PALERMO IN THE PACIFIC:

ORGANISED CRIME OFFENCES IN THE ASIA PACIFIC REGION

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Abbreviations

ACC	Australian Crime Commission
ACT	Australian Capital Territory
AFP	Australian Federal Police
ATS	Amphetamine-type stimulants
AUD	Australian Dollar
CAD	Canadian Dollar
CCE	Continuing Criminal Enterprise
China	People's Republic of China (PRC)
CISC	Criminal Intelligence Service Canada
Cth	Commonwealth of Australia
DPRK	Democratic People's Republic of Korea (North Korea)
FBI	United States Federal Bureau of Investigations
HKD	Hong Kong Dollar
ICCPR	International Covenant for Civil and Political Rights
KMT	Kuomitang
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
RICO	Racketeer Influenced and Corrupt Organisations Act
ROK	Republic of Korea (South Korea)
SA	South Australia
SAR	Special Administrative Region of China
SGD	Singapore Dollar
STDM	Sociedade de Turismo e Diversoes de Macau
Taiwan	Republic of China (Chinese Taipei)
Tas	Tasmania
TWD	New Taiwan Dollar
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
US	United States of America
USD	United States Dollar
Vic	Victoria
WA	Western Australia

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NOTE:
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* 645-685

'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

'Bullets over Broadway: New Ways to Fight Organised Crime', presentation at the *11th National Metropolis conference: Frontiers of Canadian Immigration*, Calgary, AB, March 21, 2009

'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 22 May 2009).

PART 1

INTRODUCTION, BACKGROUND, AND CONTEXT

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 reform of the substantive criminal law in order 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, criminal law, 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. 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. Generalisations about organised crime are difficult to make and 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 laws with the introduction of the US *Racketeer and Corrupt Organisations* (*RICO*) Act of 1970[1] and art 416bis 'mafia-type associations' in Italy in 1982. These new laws 'recognised that previous efforts against organised crime had failed because the focus had been on individual prosecutions rather than on organisational foundations.'[2]

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1 *Organised Crime Control Act* Pub L 91-452, Title IX, 84 Stat 922; *Racketeer Influenced and Corrupt Organisations* 18 USC §§1961–1968 [hereinafter *RICO*]. See further, Section 23.1 below.

2 Michael Goldsmith, 'RICO and Enterprise Criminality' (1982) 88 *Columbia Law Review* 774 at 775.

Since that time, many other countries — including some in the Asia Pacific region — have followed the same trend by criminalising the enterprise structure of organised crime and/or prohibiting the participation in criminal organisations. Some experts, like Sabrina Adamoli et al, have described these laws as one of 'the main innovations in criminal legislation on organised crime'.[3] Edward Wise has referred to these developments 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."[4]

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.[5] 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 was met with little interest by many countries in the region. 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. Japan has special laws to control yakuza and boryokudan groups. Similarly, in the 1990s, Canada and New Zealand created special offences to ban associations with OMCGs. 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

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

4 Eduard Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 304.

5 UNODC, www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (status as on 26 Sep 2008; accessed 22 May 2009).

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 existence and for its activities.

1.2 Purpose and Structure

The principal purpose of this study is to identify and review offences dealing with the incrimination of organised crime 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;
(4) Investigates the legislative and policy frameworks in jurisdictions without specific organised crime offences;
(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.

Part 1 includes an introductory chapter that canvasses the background and significance of organised crime as well as the purpose, structure, and methodology of the study. The second chapter explores the scope of contemporary criminal law and discusses the need — if any — to extend criminal liability further in order to prevent and suppress organised crime more effectively. 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 provided in this chapter. Part 1 is concluded with a section that explores some of the general reservations toward organised crime offences.

The focus of Part 2 is on international frameworks that aim to criminalise organised crime, namely the model developed by the *Convention against Transnational Organised Crime (Palermo Convention)*.

Part 3 explores existing and proposed organised crime offences under domestic statues, also including brief outlines of those jurisdictions currently without any such offences. The jurisdictions included in Part 3 are: Canada, New Zealand;, Australia, China including its Special Administrative Regions Hong Kong and Macau, Taiwan (Chinese Taipei), Singapore, Malaysia, Brunei Darussalam, Indonesia, Philippines, Vietnam, Cambodia, Lao PDR, Thailand, Japan, Republic of Korea (South Korea), Pacific Islands, and the United States of America. Each chapter also identifies the patterns of contemporary organised crime and the predominant criminal organisations that operate in each jurisdiction.

The final part of this work, Part 4, presents a number of observations regarding the need for and rationale of organised crime offences, the available models of such offences, and the issues surrounding the definition of organised crime and participation in criminal organisations. In concluding, this study offers a comprehensive set of recommendations to criminalise organised crime more effectively and consistently throughout the region. A final comment is also made on the limitations of criminal law in terms of the implementation and enforcement of organised crime laws.

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.

Identifying and analysing current patterns of organised crime and analysing anti-organised crime laws in over twenty jurisdictions in a region as diverse as the Asia Pacific is a difficult task, given that changes take place very rapidly and often unannounced. Information quickly becomes outdated and obsolete as a result of this. Accordingly, the information presented in this study should be considered solely as an indicative snapshot of country-specific situations. Relevant laws referred to in this report are current as on May 1, 2009, unless stated otherwise.

2. Criminalising Organised Crime: The Need for Special Laws

> The criminal law is the first line of defence against organised crime.[6]

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 as they plan and oversee the criminal organisation but frequently 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. These associates may provide the organisation with essential supplies but are often not involved in any of the organisation's criminal activities. Organised crime operates on a sustained basis and larger organisations operate independently from individual persons. The structure and strength of organised crime transcends its membership.

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. '[C]riminal enterprises can thrive despite successful individual prosecutions.'[7] 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.[8] 'The crime committed by an enterprise, like the crime of conspiracy,' notes Ethan Gerber, 'is worthy of greater punishment because collective action toward an illegal end poses greater risk to society that individual action toward the same end.'[9] 'In the same manner, society has an immense interest in preventing crime committed by gangs', remarks Raffy Astvasadoorian.[10]

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 commit 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. This generally includes:

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

7 Michael Goldsmith, 'RICO and Enterprise Criminality' (1982) 88 *Columbia Law Review* 774 at 775.

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

9 Ethan Gerber, '"A RICO you can't refuse": New York's Organised Crime Control Act' (1988) 53 *Brooklyn Law Review* 979 at 1003.

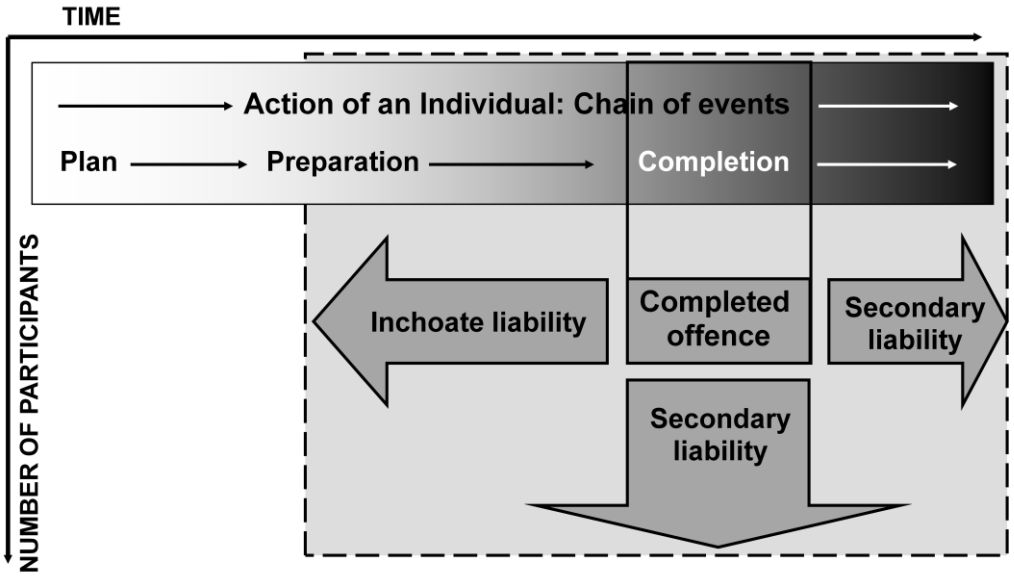
10 Raffy Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence' (1998) 19 *Journal of Juvenile Law* 272 at 298-299.

1 proof of the voluntary occurrence of the (physical/external) elements specified in the offence an accused is charged with;
2 proof of mental elements of that offence (if required) to make a person criminally responsible for that conduct; and also
3 absence of any defences (justification or excuses) that would negative criminal responsibility for the offence.[11]

Absence of one or more elements of an offence does, however, not automatically void criminal responsibility. In all criminal jurisdictions, 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 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 by criminalising agreements by two or more people to commit a crime (or other unlawful act).[12]

Figure 1 Extensions of criminal liability[13]



These extensions of criminal liability are not without controversy. 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

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11 Cf Eric Colvin & John McKechnie, *Criminal Law in Queensland and Western Australia* (5th edn, 2008) para 1.5; Bernadette McSherry & Bronwyn Naylor, *Australian Criminal Laws* (2004) 58–59 with reference to David Lanham, 'Larsonneur Revisited' [1976] *Criminal Law Review* 276–281.

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

13 Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008) 94.

debatable just how remotely a person can be connected to a criminal offence and still be liable for his/her connection to it.[14]

In response to these concerns it is argued — and now widely accepted — that these 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.[15] 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 community instinct to see justice is done to the person who has gone very close to committing substantive harm'.[16]

2.1.1 Inchoate liability

Attempt and other inchoate offences such as incitement and conspiracy[17] 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').[18] 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. Numerous acts may in a particular case be committed between the formation of the criminal plan and the commission of the complete offence that is the object of this plan. 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

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14 See further Section 2.3.3 below.

15 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).

16 Peter Gillies, *Criminal Law* (4th ed, 1997) 670. See further Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008) 94–95.

17 Conspiracy is discussed separately in Section 2.1.3 below.

18 See further, Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008) 96 with further references.

is 'sufficiently proximate' and not 'merely preparatory' is considered punishable.[19] 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.[20]

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.[21]

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.

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.[22] To be immune from prosecutions, senior members of criminal organisations 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.[23] 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'.[24]

Secondary liability may arise for conduct that occurred before or during the commission of the principal offence, hence the term called accessorial liability. 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.[25]

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

20 See further, Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008) 107–112; Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 404–408; Peter Gillies, *Criminal Law* (4th ed, 1997) 673–679.

21 *R v Smith* [1975] AC 476.

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

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

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

25 Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008) 126.

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'.[26]

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.[27]

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.[28] 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.[29]

These requirements create some 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.

2.1.3 Conspiracy

In many jurisdictions, especially those following common law traditions, the doctrine of conspiracy is currently the most suitable — and often the only available — tool to create liability for people involved in criminal organisations,[30] especially those 'who

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

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

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

29 RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (7th ed, 2008) paras 9.12–9.13. Cf Simon Bronitt & McSherry, *Principles of Criminal Law* (2nd ed, 2005) 358–364; David Lanham et al, *Criminal Laws in Australia* (2006) 499–509.

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

plan and organise crimes but take no part in their actual commissions'.[31] 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.[32]

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',[33] it exists even without preparation of the contemplated offence.[34] 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.[35] 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.[36]

In essence, liability for conspiracy arises when two or more persons enter into an agreement to commit an unlawful act[37] with the intention to commit that unlawful act.[38] Unlike attempt, there is no requirement to demonstrate that the accused came close ('proximate') to the completion of the substantive offence.[39]

At the heart of liability for conspiracy is the agreement to commit a criminal offence or to effect an unlawful purpose.[40] 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.[41] 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

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

32 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.

33 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 ed, 2008) para 19.22.

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

35 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.

36 Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008) 118.

37 *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.

38 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.

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

40 '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.

41 *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).

may also be part of the agreement without carrying out any conduct towards the common objective.[42]

The agreement between the conspirators imports an intention that the unlawful act or purpose of the agreement be done.[43] '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'.[44]

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.[45] Most US jurisdictions and some Australian jurisdictions require that at least one of the parties to the agreement commit an overt act pursuant to the agreement.[46] At common law,[47] in Canada,[48] New Zealand,[49] Queensland,[50] Victoria,[51] and Western Australia,[52] 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.[53] Justices McPherson and Thomas, for instance, remarked 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.[54]

The experience of those countries that have adopted the 'conspiracy model' set out in art 5(1)(a)(i) of the *Convention against Transnational Organised Crime*[55] has also shown that most conspiracy charges are based on evidence of an overt act, even if this is not a formal requirement. This is because it 'may be difficult for the

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

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

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

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

46 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.

47 '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.

48 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.

49 *R v Gemmell* [1985] 2 NZLR 740 at 743. Cf *R v Johnston* (1986) 2 CRNZ 289; *R v Sanders* [1984] 1 NZLR 636.

50 Sections 541, 542 *Criminal Code* (Qld)

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

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

53 '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.

54 *R v Gudgeon* (1995) 133 ALR 379; cf MJ Shanahan et al, *Carter's Criminal Law of Queensland* (16th ed, 2006) s 541.20.

55 See Section 3.3.1 below.

prosecution to prove what occurred in a private meeting between conspirators'[56] and because 'the authorities generally do not learn of the conspiracy until it has been transacted, wholly or partly.'[57]

One of the practical advantages of conspiracy is that it allows merging of the prosecution of several charges against multiple persons,[58] 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.[59] 'The conspiracy prosecution', remarks Clay Powell, 'has the great advantage of combining all the isolated acts to put together the full picture.'[60] 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'.[61]

In practice, conspiracy charges frequently involve criminal groups involved in the trafficking, supply, or sale of illicit drugs.[62] 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.[63]

First, conspiracy cannot be used as a charge against persons that are not part of the agreement. 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',[64] note Michael Levi and Alaster Smith: '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 to distinguish related or sub-conspiracies.'[65] 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.[66] Mere knowledge or recklessness of the agreement does not suffice to establish liability for conspiracy.[67] Furthermore, some criminal organisations engage in a diverse range of illegal transactions that cannot be tied together as a single common agreement.[68]

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56 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.

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

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

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

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

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

62 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.

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

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

65 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.

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

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

68 See, for example, *US v Elliot* 571 F.2d 880 (5th Cir.1978), as case in which the members

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. 'Leaders of organizations create a 'corporate veil' to insulate them from liability',[69] notes Christopher Blakesley. Peter Hill remarks:

> 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.[70]

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 note 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.'[71]

Fourth, conspiracy charges often fail because the law is so overly complex, involve a great number of defendants, and because some jurisdictions have created procedural obstacles (such as approval by Attorneys-General) to limit the use of conspiracy charges.[72]

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 period of liquor prohibition in the United States between 1920 and 1933.[73] The planning of the so-called Valentine's Day massacre of 1929, in

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of the criminal group engaged in a criminal activity such as murder, fencing of stolen goods, arson, and the sale of illicit drugs. The Fifth Circuit Court argues that conspiracy could not have been used successfully in this case because a single conspiracy, tying all defendants together, could not be established.

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

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

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

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

73 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

which seven members of a rival gang were brutally murdered in a machine gun fire, has also been attributed to Al Capone.[74] However, it was never possible to prove any link between him and this 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.[75] 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.[76] 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.[77]

The only crime Al Capone was ever convicted for was tax evasion as his unlawful income was subject to income tax.[78] He was later imprisoned for this offence between 1932 and 1939, first in Atlanta (GA) and from 1934 in Alcatraz, San Francisco (CA).[79] 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 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.

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and appears to originate in newspaper articles published in relation to the Watergate scandal during Richard Nixon's US presidency.

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

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

76 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.

77 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.

78 *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.

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

Escobar never had to face charges for any crimes he directed or committed because he was protected by a large 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 also alleged that 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.[80] In Montreal, he became involved with the Cotroni family that controlled much of the local illicit drug market, and he also established ties with the La Cosa Nostra families in New York,[81] Italy, and various offshoots in the Caribbean.[82] 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.[83] 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 should he return to Canada.[84]

2.2.4 Joaquín Guzmán

Mr Joaquín Guzmán Loera, also known as 'el chapo' ('shorty') is a Mexican national who is the leader of an international drug trafficking ring known as the Sinaloa cartel. Born in 1957, he became involved in the illicit drug trade in the 1980s and gained notoriety for the use of underground tunnels to smuggle cocaine from Mexico into Arizona. Guzmán formed his own cartel in 2003. Today, he is widely seen as Mexico's top drug kingpin and since 2009 features on the *Forbes* list of the world's richest people. Warrants have been issued by the United States and Interpol for his arrest, but Guzmán has thus far successfully evaded any prosecution. Most recently, his name has been frequently associated with the drug related violence that erupted in Mexico in 2008 and that had left 7,200 people dead by the end of March 2009.[85]

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

81 See also Section 23.1.7 below.

82 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.

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

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

85 Mark Lander, 'Clinton says demand for illegal drugs in the US "fuels the drug trade" in Mexico' (26 Mar 2009) *New York Times* 5.

2.2.5 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 without a large number of so-called foot-soldiers. The advantage of criminalising these lower-ranking participants in the criminal hierarchy is that these persons generally operate 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.[86]
- A motor mechanic who fixes motorbikes for an outlaw motorcycle gang, being aware of the criminal activities the gang is involved in.[87]
- A person buying (or selling) t-shirts bearing the logo of a criminal organisation.[88]
- 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.'[89]

These cases and 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.

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

87 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.

88 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice). See Section also 8.3.2 below.

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

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.[90]

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 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.[91]

Canadian scholar Kent Roach also argues that outlawing membership in an organisation infringes on the freedom of association.[92] 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?'[93]

Many critics argue that the 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.'[94]

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

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

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

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

94 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

The *Convention against Transnational Organised Crime* was approved by the United Nations (UN) General Assembly on November 15, 2000,[95] and was made available for governments to sign at a conference in Palermo, Italy, on 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.[96] Today, the Convention has 147 Signatories and all 147 countries have ratified it.[97] The Convention entered into force on September 29, 2003.[98]

The *Palermo Convention* 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.'[99] The Convention has two main goals:[100] 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.[101]

Giovanni Falcone, his wife, and three police officers escorting them, were assassinated on May 23, 1992 near Capaci, Sicily, on their way to Palermo airport.

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95 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).

96 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.

97 UNODC, www.unodc.org/unodc/en/treaties/CTOC/signatures.html (accessed 15 Apr 2009).

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

99 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.

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

101 Dimitri Vlassis, 'The United Nations Convention against Transnational Organized Crime and its Protocols', in *The Changing Face of International Criminal Law* (2002) 75 at 77-78; Dimitri Vlassis, 'Challenges in the Development of International Criminal Law', in M Cherif Bassiouni (ed), *International Criminal Law, vol I* (3rd ed, 2008) 907 at 909–910.

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.[102]

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 (UN). 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.[103] 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'.[104]

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[105] and the development of appropriate countermeasures.[106] 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.[107]

The conference concluded the *Naples Political Declaration and Global Action Plan against Organised Transnational Crime* (hereinafter the *Naples Declaration*)[108] 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).[109] In December 1994, the UN General

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

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

104 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).

105 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).

106 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.

107 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.

108 *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).

109 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 78-80; David McClean, *Transnational Organized Crime* (2007) 3–4; Dimitri Vlassis, 'Challenges in the Development of International Criminal Law', in M Cherif Bassiouni (ed), *International Criminal Law, vol I* (3rd ed, 2008) 907 at 910–911.

Assembly endorsed the *Naples Declaration*,[110] thus opening the way for the elaboration of an international convention against transnational organised crime under the auspices of the UN.[111]

3.1.3 Development of the Palermo Convention

On December 12, 1996, the Government of Poland submitted a first draft UN framework convention against transnational organised crime.[112] 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.[113] Pursuant to the recommendations of this meeting, the UN 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.[114] The expert group met in Warsaw, February 2-6, 1998[115] 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.[116] 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.[117] The findings of the Buenos Aires meeting were then put to the Commission on Crime Prevention and Criminal Justice and subsequently to the UN 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:

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

111 See further David McClean, *Transnational Organized Crime* (2007) 6–8; Dimitri Vlassis, 'Challenges in the Development of International Criminal Law', in M Cherif Bassiouni (ed), *International Criminal Law, vol I* (3rd ed, 2008) 907 at 912–914.

112 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; Dimitri Vlassis, 'Challenges in the Development of International Criminal Law', in M Cherif Bassiouni (ed), *International Criminal Law, vol I* (3rd ed, 2008) 907 at 914–915.

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

114 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.

115 See further, Dimitri Vlassis, 'Challenges in the Development of International Criminal Law', in M Cherif Bassiouni (ed), *International Criminal Law, vol I* (3rd ed, 2008) 907 at 917–918.

116 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).

117 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.

(a) a new comprehensive international convention against transnational organised crime, and
(b) three additional international legal instruments on:
  i. trafficking in women and children;
  ii. illicit manufacturing and trafficking in firearms, their parts and components, and
  iii. illegal trafficking in and transporting of migrants, including by sea.[118]

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 trafficking in persons and migrant smuggling protocols finished at the eleventh session in October 2000. An additional twelfth session to conclude the Firearms Protocol was held in March 2001.[119] In retrospect — and in comparison to other international treaties — the development of the *Palermo Convention* and the protocols only took a short time, which, in the view of one commentator, 'reflects the urgency of the needs faced by all States, developed and developing alike, for new tools to prevent and control transnational organised crime.'[120]

Outline of the Convention

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),[121] corruption (art 8),[122] and obstruction of justice (art 23). The *Legislative Guides* to the Convention stresses that:

> 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

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118 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].

119 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.

120 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; Dimitri Vlassis, 'Challenges in the Development of International Criminal Law', in M Cherif Bassiouni (ed), *International Criminal Law, vol I* (3rd ed, 2008) 907 at 920–925.

121 See further, Roger Clark, 'The United Nations Convention against Transnational Organized Crime' (2004) 50 *Wayne Law Review* 161 at 174-175; Andreas Schloenhardt, 'Transnational Organized Crime and International Criminal Law', in M Cherif Bassiouni (ed), *International Criminal Law, vol I* (3rd ed, 2008) 939 at 954–956.

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

> authorities. They constitute, therefore, the cornerstone of a global and coordinated effort to counter serious and well-organised criminal markets, enterprises, and activities.[123]

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.[124]

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.[125]

This definition of organised criminal group 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.[126]

3.2.1 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 focusing on the activities the organisation and its members engage in.[127]

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123 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.

124 See further Andreas Schloenhardt, 'Transnational Organized Crime and International Criminal Law', in M Cherif Bassiouni (ed), *International Criminal Law, vol I* (3rd ed, 2008) 939 at 956–960.

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

126 See also David McClean, *Transnational Organized Crime* (2007) 41–42; Andreas Schloenhardt, 'Transnational Organized Crime and International Criminal Law', in M Cherif Bassiouni (ed), *International Criminal Law, vol I* (3rd ed, 2008) 939 at 950–952.

