms trade is not fully known and not well understood. Some reports suggest that much of the illicit firearm trade occurs at the local level and is purely domestic. The illicit cross-border trade in firearms is said to be very small compared to domestic gun-running.[877]

19.2 Criminal Law in the Pacific Islands

Domestic laws in the Pacific islands have often been ill-equipped to deal with new and emerging transnational crime issues. Many nations have outdated laws containing criminal offences which have largely been left unchanged since their introduction following independence in the 1970s and 1980s. Moreover, few countries in the region have signed enforceable international treaties relating to transnational organised crime.

19.2.1 Sources

Papua Guinea, Fiji, Kiribati, Solomon Islands, Tuvalu, Nauru: the Queensland model

Some of the Melanesian islands — especially those that are former British colonies or Australian protectorates — adopted criminal codes based on the *Criminal Code* of Queensland, Australia. Papua (British New Guinea) first adopted the Queensland Code in 1902,[878] followed by New Guinea in 1921.[879] The *Criminal Code* (PNG)

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874 Jennifer Burn et al, "Combating Human Trafficking: Australia's Responses to Modern Day Slavery" (2005) 79 *Australian Law Journal* 529 at 543.

875 Pacific Islands Forum Secretariat, *Transnational Crime Strategic Assessment* (2006) 32.

876 Graduate Institute of International Studies *Small Arms Survey 2004: Rights at Risk* (2004) 284, 290–291.

877 Philip Alpers, *Gun-running in Papua New Guinea: From Arrows to Assault Weapons in the Southern Highlands* (2005) 99.

878 *Criminal Code Ordinance* 1902.

879 *Laws Repeal and Adopting Ordinance* 1921; *Laws Repeal and Adopting Ordinance* 1924.

came into operation with Papua New Guinea's independence in 1975,[880] replacing previous laws but many similarities to the Queensland Code remain. The criminal codes of Fiji,[881] Kiribati,[882] Solomon Islands,[883] and Tuvalu[884] also follow the *Criminal Code* of Queensland, although the Fijian and Solomon Islands codes are equally influenced by the *Indian Penal Code* of 1860. Nauru adopted the *Criminal Code* (Qld) through the *Laws Repeal and Adopting Ordinance* (Nauru) s 12.[885]

The common law remains important in Melanesia, especially in relation to general principles of criminal liability and defences unless the common law has been explicitly replaced by statute.[886]

Cook Islands, Niue, Samoa, Tonga, Tokelau: the New Zealand model

The criminal laws of the Cook Islands,[887] Niue,[888] Samoa,[889] and Tokelau[890] are closely related to the *Crimes Act 1961* of New Zealand which used to be the governing authority in these territories. The *Criminal Offences Act* of Tonga is also similar in many respects.[891] The shared characteristic of all these laws is that the Acts largely lack a statement of general principles of criminal liability and the criminal law continues to be common law based.[892]

New Caledonia, French Polynesia, Wallis and Futuna: the French model

New Caledonia, French Polynesia, and Wallis and Futuna are overseas territories of the French Republic with some autonomy but without powers over criminal justice. The French *Penal Code* applies to these island groups.

Other: Vanuatu

Vanuatu's *Penal Code* of 1981 is the only original criminal law in the South Pacific, substituting previously coexisting French and English criminal laws.

19.2.2 Conspiracy

The criminal codes of the Cook Islands,[893] Fiji,[894] Kiribati,[895] Micronesia,[896] Papua New Guinea,[897] Samoa,[898] Solomon Islands,[899] Tonga,[900] Tuvalu,[901] and Vanuatu[902] have