Only 'structured groups' of three or more persons can be the subject of the measures under the *Palermo 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 existence, and associations that do not need to have formally defined roles for its members, continuity of its membership or a developed structure.[128] Acts committed by individuals or less than three persons,[129] or acts done by three persons not 'acting in concert' also fall outside the scope of the Convention.[130] Signatories to the Convention are, however, free to raise or lower the number of members required by this definition.[131]

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.'[132] 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.[133]

3.2.2 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.[134] The Convention recognises that the ongoing existence of criminal organisations is generally independent from individual criminal activities; organised crime is characterised by

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

128 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.

129 It is noteworthy that the requirement of three members is higher than the two persons 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'.

130 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.'

131 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.

132 *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.

133 *Legislative Guides*, 14.

134 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.

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.[135]

3.2.3 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 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.' [136] 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.'[137] 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.[138]

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.[139] 'Because domestic laws, and not international standards, determine this aspect of the definition, some states may

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135 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.

136 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.

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

138 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.

139 Cf *Legislative Guides*, 14.

change the penalties in their domestic criminal statutes to remove crimes from the scope of the Convention.[140]

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'.[141]

3.2.4 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.[142] 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'.[143]

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'[144] 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).[145]

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.[146]

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,

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140 Jennifer Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal* 1111 at 1119.

141 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.

142 *Travaux Préparatoires*, para 3.

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

144 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

145 *Legislative Guides*, 13.

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

'referring to almost every kind of formation, thus rendering it almost meaningless'.[147] Alexandra Orlova and James Moore have described the definition as 'a conceptually weak compromise definition that is, at once, overly broad and under inclusive.'[148] In a recent paper, Jennifer M Smith commented that:

> The United Nations (UN) Convention against Transnational Organised Crime will not be a a completely effective mechanisms to counter organised crime either, because it lacks international standards to define organised crime and an international mechanism to enforce and punish organised crime.[149]

Others, however, 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.'[150]

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.
> […]

This 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).[151] According to this definition, the application of the offences under art 5 is limited to 'transnational organised crime', i.e. to offences that occur across international borders, art 3(2).[152] Article 34, however, requires that the

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147 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.

148 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.

149 Jennifer Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal* 1111 at 1115.

150 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.

151 See further, David McClean, *Transnational Organized Crime* (2007) 51–52.

152 See further, David McClean, *Transnational Organized Crime* (2007) 52–56.

offence needs to be criminalised in domestic law independently of the transnational nature of the involvement of an organised crime group.

Article 5(1)(a) of the *Palermo Convention* offers Signatories a choice between two different organised crime offences:

(i) a conspiracy offence, and
(ii) an offence for participating in an organised criminal group (also referred to as 'associations de malfaiteurs').[153]

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,[154] 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[155]).[156] Figure 3 below, however, shows that several jurisdictions have opted to use both models simultaneously.

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153 Cf Andreas Schloenhardt, 'Transnational Organized Crime and International Criminal Law', in M Cherif Bassiouni (ed), *International Criminal Law, vol I* (3rd ed, 2008) 939 at 953–954.

154 See the discussion of conspiracy in Section 2.1.3 above.

155 See, for example, art 115 *Penal Code* (Italy).

156 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.

Figure 3 Domestic implementation of art 5 *Convention against Transnational Organised Crime*, Asia Pacific Region (October 6, 2008)[157]

Country	Is participation in an organised criminal group criminalised?				Other
	1. Yes			2. No	
	conspiracy model, art 5(1)(a)(i)	overt act in furtherance of agreement required	participation model, art 5(1)(a)(ii)		
Australia	✘	✘	NSW, SA	-	-
Brunei Daruss.					no reply
Cambodia	✘	-	-	-	-
Canada	✘	-	✘	-	-
PR China	✘	-	✘		
- Hong Kong					no reply
- Macau	✘	-	✘	-	-
Cook Islands					no reply
East Timor					not a signatory
Fiji					not a signatory
France	✘	no answer	✘	-	-
Indonesia	✘	✘	✘	-	-
Japan					no reply
Kiribati					no reply
Korea (Rep)					no reply
Lao PDR					no reply
Malaysia	✘	✘	✘	-	-
Micronesia					no reply
Nauru					no reply
New Zealand	-	✘	✘	-	-
Palau					not a signatory
PNG					not a signatory
Philippines	✘	✘	✘	-	-
Samoa					not a signatory
Singapore					no reply
Solomon Isl.					not a signatory
Taiwan					not UN member
Thailand	-	-	-	✘	-
Tonga					not a signatory
USA	✘	✘	✘	-	-
Vanuatu					no reply
Vietnam					no reply

[157] UN, Conference of the Parties to the UN Convention against Transnational Organised Crime, *Information submitted by States in their response to the checklist/questionnaire on the implementation of the United Nations Convention against Transnational Organized crime for the first reporting cycle*, UN Doc CTOC/COP/2008/CRP.7 (6 Oct 2008) question 1. Note that the information set out in Figure 3 is based on information submitted by Signatories to the Conference of the Parties. This information is not always consistent with the findings in this report. Chapters 4-23 of this study explore each jurisdiction and their signature and domestic laws separately.

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 4 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 design of art 5(1)(a)(i) *Palermo Convention* is, for the most part, identical with the conspiracy offence discussed in Section 2.1.3 above, though the Convention 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.[158]

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.[159]

A second and more subtle difference of procedural significance can be found in art 5(2) which facilitates the proof of the mental elements.[160] 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.[161] 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.[162]

Of particular concern is the fact that the many countries that adopted the conspiracy model set out in art 5(1)(a)(i) also require proof of some overt act in furtherance of

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158 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.

159 See also *Legislative Guides*, 24.

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

161 See Section 2.1.3 above.

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

the agreement. In August 2008, the Conference of the Parties to the United Nations Convention against Transnational Organised Crime noted that:

> Of those States which criminalised the agreement to commit a serious crime, approximately one half reported that the definition of that offence included, as allowed by article 5, the additional element of an act committed by one of the participants in furtherance of the agreement or the involvement in an organised criminal group, while 33 States indicated that no additional element was required.[163]

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.[164] 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').[165]

Figure 5 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)).[166] 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.[167]

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163 UN, Conference of the Parties to the United Nations Convention against Transnational Organised Crime, *Implementation of the United Convention against Transnational Organised Crime: consolidated information received from states for the first reporting cycle*, UN Doc CTOC/COP/2005/2/Rev.2 (25 Aug 2008) para 7.

164 Articles 450–451 *Penal Code* (France); arts 416, 416bis *Penal Code* (Italy). See also arts 140, 265 *Penal Code* (The Netherlands). See further Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 314–320.

165 See Figure 3 above.

166 See Section 3.2 above.

167 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.

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, fixing a criminal group's motorbikes, or being a look-out man at a burglary would be enough to meet these requirements.[168]

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.[169] 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).[170]

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 offence under art 5(1)(a)(ii) 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'.[171]

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 to criminal activities. It also extends liability beyond the current parameters of secondary (or accessorial) liability (see Figure 6 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.[172]

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

169 See further, *Legislative Guides*, 24.

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

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

172 See Section 2.1.3 above.

Figure 6 Extension of criminal liability under art 5(1)(a)(ii) *Convention against Transnational Organised Crime*

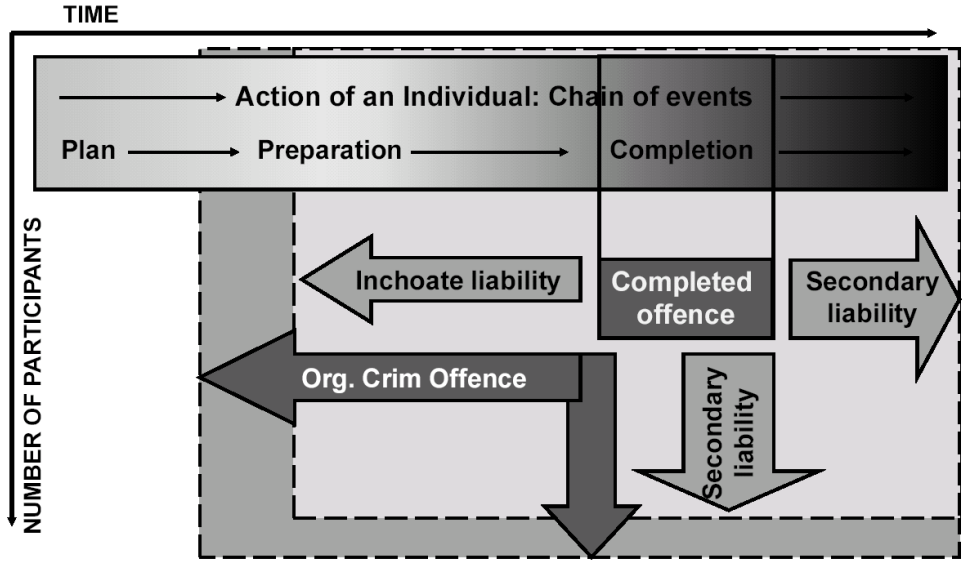

Figure 6 illustrates that art 5 (1)(a)(ii) extends the spectrum of criminal liability in two ways: First, it can attach criminal responsibility to events that occur well before the preparation (and sometimes before the planning) of specific individual offences. Second, it can create liability for participants 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 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 leaders, accomplices, organisers, and arrangers as well as lower levels of participants that assist criminal organisations in their activities.[173] 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 derived from crime, for corruption, and the obstruction of justice.[174]

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173 *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.

174 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.

The extensions of criminal liability created by the *Convention against Transnational Organised Crime* are significant and, as has been discussed elsewhere in this study, not without controversy.[175] 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.[176] 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, demonstrates 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.'[177]

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

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175 See Section 2.3 above.

176 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.

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

PART 3
DOMESTIC LAWS

4 Canada

Organised crime in Canada 'operates in all communities, from major urban centres to rural areas'.[178] 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.'[179] 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.

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.[180]

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, China in particular.[181] Canada, especially the greater Vancouver area, is also a major producer of ecstasy, methamphetamine, and cannabis that is sold in the United States, and also in Japan, Australia, and New Zealand.[182] 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.[183] Other crimes frequently associated with criminal organisations in Canada include financial fraud, tobacco smuggling, migrant smuggling, firearms trafficking, and organised motor-vehicle theft. Criminal organisations in Canada have also been found exploiting and infiltrating legitimate businesses to launder proceeds of crime and/or disguise their illicit activities.[184]

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

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

180 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

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

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

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

184 Criminal Intelligence Service Canada (CISC), *Report on Organized Crime, 2008* (2008) 27–31, 14.

4.1 Background of Canada's Organised Crime Laws

In 1997, together with New Zealand,[185] Canada became the first common law jurisdiction in the Asia Pacific 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.[186] 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. A report published in April 2009 noted that '[c]ommitting crimes is left to new recruits while those higher up reap the rewards. The hierarchical structure allows the leaders to operate with impunity while flaunting their image of power to attract recruits and draw them into crime'.[187] The report further estimates that the group has 34 chapters with about 460 members across the country. 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 private security industry.[188]

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.[189] The explosion of a car bomb in Hochelaga-Maisoneuve in Montréal, in August 1995, which killed an innocent youth,[190] 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 OMCGs.[191] 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 them,[192]

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185 See Chapter 5 below.

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

187 'Biker gangs in Canada' (1 Apr 2009) *CBC News,* available at www.cbc.ca/canada/story/2009/04/01/f-biker-gangs.html (accessed 17 Apr 2009).

188 UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix, group 27; 'Biker gangs in Canada' (1 Apr 2009) *CBC News,* available at www.cbc.ca/canada/story/2009/04/01/f-biker-gangs.html (accessed 17 Apr 2009).

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

190 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.

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

192 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.

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 and liable on conviction to a term of imprisonment of not less than one year and not more than ten years.[193]

The Bill lacked sufficient support to pass.[194] It was then modified and tabled as a new private member's Bill in the Senate on June 18, 1996,[195] but this proposal also failed. Both Bills proposed to insert a definition of 'criminal organisations' into the *Criminal Code* (Canada),[196] 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.[197] 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.[198]

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.[199] Specific provisions relating to criminal organisations were eventually added to the *Criminal Code* on April 17, 1997[200] 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.[201]

This Act was set out as 'the government's first step in developing an integrated plan to combat' criminal gang activity.[202] It sought to 'provide better means to deal with gang-related violence and crime' by focussing on three specific objectives:[203]

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

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

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

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

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

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

199 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 ed 2007) 731.

200 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).

201 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.

202 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).

- depriving criminal organisations and their members of the proceeds of their criminal activities and the means to carry out these activities;
- […] deterring those criminal organisations and their members from resorting to violence to further their criminal objects; [and]
- […] provide law enforcement officials with effective measures to prevent and deter the commission of criminal activity by criminal organisations 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.[204]

Figure 7 Elements of former s 467.1 *Criminal Code* (Canada), 1997-2001[205]

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'[206]) shown in Figure 7 above have been referred to as a '5-5-5' pattern[207] 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 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.'[208]

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

204 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. See further Section 23.5.3 below.

205 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.

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

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

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

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.
>
> 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.[209]

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 with a criminal organisation.[210] 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.'[211] 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'[212] and by adding a special offence ss 82, 231 *Criminal Code* (Canada) for unlawful possession of explosive substances.[213] The introduction of the new offences was accompanied by new powers for the forfeiture of proceeds of crime in ss 490.1-490.9.[214] The new legislation also included a peace bond designed to target gang leadership (s 810),[215] 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).[216]

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.[217] Christopher Blakesley, for instance, commented that:

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

210 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.

211 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.

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

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

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

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

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

217 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.

> The Canadian Government's adoption of an 'anti-gang' law, Bill C-95, represents the current tendency to use public fear to promote laws that accommodate political expediency rather than a long term solution to criminal problems.[218]

The new offence and law enforcement powers were seen as unnecessary, and creating 'guilt by association'.[219] There have also been concerns about possible violations of the Canadian Constitution and the *Charter of Rights and Freedom*. Many considered the legislation as too vague, grossly disproportionate, and wider than necessary to achieve its objective,[220] but all challenges of the legislation before the courts remained unsuccessful.[221]

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.[222] 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.[223]

Only a small number of prosecutions were carried out under former s 467.1 and even fewer convictions have been recorded.[224] In some provinces such as Québec and Manitoba the legislation was used more frequently than elsewhere and led to massive trials of large numbers of people.[225]

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. Starting 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'.[226] A Sub-Committee on

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218 Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 93.

219 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 ed 2007, 732.

220 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.

221 *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).

222 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.

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

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

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

226 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).

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.[227]

Some of the recommendations, and the changes to the *Criminal Code* (Canada) 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 exposed criminal organisations in Montréal.[228] 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.[229]

Bill C-24 was presented to Parliament in 2001 and entered into force on January 7, 2002.[230] 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.[231]

The *Act to amend the Criminal Code (organised crime and law enforcement) and to make consequential amendments to other Act* of December 18, 2001[232] modified the definition of 'criminal organisation' and transferred it from s 2 to s 467.1(1) *Criminal Code* (Canada). 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.[233] 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.[234] Moreover, the amendment brought Canada's

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227 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).

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

229 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).

230 Don Stuart, *Canadian Criminal Law* (5th ed 2007) 737.

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

232 Chapter 32 (Bill C-24).

233 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).

234 Section 423.1 *Criminal Code* (Canada).

organised crime provisions in line with the *Convention against Transnational Organised Crime*.[235]

4.2 Criminal Organisations

Section 467.1(1) *Criminal Code* (Canada) defines 'criminal organisation' as[236]

> 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'[237] version of the definition of criminal organisation introduced into s 2 *Criminal Code* (Canada) in 1997.[238] The 2001 amendment broadened the definition of criminal organisation by removing the 5-5-5 requirement,[239] reducing the minimum number of participants to three,[240] and expanding the scope of offences that define criminal organisations to all serious crimes.[241]

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

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235 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.

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

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

238 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'.

239 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).

240 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).

241 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).

activities of the group.[242] These elements are discussed separately in the following sections.

Figure 8 'Criminal organisation', s 467.1(1) *Criminal Code* (Canada)[243]

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.

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.[244] Groups that have been found by the courts to be criminal organisations include, for example, the Hell's Angels Motorcycle Club,[245] the Bonanno Family of La Cosa Nostra,[246] and also a number of locally operating drug trafficking networks.[247]

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.[248] '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.'[249] 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.'[250] 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

242 Cf *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 56 per Fuerst J.
243 Cf *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.
244 *Ciarniello v R* [2006] BCSC 1671 at para 67 per W F Ehrcke J.
245 *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).
246 *United States v Rizzuto* (2005) 209 CCC (3d) 325. See also Section 23.1.7 below.
247 *R v Trang* [2001] ABQB 623.
248 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.
249 *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 76 per Holmes J.
250 *R v Terezakis* [2007] BCCA 384 at para 33 per Mackenzie JA.

> 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.[251]

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 business, and strives for goals beyond the individual criminal act.'[252] 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'[253] 'would not be considered a criminal organisation.'[254]

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 organisation, it need not be the sole one. The definition thus recognises 'that criminal organisations often blend their criminal operations with legitimate operations.'[255]

Facilitating or committing serious offences may either be the purpose of the organisation or its main activity.[256] 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).[257]

'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

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

252 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.

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

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

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

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

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

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,[258] but the fact that the Governor-General may prescribe other offences opens up an avenue to add crimes without parliamentary review.[259]

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

> 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.[260]

In practice, most cases that have arisen under s 467.1, involve criminal groups that engage in the trafficking and sale of illicit drugs.[261] 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.[262] 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.[263] 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[264] 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

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

259 Don Stuart, *Canadian Criminal Law* (5th ed 2007) 738.

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

261 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)

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

263 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).

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

> 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.[265] This view was supported on appeal.[266]

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 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.[267] 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.'[268]

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].[269]

4.3 Relevant Offences

Sections 467.11-467.13 create three offences associated with criminal organisations. These provisions are substantive offences but also operate simultaneously as sentence enhancers to other offences.[270]

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

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

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

267 *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 58 per Fuerst J.

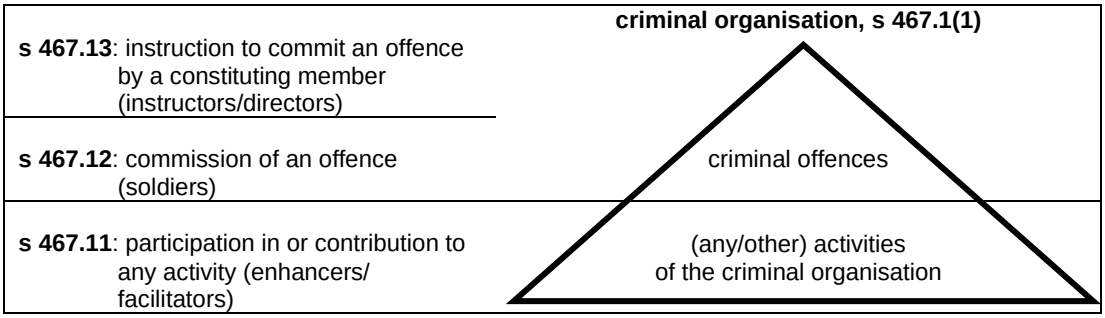
268 Mark K Levitz & Robert Prior, 'Criminal Organization Legislation: Canada's Response' (2003) 61(3) *The Advocate* 375 at 378.

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

270 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'.

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.[271]

Figure 9 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'.[272] 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.[273]

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, an 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[274] — 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).[275]

Figure 10 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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271 David Watt & Michelle Fuerst, *Tremeear's Criminal Code* (2007) 830.
272 *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.
273 Cf *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.
274 David Freedman, 'The New Law of Criminal Organizations in Canada' (2007) 85(2) *Canadian Bar Review* 171 at 201.
275 See Section 4.1 above.

Figure 10 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 467.11(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

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.[276] 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.[277]

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.[278] Accordingly, it has been remarked that this provision 'could target anyone' and not just members of the organisation.[279]

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

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

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

279 Don Stuart, *Canadian Criminal Law* (5th ed 2007) 740; David Freedman, 'The New Law

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.[280] '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.'[281]

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.

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'[282] and essentially creates strict liability (absolute responsibility)[283] for this element.[284] 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.[285]

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, or goal of the accused's contribution. Whether or not that purpose succeeds or fails is immaterial.[286]

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.[287]

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of Criminal Organizations in Canada' (2007) 85(2) *Canadian Bar Review* 171 at 206.

280 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.

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

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

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

284 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 ed 2007) 740.

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

286 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.

287 See Sections 2.1.2, 2.1.3 above.

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.'[288] 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.[289] 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.[290]

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 […].'[291] 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).[292] 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.[293]

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)[294]; 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,[295] or possessing illicit drugs for the purpose of trafficking for the benefit of, or in association with, a criminal organisation.[296]

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

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

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

291 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.

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

293 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.

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

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

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

Figure 11 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.[297] 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).[298]

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.[299] '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.[300] It is left to the courts to determine the precise nature and parameters of the relationship between the accused and the criminal organisation.[301]

As with s 467.11, an accused under s 467.12 need not be a member of the organisation.[302] 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).

297 David Watt & Michelle Fuerst, *Tremeear's Criminal Code* (2007) 831.
298 *R v Giles* [2008] BCSC 367 at para [236] per MacKenzie J.
299 Mark K Levitz & Robert Prior, 'Criminal Organization Legislation: Canada's Response' (2003) 61(3) *The Advocate* 375 at 384.
300 *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.
301 *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 59 per Fuerst J.
302 *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.[303] 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.'[304]

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.[305] 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[306] as 'the presence of the additional "criminal organisation" and mens rea requirements differentiates the participation offence from the predicate offence substantially […]'[307] enough. Suggestions that the elements of s 467.12 are impermissibly vague and overly broad were dismissed by Justice Fuerst in *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 60.

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'[308] — 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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303 *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.

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

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

306 Cf *R v Kienapple* [1975] 1 S.C.R. 729 at 747-748.

307 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.

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

Figure 12 Elements of s 467.13 *Criminal Code* (Canada)[309]

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 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.[310] 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.[311] The instructions need not be directed at a member of the organisation or at any specific person.[312] 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'.[313] It is irrelevant whether or not the predicate offence instructed is actually committed.[314]

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 as to 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'.[315] More recent case law and scholarship, however, have held that the offence requires that the accused is a member of the organisation.[316]

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

310 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.

311 *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.

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

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

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

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

316 *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.'[317] '[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.'[318] 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.'[319] 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.[320]

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.[321]

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

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

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

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

321 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.[322] 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 and are not vague or otherwise constitutionally flawed.

4.4 Bills C-14 and C-15, 2009

In early 2009, a further string of gangland killings in Vancouver and other parts of the lower mainland of British Columbia, led the Canadian Government to introduce new legislation designed specifically to tackle gang related homicides and shootings. On February 26, 2009 the Minister for Justice introduced Bills C-14 and C-15 into the House of Commons.[323] The proposed legislation, if passed, will not amend the organised crime offence outlined above, but they will add a suite of new provisions that provide aggravated penalties if certain existing offences are committed in connection with a criminal organisation.