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880 *Criminal Code Act 1974* (Qld), No 78 of 1974.
881 *Penal Code* (Fiji), cap 17.
882 *Penal Code* (Kiribati), cap 67.
883 *Penal Code* (Solomon Islands), cap 26.
884 *Penal Code* (Tuvalu), cap 8.
885 See further Eric Colvin, "Criminal Responsibility under the South Pacific Codes" (2002) 26 *Criminal Law Journal* 98–113.
886 *Bank of England v Vagliano Brothers* [1891] AC 107, *R v Wong Chin Kwee* [1983] SILR 78, Mark Findlay, *Criminal Laws of the South Pacific* (2nd ed 2000) 12–13.
887 *Crimes Act 1969* (Cook Islands).
888 Part V—Criminal Offences *Niue Act 1996*.
889 *Crimes Ordinance 1961* (Samoa).
890 *Tokelau Crimes Regulations 1975* adopting the criminal law provisions of the *Niue Act 1966*.
891 *Criminal Offences Act* Cap 18 (Tonga).
892 See further Eric Colvin, "Criminal Responsibility under the South Pacific Codes" (2002) 26 *Criminal Law Journal* 98 at 99.
893 Section 333 *Crimes Act 1969* (Cook Islands).
894 Sections 385–387 *Penal Code* (Fiji).
895 Section 376-378 *Penal Code* (Kirbati).
896 *Code of the Federated States of Micronesia*, Title 11: Crimes, § 201.

special provisions creating criminal liability for conspiracies. Minor differences aside, these provisions criminalise agreements between two or more offenders to commit an offence and/or to effect an unlawful purpose. Additional special provisions exist in some countries for conspiracies to defraud, to pervert the course of justice, and for other special cases.

The conspiracy provisions follow very closely their British (or, where applicable, their Queensland) heritage and English common law is generally used in their interpretation.[903] The differences between the offences lie, for the most part, in their application. Some jurisdictions limit liability to conspiracies to commit criminal offences,[904] while others extend liability to conspiracies to effect "any unlawful purpose".[905]

There is, to date, no reported case law in the Pacific islands involving conspiracy charges against criminal organisations or other aspects of organised crime.

19.3 Organised crime laws

19.3.1 Adoption of the Palermo Convention

As with many other international criminal law conventions, the uptake of the *Convention against Transnational Organised Crime* by Pacific island states has been extremely limited. Only a very small number of countries in the region are State Parties to the Convention and there have even fewer attempts to implement the Convention provisions into domestic law. As of December 15, 2008, only the Cook Islands,[906] Kiribati, Micronesia, Nauru, and Vanuatu[907] were Signatories to the *Palermo Convention.* France enacted the *Palermo Convention* in 2002[908] and this ratification also extends to the French overseas territories in the South Pacific. New Zealand's signature extends to Niue, but not to Tokelau.[909]

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897 Sections 515–517 *Criminal Code* (PNG).

898 Section 97 *Crimes Ordinance 1961* (Samoa). Conspiracy in Samoa is limited to conspiracy to defraud.

899 Sections 376–378 *Penal Code* (Solomon Islands).

900 Section 15 *Criminal Offences Act* Cap 18 (Tonga).

901 Section 376-378 *Penal Code* (Tuvalu).

902 Section 29 *Penal Code* (Vanuatu).

903 See further Mark Findlay, *Criminal Laws of the South Pacific* (2nd ed 2000) 88–91.

904 See, for example, s 333 *Crimes Act 1969* (Cook Islands); s 15 *Criminal Offences Act* Cap 18 (Tonga); s 29 *Penal Code* (Vanuatu).

905 See, for example, s 387 *Penal Code* (Fiji); s 517(g) *Criminal Code* (PNG).

906 See further Section 19.3.4 below.

907 *Counter Terrorism and Transnational Organised Crime Act 2005* (Vanuatu), No 29 of 2005; *Counter Terrorism and Transnational Organised Crime (Amendment) Act 2008* (Vanuatu), No 18 of 2008.

908 Law No 2002-1040 of 6 Aug 2002.

909 New Zealand made the following territorial exclusion: ".....consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory"; see www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 15 Dec 2008).

Figure 32 Adoption of the *Convention against Transnational Organised Crime*, South Pacific (current as on 15 Dec 2008).[910]

Signatory	Signature	Accession
Cook Islands		4 Mar 2004
France (New Caledonia, French Polynesia, Wallis and Futuna)	12 Dec 2000	29 Oct 2000
Kiribati		15 Sep 2005
Micronesia (FSM)		24 May 2004
Nauru	12 Nov 2001	
Vanuatu		4 Jan 2006

Among the many reasons for the lack of Signatories to the Convention in the South Pacific are the costs and technical requirements associated with the implementation and the limited legal expertise and human resources necessary to adopt the Convention in the domestic systems. Also, the problem of organised crime is not seen as a significant problem by some nations.