Bill C-14 proposes to create new offences in order to raise penalties for homicides and firearms offences of these activities are associated with criminal organisations. Proposed new s 231(6.1) *Criminal Code* (Canada) elevates any murder to first degree murder, irrespective of whether it is planned and deliberate, if

> (a) the death is caused by that person for the benefit of, at the direction of or in association with a criminal organisation; or
> (b) the death is caused by that person while committing or attempting to commit 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.

Under proposed s 244.2(3) the minimum penalty for certain offences relating to discharging firearms is raised 'if the offence is committed for the benefit of, at the direction of, or in association with a criminal organisation.'

Bill C-15 proposes a number of amendments to the *Controlled Drugs and Substance Act 1996* (Canada). Similar to Bill C-14, it is proposed that s 5(3)(a) of the Act be amended to introduce a minimum penalty of one year imprisonment if certain serious drug offences are 'committed [...] for the benefit of, at the direction of or in association with a criminal organisation, as defined in subsection 467.1(1) of the *Criminal Code*.'

4.5 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,[324] some parts of Australia,[325] and international law,[326] the criminal offences are remarkably different and more diversified than those in

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

323 *Bill to amend the Criminal Code (organised crime and protection of justice system participants* (Bill C-14), *Bill to amend the Controlled Substances Act and to make related and consequential amendments to the Act* (Bill C-15).

324 See Chapter 5 below.

325 See Chapter 6 below.

326 See Chapter 3 above.

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 only 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.[327] There are also cases that involved extortion, fraud, and money laundering.[328]

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;[329] 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 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.[330]

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

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327 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.

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

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

330 See Section 4.1.1 above.

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.'[331] Suggestions have been made 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.'[332]

Necessity

In practice, the s 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 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.[333] Freedman, for instance, asks:

> 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?[334]

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'.[335]

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331 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.

332 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.

333 Don Stuart, *Canadian Criminal Law* (5th ed 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.

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

335 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.

While the offences in Canada have not been able to erase the problem of organised crime, the provisions have enabled the arrest, prosecution, and conviction of several high profile leaders, which has had a flow-on effect on the organisations these people were directing. For example, in Quebec alone many gang members have been arrested and much of their property and their weapons have been seized since the anti-biker laws were first introduced in 1995. As a result, the homicide rate in Montreal has fallen to the lowest levels since 1972. A recent newspaper article remarked that 'the violence in Montreal came to an end only after police arrested those at the top of the criminal organisations.'[336]

On the other hand, 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.[337] 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.[338] Furthermore, in October 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.[339] 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.'[340]

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* (Canada) provisions. Cases involving criminal organisations in Alberta and Ontario equally involved multiple defendants.[341]

The Manitoba trial, for instance, involved an Aboriginal street gang known as the Manitoba Warriors that engaged in low level drug and weapons offences. This group bore 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 (each was confined in a separate cubicle in the courtroom). Two minor 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

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336 Robert Matas & Ian Bailey, 'Let the War Begin' (11 April 2009) *The Globe and Mail* (Vancouver) S3

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

338 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. See also Section 4.5 below.

339 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).

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

341 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.

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.[342]

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.[343] The accused were later sentenced to terms between 15 and 20 years depending on their role in the criminal gang.[344]

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[345] 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.'[346] 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 we 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.[347]

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342 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 ed 2007) 735-736.

343 *R v Stockford* [2001] QJ No 3834; *R v Stadnick* (2004) REJB 2004-70735 (unreported, 27 Sep 2004, Quebec Superior Court of Justice).

344 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).

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

346 Don Stuart, *Canadian Criminal Law* (5th ed 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 […].'

347 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, Canada, 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 organisations collaborating with Asian crime syndicates to get access to ATS and precursor imports.[348]

Among domestic criminal organisations, outlaw motorcycle gangs (OMCGs) are particularly prominent. 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.[349] 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* (NZ) was introduced into the New Zealand Parliament, inter alia, 'to place restrictions on the activities of criminal associations or gangs'.[350] 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 OMCGs 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.[351]

At the heart of the new 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.[352]

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

349 See Section Chapter 4 above.

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

351 *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.

352 The STEP Act provisions are modelled on the US *Racketeer Influenced and Corrupt Organisations* ('RICO') *Act*, 18 USC 1961; see further Timothy Mullins, 'Broader Liability

Definition of criminal gang

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)[353] 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.[354] The definition thus established a very high threshold and limited the application of the definition 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.[355] In contrast to the definition of 'organised criminal group' in the *Palermo Convention*,[356] 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 were included because '[d]etermining the 'purpose' of an association would involve a variety of factual considerations that are less clear cut […]'.[357]

Participation offence

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, 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.[358] Liability under former s 98A(2) was derivative as the source of liability was not the offence definition;[359] 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).[360]

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for Gang Accomplices: Participating in a Criminal Gang' (1996-99) 8 *Auckland University Law Review* 832 at 833. See further Section 23.5 below.

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

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

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

356 See Section 3.2 above.

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

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

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

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

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 and two convictions for participation in an organised criminal group were recorded.[361] The maximum penalty imposed by the courts for offences under former s 98A was a three-year sentence.[362] 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.'[363] The new legislation expanded the application of the participation offence 'to align it more closely with the Convention'[364] 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).[365] Liability under s 98A may arise even if the conduct is lawful in a foreign country.[366]

5.2.1 Organised criminal group

'Organised criminal groups' [367] are defined in s 98A(2) as groups of three or more people who have as one of their objectives to obtain material benefits[368] from offences punishable by at least 4 years imprisonment (s 98A(2)(a) and (b))[369] or to

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361 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.

362 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).

363 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).

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

365 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.

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

367 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.'

368 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.

369 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

commit certain serious violent offences (s 98A(2)(c) and (d)).[370] The new definition applies to both domestic (s 98A(2)(a) and (c)) and transnational organised criminal groups (s 98A(2)(b) and (d)).[371] 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.[372]

Figure 13 '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.[373] 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:[374] '[T]he organised criminal group charged involves a degree of organisation for criminal

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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.

370 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).

371 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).

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

373 See Section 3.2 above.

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

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.

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,[375] and without a formal membership system.[376] 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.[377]

While it is generally required to show that the group has some degree of continuity, permanence, or regularity,[378] 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. 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.[379] 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 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

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

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

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

378 *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.

379 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' 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 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 14 below).

Figure 14 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[380]

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.[381] 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.'[382]

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

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380 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).

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

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

for 'participation' in that gang has been controversial and cannot be answered definitely on the basis of the legislation.[383] The lack of a definition of the term 'participation' in organised crime laws — not just in New Zealand[384] — is seen by some as 'a grave flaw' because it is unclear to whom the offence applies.[385]

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.[386] The case law, however, reveals that the application of the participation offence may extend to passive participation or participation by mere presence.[387] It has been suggested to limit the offence to 'active' participation to ensure that the legislation is construed strictly.[388] This would also bring the offence in line with art 5(1)(a)(ii) *Palermo Convention*.[389]

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.' [390] 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

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383 Cf Section 2.2.5 above; and NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) paras 23-25, 29.

384 See also New South Wales, Section 6.2.1 below.

385 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).

386 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.

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

388 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.

389 See Section 3.3.2 above.

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

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 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.[391] 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.[392]

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.[393]

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 practical applications.

The amendments to s 98A *Crimes Act 1961* (NZ) in 2002 resulted in a 'dramatic increase in the bringing of prosecutions',[394] see Figure 15 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.'[395]

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391 *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.

392 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).

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

394 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).

395 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-

Figure 15 Number of people prosecuted and convicted under s 98A *Crimes Act 1961* (NZ), 1997-2006[396]

	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 thus 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.[397] 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 (Australia), have adopted provisions similar to that of New Zealand and, as will be shown, have broadened their application even further.[398]

Figure 15 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 remarked 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.'[399] No information about proposed amendments was available at the time of writing.

NZ/PB/Debates/QWA/ (accessed 1 Dec 2008).

396 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).

397 See Section 2.3 above.

398 See Sections 6.2.1 below.

399 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. Organised crime can be found across the country and even regional centres and remote communities are not immune to the activities of criminal organisations. The Australian Crime Commission (ACC), Australia's national anti-organised crime enforcement and analysis agency, reported that:

> In 2008, organised crime is estimated conservatively to have cost at least $10 billion. This calculation is based in part on the extrapolation of current international estimates of the cost of organised crime applied to the Australian environment and in part on intelligence developed by the ACC.[400]

The supply and distribution of illicit drugs and the illegal manufacturing of amphetamines have been identified by the ACC as the most significant illegal markets and organised crime activities in Australia. Money laundering, fraud and financial sector crimes, environmental crime, firearms trafficking, and intellectual property crime are regarded as relevant but secondary types of organised crime.[401] The levels of migrant smuggling and human trafficking in Australia are vey small in regional and international comparison.

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.[402] Vietnamese organised crime 'arrived' in Australia with the exodus of Indochinese following the fall of Saigon in 1975 and the subsequent resettlement of refugees. Other Asian groups, especially from China, followed in the 1980s.[403] 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.[404] Recently, there has been growing attention on Middle Eastern organised crime, especially in Sydney's western suburbs but also in Queensland and Western Australia.[405] The ACC notes that even today 'some groups

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400 Australia, ACC, *Organised Crime in Australia 2009* (2009) 5.

401 Australia, ACC, *Organised Crime in Australia 2009* (2009) 7–11.

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

403 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.

404 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.

405 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry*

will prefer to deal predominantly with trusted members of their own ethos or ethnicity.'[406]

Many other 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.[407] This is well manifested in the gangland killings that shocked Melbourne in the late 1990s and early 2000s.[408] There is also increasing evidence of greater internationalisation of Australian organised crime, demonstrated in 'greater partnerships between domestic (eg outlaw motorcycle gangs (OMCGs)) and transnational organised crime groups (eg Asian organised crime groups)'.[409] The Lawrence McLean syndicate is a good example for a loosely connected criminal syndicate involving members from a diverse range of nationalities engaging in opportunistic organised crime and sporadic use of violence.[410]

As in Canada and New Zealand, OMCGs (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.[411] 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'.[412]

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)).[413]

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into the future impact of serious and organised crime on Australian society (2007) 2.24–2.25; See further Section 6.2.1 below.

406 Australia, ACC, *Organised Crime in Australia 2009* (2009) 5.

407 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; Australia, ACC, *Organised Crime in Australia 2009* (2009) 5.

408 For further reading see Gary Tippet & Ian Munro, *Lives of Crime: The Melbourne gangland murders and other tales of true crime* (2008).

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

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

411 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). Cf Australia, ACC, *Organised Crime in Australia 2009* (2009) 11.

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

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

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. These 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.[414] South Australia introduced sweeping new measures, including offences, against criminal associations in 2008 which are fundamentally different compared to those in operation elsewhere.[415] New South Wales followed with similar amendments in April 2009 and other States and Territories may soon follow.[416]

6.2. New South Wales

In September 2006, New South Wales (NSW) became the first jurisdiction in Australia to have specific offences against criminal organisations. The *Crimes Legislation Amendment (Gangs) Act 2006*[417] introduced several new offences in relation to 'participation in criminal groups' into the *Crimes Act 1900* (NSW). Section 6.2.1 below explores the circumstances that led to the introduction of these provisions, followed by an analysis of the definition of criminal group and the participation offence.

In April 2009, New South Wales added further legislation designed specifically to ban OMCGs. The *Crimes (Criminal Organisations Control Act) 2009*[418] established mechanisms that allow the Government in conjunction with the judiciary to 'declare' organisations that are perceived to pose a risk to public safety and to impose control orders on and criminalise the association of members of declared organisations. This Act is further examined in Section 6.2.2.

6.2.1 Crimes Legislation Amendment (Gangs) Act 2006

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',[419] to 'increase that feeling of safety within our community',[420] and to 'prevent Sydney from turning into Chicago or Los Angeles.'[421] In his second reading speech, Parliamentary Secretary Tony Steward remarked:

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

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

416 See Section 6.2.2 below.

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

418 No 6 of 2009.

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

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

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

> 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.[422]

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.[423]

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 the trade of amphetamine, methamphetamine, and MDMA (ecstasy) and the associated nightclub and security industry.[424]

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.[425]

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422 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.

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

424 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.

425 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.

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'.[426] 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.[427]

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).[428]

In addition to new offences for criminal groups, the *Crimes Legislation Amendment (Gangs) Act 2006* (NSW) also increased law enforcement powers in relation to criminal organisations in a new Part 16A *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). But these 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'),[429] increase penalties for offences against law enforcement officers,[430] and enhance related enforcement powers.[431] 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 sceptical 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.'[432]

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

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

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

428 *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.

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

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

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

432 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.

definition of 'organised criminal group' in New Zealand.[433] 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.'[434]

Figure 16 '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.

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 a criminal group. 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.

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,[435] capturing two types of associations: (1) those that seek to profit from serious offences, and (2) those that seek to engage in serious violence.

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433 See Section 5.2.1 above.

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

435 See Section 5.2.1 above.

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,[436] it marks a sharp departure from general concepts of organised crime. In particular, the second objective does not require any 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.[437] 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).[438] In contrast to conspiracies, however, there is no requirement of any specific agreement among the three or more people to commit particular (identifiable) crimes.[439] 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.[440]

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'.[441] 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

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436 Cf *R v Bilaf Skaf* [2005] NSWCCA 297.

437 See Section 2.1.3 above.

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

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

440 See 'participation in criminal groups' below.

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

car rebirthing operation would be,' [442] the legislation offers little guidance to sustain 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.

Participation in criminal groups

Section 93T *Crimes Act 1900* (NSW) contains four 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.

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 17 below.[443] Offences under s 93T(1) are punishable by up to five years imprisonment.

Figure 17 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

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. [444] 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

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442 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).

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

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

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'.[445]

Membership is not a separate element of the 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.'[446] 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.'[447]

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,[448] 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.[449] This is seen by some as a 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.[450]

> 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.[451]

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

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

446 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.

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

448 See Section 4.3 above.

449 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.

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

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

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.[452]

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 around pulling out sprinklers and street signs and causing nuisance.'[453] 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.

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.[454]

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.[455] 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.[456]

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

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

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

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

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

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

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.'[457] On the other hand, the mental elements for the offence under s 93T(1) have been criticised for being too broad and lacking clarity.[458] 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.'[459] 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. Additionally 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 in criminal law that an accused is guilty only if they had a guilty mind and intended to commit an offence.[460]

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,[461] 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.'[462] 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.[463]

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.[464]

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.'[465]

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

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

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

460 Dennis Miralis, 'Law & Order 2007-style' (Mar 2007) *NSW Law Society Journal* 54 at 55.

461 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) paras 33-34.

462 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Malcolm Kerr, Cronulla) 1532.

463 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Ms Lee Rhiannon) 1757.

464 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).

465 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of

Aggravations

The 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 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, 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.'[466]

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'.[467]

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.[468] 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

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2006 (5 Sep 2006) para 35.

466 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1143.

467 *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.

468 Cf s 195 *Crimes Act 1900* (NSW).

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'. 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.

6.2.2 Crimes (Criminal Organisations Control) Act 2009

On April 2, 2009, the NSW Parliament passed the *Crimes (Criminal Organisations Control) Bill 2009* 'for the purpose of disrupting and restricting the activities of criminal organisations and their members'[469] and 'to give no second chance to those [who are part] of an illegal gang'.[470] The objective of this Act is

> to disrupt and restrict the activities of organisations (declared organisation):
> (a) whose members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and that represent a risk to public safety and order in New South Wales, and
> (b) which are the subject of a declaration by an eligible Judge.[471]

This legislation is a response to an incident that took place in the check-in area of the Qantas Airways terminal at Sydney airport on March 22, 2009 in which a member of the Hells Angels Motorcycle Club was viciously attacked and killed by a member of another rival gang, the Comancheros. This incident, and a number of retaliatory strikes that followed this event, sparked a fierce debate in NSW about 'an escalation in violence [involving] outlaw motorcycle gangs'.[472] Within a few days of this incident, the NSW Government announced the introduction of the *Crimes (Criminal*

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469 *Crimes (Criminal Organisations Control) Act 2009* (NSW), long title; No 6 of 2009.

470 NSW Premier Mr Nathan Rees as cited in Andrew Clenell & Alexandra Smith, 'NSW rushes in bikie law' (2 Apr 2009) *Sydney Morning Herald*; Lisa Carty, 'No second chances as NSW gets tough for bikies on gangs' (30 Mar 2009) *Sydney Morning Herald*.

471 *Crimes (Criminal Organisations Control) Bill 2009* (NSW), Explanatory Note, 1.

472 NSW Premier Mr Nathan Rees as cited in Andrew Clenell & Alexandra Smith, 'NSW rushes in bikie law' (2 Apr 2009) *Sydney Morning Herald*.

Organisations Control) Bill 2009 on March 31, 2009 and, two days after this announcement, both Houses of Parliament passed this Bill into law.

The *Crimes (Criminal Organisations Control) Act 2009* (NSW) is based on the *Serious and Organised Crime Control Act 2008* of South Australia.[473] In summary, the Act enables the NSW Police Commissioner to apply to a Supreme Court Judge for a declaration of an organisation, s 6. If the Judge is satisfied that certain criteria are met, he or she may then declare that organisation. Once an organisation has been declared, the Police Commissioner may further apply to the court to place individual members of the organisation under a control order, s 14. Under s 26 of the Act it is an offence for a person under a control order to associate with declared organisations or with other 'controlled' persons. Section 26A makes it an offence to recuit members for a declared organisation.

Declared organisations

Section 6(1) *Crimes (Criminal Organisations Control) Act 2009* (NSW) enables the Commissioner of Police to apply to a Supreme Court Judge[474] for a declaration (or a renewal of a declaration) that a particular organisation is a so-called 'declared organisation'. Subsection (2) sets out the requirements in relation to contents, grounds, and procedure of this application, including requirements that the organisation, its members, its nature and characteristics be identified. Applications for a declaration must be gazetted and published, and members of the organisation may make submissions at the hearing of the application.[475]

The Judge may make a declaration of the organisation if he/she is satisfied, on the balance of probabilities,[476] that its members associate for criminal purposes and that the organisation poses a risk to public safety, s 9. In making this decision, the Judge may take into account, inter alia, any links between the group and criminal activities, prior convictions of its members, links to other organisations in other States, Territories or overseas, and 'any other matter that he/she considers relevant'.[477] The judge is not required to provide any grounds or reasons for the decision to declare an organisation.[478] A declaration remains in force for up to three years at which point an application for renewal is required, unless the declaration has been revoked.[479] All declarations are recorded in a register of criminal organisations, s 30.

The New South Wales Parliament's Legislation Review Committee found that the legislation fails to take into account that the members of the declared organisation may change over time. It argued that if the declaration of an organisation is unaffected by the change in membership s 11(3) *Crimes (Criminal Organisations Control) Act 2009* (NSW) may be inconsistent with the presumption of innocence under art 14(2) *International Covenant for Civil and Political Rights* (*ICCPR*).[480] While the involvement of the judiciary in the declaration process avoids one of the shortcomings of the South Australian law, it raises concerns over a possible collusion

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473 See Section 6.4 below.
474 Section 5 *Crimes (Criminal Organisations Control) Act 2009* (NSW).
475 Sections 7, 8 *Crimes (Criminal Organisations Control) Act 2009* (NSW).
476 Section 32(1) *Crimes (Criminal Organisations Control) Act 2009* (NSW).
477 Section 9(2) *Crimes (Criminal Organisations Control) Act 2009* (NSW).
478 Cf NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) para 52.
479 Sections 11, 12 *Crimes (Criminal Organisations Control) Act 2009* (NSW).
480 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) para 13.

between the executive and the Supreme Court as the Attonery-General has discretion which judge he chooses.[481]

Control orders

Once an organisation has been declared, the Police Commissioner may further apply to the court to place individual members of the organisation under an interim control order, s 14 *Crimes (Criminal Organisations Control) Act 2009* (NSW). After notice of an interim control order has been served,[482] the Court may consider issuing a (confirmatory or final) control order if the court is satisfied, on the balance of probabilities,[483] that:

> (a) the person is a member of a particular declared organisation, and
> (b) sufficient grounds exist for making the control order.[484]

The term 'member' is further defined in s 3 to include associate and prospective members, persons identifying themselves or treated by the group as belonging to the organisation, and directors and officers if the organisation is incorporated. The other grounds taken into consideration by the Court are those provided by the Commissioner and by the person against whom the control order is to be issued.[485] Form, procedures, and duration of control orders are set out in ss 20–23 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

Persons placed under a control order or an interim control order (so-called 'controlled members') are prohibited from associating with one other and with other members of declared organisations. Furthermore, controlled members are not allowed to engage in a range of 'prescribed activities' set out in s 27(6).[486] These activities relate to employment 'in a number of industries that are vulnerable to organised crime',[487] for example, involvement in the casino and racing industries, employment in the security industry, possessing or using a firearm, and selling or supplying liquor.

The NSW Legislation Review Committee noted that the provisions relation to control orders and interim control orders are excessively wide and that

> the fundamental right to a presumption of innocence established by Article 14(2) of the *International Covenant on Civil and Political Rights* may be eroded [...] since the [...] interim control orders and control orders under Part 3 will be applied to people without being convicted of a specific crime such as associating with another person for any particular purpose or the association would have led to the commission of an offence.[488]

The Committee also formed the view that the list of activities set out in s 27 is excessively broad, that some of the activities are insufficiently related to serious criminal activity, and that the prohibition that flows from s 27 may infringe upon the

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481 Cf the remaks by Mark Le Grand, 'Crimes against Legality' (25-26 Apr 2009) *The Weekend Australian*, 23.

482 Sections 15, 16 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

483 Section 32(1) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

484 Section 19(1) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

485 Section 19(2) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

486 Cf *Crimes (Criminal Organisations Control) Bill 2009* (NSW), Explanatory Note, 1.

487 NSW, Legislative Assembly, *Hansard* (31 Mar 2009), Outlaw Motorcycle Gang Countermeasure (Mr Nathan Rees (Premier)); NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) para 5.