19.3.3 Regional initiatives: Pacific Islands Forum

The Pacific Islands Forum (PIF) Secretariat in Suva, Fiji, has taken on a leading role in establishing a regional framework to prevent and suppress transnational organised crime. The PIF's Regional Security Committee brings together law enforcement agencies from the 16 Member Countries. The Forum Secretariat's Law Enforcement Unit has established itself as a centre for cooperation and has produced a series of relevant declarations to fight transnational organised crime more effectively.[911] The *Honiara Declaration on Law Enforcement Cooperation* (*Honiara Declaration*),[912] adopted by the Forum in 1992, was the first regional effort to address some of the issues associated with transnational organised crime in the region. The *Honiara Declaration* seeks to prevent and suppress a range of relevant offences through law enforcement cooperation, mutual legal assistance, extradition, and a range of other measures.[913] In 2000, the South Pacific Chiefs of Police Conference (SPCOC) also agreed on a common framework for weapons control, known as the *Nadi Framework*. In 2002, the *Nasonini Declaration*, the Forum's anti-terrorism strategy, followed.[914]

While the *Honiara* and *Nasonini* Declarations have widespread support of most Forum Members, their implementation has been, at best, sluggish and some countries do not see any urgency for legislative reform in this field.[915] A major

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910 Available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 15 Dec 2008).

911 John Hill, "Transnational crime proves problematic in the Pacific Islands" (Dec 2006) *Jane's Intelligence Review* 50 at 50.

912 South Pacific Forum, "Declaration by the South Pacific Forum on Law Enforcement to Cooperation" (Attachment to the Twenty-Third South Pacific Forum Communiqué SPFS(92)18, Honiara, Solomon Islands, 8-9 July 1992) [Honiara Declaration], available at www.forumsec.org (accessed 25 Nov 2006).

913 Neil Boister, "Regional Cooperation in the Suppression of Transnational Crime in the South Pacific", in Geoff Leane & Barbara von Tigerstrom (eds), *International Law Issues in the South Pacific* (2005) 35 at 41; Neil Boister, "New Directions for Regional Cooperation in the Suppression of Transnational Crime in the South Pacific" (2005) 9(2) *Journal South Pacific Law.*

914 Pacific Islands Forum "Nasonini Declaration on Regional Security" (Annex 2 to the Thirty-Third Pacific Islands Forum Communiqué PIF(02)8, Suva, Fiji, 15-17 Aug 2002) [Nasonini Declaration], available at www.forumsec.org (accessed 25 Nov 2006).

915 Neil Boister, "Regional Cooperation in the Suppression of Transnational Crime in the

shortcoming of the PIF declarations has been the lack of enforceability of these instruments and the failure of some nations to "live up" to their commitments. These problems relate directly to the nature of the Forum and its lack of enforcement powers. Neil Boister observed that:

> Currently, the Forum cannot pass regional criminal laws. In the absence of the transformation of the Forum into a supranational regional organisation in the South Pacific, which is politically unlikely, any regional criminal law must thus be a product of an intergovernmental treaty adopted by the member states of the Forum. […] A possible next step for Forum members is to provide for a range of regional treaties to suppress a range of transnational crimes.[916]

The Forum has also developed a range of model laws and best practice guidelines on a range of issues relating to illicit drugs, sex-related offences, and firearms trafficking. These initiatives include the *Counter Terrorism and Transnational Organised Crime Model Provisions 2003*, the *Illicit Drugs Control Bill 2002*, the *Weapons Control Bill 2003* and the *Sex Offences Model Provisions 2005*.