488 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) paras 24, 29, 37.

right to work under art 6(1) *International Covenant on Economic, Social, and Cultural Rights*.[489]

Criminal offences

The criminal offence established by the *Crimes (Criminal Organisations Control) Act 2009* (NSW) is limited to regular and habitual associations between members of declared organisations subject to interim control orders or control orders. It has been noted that the Act 'does not determine the minimum level of association that may be defined as "habitual" or "regular"' and there is some concern that 'its broad scope [may] unduly trespass on individual rights of freedom of association.'[490]

Under s 26(1) of the Act it is an offence for a person under a control order to associate with declared organisations or with other 'controlled' persons. The purpose of this association is irrelevant.[491] In particular, the offence is not limited to persons associating for criminal purposes and s 26 does not require proof of any other mental element, thus creating strict liability for this offence. The NSW Legislation Review Committee

> finds the offence of strict liability under section 26(1) and (2) where the prosecution is not required to establish that there was an intention to seek out the company or association or intention to "regularly" associate instead of an accidental or one-off association, could constitute an undue trespass on individual rights and be contrary to the right to a presumption of innocence.[492]

It is a defence to a charge under s 26(1) if the defendant can establish that he or she had no knowledge and could not have been expected to know that the person he or she is associating with is a controlled member of a declared organisation, s 26(3). Subsection 26(5) exempts certain associations, such as those between family members, lawful professional associations et cetera.

First offenders may be punished by up to two years imprisonment; repeat offenders face imprisonment of up to five years. Special proceedings for offences under this Act are set out in s 36. These penalties are seen as unduly harsh for offences of strict liability that do no require prove of subjective fault.[493]

A further offence was added in May 2009 with the *Criminal Organisations Legislation Amendment Bill 2009* (NSW). Under s 26A(1) it is an offence for a controlled member to recruit another person to become a member of the declared organisation. The term 'recruiting' is defined in subs (2) to include counselling, procuring, soliciting, inciting, and inducing. The offence attracts a maximum penalty of five years imprisonment.

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489 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) paras 43, 46..

490 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) para 21.

491 Section 26(3) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

492 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) para 42.

493 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) para 42.

Observations

The creation of the *Crimes (Criminal Organisations Control) Act 2009* was a rushed and reactionary response by the Premier and the Attorney-General of NSW within days after the incident at Sydney airport. The text of this Act, which is largely inspired by South Australia's *Serious and Organised Crime Control Act 2008*,[494] was written over the course of less than 48 hours. The legislation was passed without any proper debate or scrutiny within one day of its introduction. 'The processes of debate and review were displaced by populism and political grandstanding', noted one commentator.[495]

A report by the NSW Legislation Review Committee that was released one month after the Act came into force identifies many fundamental flaws of the Act and highlights serious concerns about possible infringements of basic human rights and civil liberties.[496] A newspaper articled remarked that: 'The NSW legislation, the *Crimes (Criminal Organisations Control) Act 2009*, is a bad law that alters the balance between the state and its citizens, between investigator and suspect, and between prosecutor and defendant.'[497] The Premier of NSW, however, defended the new laws by saying that:

> We [the NSW Government] are going to smash them [OMCGs] straight away — once a court declares the gang a criminal organisation, all bets are off. [...] They won't have the chance to get together and plan their criminal pursuits. By driving them apart, we'll make it impossible for them to continue as a group and their gangs will simmer out.[498]

The Premier's optimism that the new laws will indeed prevent and suppress organised crime in New South Wales is, however, not supported by any evidence. The Act is seen by many critics as policy making on the run. The NSW Government has failed to answer any questions about how the new laws actually address the problem of violent gang clashes, how the laws respond to the causes of organised crime, and the Government has presented no empirical evidence as to how these laws will effectively reduce organised crime in the medium and long term. The Act largely ignores and conflicts with the available knowledge, criminal intelligence, and academic research on organised crime.

But more importantly, the new laws are potentially dangerous as they may create guilt by association — a concern also shared by some Members of Parliament.[499] The parliamentary Legislation Review Committee also expressed concern that the Act

> will criminalise a person's associations instead of a guilty act of a specific conduct, and will deny a person's right of freedom of association with others, a fundamental right established by Article 22(1) of the *International Covenant on Civil and Political Rights*. [...]

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494 See Section 6.4 below.

495 Mark Le Grand, 'Crimes against Legality' (25-26 Apr 2009) *The Weekend Australian*, 23.

496 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009).

497 Mark Le Grand, 'Crimes against Legality' (25-26 Apr 2009) *The Weekend Australian*, 23 [emphasis added].

498 Lisa Carty, 'No second chances as NSW gets tough for bikies on gangs' (30 Mar 2009) *Sydney Morning Herald*.

499 Andrew Clenell & Alexandra Smith, 'NSW rushes in bikie law' (2 Apr 2009) *Sydney Morning Herald*.

> Part 3 of this [Act may be] constituting an undue trespass on personal rights and liberties by undermining the right to freedom of association and undue interference on a person's honour and reputation.[500]

There is some fear that the laws may not only be used against criminal organisations but also against sporting, ethnic, and religious groups.[501] And most experts warn that this Act will be counter-productive by pushing criminal organisations further underground, thus consolidating existing groups and making them more violent and powerful rather than 'driving them apart' and 'simmering the gangs out'.[502]

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.'[503] Supporters of the Bill argued that 'Brisbane has more crime gangs than Chicago'[504] and that the proposed legislation will 'help this State ensure that it does not become an attractive haven for organised crime.'[505]

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.'[506] The legislative material also makes brief reference to the *Convention against Transnational Organised Crime*.[507]

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 copied from the definition of 'organised criminal group' in New Zealand,[508] 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[509] (s 545A(2)(a) and (b)) or to commit serious violent offences

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500 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) paras 16, 19.

501 NSW Law Society president Joe Catanzariti as cited in Alexandra Smith, 'Laws "won't stop bike violence" (30 Mar 2009) *Sydney Morning Herald*, 2.

502 'Bikie laws "an overreaction"' (2 Apr 2009) *ABC News*, citing NSW Law Society president Joe Catanzariti.

503 *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.

504 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4012 (Mr Langbroek).

505 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4011 (Dr B Flegg).

506 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 1.

507 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4015 (Mr M McArdle).

508 See Section 5.2.1 above.

509 '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),

(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.[510] There is no further requirement of any structure, formal association, or any existence of the group for any length of time, and there are no elements relating to the actual activities the group engages in.

Figure 18 '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)): ○ Some of the persons 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 ○ 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 includes the additional word 'organised'. This inclusion may be purely rhetorical but it may also indicate 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, the concerns over the proposal 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.'[511] 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.[512]

Explanatory Notes, 4.

510 See Section 6.2.2 above.

511 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4013 (Mr Lawlor).

512 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice).

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:

> 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 19 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 an 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, clothes et cetera, proposed 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.[513]

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. Members of criminal organisations generally do not carry club-cards or other personal identifiers to prove their membership. To facilitate establishing 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.[514] 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;

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513 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4016 (Mr Messenger).

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

- Making statements about membership of or belonging to the group;
- Having a known association with members of the group.

These indicia 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 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.[515]

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.[516]

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.[517]

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.'[518]

This, however, would confirm concerns that mere membership in an organised criminal group is indeed a crime.[519] 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 […].'[520] 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

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515 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.

516 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice).

517 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 2.

518 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 2.

519 Kerry Shine, Attorney-General and Minister for Justice (Qld) (pers comm., 5 Feb 2008, on file with author).

520 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4017 (Mr Messenger).

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 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.[521]

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.[522]

It is very doubtful that the proposed provisions would be 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. […]

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[521] See further Section 3.2 above.

[522] Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4013-4014 (Mr Johnson).

> 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.[523]

The Opposition expressed that it may re-introduce the failed Bill in 2008,[524] but this did not occurr. In March and April 2009, the new Attorney-General raised the possibility that Queensland may introduce anti-OMCG laws similar to those in New South Wales and South Australia, but no concrete proposals had been released by the time of writing.

6.4 South Australia

In South Australia, new laws against organised crime were first proposed by Premier Mr Mike Rann and the Director of Public Prosecutions in June 2007.[525] On November 20, 2007 the Premier outlined the provisions before Parliament and introduced the *Serious and Organised Crime Bill 2007* — an instrument specifically designed to suppress the activities of outlaw motorcycle gangs (OMCGs).

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.[526] 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 [527]

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523 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice).

524 Personal communication with Mr Mark McArdle, Shadow Attorney-General, Shadow Minister Justice, Brisbane (Qld), 26 Nov 2007.

525 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.

526 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 16 Apr 2009).

527 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 16 Apr 2009).

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 of South Australia on May 8, 2008.[528] The *Serious and Organised Crime (Control) Act 2008* (SA) entered into force on September 4, 2008.[529]

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 members 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.[530]

The legislation in South Australia, which is modelled in part after Hong Kong's *Societies Ordinance 1997*,[531] marks a significant departure from the spirit and concept of organised crime under the *Palermo Convention*. 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'.[532] 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).

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528 *Serious and Organised Crime (Control) Act 2008* (SA).

529 Unless renewed, the legislation will expire five years after the date it came into operation.

530 South Australia, House of Assembly, *Daily Hansard* (20 Nov 2007) (Hon MD Rann, Premier). Cf s 8 *Societies Ordinance 1997* (Hong Kong).

531 See Section 8.3 below.

532 South Australia, House of Assembly, *Daily Hansard* (26 Feb 2008) (Hon MJ Atkinson, Attorney-General).

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 indicia and administrative discretion. Figure 20 attempts to visualise the key points required to declare an organisation.

Figure 20 '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, [...].'[533] 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).

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[533] 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 16 Apr 2009).

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:

> (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 themselves 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).[534]

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,[535] and those that involve persons with a criminal history (including gangs formed in prisons).[536]

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534 Cf s 35(11)(a) *Serious and Organised Crime (Control) Act 2008* (SA).
535 Cf s 10(3)(a) and (c) *Serious and Organised Crime (Control) Act 2008* (SA).
536 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.

In December 2008, the Commissioner of South Australia Police applied to the Attorney-General to declare the Finks Motorcycle Club under the *Serious and Organised Crime (Control) Act 2008* (SA). On May 14, 2009, the Attorney-General made that declaration based on

> reliable evidence and other information that the members of the Finks Motorcycle Club are involved in serious and organised crime, that these members immersed in with criminal activity including 173 convictions of drug offences, 263 property offences, many shootings, more than 160 violent offences, rape and sexual assault, 137 convictions for firearms and weapons offences, more than 40 counts of blackmail and many counts of theft, including highly sensitive material.[537]

This declaration applies to 48 known members, former members, and other associates of the Finks and its subsidiary groups.

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 Act also creates measures 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.[538] Accordingly, many if not most defendants will not know the reasons why a control order is sought against them.

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[537] South Australia, Attorney-General's Department, Michael Atkinson (Attorney-General), *Serious and Organised Crime (Control) Act 2008*, Ministerial Statement (14 May 2009), available at www.agd.sa.gov.au/news/index.php#declared_soc (accessed 18 May 2009).

[538] Section 21 *Serious and Organised Crime (Control) Act 2008* (SA). Cf South Australia,

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 the Court's decision.[539] But the control order remains in operation during the appeal process and a privative clause protects any decision from further judicial review.[540]

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 21 below.[541] 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 21 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

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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 16 Apr 2009); *K Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4.

539 Section 19 *Serious and Organised Crime (Control) Act 2008* (SA).

540 Sections 14, 16,17, 41 *Serious and Organised Crime (Control) Act 2008* (SA)

541 The *Serious and Organised Crime (Control) Act 2008* (SA) repealed the offence of consorting under former s 13 *Summary Offences Act 1953* (SA).

the group as belonging to it.[542] 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 international law, 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 offence.'[543] 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 some 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 be a member of a declared organisation or might be 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.[544]

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 OMCGs. There are no clear boundaries that limit the provisions under this Act 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'. The Attorney-General also has no obligation to provide reasons when organisations are declared; a point that was also stressed by the incumbent Minister when the Finks Motorcycle Club became the first declared organisation on May 14, 2009.[545]

Further reflection on the proposed declaration of criminal organisations in South Australia reveals remarkable similarities to federal laws relating to terrorist

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542 See further Section 6.4.1 above.

543 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 16 Apr 2009).

544 Sections 248, 250 *Criminal Law Consolidation Act 1935* (SA).

545 South Australia, Attorney-General's Department, Michael Atkinson (Attorney-General), *Serious and Organised Crime (Control) Act 2008*, Ministerial Statement (14 May 2009), available at www.agd.sa.gov.au/news/index.php#declared_soc (accessed 18 May 2009)

organisations. This is also evident from a recent submission by the South Australian Government to a federal parliamentary inquiry.[546] 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 built 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 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.'[547] 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.[548] 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.[549]

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

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546 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 16 Apr 2009).

547 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 16 Apr 2009).

548 Arthur Veno, 'Bikies suffer as politics of fear takes hold in SA' (26 Feb 2008) *The Advertiser* (Adelaide) 20.

549 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 16 Apr 2009).

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'.[550]

The introduction of the South Australian laws has been closely monitored by neighbouring States and Territories. In 2009, the Northern Territory and New South Wales started to explore similar legislation.[551] Other jurisdictions 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 as a legitimate outcome.'[552]

Among the chief critics of the new South Australian Act is former Chief Commissioner of Victoria Police Ms Christine Nixon. 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 between declared persons. Victoria Police is of the view that such measures are disproportionate and unlikely to be effective [...].[553]

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, a view also shared by Victorian Attorney-General, Mr Bob Hulls. He remarked that:

> Victoria does not believe this is the best way to address organised criminal activity groups, nor do we think it effectively targets or disrupts' criminal enterprises. There is no evidence to suggest legislation to criminalise motorcycle gangs, including the laws introduced in South Australia, have actually been effective in affecting the organised criminal activity of these groups.[554]

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

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550 Jeremy Roberts, 'Bikie laws not tough enough: prosecutor' (9 May 2008) *The Australian* (accessed online).

551 Personal communication with Northern Territory Police, Darwin (NT), 11 Mar 2009; Rebekah Cavanagh, 'Tough new laws to target NT bikies' (31 Mar 2009) *Northern Territory News*. See also Section 6.2.2 above.

552 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 16 Apr 2009).

553 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 16 Apr 2009).

554 Emma Griffiths 'Victoria breaks ranks on outlaw bikies' (15 Apr 2009) *ABC News*, available at www.abc.net.au/news/stories/2009/04/16/2544042.htm (accessed 16 Apr 2009).

> to move its operations to another jurisdiction or to adopt more effective covert measures.[555]

6.5 Federal Initiatives

6.5.1 Australia's 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.[556]

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.[557] The Convention entered into force in Australia on June 26, 2004, but it is not certain whether the implementation of the Convention obligations rests primarily 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.[558] Official sources are unclear about this issue. The Attorney-General's Department (Cth) notes:

> There are various sources of constitutional power available to the Commonwealth to combat serious and organised crime. Wherever the Commonwealth has a head of legislative power, it may enact offence[s] or other regulatory provisions related to that head of power. For example, the Commonwealth has enacted offence provisions in relation to people trafficking using its external affairs power under section 51(xxix) of the Constitution.
> [...]
> Where a cooperative approach is seen to be appropriate, section 51 (xxxvii) (references from the States) is another potential source of power. The Commonwealth has used the source of power in section 51 (xxxvii) to enact various aspects of its anti-terrorism legislation.
> [...] As the Commonwealth is not proposing any legislative scheme in relation to serious and organised crime, it is not appropriate for the Department to speculate on this issue. Similarly, it is not appropriate for the Department to speculate on any risk that any Commonwealth legislation in this area would be unconstitutional or unduly trespass on individual rights.[559]

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555 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 16 Apr 2009).

556 See further Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008) 32–35 with further references.

557 [2004] ATS 12.

558 See further David Brown et al, *Criminal Laws* (4th ed, 2006) 956.

559 Australia, Attorney-General's Department, *Answers to questions taken on notice, Inquiry*

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 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, 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.'[560] This document does not address the question of 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.[561]

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*

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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 16 Apr 2009).

560 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 16 Apr 2009).

561 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 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 and organised crime.'[562] But the inquiry is also a response to the legislation introduced in South Australia in 2007, 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 Australian Federal Police (AFP) and the Australian Crime Commission (ACC) are generally satisfied with the current laws and do not see any immediate need for legislative change.[563] 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.[564] 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 arguably make such groups more ruthless and ultimately harder to detect.'[565]

To avoid major discrepancies between Australian jurisdictions arising from the new laws in New South Wales and South Australia, the Parliamentary Committee recommended in 2007 '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.'[566]

Terms of Reference

The terms of reference of the *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;

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562 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.

563 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.

564 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.

565 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.

566 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.

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
   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.

This inquiry carefully analyses both the domestic and international provisions and it is anticipated that it will 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 April 16, 2009)

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 submissions, 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.[567] 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.'[568] 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.[569]

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567 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 16 Apr 2009).

568 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 16 Apr 2009).

569 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 16 Apr 2009); 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 16 Apr 2009); 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 2 Mar 2009); Robert (Robbie) Fowler, Outcasts MC Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*,

Many law enforcement agencies, Police Ministers and Police Commissioner 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.
>
> 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.[570]

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 groups 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 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.[571]

These observations are also reflected in the submission by Queensland's Crime and Misconduct Commission.[572] The Commonwealth Attorney-General's Department also notes 'that legislation specifically targeting serious and organised crime groups is only one of the possible approaches to combating such groups.'[573]

Parliamentary Joint Committee on the Australian Crime Commission (undated), available at www.aph.gov.au/Senate/committee/acc_ctte/laoscg/submissions/sublist.htm (accessed 16 Apr 2009);

570 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 16 Apr 2009).

571 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 16 Apr 2009).

572 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 16 Apr 2009).

573 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 16 Apr 2009).

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.[574]

After the Communists seized power in 1949, triads and other criminal syndicates were largely eradicated.[575] 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.[576] At that time, the political momentum of triads ceased and since the Communist takeover the triads have become gradually more associated with organised crime.[577] Few triads remained in mainland and their members were pushed further underground and their activities became more scattered.[578]

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

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574 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.

575 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.

576 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.

577 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.

578 Ming Xiang, 'Assessing and Explaining the Resurgence of China's Criminal Underworld' (2006) 7(2) *Global Crime* 151 at 157–158.

domestic syndicates[579] and also to a greater influx of criminal organisations from Hong Kong, Macau, Taiwan and further afield that tried to infiltrate China and take advantage of its rapid modernisation and economic growth.[580] The illicit drug market in China, for instance, is said to be dominated by transnational criminal groups.[581] Moreover, there are frequent reports of organised crime groups receiving protection or active collaboration from corrupt government officials. This problem, notes Zhao Guoling, 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.'[582]

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.[583] Among the most notorious groups are the 14K,[584] 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.[585] 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.[586] Other sources report that 'over

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579 See, for example, the Liu Yong, Zhang Wei, and Lang Xiao Min syndicates explored in UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix B.

580 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.

581 UNODC, *Amphetamines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 37.

582 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.

583 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.

584 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; cf Bertil Lintner, 'Chinese Organised Crime' (2004) 6(1) *Global Crime* 84 at 88.

585 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.

586 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.

the past 20 years, mafia-style gang crime has increased sevenfold'.[587] More recent 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.[588]

This apparent surge in organised crime activity — seen by some observers as 'an organisational and potentially political threat to the communist regime'[589] — led to the adoption of a 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.[590]

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.[591]

Prior to the reforms of 1997, China's criminal law only contained provisions that rudimentarily dealt with organised crime. Article 22 of the *Criminal Law 1979* (China) followed European and particularly Soviet criminal laws by creating liability for complicity, i.e. '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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587 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.

588 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..

589 An Chen, 'Secret Societies and Organised Crime in Contemporary China' (2005) 9(1) *Modern Asian Studies* 77 at 79.

590 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.

591 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.[592]

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).[593]

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 extends to Macau and, since September 7, 2006, also to Hong Kong.[594]

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 22 below). Some observers equate this definition as the Chinese equivalent to the *Palermo's Convention* 'organised crime group'.[595]

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592 Yu Zhigang, Chinese People's University, cited in Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 94.

593 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.

594 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.

595 Ming Xiang, 'Assessing and Explaining the Resurgence of China's Criminal Underworld'

Figure 22 'Criminal group', art 26[2] *Criminal Law 1997* (PRC)[596]

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 of severity, nor does it specify that the goal be to obtain a financial or other material benefit.'[597] 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.[598]

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.[599] 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.'[600]

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.[601] The article contains a special offence relating to criminal syndicates.

(2006) 7(2) *Global Crime* 151 at 153.

596 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.

597 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.

598 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.

599 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.

600 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 97.

601 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 view these terms 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.'[602] Chinese authors have explained the type of organisation referred to in art 294 as 'underworld crime',[603] '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

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Cross-border Organised Crime', in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 249.

602 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.

603 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.'

harm than the formal organised crime organisation.'[604] Ding Mu-Ying & Shan Chang Zong define underworld crimes as:

> [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.[605]

Zhang Xin Feng notes that local criminal groups are generally more loosely structured based on family and kinship (frequently referred to as guanxi[606]) that can often be found in rural areas.[607] 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.[608]

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.'[609] These explanations are designed to assist courts in the interpretation of art 294, but it is not binding on police, prosecutors, or other authorities.[610] 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'.[611] The key requirements of these documents are set out in the following table.

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604 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 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.

605 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.

606 Cf An Chen, 'Secret Societies and Organised Crime in Contemporary China' (2005) 9(1) *Modern Asian Studies* 77 at 93.

607 Cf Yiu Kong Chu, 'Global Triads: Myth or Reality?', in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 183 ay 187.

608 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.

609 See Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102 (with reference to the original source in Mandarin).

610 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.

611 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 23 Interpretation of 'Criminal organisation of a syndicate nature', art 294[1] *Criminal Law 1997* (China)[612]

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.'[613] It also marks a difference to criminal groups within the meaning of art 26 which includes small and loose associations.[614]

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.[615]

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612 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.

613 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).

614 See Section 7.2 above.

615 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.[616] 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.[617]

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.[618] 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.'[619]

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.

616 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.

617 Andreas Schloenhardt, *Migrant Smuggling* (2003) 109.

618 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 103.

619 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 23 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.[620]

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].[621]

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'[622] of up to three years fixed-term imprisonment,[623] criminal detention (of up to six months),[624] public surveillance,[625] or 'supplementary punishment'[626] by deprivation of political rights.[627]

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620 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.

621 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.

622 Article 33 *Criminal Law* 1997 (China).

623 Articles 45, 46 *Criminal Law 1997* (China).

624 Articles 42–44 *Criminal Law 1997* (China).

625 Articles 38–41 *Criminal Law 1997* (China)

626 Article 34 *Criminal Law 1997* (China).

627 Articles 54–58 *Criminal Law 1997* (China).

Figure 24 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.[628]

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 a 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).[629]

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.[630]

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.'[631]

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628 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.

629 Articles 14-15 *Criminal Law 1997* (China).

630 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).

631 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.[632] The Chinese translation of art 294 distinguishes between domestic, triad-style syndicates [para 1] and foreign 'mafia-type' organisations [para 2].[633]

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.[634]

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.[635] 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 in a much broader manner than similar Western concepts.[636] 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

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632 See Section 7.1.1 above.

633 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.

634 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.

635 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.

636 See Section 7.3.1 above.

groups (art 26) and 'criminal organisations of a triad nature' (art 294).[637] 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.[638]

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 effectiveness 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.[639]

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637 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.

638 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.