Transnational Organised Crime Model Provisions

In an attempt to improve and harmonise criminal laws relating to organised crime in South Pacific nations, the Forum Secretariat has developed a suite of model provisions for adoption by Member States. These provisions are designed as a template for uniform and consistent anti-organised crime laws throughout the South Pacific, easily adoptable by PIF members. The provisions assist Member States with the development and implementation of domestic laws, in particular those nations that may have little or no expertise in addressing the legal, administrative, and technical challenges involved in this process. The Forum Secretariat is working actively with Attorneys-General and Justice departments in the region to adopt the *Model Provisions* to the different domestic legal systems.[917]

A first draft of the *Transnational Organised Crime Model Provisions* was presented in 2003. This draft was further amended and extended in subsequent years and a new set of *Counter Terrorism and Transnational Organised Crime Model Provisions* was released on July 10, 2007. Minor changes followed in 2008. The *Model Provisions* are based on New Zealand's counter-terrorism and anti-organised crime laws and contain elements of the United Nations' counter-terrorism and organised crime conventions and related UN Security Council resolutions.[918] Specifically, Parts 7, 8, and 9 reflect relevant offences and other provisions of the *Convention against Transnational Organised Crime* (Part 7 *Counter Terrorism and Transnational Organised Crime Model Provisions 2007*); the *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children* (Part 8), and the *Protocol against the Smuggling of Migrants by Land, Air, and Sea* (Part 9).

South Pacific", in Geoff Leane & Barbara von Tigerstrom (eds), *International Law Issues in the South Pacific* (2005) 35 at 56–78; Neil Boister, "New Directions for Regional Cooperation in the Suppression of Transnational Crime in the South Pacific" (2005) 9(2) *Journal South Pacific Law.*

916 Neil Boister, "New Directions for Regional Cooperation in the Suppression of Transnational Crime in the South Pacific" (2005) 9(2) *Journal South Pacific Law.*

917 Personal communication with Ms Daiana Buresova, Legal Drafting Officer, Pacific Islands Forum Secretariat, Suva, 26 Sep 2008.

918 Section 1(a) *Counter Terrorism and Transnational Organised Crime Model Provisions 2007* confirms that one of the principal objects of the Provisions is "to implement United Nations Security Council Resolutions and Conventions dealing with terrorism and transnational organised crime".

Section 55(1) of the *Counter Terrorism and Transnational Organised Crime Model Provisions* stipulates an offence for participation in a in an organised criminal group based on the definition of organised criminal group set out in ss 2, 55(2). These provisions are modelled after the *Palermo Convention*.[919]

As on October 1, 2008 only Palau and Vanuatu have adopted the *Model Provisions* domestically, though Vanuatu did not include the offence for participating in an organised criminal group.[920] The text of the Palau adoption was not available outside Palau at the time this report was written. The Federated States of Micronesia introduced a Bill in 2008 to make the *Model Provisions* domestic law.[921]

Definition of organised criminal group, ss 2, 55(2)

Section 2 of the *Counter Terrorism and Transnational Organised Crime Model Provisions* defines 'organised criminal group' as

> A group of at least 3 persons, existing for a period of time, that acts together with an objective of obtaining material benefits from the commission of offences that are punishable by a maximum penalty of at least 4 years imprisonment.

To constitute an organised criminal group, it is irrelevant whether or not

- some of the people involved in the group are subordinates or employees of others, s 55(2)(a);
- only some of the people involved in the group at a particular time are involved in the planning, arrangement or execution at that time of any particular action, activity, or transaction, s 55(2)(b); or
- the group's membership changes from time to time, ss 55(2)(c) *Counter Terrorism and Transnational Organised Crime Model Provisions*.

Figure 33 "Organised criminal group", ss 2, 55(2) *Counter Terrorism and Transnational Organised Crime Model Provisions*

Terminology Elements	**Organised Criminal Group**
Structure	• a group acting together • at least three persons • existing for a period of time ○ hierarchical structure, involvement in criminal offences, and changing membership are irrelevant, s 55(2).
Activities	• [no element]
Objectives	• objective of obtaining material benefits from the commission of offences that are punishable by a maximum penalty of at least 4 years imprisonment

The concept of organised criminal group under the PIF's *Counter Terrorism and Transnational Organised Crime Model Provisions* reflects the elements of the definition in the *Palermo Convention*, combining structural requirements with an element relating to the objectives of the group. As in many other definitions of

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919 See arts 2(1), 5(1)(a)(ii) *Conventional against Transnational Organised Crime*; see further Section 3.2 above.

920 *Counter Terrorism and Transnational Organised Crime Act 2005* (Vanuatu), No 29 of 2005; *Counter Terrorism and Transnational Organised Crime (Amendment) Act 2008* (Vanuatu), no 18 of 2008.