639 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,[640] 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 on December 19, 1984.[641] 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'.[642] 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.[643] 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[644] 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.[645]

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)[646] and most amphetamine-type stimulants and their precursors (especially ephedrine) usually originate in mainland China.[647]

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640 See Chapter 9 below.

641 Signed at Beijing, Dec 19, 1984, 1399 UNTS 60.

642 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.

643 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.

644 See further Section 7.1.1 above.

645 Karen Joe Laidler, *The Hong Kong Drug Market* (2000) 7.

646 See further, UNODC, *Amphatmines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 34.

647 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*

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 it's booming and liberal market economy.[648] 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.'[649] Other writers have described Hong Kong as 'the undisputed capital of modern day triads'.[650] 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.[651] However, most observers agree that 'the reverse turned out to be the case'.[652]

In 1999, Hong Kong Police reported that it was aware of fifty triad societies operating in the SAR, of which fifteen to twenty groups regularly come to the attention of local authorities.[653] It has been estimated that '1 out of every 20 persons [in Hong Kong] may be a triad member or affiliate'[654] and that there are between 30,000 and 160,000 triad members in Hong Kong.[655] The 14K, Who Shing Wo (the Wo groups), and Sun Yee On groups are among the most notorious Hong Kong triads.[656] Their activities cover a great range of illegal undertakings including the smuggling of various

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Hong Kong Drug Market (2000) 9, 11; Yiu Kong Chu, 'Global Triads: Myth or Reality?', in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 185.

648 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.

649 Jon Vagg, 'The Borders of Crime: Hong Kong-China Cross-Border Activity' (1992) 32(3) *British Journal of Criminology* 310 at 310.

650 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.

651 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.

652 Bertil Lintner, 'Chinese Organised Crime' (2004) 6(1) *Global Crime* 84 at 84–85.

653 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.

654 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.

655 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'.

656 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.

contraband such as cigarettes, artefacts, and motor vehicles;[657] migrant smuggling from China into Hong Kong but also to destinations further afield such as North America, Australia, and Europe;[658] trafficking in persons;[659] prostitution and the brothel industry;[660] illegal gambling, also including online betting and soccer gambling;[661] loan sharking and debt collection;[662] and large-scale credit card and identity card fraud.[663]

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.[664] To increase profits, raise funds, and to conceal their criminal activities and proceeds of crime, the larger criminal organisations also operate multiple legitimate enterprises.[665] Legal activities of triad societies in Hong Kong frequently involve local transport companies and the film industry.[666]

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

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657 Jon, 'The Borders of Crime: Hong Kong-China Cross-Border Activity' (1992) 32(3) *British Journal of Criminology* 310 at 311–319.

658 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.

659 Lo Shiu-Hing, 'Cross-Border Organised Crime in Greater South China' (1999) 5(2) *Transnational Organised Crime* 176 at 188.

660 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.

661 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/

662 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.

663 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.

664 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.

665 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.

666 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.

> 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 communication work, white fans who are the planners and administrators, and ordinary members.[667]

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.[668] 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.[669]

But not all criminal organisations in Hong Kong are of the same design 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.[670] 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.[671] Profits usually remain with local gangs and are not collected centrally.[672] 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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667 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.

668 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.

669 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.

670 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.

671 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.

672 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.[673]

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.'[674]

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*[675] and the *Societies Ordinance*.[676] 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.[677]

The principal purpose of this Ordinance is to enable law enforcement agencies to combat organised crime more effectively by using special powers of investigation.[678] Secondly, the Ordinance facilitates forfeiture and the seizure of illegitimate assets[679] and contains special provisions regarding criminal procedure and the prosecution and sentencing of offenders.[680] 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.[681]

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673 Sheldon Zhang & Ko-lin Chin, 'The Declining Significance of Triad Societies in Transnational Illegal Activities' (2003) 43 *British Journal of Criminology* 469 at 478.

674 Bertil Lintner, 'Chinese Organised Crime' (2004) 6(1) *Global Crime* 84 at 89.

675 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).

676 See Section 8.3 below.

677 Long title *Organised and Serious Crime Ordinance 1994* (Hong Kong)

678 Sections 2-7, 24E *Organised and Serious Crime Ordinance 1994* (Hong Kong). Cf Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 10.

679 Sections 8-24D, 25-26 *Organised and Serious Crime Ordinance 1994* (Hog Kong).

680 Sections 27-30 *Organised and Serious Crime Ordinance 1994* (Hong Kong).

681 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 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*.[682]

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[682] 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 25 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 organisation
Activities	[none required]
Objectives	• solely or 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 26 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.[683]

[683] 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,[684] powers relating to the confiscation of property and proceeds of crime,[685] restraining orders,[686] and provisions for remittance agents and money chargers.[687]

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.[688] 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.[689]

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.[690] 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).[691]

92006) 9(4) *Journal of Money Laundering Control* 379 at 390–391.

684 Sections 3-6 *Organised Crime Ordinance 1994* (Hong Kong).

685 Sections 8-13, 16-23 *Organised Crime Ordinance 1994* (Hong Kong).

686 Sections 14, 15 *Organised Crime Ordinance 1994* (Hong Kong).

687 Sections 24A–24E *Organised Crime Ordinance 1994* (Hong Kong).

688 *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.

689 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.

690 No 12 of 1845. See further Ernst Eitel, *Europe in China* (1895) 228.

691 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[692] 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'.[693] '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.[694]

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, . 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.[695] 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.[696] The prohibition may also be applied to political organisations.[697] 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.[698]

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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692 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).

693 Section 2(1) *Societies Ordinance 1997* (Hong Kong).

694 A Chen, 'Editorial: Civil liberties in Hong Kong: freedoms of expression and association' (1989) 19 *Hong Kong Law Journal* 4 at 5_6.

695 '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).

696 Section 8(1)(a) *Societies Ordinance 1997* (Hong Kong).

697 Section 8(1)(b) *Societies Ordinance 1997* (Hong Kong).

698 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.[699] 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 27 provides a summary of the existing offences which are discussed separately in the following sections.

Figure 27 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 Paying money, giving aid, control of books, accounts, seals, lists of members etc	S 20(1) 1yr |HKD20,000 (1st offence) - S 20(1) 1yr | HKD20,000 (1st offence)	S 20(2) 3yrs | HKD100,000 (1st offence) 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[700] or any person professing or claiming to be an office-bearer and any person managing or assisting in the management of any

699 Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9.

700 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.[701] 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.

701 *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.[702]

Membership is not further defined in the Ordinance and it remains unclear just how formally 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.[703]

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 of if and how membership in a triad society ends. Many cases have relied on the traditional notion that triad membership is inextinguishable,[704] while more modern interpretations suggest that members can terminate their membership.[705] Some triad members have deliberately made admissions to the police in order to break their oath and thus try to break their connection to the society.[706]

A triad renunciation scheme was established in 1988 to allow non-active members to formally renounce their membership.[707] 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.[708] 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'.[709]

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

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702 *HKSAR v Wong Fuk Tak & Others* [2000] HKLRD (Yrbk) 189.

703 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.

704 See Section 8.1.2 above.

705 H Litton, 'Editorial: So-called 'Triad Experts'' (1986) 16 *Hong Kong Law Journal* 3 at 4-5.

706 *Cheng Chung-Wai v R* [1980] HKLR 593 at 600.

707 Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 501.

708 Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9.

709 *Ngchi-Wah v R* [1978] HKLR 101 at 103.

'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,[710] wrongful beliefs by the accused that he/she is a member,[711] or the use of triad language alone do not suffice to establish liability, though this may be used as supporting evidence.[712] 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.*[713]

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(2) 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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710 *Ngchi-Wah v R* [1978] HKLR 101 at 103; *Cheng Chung-Wai v R* [1980] HKLR 593.

711 *Cheng Chung-Wai v R* [1980] HKLR 593.

712 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.

713 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:

> 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.[714]

Official statistics and the extensive case law demonstrate that the offences under the *Societies Ordinance* are in practice used frequently 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.[715] 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[716] or by so-called police triad experts who testify in order to confirm the accused's membership.[717] 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 the societies registration authority: the Registrar of Societies and the Commissioner of Police used to be the same person.[718] 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 suggests '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.[719]

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 introduced in places like South

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714 A Chen, 'Editorial: Civil liberties in Hong Kong: freedoms of expression and association' (1989) 19 *Hong Kong Law Journal* 4 at 5.

715 See also Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9.

716 See, for example, *HKSAR v Fu Ming Yung & Others* [2001] HKEC 1428; *HKSAR v Lam Yan Ming* [2004] HKEC 254.

717 See also Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9. See, for example, *HKSAR v Mak Chi Hing* [2001] HKEC 140.

718 A Chen, 'Editorial: Civil liberties in Hong Kong: freedoms of expression and association' (1989) 19 *Hong Kong Law Journal* 4 at 6.

719 H Litton, 'Editorial: So-called 'Triad Experts'' (1986) 16 *Hong Kong Law Journal* 3 at 7.

Australia. 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.

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 ever 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.[720] Chinese triads, secret societies, and other criminal organisations have operated in Macau under Portuguese rule and continue to do so since Macau's return to China as a Special Administrative Region (SAR) in 1999. Following the granting of the first casino franchise in 1937, several criminal organisations saw the gambling industry as an easy way to launder illicit money,[721] including embezzled funds from mainland China.[722] 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.[723] There have also been frequent allegations about prostitution, loan sharking, extortion, and the collection of protection money from people associated with the casino industry.[724] 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.[725]

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, the Sociedade de Turismo e Diversoes de Macau (STDM), 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 Mr 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.[726] Triad members, too, have allegedly participated in regional elections or have otherwise attempted to influence political processes.[727]

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720 Mary-Anne Toy, 'A bet bigger than Vegas' (1 Apr 2006) *The Age*.

721 Angela Veng Mei Leong, 'Macau Casinos and Organised Crime' (2004) 74 *Journal of Money Laundering* 298 at 300.

722 Mary-Anne Toy, 'A bet bigger than Vegas' (1 Apr 2006) *The Age*.

723 Lo Shiu-Hing, 'Cross-border Organized Crime in Greater South China' (1999) 5(2) *Transnational Organized Crime* 176 at 176.

724 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.

725 Lo Shiu-Hing, 'Cross-border Organized Crime in Greater South China' (1999) 5(2) *Transnational Organized Crime* 176 at 180–182.

726 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*.

727 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*.[728] 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.[729] In accordance with Macau's *Basic Law*, China has extended the application of the *Convention against Transnational Organised Crime* to Macau.[730]

Macau's criminal law, including its general principles, are guided by the *Penal Code* (Macau) (*Código Penal*)[731] 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[732] and attempts,[733] but has no separate offence for conspiracy. The Code does, however, contain a special offence entitled 'criminal associations' (associação criminosa) in art 288.[734]

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,[735] but it was never rigorously enforced.[736] Following a wave of violent turf wars between rival triads and political assassinations in the mid 1990s,[737] this Law was eventually repealed. It was substituted on July 30, 1997 with a more comprehensive *Organised Crime Law* (*Lei da Criminalidade Organizada*) which continues to apply today.[738] 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.[739] Articles 3 to 13 contain a range of other specific offences relating to organised crime.[740]

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728 Signed at Beijing, 13 Apr 1987, 1498 UNTS 228.

729 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.

730 Macau SAR, *Advise of the Chief Executive No 30/2004* (31 Aug 2004).

731 No 11 of 1995.

732 See arts 20-24 *Penal Code* (Macau).

733 See arts 20-24 *Penal Code* (Macau).

734 See Section 9.2 below.

735 No 5 of 1978.

736 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.

737 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.

738 No 6 of 1997.

739 See Section 9.3.2 below.

740 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 for between five and twelve years under art 288(3).

9.3 Secret Societies/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 28 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,[741] offences against the person,[742] abduction and kidnapping,[743] rape,[744] trafficking in persons, extortion,[745] exploitation of the prostitution of others, loan sharking (usury),[746] robbery,[747] 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 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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741 Articles 128–134 *Penal Code* (Macau).
742 Articles 137–142 *Penal Code* (Macau)
743 Articles 147–149 *Penal Code* (Macau).
744 Article 154 *Penal Code* (Macau).
745 Article 216 *Penal Code* (Macau).
746 Article 219 *Penal Code* (Macau).
747 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 for 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 between 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 of 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[748] 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 for the 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

[748] See also art 33 *Organised Crime Law 1997* (Macau).

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 as to 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.[749] As the KMT leadership retreated to Taiwan and established an independent Republic of China, they were followed by many supporters, including the Green Gang.[750]

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 controlled 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 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 an influx of firearms and other contraband.[751]

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.[752]

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 the island's criminal organisations to other countries, especially Japan, the Philippines, and Thailand.[753] 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.[754]

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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749 See further Section 7.1.1 above.

750 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.

751 Ko-lin Chin, *Heijin* (2003) 3, 6.

752 Ko-lin Chin, *Heijin* (2003) 168.

753 Ko-lin Chin, *Heijin* (2003) 194-197. See further Sections 14.1, 18.1 below.

754 Ko-lin Chin, *Heijin* (2003) 169.

maximum security prison on a remote island.[755] 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.[756] 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.[757] 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.[758]

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 was by moving into public office or becoming elected officials.[759] 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.[760]

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. Three weeks later, the *Organised Crime Control Act* was introduced into the Legislative Yuan and the Act entered into force on December 11, 1996.[761]

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. It was found, however, 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.[762] The United Bamboo

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755 Ko-lin Chin, *Heijin* (2003) 171–172.

756 Ko-lin Chin, *Heijin* (2003) 197-201. See further Section 16.1 below.

757 Bertil Lintner, 'Chinese Organised Crime' (2004) 6(1) *Global Crime* 84 at 92; Ko-lin Chin, *Heijin* (2003) 204–209.

758 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.

759 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.

760 '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.

761 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.

762 Ko-lin Chin, *Heijin* (2003) 11, 21-22.

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.[763]

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.[764] 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 television, movie, and publishing industries.[765]

10.2 Criminal Code (Taiwan)

Taiwan's criminal law and criminal justice system is for the most part based 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.[766] 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.[767]

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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763 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.

764 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.

765 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.

766 Articles 25–31 *Criminal Code* (Taiwan).

767 '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'.[768] 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.[769]

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.[770]

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,[771] 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.[772] 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.[773] Further, the *Organised Crime Control Act 1996* includes special sanctions for persons liable under the Act[774] and contains some enhanced enforcement powers in relation to tracing and confiscation of property.[775]

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768 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1020.

769 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1023, 1027.

770 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1020; Ko-lin Chin, *Heijin* (2003) 163.

771 See Section 10.1 above.

772 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1023–1026.

773 Articles 4, 5, 8, 13, 14 *Organised Crime Control Act 1996* (Taiwan).

774 Articles 4, 5, 8, 13, 14 *Organised Crime Control Act 1996* (Taiwan).

775 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 29 below).

Figure 29 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'[776]), 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'.[777]

The purpose of criminal organisations has to relate — exclusively or predominantly — to criminal activities;[778] 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 of 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.[779]

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776 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1021.

777 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1021.

778 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1022.

779 '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 prove 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* (Taiwan) 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' of 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.[780]

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 others 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[781] in that it seeks to encourage members of criminal groups to

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780 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1025.

781 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.[782] 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.[783]

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 others 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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782 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1028.

783 '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.[784]

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 1996* 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.'[785]

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.'[786]

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.[787] 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.[788]

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784 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.

785 Ko-lin Chin, *Heijin* (2003) 179 with further references.

786 '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.

787 Ko-lin Chin, *Heijin* (2003)182–184.

788 Ko-lin Chin, *Heijin* (2003) 185–188.

11 Singapore

11.1 Conspiracy Provisions

Singapore's domestic criminal law (like that of Malaysia and Brunei Darussalam)[789] 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.[790] To comply with the obligations under the Convention, Singapore introduced specific legislation with the *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 2007*[791] 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.[792] In addition to these provisions, Singapore's *Societies Act 1967* contains offences for associations with so-called 'unlawful societies', including triads.[793]

11.1.1 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 between two or more persons to do illegal acts or use illegal means to carry out legal acts.[794]

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789 See Chapters 12 and 13 below.

790 UNODC, *United Nations Convention against Transnational Organized Crime*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 15 Dec 2008).

791 Bill No 33 of 2007.

792 Bill No 38 of 2007.

793 See Section 11.3 below.

794 See Section 2.1.3 above.

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.[795] The agreement only needs to be reached in principle and not in detail.[796] It is also possible for a person to join the agreement at a later stage.[797]

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).[798]

Fault element

The fault element of criminal conspiracy requires that any party to the agreement has the intention to carry out the agreement.[799]

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).

11.1.2. 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).[800] 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.

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.[801]

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795 Cf *Ang Ser Kuang v Public Prosecutor* [1998] 2 SLR 209.

796 Cf *Nomura Taiji & Ors v Public Prosecutor* [1998] 2 SLR 173 para 110.

797 *R v Chew Chong Jin* [1956] MLJ 185.

798 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.

799 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.

800 *Er Joo Nguang & Anor v Public Prosecutor* [2000] 2 SLR 645 at 656.

801 See further Secttion 2.1.3 above, and Stanley Yeo et al, *Criminal Law in Malaysia and Singapore* (2007) paras 34.13–34.17.

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.[802]

11.1.3 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.[803]

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?[804]

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 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.[805]

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802 Stanley Yeo et al, *Criminal Law in Malaysia and Singapore* (2007) para 34.50.
803 Stanley Yeo et al, *Criminal Law in Malaysia and Singapore* (2007) para 34.52.
804 Stanley Yeo et al, *Criminal Law in Malaysia and Singapore* (2007) para 34.67.
805 Cited in Chan Wing Cheong et al, *Fundamental Principles of Criminal Law* (2005) 532.

11.2 Societies Act

In addition to the conspiracy provisions in the *Penal Code*, Singapore's *Societies Act 1967*[806] contains a range of criminal offences that apply to persons associated with triads and 'unlawful societies'. Similar to the *Societies Ordinance* in Hong Kong,[807] 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.

11.2.1 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.[808]

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'[809] 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.

11.2.2 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 30 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.[810] Any property belonging to unlawful societies may be seized and forfeited.[811]

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806 Chapter 311.
807 See Section 8.3 above.
808 Section 2(a)–(g) *Societies Act 1967* (Singapore).
809 Schedule B *Societies Act 1967* (Singapore).
810 Section 30(1) *Societies Act 1967* (Singapore).
811 Section 32 *Societies Act 1967* (Singapore)

Figure 30 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.

Offences

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.

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.

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).

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).

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.

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'.

11.2.3 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.[812]

[812] For general comments see Section 24.2.4 below.

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. Organised crime in Malaysia is most frequently associated with piracy in the Malakka Strait and elsewhere in Southeast Asian waters,[813] though most piratical attacks in the region are opportunistic and not part of systematic, organised criminal enterprises.[814] There are also some reports linking the illicit trafficking in timber in Malaysia to criminal elements, including criminal organisations.[815]

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.[816] While there have been some reports linking political corruption and nepotism to criminal groups,[817] 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. The Malaysian *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.[818] 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*[819] which were originally introduced on December 18, 1948.[820] Unlike Singapore, however, no

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813 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.

814 Stefan Eklöf, *Pirates in Paradise: A Modern History of Southeast Asia's Maritime Marauders* (2006) 44–51.

815 Andreas Schloenhardt, *The Illegal Trade in Timber and Timber Products in the Asia Pacific Region* (2008) 59.

816 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.

817 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.

818 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed July 7, 2008).

819 Act No 574.

820 F.M. Ord 32/1948.

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*:[821]

> 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

The conspiracy can be aimed at carrying out an illegal act, but can also involve non-criminal acts or legal acts by illegal means. If the agreement between the co-conspirators is to commit an offence, then this agreement is the only required physical element. If the agreement is to commit non-criminal acts or legal acts by illegal means, proof of an overt act in furtherance of the agreement becomes necessary.[822]

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 prosecutions 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,[823] 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).

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821 See Section 11.1 above.

822 *Marija Balayya v State of Orissa* (1976) 42 Cut LT 374; Lee Chong Fok & Che Audah Hassan, *Introduction to Principles & Liabilities in Criminal Law* (2006) paras 10.2, 10.4.

823 See Sections 8.3 and 11.3 above.

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.

13 Brunei Darussalam

According to Government officials, organised crime in Brunei Darussalam (Brunei) is extremely limited, even non-existent.[824] Activities such as drug trafficking, trafficking in persons, and illegal gambling are frequently attributed to migrant workers in Brunei.[825] 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,[826] 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.[827] 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.[828] 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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824 Cf Ernesto Savona et al, *Organised Crime across the Borders* (1995) 23.

825 Personal communication with members of the Royal Brunei Police Force, Singapore, April 22, 2008.

826 Cf Ernesto Savona et al, *Organised Crime across the Borders* (1995) 23.

827 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 15 Dec 2008).

828 See Sections 11.2 and 12.2 above.

14 Indonesia

At present, Indonesia does not have specific legislation on organised crime. Specifically, existing Indonesian law does not directly criminalise organised criminal groups and participation in or association with these groups. The *Penal Code* of Indonesia contains general provisions relating to joint crimes and participation. In addition, Indonesia's laws relating to human trafficking criminalises participation in a criminal group, but only if that group is involved in this specific type of crime (i.e. trafficking in person.[829]

Indonesia signed the *Convention against Transnational Organised Crime* on December 12, 2000.[830] According to information provided by the Indonesian Department of Foreign Affairs, the Parliament in Jakarta passed a Bill ratifying the Convention in December 2008. The Bill has yet to be published in the State Gazette. Official government sources in Indonesia are still unclear about the necessary amendments domestic laws may require to fully implement the Convention.[831]

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829 Personal communication with Mr Andhika Chrisnayudhanto, Department of Foreign Affairs, Jakarta, 20 Jan 2009 [record kept by author]; cf UN, Conference of the Parties to the UN Convention against Transnational Organised Crime, *Information submitted by States in their response to the checklist/questionnaire on the implementation of the United Nations Convention against Transnational Organized crime for the first reporting cycle*, UN Doc CTOC/COP/2008/CRP.7 (6 Oct 2008) question 1.

830 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed July 7, 2008).

831 Personal communication with Mr Andhika Chrisnayudhanto, Department of Foreign Affairs, Jakarta, 20 Jan 2009 [record kept by author].

15 Philippines

15.1 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.[832] For example, the UN Office on Drugs and Crime (UNODC), 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.[833] Trafficking in persons, especially women, from the Philippines occurs at very high levels. In 2000, it was estimated that 143,611 Filipina women had left the country and ended up working in slavery-like conditions abroad.[834] 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, and kidnappings for ransom, are the crimes most commonly connected to organised crime groups in the Philippines. The available reports further argue that some criminal organisations are closely connected to separatist and terrorist organisations in the southern parts of the Philippines.[835] This is 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.[836]

Information about the types and size of criminal organisations is not always consistent. In 2003, the Philippine Center on Transnational Crime noted 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.[837] Another paper released by the Center

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832 See generally, James Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime* (2007) 9–10.