921 Personal communication with Ms Daiana Buresova, Legal Drafting Officer, Pacific Islands Forum Secretariat, Suva, 26 Sep 2008.

(organised) criminal group, proof of the commission of actual criminal offences is not required.

The differences to the definition in art 2 *Convention against Transnational Organised Crime* are minor. Unlike the *Palermo Convention*, the *Model Provisions* do not require that the group is "structured" and it is specifically stated in s 55(2) that the existence of a hierarchical structure is not a prerequisite. It may thus be possible to capture more loosely connected criminal organisations.

The objective of the organised criminal group is expressed somewhat differently in the *Model Provisions* though the focus of this element is largely identical to that contained in the *Palermo Convention*. The purpose of the group has to be the accumulation of profits through criminal offences that are punishable under domestic laws by four years imprisonment or more.[922] In addition, the notes to the *Model Provisions* suggest that "[c]ountries may wish to go further and cover serious violent offences" thus extending the application of the definition beyond economically motivated crime.

Participation in an organised criminal group, s 55(1)

Section 55(1) of the *Counter Terrorism and Transnational Organised Crime Model Provisions* proposes the introduction of an offence for participating in an organised criminal group:

> A person must not participate (whether as a member, associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group:
>
> (a) knowing that his or her participation contributes to the occurrence of criminal activity; or
>
> [(b) reckless as to whether his or her participation contributes to the occurrence of criminal activity.]
>
> Maximum penalty: imprisonment for [*length – grade 2*] years

Unlike the *Palermo Convention*, the *Model Provisions* do not propose an alternative criminal conspiracy offence based on an agreement between multiple offenders,[923] but it is noted that "if a country has a conspiracy offence, that may be used instead of the provision".[924] As mentioned earlier, the criminal codes of the Cook Islands, Fiji, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Vanuatu contain conspiracy provisions.[925]

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922 Cf the definition of "serious crimes" in art 2(b) *Convention against Transnational Organised Crime*; see further Section 3.2 above.

923 See art 5(1)(a)(i) *Conventional against Transnational Organised Crime*; see further Section 3.3 above.

924 Notes to s 55 *Counter Terrorism and Transnational Organised Crime Model Provisions* (July 2007 draft) [copy held with author].

925 See Section 19.2.2 above.

Figure 34 Elements of s 55(1) *Counter Terrorism and Transnational Organised Crime Model Provisions*

S 55(1)	Elements of the offence
Physical elements	• participation (whether as a member, associate member, or prospective member); • organised criminal group, s 2
Mental elements	• knowledge that it is an organised criminal group; • Knowledge/recklessness that/whether the participation contributes to the occurrence of criminal activity.

The offence set out in s 55(1) creates very broad liability for associated of criminal organisations. Under this provision, it is unlawful to be a member or associate of a criminal organisation, or to take steps to become a member if the person knows the nature of the organisation (ie its criminal objectives) and has at least some awareness (recklessness) that his or her involvement in the group may contribute to some criminal activity (presumably by the group).

This provision casts a much wider net than other participation offences, including the offence stipulated by the *Palermo Convention*. In particular, s 55(1) does not define the nature of the participation in the group. Concerns may also arise over the low threshold of recklessness in s 55(1)(b).

The two main limitations of liability in this offence are, first, the requirement of some affiliation with the group. The offence requires some formal link between the accused and the group, such as membership or association. It means that random connections to the organised criminal group (such as a person selling food or equipment to the group) are outside the scope of criminal liability. A second, albeit very minimal, limitation arises from the mental elements which require proof of the accused's knowledge of or recklessness about the link between his/her participation and the occurrence of criminal activity. Accordingly, participation that does not or cannot contribute to criminal activity (such as supplying food) is excluded from liability, even if the accused is a formal member or associate of the group.