833 UNODC, *Amphetamines and Ecstasy: 2008 Global ATS Assessment*, Vienna: UNODC, 2008, 43.

834 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).

835 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.

836 Stefan Eklöf, *Pirates in Paradise: A Modern History of Southeast Asia's Maritime Marauders* (2006) 35–44.

837 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).

in the same year, however, identified '83 big time drug syndicates operating in the 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.'[838]

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.[839] 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.[840]

15.2 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*.[841] 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].[842]

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.[843] Since about 1998 there have been a series of Bills before the Philippines' House of Parliament designed

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838 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).

839 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).

840 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 20.1 below.

841 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).

842 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).

843 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.[844]

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. The Philippines has reported to the Conference of the State Parties to the UN Convention against Transnational Organised Crime that it criminalises participation in an organised crime,[845] but it is not clear where these provisions can be found.

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.

These bills are largely identical,[846] containing extensive provisions directed at the activities of criminal organisations,[847] powers to order the forfeiture and seizure of assets[848] and regulate the restitution of property and compensation of victims of organised crime.[849] The following sections examine the core offences included in the *RICO* bills.

15.2.1 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.

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844 Section 2 *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

845 UN, Conference of the Parties to the UN Convention against Transnational Organised Crime, *Information submitted by States in their response to the checklist/questionnaire on the implementation of the United Nations Convention against Transnational Organized crime for the first reporting cycle*, UN Doc CTOC/COP/2008/CRP.7 (6 Oct 2008) question 1.

846 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]

847 Sections 5, 4(c) *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

848 Sections 7, 9, 13-14 *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

849 Sections 15, 17 *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

Figure 31 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 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.[850]

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

[850] 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.

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).

15.2.2 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.

15.2.3 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 Bill 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.

16 Vietnam

16.1 Organised Crime

16.1.1 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 this contributes 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.'[851]

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.[852]

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.[853] 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.[854]

16.1.2 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 local area.

The war between China and Vietnam that started in 1978 brought with it a new wave of refugees from Vietnam, most of which were 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.[855]

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851 UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 10, citing official Vietnamese sources.

852 UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 8, 23–24.

853 UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 27.

854 UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 28.

855 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.

Vietnamese criminal organisations in the United States have mostly been described as comparatively small, localised networks brought together by family ties. While the 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 and protection, home invasion robberies, and motor vehicle theft,[856] while in Canada and Australia, Vietnamese groups are often associated with large scale cannabis cultivation and distribution.[857]

16.2 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.[858] 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.[859]

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.[860]

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'

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856 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.

857 Personal communication with State Drug Command, Queensland Police Service, Brisbane, July 7, 2006; RCMP-GRC, Ottawa (Ont), July 30, 2008.

858 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 29 Aug 2008).

859 UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 32–33.

860 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).

who support and facilitate criminal offences. In addition, subsection 20(3) 'stipulates a high-level form of complicity'[861] 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.[862]

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 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.[863]

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861 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.

862 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.

863 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.

17 Cambodia

In Cambodia, organised crime is a more recent phenomenon than in many other parts of the region. The oppressive system of government under the Khmer Rouge made it largely impossible for non-state organisations to gain any stronghold and most forms of resistance were violently suppressed by the regime.

The beginning of the transitional period in 1992, and the opening of the country to foreign aid, visitors, and trade also attracted a range of criminal organisations that gradually established a presence in Cambodia and became involved in range of illicit activities, most notably the illegal drug trade and trafficking in persons. Taiwan was among the greatest investors in Cambodia at that time, purchasing large blocks of land and taking over many parts of the domestic logging and construction industries. This trend was accompanied by a number of senior organised crime figures who fled to Cambodia to avoid arrest during Taiwan's crackdown on criminal organisations. The Bamboo United group, for example, quickly established itself in Phnom Penh and became involved in a variety of legal and illegal enterprises.[864]

The production and trafficking of illicit drugs and human trafficking are the most prominent organised crime problems in Cambodia. Cambodia is a sending country for many women and children that are trafficked into the sex industry in Thailand, and Cambodia is simultaneously a receiving country for trafficked women from Vietnam.[865] Of particular concern in Cambodia have also been the very high levels of corruption, involving all levels of government, which has facilitated the rise of organised crime since the early 1990s and also explains the inability — and sometimes unwillingness — of government agencies to crack down on criminal organisations.[866]

Cambodia signed the *Convention against Transnational Organised Crime* on November 11, 2001, and ratified the Convention on December 12, 2005.[867] From the available open-source material, it is not possible to state conclusively how Cambodia has implemented the Convention obligations, including relevant offences, into domestic law. Cambodia has reported to the Conference of the State Parties that it criminalises participation in an organised crime using the conspiracy model set out in art 5(1)(a)(i),[868] but has not provided any further information in this regard and it is not clear where that offence can be found in Cambodian law.[869]

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864 Ko-lin Chin, *Heijin* (2003) 198–200. See further Section 10.1 above.

865 James Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime* (2007) 10.

866 James Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime* (2007) 10–11.

867 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 29 Aug 2008).

868 UN, Conference of the Parties to the UN Convention against Transnational Organised Crime, *Information submitted by States in their response to the checklist/questionnaire on the implementation of the United Nations Convention against Transnational Organized crime for the first reporting cycle*, UN Doc CTOC/COP/2008/CRP.7 (6 Oct 2008) question 1.

869 Personal communication with Organised Crime and Criminal Justice Section, Division for Treaty Affairs United Nations Office on Drugs and Crime (UNODC), Vienna, 27 Jan 2009.

18 Lao PDR

The Lao People's Democratic Republic (PDR) acceded to the *Convention against Transnational Organised Crime* on September 26, 2003.[870] The *Penal Law 1990* (Lao) contains general provisions relating to liability preparation, attempt, and participation in criminal offences in arts 12, 13, and 16.

From the available open-source material, it is not possible to state conclusively whether Lao PDR has implemented the Convention obligations, including relevant offences, into domestic law. Lao PDR has not submitted any reports to the Conference of the State Parties about the ways (if any) in which it criminalises participation in an organised crime.[871]

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870 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 29 Aug 2008).

871 Cf UN, Conference of the Parties to the UN Convention against Transnational Organised Crime, *Information submitted by States in their response to the checklist/questionnaire on the implementation of the United Nations Convention against Transnational Organized crime for the first reporting cycle*, UN Doc CTOC/COP/2008/CRP.7 (6 Oct 2008) question 1. Personal communication with Organised Crime and Criminal Justice Section, Division for Treaty Affairs United Nations Office on Drugs and Crime (UNODC), Vienna, 27 Jan 2009.

19 Thailand

19.1 Organised Crime in 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 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.[872] 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.[873]

19.2 Organised Crime Offences

Thailand's criminal law currently contains no specific provision relating to organised crime. The *Penal Code* of 1956 — which derives 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 in or association with criminal organisations.

Thailand signed the *Convention against Transnational Organised Crime* at the opening ceremony in Palermo, Italy but has yet to implement it into domestic law.[874] 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.[875]

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

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872 James Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime* (2007) 10.

873 James Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime* (2007) 10.

874 UNODC, *United Nations Convention against Transnational Organised Crime*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed June 16, 2008).

875 Thailand, *Thailand Country Report* (to the Eleventh United Nations Congress on Crim Prevention and Criminal Justice, April 18-25, 2005) (2005) 4.

assistances in criminal matters, and also create greater awareness in the community and private sector about organised crime.[876]

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.[877]

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. By August 2008, the United Nations was also not aware about any steps taken to criminalise participation in an organised criminal group under domestic law 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.[878]

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876 Thailand, *Thailand Country Report* (to the Eleventh United Nations Congress on Crim Prevention and Criminal Justice, April 18-25, 2005) (2005) 4–59.

877 Thailand, *Thailand Country Report* (to the Eleventh United Nations Congress on Crim Prevention and Criminal Justice, April 18-25, 2005) (2005) 61.

878 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; UN, Conference of the Parties to the United Nations Convention against Transnational Organised Crime, *Implementation of the United Convention against Transnational Organised Crime: consolidated information received from states for the first reporting cycle*, UN Doc CTOC/COP/2005/2/Rev.2 (25 Aug 2008) para 4.

20 Japan

20.1 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.[879]

Historically, boryokudan comprised groups of outsiders including people involved in gambling, low-level crime, or protection rackets.[880] 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.[881] 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.[882] Peter Hill notes that 'the yakuza apparently enjoyed a position of wealth, security and acceptance, inconceivable for organised crime groups in other advanced democracies.'[883] 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.[884]

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, boryokudan in cooperation with low-level racketeering groups ran much of the black market for food and basic supplies.[885] Over the years, the yakuza became increasingly influential across Japan and — particularly in the decade of Japan's

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879 In this report, the two terms are used interchangeably.

880 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.

881 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.

882 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.

883 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.

884 Keith Maguire, 'Crime, Crime Control and the Yakuza in Contemporary Japan' (1997) 21(3) *Criminologist* 131 at 140.

885 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.

'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.'[886] At that time, the yakuza also became involved in an activity known as sokaiya, a unique form of corporate blackmail,[887] and in corporate crimes such as money lending (sarakin), debt collecting and loss cutting, auction obstruction, and bankruptcy management.[888] 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.[889]

Boryokudan are generally made up of several smaller entities and sub-groups which — in combination — form a hierarchical, 'quasi-feudal',[890] 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).[891]

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.[892] 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.[893] It is estimated that 'the yakuza generate USD 50 billion annually from theri activities.[894]

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886 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.

887 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.

888 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.

889 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.

890 Peter Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō' (2003) 6(1) *Social Science Japan Journal* 1 at 2.

891 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; Jennifer Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal* 1111 at 1116-1117.

892 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.

893 Joseph E Ritch, 'They'll make you an offer you can't refuse: A comparative analysis of

Figure 32 Organised crime groups and membership in organised crime groups, Japan 2000-2005[895]

	2000	2001	2002	2003	2004	2005
Total number of organised crime group members (as on December 31)	83,600	84,400	85,300	85,800	87,000	86,300
Designated organised crime groups[896]	25	24	24	24	24	21
• incl major groups	3	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 86,300 at the end of 2005.[897] About half or 43,300 are seen as regular members. Since 2001, there are 24 'designated organised crime groups' in Japan,[898] 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),[899] Inagawa-kai (稲川会, designated since June 1992),[900] and the Sumiyoshi-kai (住吉会, designated since June 1992).[901] Their members account for over 76 percent of all organised crime group members in Japan.[902]

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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) *Journal of Money Laundering Control* 416 at 416.

894 Jennifer Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal* 1111 at 1117.

895 Japan, Ministry of Justice, *White Paper on Crime 2001*, available at http://hakusyo1.moj.go.jp/en/46/nfm/mokuji.html (accessed 18 Apr 2009); Japan, Ministry of Justice, *White Paper on Crime 2002*, available at http://hakusyo1.moj.go.jp/en/47/nfm/mokuji.html (accessed 18 Apr 2009); Japan, Ministry of Justice, *White Paper on Crime 2003*, available at http://hakusyo1.moj.go.jp/en/49/nfm/mokuji.html (accessed 18 Apr 2009); Japan, Ministry of Justice, *White Paper on Crime 2004*, available at http://hakusyo1.moj.go.jp/en/50/nfm/mokuji.html (accessed 18 Apr 2009); Japan, Ministry of Justice, *White Paper on Crime 2005*, available at http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html (accessed 18 Apr 2009); Japan, Ministry of Justice, *White Paper on Crime 2006*, available at http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html (accessed 18 Apr 2009).

896 Designated organised crime groups under the *Law to Prevent Unjust Acts by Organised Crime Group Members 1991* (Japan).

897 See also Peter Hill, 'The Changing Face of the Yakuza' (2004) 6(1) *Global Crime* 97 at 106.

898 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.

899 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.

900 For more on the Inagawa-kai see, for example, David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 135–143.

901 For more on the Sumiyoshi-kai see, for example, David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 123–135.

902 Japan, Ministry of Justice, *White Paper on Crime 2006*, available at

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, especially those involving methamphetamine (44.5%), and extortion (39.8%).[903] 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.[904]

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.[905] 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.[906]

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.[907]

20.2 Organised Crime under Japan's Criminal Law

Japan's *Criminal Code* of 1907[908] 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

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http://hakusyo1.moj.go.jp/en/53/nfm/mokuji.html (accessed 18 Apr 2009).

903 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)

904 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.

905 Peter Hill, 'The Changing Face of the Yakuza' (2004) 6(1) *Global Crime* 97 at 111–112.

906 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. See further Section 10.1 above.

907 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.

908 Act No 45 of 1907.

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'.[909]

Japan signed the *Convention against Transnational Organised Crime* on December 12, 2000.[910] The *Palermo Convention* was approved during the 156th session of the Diet, the Japanese Parliament, on May 14, 2003.[911]

20.2.1 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[912] 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).[913]

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.[914] Since its introduction, the bōtaihō has seen two significant amendments in 1993 and 1997.[915]

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.'[916] 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

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909 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.

910 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed Aug 29, 2008).

911 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).

912 The draft of the anti-boryokudan law is discussed in Peter Hill, *The Japanese Mafia* (2003) 155–157.

913 No 77 of 1991. An English (or other) translation of the Act was not available at the time of writing.

914 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.

915 See further Peter Hill, *The Japanese Mafia* (2003) 163–166.

916 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'.

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 decision by the Commissions judicially reviewed.[917] 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'.[918] 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:[919]

- 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.[920]
- 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.[921]

The existence of a criminal organisation alone does not create any criminal offences. Liability only arises if orders made under the Law are violated,[922] 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.[923] 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

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917 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.

918 Peter Hill, *The Japanese Mafia* (2003) 158.

919 Cf Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 74–75, fn 13.

920 Cf similar requirements in s 467.1 *Criminal Code* (Canada) (now amended), see Section 4.1.1 above.

921 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.

922 Ko Shikata, 'Yakuza — organised crime in Japan' (2006) 9(4) *Journal of Money Laundering Control* 416 at 419.

923 The complete list of activities is set out in Peter Hill, *The Japanese Mafia* (2003) 160.

request of victims.[924] 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.[925] Additionally, an organised crime group member who is likely to violate provisions under the *Law to Prevent Unjust Acts by Organised Crime Group Members* repeatedly 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.[926] 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.[927]

20.2.2 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 terrorist incident raised concerns about the operation of secret organisations in Japan.[928]

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*[929] 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.[930]

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.

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924 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.

925 Peter Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō' (2003) 6(1) *Social Science Japan Journal* 1 at 10; Peter Hill, *The Japanese Mafia* (2003) 165.

926 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.

927 Peter Hill, 'The Changing Face of the Yakuza' (2004) 6(1) *Global Crime* 97 at 102; Peter Hill, *The Japanese Mafia* (2003) 161–163.

928 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.

929 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.

930 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).

20.2.3 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.[931] Peter Hill, for 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.'[932]

Japan's organised crime laws adopt a unique model that is partly inspired by the US *RICO Act*[933] but also includes features of laws that proscribe organisations and criminalise activities committed on their behalf.[934] 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'.[935] 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.'[936] 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.[937]

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 a 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.[938]

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931 Cf Hitoshi Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime' (1998) 69 *International Review of Penal Law* 413 at 418.

932 Peter Hill, *The Japanese Mafia* (2003) 168 [emphases removed].

933 See Section ?? below.

934 Cf Peter Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō' (2003) 6(1) *Social Science Japan Journal* 1 at 9.

935 Hitoshi Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime' (1998) 69 *International Review of Penal Law* 413 at 419.

936 David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 211.

937 Peter Hill, *The Japanese Mafia* (2003) 167.

938 Hitoshi Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised

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.[939] Official records 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.[940] Some more recent reports suggest that boryokudan have difficulties finding new and younger members.[941] On the other hand, it has been noted that criminalising membership in an organised crime group would also create a practical enforcement problem in country that has well over 80,000 yakuza members.[942] 'Would criminalisation result in trebling the overall prison population? Regardless of the cost of such a measure, would it be desirable?', asks Peter Hill.[943]

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).[944] 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.[945] 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.[946]

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.[947] Hill also highlighted that the functions of Public Safety Commissions are often carried out by police.[948] He further 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.[949]

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

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Crime' (1998) 69 *International Review of Penal Law* 413 at 416, 417.

939 Cf Ko Shikata, 'Yakuza — organised crime in Japan' (2006) 9(4) *Journal of Money Laundering Control* 416 at 419.

940 David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 211–212.

941 Peter Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō' (2003) 6(1) *Social Science Japan Journal* 1 at 11.

942 See Section 20.1 above.

943 Peter Hill, *The Japanese Mafia* (2003) 174.

944 See further, Peter Hill, *The Japanese Mafia* (2003) 169.

945 Peter Hill, 'The Changing Face of the Yakuza' (2004) 6(1) *Global Crime* 97 at 103; Peter Hill, *The Japanese Mafia* (2003) 202–204.

946 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.

947 Peter Hill, *The Japanese Mafia* (2003) 170.

948 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.

949 Peter Hill, *The Japanese Mafia* (2003) 171.

before.[950] 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.[951] But the 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.[952] 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.[953]

This view is shared by other observers.[954] The new measures may have also led to a displacement of criminal activities and may have contributed to Japanese organisations exploring opportunities abroad.[955] On the other hand, some authors have noted that the laws have significantly reduced the violence used by different gangs against each other.[956]

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950 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.

951 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.

952 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; Jennifer Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal* 1111 at 1118.

953 Hitoshi Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime' (1998) 69 *International Review of Penal Law* 413 at 418.

954 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.

955 David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 212.

956 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.

21 Republic of Korea (South Korea)

21.1 Organised Crime in South Korea

The patterns and levels of organised crime in South Korea (Republic of Korea (ROK)) are not very well documented and the nature and activities of criminal organisations on the Peninsula remain poorly researched. Further complicating any examination of organised crime in South Korea is the fact that many sources are only available in Korean language and are inaccessible from abroad.

The available documentation generally suggests that levels of organised crime in South Korea were historically relatively low. Before the Korean War of 1950–51, criminal organisations usually involved local violent gangs and so-called hoodlums that had no sophisticated structure and largely only engaged in low-level crime.[957] Following the coup of 1961, the military administration saw organised crime groups as a challenge to its authority and conducted wide-spread campaigns resulting in the arrest of 13,000 members of criminal organisations between 1961 and 1963.[958] Aside from infrequent violent clashes between gangs, levels of organised crime remained low throughout the 1960s and 70s while the military regime exercised close social control.

Most authors attribute the emergence of organised crime to the liberalisation and democratisation process in the 1980s and the lead-up to the 1986 Asian Games and the 1988 Olympiad in Seoul.[959] During this phase, criminal organisations infiltrated the local prostitution and entertainment industries, set up illegal gambling venues, and also became involved in loan sharking, liquor supply, speculative real estate businesses, and corruption of government officials and business figures.[960]

During the 1990s, when the South Korean economy witnessed rapid development and growth, which was accompanied by significant deregulation, organised crime gradually became more sophisticated, more widespread, and more internationalised. For example, there have been reports about Japanese, Chinese, and Russian syndicates establishing a presence in Korea and carrying out offences such as drug trafficking and illegal gambling. More recently, there has been growing concern about North Korean organised crime as evidence emerged that the DPRK may be engaging in the illicit drug trade and the smuggling of other contraband to overcome its shortage in foreign currency.[961] The 'rise' of organised crime has been

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957 Yook Sang Jung, 'Organised Crime in Contemporary Korea: International Implications' (1997) 21(1) *International Journal of Comparative and Applied Criminal Justice* 91 at 91–92.

958 Yong Kwan, 'Transnational Organised Crime and the Countermeasures in Korea' (2001) 58 *UNAFEI Resource Material Series* 61 at 61–62; Seungmug Lee, 'Organised Crime in South Korea' (2006) 9(3) *Trends in Organized Crime* 61 at 64–65.

959 Following the assassination of President park Jung-hee in 1980 the Government temporarily proclaimed marshal law and introduced 'special measures to root out social evils' which marked a short period of harsh suppression of organised crime in Korea. See further Yook Sang Jung, 'Organised Crime in Contemporary Korea: International Implications' (1997) 21(1) *International Journal of Comparative and Applied Criminal Justice* 91 at 92.

960 Ernesto Savona et al, *Organised Crime across the Borders* (1995) 30; Yong Kwan, 'Transnational Organised Crime and the Countermeasures in Korea' (2001) 58 *UNAFEI Resource Material Series* 61 at 61; Seungmug Lee, 'Organised Crime in South Korea' (2006) 9(3) *Trends in Organized Crime* 61 at 66.

961 See further, Yook Sang Jung, 'Organised Crime in Contemporary Korea: International Implications' (1997) 21(1) *International Journal of Comparative and Applied Criminal Justice* 91 at 93–98.

accompanied by a surge in associated violence with one report remarking that: 'The crimes are gradually becoming more brutal, with an increased use of more deadly weapons. Organised crime groups commit murders to expand their power, protect their interest and carry out reprisals.'[962]

Criminal organisations in Korea now engage in more diverse activities also including financial fraud, blackmail, trafficking in arms and ammunition, motor vehicle and motorcycle theft, migrant smuggling, and human trafficking.[963] According to Korean Government sources there were 404 criminal organisations with 11,500 members in South Korea in 1999. It has also been reported that between 1999 and 2005 the Korean National Police Agency arrested approximately 2000 to 3300 members of organised crime groups annually.[964]

21.2 Organised Crime Legislation

The Republic of Korea signed the *Convention against Transnational Organised Crime* on December 13, 2000, but has not yet implemented the Convention provisions domestically.[965]

21.2.1 Organisation of criminal group, art 114(1) Criminal Code (ROK)

The Korean *Criminal Code*, which entered into force in 1953 and has been influenced by Chinese, German, and Anglo-American criminal law, contains a special offence in art 114(1) to penalise persons who organise or join criminal organisations.

> (1) A person who organises or joins a group the purpose of which is commission of a crime shall receive the punishment specified for such crime; but the punishment may be reduced.

Although this offence is placed with the 'specific provisions' in the *Criminal Code*, art 114(1) is essentially an extension of criminal liability for other existing offences. The article simply extends responsibility for the substantive offence to persons who organise or join groups that have the purpose to carry out that substantive crime. For this article, it is immaterial whether or not that crime is actually carried out. If the substantive offence is carried out, the accused will be liable for that offence and additionally for his or her role in the criminal organisation.[966]

In essence, art 114(1) *Criminal Code* (ROK) is a very simple form of the participation offence established under the *Palermo Convention* and many domestic laws

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962 Ernesto Savona et al, *Organised Crime across the Borders* (1995) 23.

963 See further, Yong Kwan, 'Transnational Organised Crime and the Countermeasures in Korea' (2001) 58 *UNAFEI Resource Material Series* 61 at 64–68.

964 Seungmug Lee, 'Organised Crime in South Korea' (2006) 9(3) *Trends in Organized Crime* 61 at 67, 69. For earlier figures see Yook Sang Jung, 'Organised Crime in Contemporary Korea: International Implications' (1997) 21(1) *International Journal of Comparative and Applied Criminal Justice* 91 at 93.

965 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 1 Apr 2009).

966 Seungmug Lee, 'Organised Crime in South Korea' (2006) 9(3) *Trends in Organized Crime* 61 at 70: 'For example, the person who forms or participates in a criminal organisation aiming to commit a robbery will be punished for two criminal charges: the crime of robbery and the formation of, or participation in, a criminal organisation. Cf Yong Kwan Park, 'Transnational Organised Crime and the Countermeasures in Korea' (2001) 58 *UNAFEI Resource Material Series* 61 at 68.

discussed in this study. The Korean offence is not limited to groups planning or engaging in serious offences and the *Code* also does not define terms such as 'group', 'organising', or 'joining'.

In the absence of further case law and other material it is not possible to make conclusive comments about the scope and application of this provision. It is arguable, however, that the elements of art 114(1) fulfil the requirements of art 5 *Convention against Transnational Organised Crime*. It follows that South Korea may not need to introduce any additional offences to criminalise conspiracy or participation in an organised crime group.

According to reports from South Korea, approximately 700 persons are convicted annually for the forming and joining a criminal organisation.[967]

21.2.2 Criminal organisation offences, art 4 Act on the Aggravated Punishment of Violence

In addition to the *Criminal Code* provision, Korea's *Act on the Aggravated Punishment of Violence* contains a special offence in art 4 to criminalise persons who set up, direct, participate in, or otherwise support criminal organisations that aim to engage in violent crimes. Translations of this provision are currently not available.

In a paper published in 2001, Yong Kwan Park examined the available case law and identified the elements of the term 'criminal organisation' which relate to the structure and purpose of the group (see Figure 33 below).[968] These elements share many similarities with other definitions of criminal organisations in international and domestic laws discussed elsewhere in this study.[969]

Figure 33 'Criminal organisation', art 4 *Act on the Aggravated Punishment of Violence* (ROK)

Terminology Elements	**Organised Criminal Group**
Structure	• Organisation is composed of multiple members • Hierarchical structure • (acting in concert) for a period of time
Activities	• Members of the organisation act in concert (for a period of time)
Objectives	• Committing certain violent offences (one or more)

The Act provides a number of criminal offences for the organisers, 'assistant leaders', and 'ordinary members' of criminal organisations and for any person providing or collecting funds for a criminal organisation:

> This Act provides:
> (i) Death penalty, life imprisonment or imprisonment of not less than ten years for the boss of such organisation;
> (ii) Life imprisonment or imprisonment of not less than seven years for the assistant leaders;
> (iii) Imprisonment of not less than two years for ordinary members; and

967 Yong Kwan Park, 'Transnational Organised Crime and the Countermeasures in Korea' (2001) 58 *UNAFEI Resource Material Series* 61 at 68.

968 Yong Kwan Park, 'Transnational Organised Crime and the Countermeasures in Korea' (2001) 58 *UNAFEI Resource Material Series* 61 at 68.

969 See, for example, Canada (Section 4.2.1 above) and New Zealand (Section 5.2.1); *Convention against Transnational Organised Crime* (Section 3.2).

(iv) Imprisonment of not less than three years for those persons who collect or provide funds for such an organisation.[970]

In the absence of more accurate translations and without access to the case law, it is not possible to analyse the elements and application of these offences in greater detail.

[970] Yong Kwan Park, 'Transnational Organised Crime and the Countermeasures in Korea' (2001) 58 *UNAFEI Resource Material Series* 61 at 68.

22 Pacific Islands

22.1 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'.[971] Among the most significant types or organised crime in the South Pacific are narcotrafficking, migrant smuggling, and firearms trafficking.[972] 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.[973] 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.[974]

Narcotrafficking

The cultivation, trafficking, and consumption of narcotic drugs represent perhaps the longest-standing organised crime problems in the Pacific region. The Pacific Islands have been considered vulnerable to exploitation by criminal syndicates for some time, especially involving drug trafficking activities by sea and air.[975] 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

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971 Ron Crocombe, *Asia in the Pacific Islands* (2007) 177.

972 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.

973 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.

974 Pacific Islands Forum Secretariat (Forum Secretariat) *Transnational Crime Strategic Assessment* (2006) 32–34.

975 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.

> traffickers continue to move cocaine from South America to Australia through the Pacific islands.[976]

In recent years, evidence of manufacturing of, and trafficking in, psychotropic substances has added a new dimension to this problem.[977]

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. 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.[978] Little information is available on the level of migrant smuggling in and between the South Pacific islands. In March 2001, Fijian authorities confirmed the existence of a smuggling ring that shipped mostly Asian migrants through South Pacific nations.[979] A 2006 report suggested that 'there are 100,000 illegal Chinese immigrants in Papua New Guinea.'[980]

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.[981] 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.'[982] There is some limited evidence about small levels of trafficking in persons for employment in the garment and sex industries.[983] In 2003, one of the largest cases of 'modern day slavery' was

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976 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).

977 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.

978 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.

979 'Authorities confirm existence of people smuggling ring' (2001) 5 *UNDCP Eastern Horizons* 15.

980 John Hill, 'Transnational crime proves problematic in the Pacific Islands' (Dec 2006) *Jane's Intelligence Review* 50 at 53.

981 UNODC Regional Centre for East Asia and the Pacific, *Regional Profile on Drugs and Crime in the Pacific Islands* (2003) 23.

982 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.

983 Pacific Islands Forum Secretariat (Forum Secretariat) *Transnational Crime Strategic Assessment* (2006) 28.

uncovered in American Samoa where nearly 250 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.[984]

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, 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 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.[985]

Criminal organisations

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 engages in illegal gambling and the smuggling of narcotics and firearms.[986] 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.[987]

22.2 Criminal Law in the Pacific Islands

Domestic laws in the Pacific islands have often been ill-equipped to deal with new and emerging organised crime issues. Many nations have outdated laws containing criminal offences that 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.

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984 Jennifer Burn et al, 'Combating Human Trafficking: Australia's Responses to Modern Day Slavery' (2005) 79 *Australian Law Journal* 529 at 543.

985 Philip Alpers, *Gun-running in Papua New Guinea: From Arrows to Assault Weapons in the Southern Highlands* (2005) 99.

986 Ron Crocombe, *Asia in the Pacific Islands* (2007) 178, 180.

987 John Hill, 'Transnational crime proves problematic in the Pacific Islands' (Dec 2006) *Jane's Intelligence Review* 50 at 52.

22.2.1 Sources

Papua New 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 laws based on the *Criminal Code* of Queensland, Australia. Papua (British New Guinea) first adopted the Queensland Code in 1902,[988] followed by New Guinea in 1921.[989] The *Criminal Code* (PNG) came into operation with Papua New Guinea's independence in 1975,[990] replacing previous laws but many similarities to the Queensland Code remain. The criminal codes of Fiji,[991] Kiribati,[992] Solomon Islands,[993] and Tuvalu[994] 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.[995]

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.[996]

Cook Islands, Niue, Samoa, Tonga, Tokelau: the New Zealand model

The criminal laws of the Cook Islands,[997] Niue,[998] Samoa,[999] and Tokelau[1000] 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.[1001] 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.[1002]

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.

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988 *Criminal Code Ordinance* 1902.

989 *Laws Repeal and Adopting Ordinance* 1921; *Laws Repeal and Adopting Ordinance* 1924.

990 *Criminal Code Act 1974* (Qld), No 78 of 1974.

991 *Penal Code* (Fiji), cap 17.

992 *Penal Code* (Kiribati), cap 67.

993 *Penal Code* (Solomon Islands), cap 26.

994 *Penal Code* (Tuvalu), cap 8.

995 See further Eric Colvin, 'Criminal Responsibility under the South Pacific Codes' (2002) 26 *Criminal Law Journal* 98–113.

996 *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.

997 *Crimes Act 1969* (Cook Islands).

998 Part V—Criminal Offences *Niue Act 1996*.

999 *Crimes Ordinance 1961* (Samoa).

1000 *Tokelau Crimes Regulations 1975* adopting the criminal law provisions of the *Niue Act 1966*.

1001 *Criminal Offences Act* Cap 18 (Tonga).

1002 See further Eric Colvin, 'Criminal Responsibility under the South Pacific Codes' (2002) 26 *Criminal Law Journal* 98 at 99.

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.

22.2.2 Conspiracy

The criminal codes of the Cook Islands,[1003] Fiji,[1004] Kiribati,[1005] Micronesia,[1006] Papua New Guinea,[1007] Samoa,[1008] Solomon Islands,[1009] Tonga,[1010] Tuvalu,[1011] and Vanuatu[1012] have 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.[1013] The differences between the offences lie, for the most part, in their application. Some jurisdictions limit liability to conspiracies to commit criminal offences,[1014] while others extend liability to conspiracies to effect 'any unlawful purpose'.[1015]

There is, to date, no reported case law in the Pacific islands involving conspiracy charges against criminal organisations or other aspects of organised crime.

22.3 Organised Crime Laws

22.3.1 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 been even fewer attempts to implement the Convention provisions into domestic law. As of April 19, 2009, only the Cook Islands,[1016] Kiribati, Micronesia, Nauru, and Vanuatu[1017] were Signatories to the

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1003 Section 333 *Crimes Act 1969* (Cook Islands).
1004 Sections 385–387 *Penal Code* (Fiji).
1005 Section 376-378 *Penal Code* (Kirbati).
1006 *Code of the Federated States of Micronesia*, Title 11: Crimes, § 201.
1007 Sections 515–517 *Criminal Code* (PNG).
1008 Section 97 *Crimes Ordinance 1961* (Samoa). Conspiracy in Samoa is limited to conspiracy to defraud.
1009 Sections 376–378 *Penal Code* (Solomon Islands).
1010 Section 15 *Criminal Offences Act* Cap 18 (Tonga).
1011 Section 376-378 *Penal Code* (Tuvalu).
1012 Section 29 *Penal Code* (Vanuatu).
1013 See further Mark Findlay, *Criminal Laws of the South Pacific* (2nd ed 2000) 88–91.
1014 See, for example, s 333 *Crimes Act 1969* (Cook Islands); s 15 *Criminal Offences Act* Cap 18 (Tonga); s 29 *Penal Code* (Vanuatu).
1015 See, for example, s 387 *Penal Code* (Fiji); s 517(g) *Criminal Code* (PNG).
1016 See further Section 22.3.4 below.
1017 *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.

Palermo Convention. France enacted the *Palermo Convention* in 2002[1018] 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.[1019]

Figure 34 Adoption of the *Convention against Transnational Organised Crime*, South Pacific (current as on 15 Dec 2008).[1020]

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, organised crime is not seen as a significant problem by some nations.

22.3.3 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 produced a series of relevant declarations to fight transnational organised crime more effectively.[1021] The *Honiara Declaration on Law Enforcement Cooperation* (*Honiara Declaration*),[1022] 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.[1023] In 2000, the South Pacific Chiefs of

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1018 Law No 2002-1040 of 6 Aug 2002.

1019 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 19 Apr 2009).

1020 Available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 19 Apr 2009).

1021 John Hill, 'Transnational crime proves problematic in the Pacific Islands' (Dec 2006) *Jane's Intelligence Review* 50 at 50.

1022 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).

1023 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.*

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.[1024]

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.[1025] A major 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.[1026]

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 (PIF)

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.[1027]

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.[1028] The *Model*

1024 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).

1025 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 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.*

1026 Neil Boister, 'New Directions for Regional Cooperation in the Suppression of Transnational Crime in the South Pacific' (2005) 9(2) *Journal South Pacific Law.*

1027 Personal communication with Ms Daiana Buresova, Legal Drafting Officer, Pacific Islands Forum Secretariat, Suva, 26 Sep 2008.

1028 Hereinafter *Counter Terrorism and Transnational Organised Crime Model Provisions*

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.[1029] 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).

Section 55(1) of the *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF) stipulates an offence for participation 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*.[1030]

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.[1031] 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.[1032]

Definition of organised criminal group, ss 2, 55(2)

Section 2 of the *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF) 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* (PIF).

(PIF).

1029 Section 1(a) *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF) 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'.

1030 See arts 2(1), 5(1)(a)(ii) *Conventional against Transnational Organised Crime*; see further Section 3.2 above.

1031 *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.

1032 Personal communication with Ms Daiana Buresova, Legal Drafting Officer, Pacific Islands Forum Secretariat, Suva, 26 Sep 2008.

Figure 35 'Organised criminal group', ss 2, 55(2) *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF)

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 (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.[1033] 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* (PIF) 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.

[1033] Cf the definition of 'serious crimes' in art 2(b) *Convention against Transnational Organised Crime*; see further Section 3.2 above.

Unlike the *Palermo Convention*, the *Model Provisions* do not propose an alternative criminal conspiracy offence based on an agreement between multiple offenders,[1034] but it is noted that 'if a country has a conspiracy offence, that may be used instead of the provision'.[1035] As mentioned earlier, the criminal codes of the Cook Islands, Fiji, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Vanuatu contain conspiracy provisions.[1036]

Figure 36 Elements of s 55(1) *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF)

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 associates 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.

22.3.4 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*,[1037] 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.[1038] The introduction of this offence was part of a comprehensive suite of amendments relating to organised crime,

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1034 See art 5(1)(a)(i) *Conventional against Transnational Organised Crime*; see further Section 3.3 above.

1035 Notes to s 55 *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF) (July 2007 draft) [copy held with author].

1036 See Section 22.2.2 above.

1037 See Section 22.3.1 above.

1038 *Crimes Amendment Act 2003* (Cook Islands), No 6 of 2003.

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.[1039]

Definition of organised criminal group

The term 'organised criminal group' is defined in s 109A(2), (3) *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).[1040]

Figure 37 '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

1039 No 5 of 2004; ss 109B–109Q *Crimes Act 1969* (Cook Islands).
1040 See Section 5.2.1 above.

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 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 38 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.

23 United States of America

In the United States of America (US), offences and other criminal laws designed to prevent and suppress organised crime can be found at federal and state levels. The United States signed the *Convention against Transnational Organised Crime* on December 13, 2000, and ratified the Convention on November 3, 2005.[1041]

The following Sections explore and analyse the principal federal statute relating to organised crime commonly known as *RICO* or *Racketeer Influenced and Corrupt Organisations Act*. This analysis is followed by brief outlines of other federal organised crime provisions and relevant organised crime laws in selected US States. Approximately one half of US states have passed laws similar to *RICO*.[1042] The main focus of this study will be on organised crime offences in California and New York.

Given the complexity and diversity of organised crime in the US, it is not possible to give a short and meaningful synopsis of patterns and levels of organised crime in this country. The following Sections, however, contain many references to and examples of organised crime activity in the United States.

23.1 RICO: Racketeer Influenced and Corrupt Organisations Act

23.1.1 Purpose and background

The *Racketeer Influenced and Corrupt Organisations Act* (hereinafter *RICO*)[1043] was enacted by the US Congress in 1970 in an attempt to eradicate organised crime.[1044] The idea for *RICO* derives from the President's Commission on Law Enforcement and Administration of Justice, that was set up in 1965 by President Lyndon B Johnson and was headed by then Attorney-General Nicholas Katzenbach.[1045] *RICO* was developed by Professor G Robert Blakey who worked in the Organised Crime and Racketeering Section of the Department of Justice under then Attorney-General Robert F Kennedy who elevated the suppression of organised crime to a national priority.[1046]

At that time, US federal criminal law contained specific provisions relating to conspiracy. But prosecutors and Congress perceived the existing conspiracy laws to be insufficient to prosecute the many activities of organised crime and the various levels of associates of criminal organisations.

In 1969, the *Organised Crime Control Act* was introduced in the US Senate. It was the first federal statute containing specific provisions designed to prevent and suppress organised crime, including, inter alia, provisions to increase the punishment

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1041 UNODC, *United Nations Convention against Transnational Organized Crime, signatures*, available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 29 Aug 2008).

1042 See further Section 23.2 below.

1043 *Racketeer Influenced and Corrupt Organisations* 18 USC §§1961–1968 [hereinafter *RICO*].

1044 Title IX *Organised Crime Control Act 1970* (US), Pub L 91-452, 84 Stat 922.

1045 US, President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society, Report* (1967).

1046 For more on the background, development, and history of *RICO*, see, for example, Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 838–845; Gerard Lynch, 'RICO: The Crime of Being a Criminal, Part I & II' (1987) 87(4) *Columbia Law Review* 661 at 666–680; James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 158–161, 169–170.

for 'organised crime offenders'.[1047] The 1969 Act, however, did not address the use of proceeds of organised crime and the infiltration of legitimate business enterprises by criminal organisations, which was of particular concern at that time.[1048] This necessitated the introduction of *RICO* which is now, forty years later, widely seen as a milestone in preventing and suppressing the activities of criminal organisations. *RICO* has been described by some scholars as 'the most important substantive and procedural legal instrument in the history of organised crime control.'[1049]

The stated objective of the *RICO* legislation is to eradicate

> organised crime in the US by strengthening legal tools of the evidence gathering process through establishing new penal provisions, and providing enhanced criminal sanctions and new remedies to deal with the unlawful activities of those engaged in organised crime.[1050]

Unlike most other organised crime laws explored in this study, the provisions under *RICO* are designed to break up the economic power of criminal organisations. *RICO* is predominantly concerned with enterprise criminality. The legislation focuses specifically on the enterprise structure of an organisation, rather than on the individuals that constitute the association. Unlike other organised crime laws, *RICO*'s application is not limited to organised criminal groups. Despite its name, the legislation does not refer to a special kind of organisation. 'There is no such thing as a Rico',[1051] remarks Edward Wise. *RICO* captures any organisation — legitimate and illegitimate — engaged in illegal activities and/or corruption. To capture a diverse range of organisations, *RICO* contains a so-called 'liberal construction clause' in §1961 to ensure that the statute is 'liberally construed to effectuate its remedial purpose'.[1052] The criminal offences set out in *RICO* are accompanied by extensive investigative and enforcement powers, special procedural rules, and sentencing guidelines.

23.1.2 RICO offences, §1962

RICO §1962(a)–(d) set out four separate 'prohibited activities' that each require some involvement of, or association with, an 'enterprise'. *RICO* offences can be committed equally by natural and legal persons.[1053] *RICO* does not criminalise membership in a criminal organisation per se, 'although', notes Wise, 'it may have that effect'.[1054]

The design of these four offences is not a model of clarity. '*RICO* is a very complex statute', remarks Wise: 'The wording of its substantive provisions is notoriously complicated. It is hard even for native speakers of English to penetrate their meaning. These provisions are complex in part because they are concerned with

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1047 S. 30, 91st Cong, 1st Sess §801 (now 18 USD §3575 (1976)).

1048 See further Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 840.

1049 James Jacobs et al, *Busting the Mob* (1994) 9; Sabrina Adamoli et al, *Organised Crime around the World* (1998) 135.

1050 *Organised Crime Control Act 1970* (US), Pub L 91-452, 84 Stat 922, 923.

1051 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 303.

1052 See further Barry Tarlow, 'RICO Revisited' (1983) *Georgia Law Review* 291 at 308–311.

1053 18 USC §1961(3) defines person as 'any individual or entity capable of holding a legal or beneficial interest in property'. See further Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1105, note 9.

1054 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 303.

multifarious harms.'[1055] In essence, the offences in §1962 criminalise 'the investment of 'dirty' money by racketeers, the takeover or control of an interstate business through racketeering, and the operation of such a business through racketeering.'[1056]

All four subsections share a number of common elements: proof of a 'pattern of racketeering activity' or the 'collection of an unlawful debt', and proof of an 'enterprise' which is 'engaged in or the activities of which affect, interstate or foreign commerce' (see Figure 39 below).[1057] The definitions and interpretation of these terms are explored further in Sections 23.1.3–23.1.5 below. None of the offences require proof of fault elements beyond those necessary for the predicate acts.[1058]

Figure 39 Structure of *RICO* offences, 18 USC §1962 (a)-(d) [simplified]

	Conduct element	**Enterprise**	**Pattern of racketeering/ collection of unlawful debt**	**Other**
§1962(a)	Investing by way of • acquisition of any interest or • establishment or • operation of ...→	←... an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce	Invested income derives • from a pattern of racketeering activity; or • through collection of an unlawful debt [...].	--
§1962(b)	Acquiring or maintaining any interest in or control of ...→	←... an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce ..→	←...through • a pattern of racketeering activity; or • collection of an unlawful debt.	--
§1962(c)	Conducting or participating in the conduct of ...→	←... an enterprise [which is engaged in, or the activities of which affect, interstate or foreign commerce] ..→	←...through • a pattern of racketeering activity; or • collection of an unlawful debt.	Person is employed by or associate with that enterprise.
§1962(d)	Conspiracy to commit any of the offences in (a), (b), or (c)			

The following Sections identify the key elements of each subsection separately. Not further discussed here are the procedural sections, §1965 dealing with venue and process, §1966 dealing with evidential matters, and §1968 dealing with civil investigative demands.

§1962(a): Investment of racketeering funds

§1962(a) makes it a criminal offence to use the proceeds from a pattern of racketeering activity or through the collection of an unlawful debt in an enterprise affecting interstate or foreign commerce:

1055 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 306.

1056 Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 844–845.

1057 For an alternative structure of *RICO* elements, see, for example, Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1107: '[E]lements of a *RICO* offence: (A) two or more predicate acts of racketeering activity; (B) pattern; (C) enterprise; (D) effect on interstate commerce; (E) prohibited acts; and (F) scope of outsider liability.'

1058 *Bruner Corp v RA Bruner Co* 133 F 3d 491, 495 (7th Cir, 1998); *US v Baker* 63 F 3d 1478, 1493 (9th Cir 1995).

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. [...]

In essence, this offence requires an accused to, first, receive some illegal income, and, second, to then use or invest that income or proceeds from that income (see Figure 40 below). §1962(a) is limited to investments by an accused who has participated as a principal in the racketeering activity.[1059]

(1) The illegal income has to be received in one of two ways: either from a pattern of racketeering activity,[1060] or through collection of an unlawful debt.[1061] The income may be received 'indirectly', thus it is not necessary to show that the particular funds invested came directly from a racketeering activity (which would practically be impossible to prove).[1062]

(2) That income — or any part or proceeds of such income — then has to be used or invested by the accused to establish, operate, or acquire an interest in an enterprise that engages in, or the activities of which affect, commerce between US States or between the US and a foreign country.[1063] Most courts have held that §1962(a) does not require the accused to be separate from the enterprise.[1064]

Figure 40 Elements of *RICO* 18 USC §1962 (a)

Elements	
(1) Receiving any income	Income derives either • from a pattern of racketeering activity (§1961(1)); or • through collection of an unlawful debt in which the person participated as a principal (§1961(6)).
(2) Investing any part or proceeds of such income	Investment by way of • acquisition of any interest in; or • establishment; or • operation; of an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

§1962(a) is essentially and aggravated offence that criminalises conduct stemming from activity that has already been criminalised. The criminal activity generating illicit income that makes up element (1) is illegal under a variety of statutes. The enterprise element, element (2), aggravates this underlying offence.[1065]

In practice, §1962(a) has found limited application and charges under this subsection are relatively rare. This has largely been attributed to the high standard of proof

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1059 18 USC §2.