19.3.4 Cook Islands

The first country in the South Pacific to introduce a specific organised crime offence was the Cook Islands. In addition to its general conspiracy offence in s 333 *Crimes Act 1969*,[926] and following its accession to the *Convention against Transnational Organised Crime,* a new s 109A entitled "participating in organised criminal group" was inserted into the *Crimes Act 1969* in 2003.[927] The introduction of this offence was part of a comprehensive suite of amendments relating to organised crime, corruption, and money laundering. This was followed by the *Crimes Amendment Act 2004* (Cook Islands) which introduced new offences relating to migrant smuggling and trafficking in persons.[928]

Definition of organised criminal group

The term 'organised criminal group' is defined in s 109A(2), (3) *Crimes Act 1969* (Cook Islands):

926 See Section 19.3.1 above.
927 *Crimes Amendment Act 2003* (Cook Islands), No 6 of 2003.
928 No 5 of 2004; ss 109B–109Q *Crimes Act 1969* (Cook Islands).

(2) For the purposes of this Act, a group is an organised criminal group if it is a group of 3 or more people who have as their objective or one of their objectives -

(a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or

(b) obtaining material benefits from conduct outside the Cook Islands that, if it occurred in the Cook Islands, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or

(c) the commission in the Cook Islands of offences that are punishable by imprisonment for 10 years or more; or

(d) conduct outside the Cook Islands that, if it occurred in the Cook Islands would constitute the commission of an offence punishable by imprisonment for a term of 10 years or more.

(3) A group of people is capable of being an organised criminal group for the purposes of this Act whether or not -

(a) some of them are subordinates or employees of others; or

(b) only some of the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or

(c) its membership changes from time to time.

This definition is, for the most part, identical to the definition of organised criminal group in s 98A *Crimes Act 1961* (NZ).[929]

Figure 35 "Organised criminal group", s 109A(2), (3) *Crimes Act 1969* (Cook Islands)

Terminology Elements	**Organised Criminal Group**
Structure	• Three or more persons. Irrelevant whether or not (s 109A(3)): ○ Some of them are subordinates or employees of others; or ○ Only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or ○ Its membership changes from time to time.
Activities	• [no element]
Objectives	Either: • Obtaining material benefit from offences punishable by at least 4 years imprisonment (a) in the Cook Islands or (b) equivalent outside the Cook Islands; or • Offences punishable by ten years imprisonment or more (c) in the Cook Islands, or (d) equivalent elsewhere.

The only difference to the New Zealand definition lies in paras 109A(2)(c) and (d). The definition extends to groups of three or more people that have as their objective the commission of offences punishable by ten years imprisonment or more. In New Zealand, this element is limited to so-called 'serious violence offences'. The Cook Islands, in contrast, do not limit the definition in that way. This difference is, however, of marginal relevance as there are very few offences that attract a penalty of ten years imprisonment that are not serious offences involving violence and are also not

[929] See Section 5.2.1 above.

designed to obtain material benefit. For a discussion of the remaining elements of this definition see Section 5.2.1 above.

Participation in an organised criminal group

The offence for participating in an organised criminal group is set out in s 109A *Crimes Act 1969* (Cook Islands). As with the definition of organised criminal group, this offence is modelled after s 98A(1) *Crimes Act 1961* (NZ).

> (1) Every one is liable to imprisonment for a term not exceeding 5 years who participates (whether as a member or an associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group; and
>
> (a) knowing that his or her participation contributes to the occurrence of criminal activity; or
>
> (b) reckless as to whether his or her participation may contribute to the occurrence of criminal activity.

Figure 36 Elements of s 109A(1) *Crimes Act 1969* (Cook Islands)

S 98A(1)	**Elements of the offence**
Physical elements	• participation (whether as a member or an associate member or prospective member) • in an organised criminal group (s 109A(2)).
Mental elements	• knowledge of the nature of the group; • knowledge or recklessness as to whether the participation may contribute to the occurrence of criminal activity, s 109A(1)(a) or (b).
Penalty	5 years imprisonment

The elements of this definition are discussed further in Section 5.2.2 above.

20 United States of America

[to be completed]

21 Countries without any organised crime laws

21.1 Thailand

Illicit drugs and trafficking in persons, especially women and children, are historically Thailand's most notorious organised crime problems. In the late 1900s, Thailand was a key producer of illicit opium, especially the border region to Myanmar, Lao, and China, known as the Golden Triangle. Gradually, the country has transformed from a drug producing and transit country, to a major consumer of illicit drugs, though the levels of drug trafficking through Thailand remain high in regional comparison. Radical measures adopted by the government of former Prime Minister Thaksin Shinawatra to suppress the illicit drug trade have had considerable success in dismantling drug cartels, but came at the expense of thousands of lives and raised serious concerns over human rights infringements.

The Jao Pho groups and the United Wa State Army have been identified as two of the most influential and widespread criminal organisations in Thailand. The Jao Pho is made up mostly by members of ethnic Chinese background who also operate many legitimate businesses and have close associations with (corrupt) government officials, law enforcement agencies, and local and national legislatures.[930] The United Wa State Army (also referred to as the 'Red Wa') is based in the Burmese part of the Golden Triangle and is said to be in control of much of the methamphetamine and heroin production in this part of Myanmar and in trafficking these drugs across the border for sale in Thailand.[931]

Thailand's criminal law currently contains no specific provision relating to organised crime. The *Penal Code* of 1956 — which is based principally on French criminal law — contains general provisions relating to "instigation of a criminal offence" (s 84) and assisting and facilitating criminal offences (s 86). There are, however, no provisions relating to conspiracy or to participation is or association with criminal organisations.

Thailand signed the *Convention against Transnational Organised Crime* at the opening ceremony in Palermo, Italy in 2000, but has yet to implement it into domestic law.[932] At the time of the inception of the *Palermo Convention*, the Thai Government also set up an enhanced anti-organised crime policy. On November 7, 2000 the Thai Cabinet under the Prime Minister Thaksin Sinawatra launched a new

> national security policy for prevention and correction of the problem of organised crime [...] to serve as a guideline for all government agencies concerned, in order to facilitate coordination and cooperation for systematic prevention, suppression, and correction of this problem.[933]

The Office of the National Security Council was assigned the role of lead agency in this approach. Subsequent to this new policy, a number of laws were passed in order to increase law enforcement powers, improve extradition and mutual legal assistance in criminal matters, and also create greater awareness in the community and private sector about organised crime.[934]

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930 James Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime* (2007) 10.

931 James Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime* (2007) 10.

932 UNODC, *United Nations Convention against Transnational Organised Crime*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed June 16, 2008).

933 Thailand, *Thailand Country Report* (to the Eleventh United Nations Congress on Crim Prevention and Criminal Justice, April 18-25, 2005) (2005) 4.

934 Thailand, *Thailand Country Report* (to the Eleventh United Nations Congress on Crim Prevention and Criminal Justice, April 18-25, 2005) (2005) 4–59.

Following Thailand's signature of the *Palermo Convention*, the Office of the Attorney-General conducted a comparative study on the compatibility of the Convention with Thai laws. This study concluded that:

> Thailand should enact new laws to be more efficient in the prevention and suppression of organised crime. Current laws are not comprehensive enough to criminalise organised crime efficiently, especially when there is no clear or well-formulated definition of 'organised crime' and the 'transnational' nature of organised crime syndicates. General legal provisions to criminalise an act of 'conspiracy' to commit serious crimes are also lacking.[935]

It is understood that in 2004 or 2005 several bills were drafted to address these shortcomings. To date, there has been no further update about the state of these proposals. In August 2006 the United Nations was also not aware about any steps taken to criminalise participation in an organised criminal group under domestic law[936] and Thai government submissions to the Conference of the Parties to the UN Convention against Transnational Organised Crime confirm that participation in an organised criminal group is (still) not criminalised.[937]

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935 Thailand, *Thailand Country Report* (to the Eleventh United Nations Congress on Crim Prevention and Criminal Justice, April 18-25, 2005) (2005) 61.

936 UN, Conference of the Parties to the United Nations Convention against Transnational Organised Crime, *Review of the Implementation of the United Nations Convention against Transnational Organised Crime*, UN Doc CTOC/COP/2005/2/Rev.1 (9 Aug 2006) para 1.

937 UN, Conference of the Parties to the United Nations Convention against Transnational Organised Crime, *Information submitted by States in their responses to the questionnaires for the first reporting cycle*, UN Doc CTOC/COP/2006/CRP.2 (28 Aug 2006) 4.

PART 4: THE WAY AHEAD

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