1060 18 USC §1961(1), see Section 23.2.3 below.

1061 18 USC §1961(6), see Section 23.2.4 below.

1062 Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 871 with reference to *US v Parness* 503 F.2d 430 (2d Cir 1974).

1063 See Section 23.1.5 below.

1064 See, for example, *Crowe v Henry* 43 F.3d 198. 205 (5th Cir 1995); *Riverwoods Chappaqua Corp v Marine Midland Bank* 30 F 3d 339, 345 (e2 Cir, 2994); *New Beckley Mining Corp v INt'l Union, United Auto Workers* 18 F.3d 1161, 1993 (4th Cir, 1994); *Schreiber Distrib Co v Serv-Well Furniture Co* 806 F.2d 1393, 1396–98 (9th Cir 1986).

1065 Michael Goldsmith, 'RICO and Enterprise Criminality' (1982) 88 *Columbia Law Review* 774 at 795.

created by the combination of the 'receiving' and 'investing' elements. Amy Franklin et al note that:

> §1962(a) requires the government to prove that the defendant both committed the alleged predicate activities and invested the income from those activities in the targeted manner. The limited case law suggests that if such a tracing exists, courts tend not to enforce it strictly.[1066]

§1962(b): Illegal acquisition of enterprise interest

§1962 (b) makes it an offence to acquire or maintain an interest in an enterprise[1067] through a pattern of racketeering activity[1068] or through collection of an unlawful debt.[1069] This offence is aimed at cases in which criminal organisations commit racketeering acts to gain control of legitimate businesses.

Figure 41 Elements of *RICO* 18 USC §1962(b)

Elements	
(1)	Acquiring or maintaining any interest in or control of an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(2)	Through either • A pattern of racketeering activity (§1961(1)); or • collection of an unlawful debt (§1961(6).)

Most courts have held that §1962(b) does not require the accused to be separate from the enterprise.[1070] Like subsection (a), §1962(b) rarely forms the basis of a *RICO* charges.[1071]

§1962(c): Operation of an enterprise through racketeering

§1962(c) creates an offence for employees and associates of an enterprise[1072] to engage in that enterprise's activities through a pattern of racketeering activity[1073] or through collection of an unlawful debt.[1074] In practice, the great majority of *RICO* indictments involve charges under §1962(c) or conspiracies to commit a subsection (c) offence.[1075]

1066 Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 890–891 with further references; Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1125-1126.

1067 See Section 23.1.5 below.

1068 18 USC §1961(1), see Section 23.1.3 below.

1069 18 USC §1961(6), see Section 23.1.4 below.

1070 See, for example, *Crowe v Henry* 43 F.3d 198. 205 (5th Cir 1995); *Schreiber Distrib Co v Serv-Well Furniture Co* 806 F.2d 1393, 1396–98 (9th Cir 1986).

1071 Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 890–891; Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1126.

1072 See Section 23.1.5 below.

1073 18 USC §1961(1), see Section 23.1.3 below.

1074 18 USC §1961(6), see Section 23.1.4 below.

1075 Cf Gerard Lynch, 'RICO: The Crime of Being a Criminal, Part I & II' (1987) 87(4) *Columbia Law Review* 661at 731.

Figure 42 Elements of *RICO* 18 USC §1962(c)

Elements	
(1)	Person employed by or associated with an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(2)	Conducting or participating in the conduct of the enterprise's affairs through • A pattern of racketeering activity (§1961(1)); or • collection of an unlawful debt(§1961(6).)

The language of §1962(c) suggests that this offence applies to employees and associates of an enterprise who use that enterprise to commit crimes. 'This would', for instance, 'catch the car dealer who uses his/her business to assist a stolen car ring.'[1076] But some scholars remark that §1962(c) has much wider application. Wise, for instance, suggests that this provision realises 'the idea of criminalising participation in the activities of a criminal organisation. [...] It makes active Mafia membership a crime.'[1077] §1962(c) captures the directors and managers of criminal organisations, but also professional lawyers and accountants that assist the organisation. Lower levels of participants may also be liable under this offence, though it is not fully clear just how far liability 'extends down the corporate ladder'.[1078]

Most courts have held that §1962(c) requires the accused to be legally — but not actually — distinct from the enterprise that conducts its affairs through a pattern of racketeering or through the collection of an unlawful debt.[1079] It is thus possible to hold the leaders and directors of criminal organisations liable for their role in the group. 'As a result', notes Angela Veng Mei Long, 'the "Godfather" can be prosecuted for operating and managing criminal enterprises even though he has never engaged in the actual acts of racketeering activities in person.'[1080]

Liability under §1962(c) also extends to other members and participants in the criminal organisation. Furthermore, the offence may even apply to persons without a formal role in the enterprise. The subsection 'makes it unlawful for anyone connected with any kind of enterprise to engage in a series of predicate crimes on its behalf,'[1081] even for outsiders if they 'exert sufficient control over the enterprise's affairs through illegal means to satisfy' the threshold of §1962(c).[1082]

§1962(d): Conspiracy

§1962(d) makes it a criminal offence to conspire to commit any of the three offences in §1962(a), (b), and (c). While this offence shares some similarities with the general

1076 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002).

1077 Eduard Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 311.

1078 *Reves v Ernst & Young* 507 US 170 (1993); cf Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1127–1128.

1079 See, for example, *Crowe v Henry* 43 F.3d 198. 205 (5th Cir 1995); *Riverwoods Chappaqua Corp v Marine Midland Bank* 30 F 3d 339, 345 (e2 Cir, 2994); *New Beckley Mining Corp v Int'l Union, United Auto Workers* 18 F.3d 1161, 1993 (4th Cir, 1994); *Schreiber Distrib Co v Serv-Well Furniture Co* 806 F.2d 1393, 1396–98 (9th Cir 1986).

1080 Angela Veng Mei Long, *The Disruption of International Organised Crime* (2007) 92.

1081 Eduard Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 311.

1082 Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 91, citing *US v Castro*, 89 F.3d 11th Cir 1996).

conspiracy provision in US federal law, §1962(d) does not require an overt act committed by the accused in furtherance of the agreement. Further, the agreement between the co-conspirators only needs to be in principle. In *Salinas v US* the US Supreme Court held that 'partners in the criminal plan must agree to pursue the same criminal objective'.[1083]

But a conspiracy may be established even if one or more co-conspirators do not agree to commit or facilitate each and every part of the substantive criminal offence. §1962(d) therefore allows the prosecution of persons who have not committed any of the predicate acts of racketeering as long as the prosecution can prove that the defendant intended to further an endeavour which, if completed, would satisfy all of the elements of a substantive criminal offence.[1084] 'As a result,' note Amy Franklin et al, 'a defendant may be found not guilty of the substantive offence, but may still be convicted of conspiracy if there is proof of an agreement to commit the substantive crime.'[1085]

Mere association with a *RICO* enterprise, however, is not enough for liability under §1962(d).[1086]

23.1.3 Pattern of racketeering activity

One of the principal elements of §1962(a)–(d) is the requirement that the offences are committed through or otherwise associated with either a 'pattern of racketeering activity' or the 'collection of an unlawful debt'. The first of these two options has sparked much debate and controversy which are explored in the following paragraphs. The collection of an unlawful debt is further discussed in Section 23.1.4 below.

Figure 43 Elements of 'pattern of racketeering activity', *RICO* 18 USC §1961(1), (5) [simplified]

Elements	
Racketeering activity, §1961(1)	Proof person committed offence listed in §1961(1)(A)–(G)
Pattern, §1961(5)	• Person has committed any two of the listed offences within a ten-year period; and • Continuity between the two offences in the past (closed continuity) or into the future (open continuity); and • Relationship between the offences (offences the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise are interrelated by distinguishing characteristics and are not isolated events).

Racketeering activity

One of the many innovative features of *RICO* is the mechanism that allows prosecutors to link separate offences, committed at different times in different places, together. This is achieved by incorporating an element that requires proof of one or more specific criminal offences referred to as 'racketeering activity' or sometimes

1083 *Salinas v US* 522 US 52, 93 (1997).
1084 *Salinas v US* 522 US 52, 65 (1997).
1085 Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 892–893.
1086 *US v Neapolitan* 791 F.2d 489 at 499 (&th Cur 1986). For a more detailed analysis of this offence see, for example, Barry Tarlow, 'RICO Revisited' (1983) *Georgia Law Review* 291 at 383–398.

called '*RICO* predicate'. It is this requirement of a racketeering activity that marks a significant difference to the participation and association offences found in other jurisdictions. *RICO* 'is dependent on behaviour, not status.'[1087]

The definition of this 'racketeering activity' in *RICO* 18 USC §1961(1)(A)–(G) refers to a wide range of criminal offences under State (A) and Federal (B–G) criminal laws 'which are symptomatic of organised criminal activity.'[1088] The offences included in §1961(1) are:

(A) Offences that are punishable under State law, if that offence is a felony (i.e. punishable by imprisonment for one year or more) and involves an act or threat of murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in controlled substance or listed chemical (as defined in s 102 of the *Controlled Substances Act*). The list of State offences set out in §1961(1)(A) contains a range of activities commonly associated with criminal organisations as well as offences against the person such as murder and kidnapping.

(B) §1961(1)(B) lists a great range of federal offences under Title 18 USC ('Crimes and Criminal Procedure') that may constitute a racketeering activity. This includes, inter alia, bribery, counterfeiting, theft, embezzlement, fraud, dealing in obscene matter, obstruction of justice, slavery, racketeering, gambling, money laundering, commission of murder-for-hire, and several other offences covered under that Title.

(C-F) §1961(1)(C–F) refer to a number of offences under other federal statutes, including, (C) embezzlement of union funds,[1089] (D) securities and bankruptcy fraud,[1090] drug trafficking, (E) money laundering,[1091] and (F) immigration offences such as migrant smuggling and trafficking in persons.[1092]

(G) §1961(1)(G) extends the meaning of 'racketeering activity' to certain acts of terrorism. This subsection was added by the US *USA PATRIOT Act* that followed the events of September 11, 2001.[1093]

It has been remarked that this list of offences 'encompasses virtually all serious criminal activity prohibited by either state or federal law'.[1094] There has been some criticism of the fact that Congress keeps adding new offences to the list that can give rise to a *RICO* charge.[1095] James B Jacob et al, for instance, note that the list contains 'virtually any serious federal felony and most state felonies'.[1096]

Proof of a racketeering activity does not require that a defendant has been convicted for the predicate offence before he or she can be charged with a §1962 offence.[1097]

1087 Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 89, with reference to *US v Mandel*, 1654 F Supp 997 (DC MD 1976), vacated, 672 F. Supp 864 (D.Md.1987), affirmed 862 F.2d 1067 (4th Cir. 1988, cert. Denied, 491 US 906 (1989)).

1088 Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 89.

1089 29 USC §§186, 501(c).

1090 11 USC.

1091 *Currency and Foreign Transactions Reporting Act*.

1092 *Immigration and Nationality Act* §§277, 278.

1093 *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001* (US).

1094 Sabrina Adamoli et al, *Organised Crime around the World* (1998) 135.

1095 Angela Veng Mei Long, *The Disruption of International Organised Crime* (2007) 94.

1096 James B Jacobs et al, *Busting the Mob* (1994) 10.

1097 *BancOklahoma Mortgage Corp v Capital Title Co Inc* 194 F 3d 1089, 1002 (10th Cir 1999).

Liability for §1962(a)–(d) may arise even if the defendant has been acquitted for the underlying offence.[1098]

Pattern

§1962(a)–(d) require proof of a 'pattern' of racketeering activity. §1961(5) defines pattern as

> at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

In short, only a person who is a member of an enterprise that has committed any two of the listed offences within a ten-year period can be charged with a *RICO* offence.

RICO thus creates so-called compound liability, which combines several prior offences into a new, separate *RICO* offence. This compound liability allows the use of the same evidence for multiple offences. As mentioned earlier, liability for a §1962 *RICO* offence may arise '[e]ven if the defendant has previously been convicted and has served his sentence for the predicate offence itself'.[1099] *RICO* thus creates an avenue to circumvent the double jeopardy clause as it allows defendants to be charged twice: both for predicate offence and for the *RICO* offence (which combines the predicate offence with additional elements).[1100] 'The jury in the *RICO* case must find only that the defendants were chargeable with the predicate offences at the time they committed the *RICO* violation.'[1101]

Continuity plus relationship test

To ensure some connection between the two predicate acts so that 'two isolated acts of racketeering do not constitute a pattern,' the US Supreme Court held in *Sedima, SPRL v Imrex Co Inc* that a pattern of racketeering requires proof that the predicate offences are (1) continuous, and (2) interrelated.[1102] The US Supreme Court has instructed federal courts to follow this 'continuity plus relationship test' in order to determine whether the facts of a specific case give rise to an established pattern. Today, nine federal circuit courts of appeal use this test with some consistency. Two courts, the Seventh and Tenth circuit, use a multi-factor test, while the Fourth Circuit uses a hybrid model.[1103]

1098 *US v Farmer* 924 F.2d 657, 649 (7th Cir 1991).

1099 Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 80.

1100 Dorean Koenig, 'The Criminal Justice System Facing the Challenge of Organised Crime' (1998) 44 *Wayne Law Review* 1351 at 1360.

1101 Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 850–851.

1102 *Sedima, SPRL v Imrex Co Inc* 473 US 479, 496 (1985). Cf the similar, earlier approach in *US v Stofsky* 409 F.Supp. 609 (SDNY 1973). These decisions confirms the legislative material, see further Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 863 with reference to relevant Senate reports.

1103 See further, Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 878–880; Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1109–1115.

The two elements of continuity and relationship were further develop in *HJ Inc v Northwestern Bell Telephone Co*.[1104] Here, the Supreme Court held that 'pattern of racketeering' requires both a relationship between the two acts and continuity of those two acts. Both elements need to be established independently, though the evidence for the elements will frequently be the same.[1105]

1. In reference to the relationship element, the Court stated that: 'Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'[1106]
2. The continuity element can be established in one of two forms:
   2.1. Closed-ended continuity, i.e. 'a series of predicates extending over a substantial period of time.';[1107] or
   2.2. Open-ended continuity, i.e. conduct that poses a threat of extending or repeating into the future.

23.1.4 Collection of an unlawful debt

In §1962(a), (b), and (c) the 'collection of unlawful debt' is an alternative element (or a substitute predicate) to the 'pattern of racketeering' requirement. 'Unlawful debt' is further defined in §1961(6) as a debt

> (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and
>
> (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

The practical application of this element — as well as the case law and scholarship — is very limited, as it overlaps largely with the offence of 'extortionate credit transactions' already included in §1961(1). 'It is not apparent, nor is it anywhere explained, why this subsection was needed', notes Craig Bradley. He suggests that the 'collection of unlawful debt' element may 'serve no other purpose than to make it clear that loan sharking under state as well as federal law is included in §1962(b) [...].'[1108] There is, however, one important difference between the 'pattern of racketeering activity' and the 'collection of unlawful debt' elements: The pattern requires proof of at least two predicates, while liability for collection of unlawful debt may arise after a single violation.[1109]

23.1.5 Enterprise

The involvement of an enterprise is another common element of the *RICO* offences in §1962(a)–(d). This is perhaps also the most fiercely debated aspect of the *RICO*

1104 *HJ Inc v Northwestern Bell Telephone Co* 492 US 229 (1989).
1105 *HJ Inc v Northwestern Bell Telephone Co* 492 US 229, 239 (1989).
1106 *HJ Inc v Northwestern Bell Telephone Co* 492 US 229, 240 (1989).
1107 *HJ Inc v Northwestern Bell Telephone Co* 492 US 229, 242 (1989).
1108 Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 867.
1109 Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 867.

legislation. The term 'enterprise' includes 'any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity,' §1961(4). This definition is only illustrative and does not exhaustively list all possible types of *RICO* enterprises.[1110] The US Supreme Court has defined a *RICO* enterprise as 'a group of persons associated together for a common purpose of engaging in a course of conduct'[1111] that affects interstate or foreign commerce. In *Handeen v Lemaire* the Eight Circuit identified three features of a *RICO* enterprise: '(1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in a pattern of racketeering.'[1112]

Nature/types of the enterprise

Both legitimate and illegitimate businesses can be subject to *RICO* legislation.[1113] Since the Supreme Court's decision in *US v Turkette* 452 US 576 in 1981 it is widely accepted held that a wholly illegitimate group can constitute an enterprise under §1961(4).[1114] The decision in *US v Turkette* opened the way to use *RICO* against criminal organisations which has been described as 'the most important, and the most radical, application of the criminal provisions of *RICO*.'[1115] In *Sedima SPRL v Imrex Co* the US Supreme Court confirmed that *RICO* may also apply to legitimate businesses, and is not limited to criminal organisations.[1116] Accordingly, *RICO* can also 'be used as a weapon against white collar crime and other forms of enterprise criminality.'[1117]

Including criminal organisations into the meaning of 'enterprise' has resulted in a de facto criminalisation of participation and membership in criminal organisations such as the Mafia, the Cosa Nostra, outlaw motorcycle gangs, and other more loosely associated syndicates. [1118]

But *RICO* is also frequently used to prosecute persons without any affiliations with organised crime, and to prosecute persons involved in legitimate enterprises.[1119] Further, there is general consensus that a government agency can also constitute an enterprise.[1120]

1110 A Laxmidas Sawkar, 'From the Mafia to Milking Cows: State RICO Act Expansion' (1999) 41 *Arizona Law Review* 1133 at 1139–1140.

1111 *US v Turkette* 452 US 576, 583 (1981)

1112 *Handeen v Lemaire* 112 F.3d 1339 at 1351 (8th Cir 1997).

1113 See further, Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1115–1117.

1114 Cf *HJ Inc v Northwestern Bell Tel Co* 492 US 229 at 244 (1989): 'RICO's language supplies no grounds to believe that Congress meant to impose such a [organised crime] limit on the Act's scope. [...] [N]o such restriction is explicitly stated.' See further, Jason Reichelt, 'Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element' (1995) 81 *Cornell Law Review* 224 at 244–246.

1115 Gerard Lynch, 'RICO: The Crime of Being a Criminal, Part I & II' (1987) 87(4) *Columbia Law Review* 661at 699–700.

1116 *Sedima SPRL v Imrex Co* 473 US 479 at 499–500 (1985).

1117 Larry Newman, 'RICO and the Russian Mafia' (1998) 9 *Indiana International and Comparative Law Review* 225 at 241.

1118 Gerard Lynch, 'RICO: The Crime of Being a Criminal, Part I & II' (1987) 87(4) *Columbia Law Review* 661at 706.

1119 Thomas Gabor, *Assessing the Effectiveness of the Organised Crime Control Strategies* (2003) 20.

1120 See, for example, *US v Frumento* 563 F.2d 1083 (3d Cir, 1977) involving the Department of Revenue of Pennsylvania; and *US v Brown* 555 F.2d 407 (5th Cir 1977) cert denied, 435 US 904 (1978) involving the police department of Macon, GA See further, Craig

Structure of the enterprise

To constitute an enterprise, it is necessary that the entity has a continuing association that can be formal or informal. It is not required to have a hierarchical structure or formal membership, but the enterprise needs to be more than a random, ad hoc group of individuals. To distinguish an enterprise from a mere conspiracy it is necessary that the enterprise is an entity with an internal structure that goes beyond that inherent in the pattern of racketeering activity,[1121] though it suffices that the structure exists merely to carry out the predicate offences.[1122] This overrules earlier decisions in which the pattern of racketeering activity was the enterprise and where there was no separate business.[1123]

Various associates involved in the enterprise need to function as an ongoing unit. Membership in or associations with the group may change from time to time. Within the enterprise, there has to be some sort of decision-making structure and some mechanism to direct or otherwise control the activities of the group. It may be an 'ongoing "structure" of persons associated through time, joined in purpose, and organised in a manner amenable to hierarchical or consensual decision-making.'[1124] Decisions do not need to be made by the same person; they may be delegated. [1125]

There has been some controversy over the question whether the person(s) charged with a *RICO* offence and the enterprise have to be distinct. Circuit courts differ in their approaches and requirements.[1126] It is also not clear whether a single individual can constitute an enterprise.[1127]

Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 858–861; Gerard Lynch, 'RICO: The Crime of Being a Criminal, Part I & II' (1987) 87(4) *Columbia Law Review* 661at 697–699.

1121 *Chang v Chen*, 80 F.3d 1293 (9th Cir.1996); *US v Rogers*, 89 F.3d 1326, 1337 (7th Cir.1996); *US v Bledsoe* 674 F.2d 647 at 665 (8th Cir); Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 90; Michael Goldsmith, 'RICO and Enterprise Criminality' (1982) 88 *Columbia Law Review* 774 at 792.

1122 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 3.

1123 See, for example, *US v Eilliott* 571 F,2d 880 (5th Cir), cer denied 439 US 953 (1978);*US v Rone* 598 F.2d 564 (9th Cir, 1979). See further Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 854–855.

1124 *US v Rogers*, 89 F.3d 1326, 1337 (7th Cir.1996); *Richmond v Nationwide Cassel LP*, 52 F.3d 640, 644 (7th Cir.1995); Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 881 with further references.

1125 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 3.

1126 Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 881; Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1121–23.

1127 In *von Bulow v von Bulow* 634 F Supp 1284 at 1305 (SDNY 1986), for example, the court held that 'an individual may qualify as an enterprise within the meaning of 18 USC §1961(4).'

Purpose of the enterprise

To constitute an enterprise, the group must have a joint purpose.[1128] The shared purpose need not be an illegal objective or a profit-related goal. The US Supreme Court has held that *RICO* may be applied to legitimate businesses and also to enterprises without any economic objective. For example, in *National Organisation for Women v Scheidler* the Court famously used *RICO* in a case involving an anti-abortion group.[1129] In *US v Muyet* it was held that *RICO* does not require proof that a drug gang operated with financial purpose.[1130]

Interstate or foreign commerce

The application of the offences under §1962 are limited to enterprises 'which are engaged in, or the activities of which affect, interstate or foreign commerce'. This limitation is a reflection of the limited scope of US federal powers and the limited authority of Congress to legislate on matters relating to organised crime.[1131]

In the early years of *RICO*, courts held that the enterprise itself must affect interstate or foreign commerce. It was not enough to show that only the predicate offence would do so. The interpretation has since become broader and for most courts it suffices if the predicate acts have a de minimis impact on interstate commerce, demonstrated by 'proof of a probable or potential impact'.[1132]

23.1.6 Criminal penalties and civil remedies

Violation of any of the four *RICO* offences under §§1962(a)–(d) may result in criminal penalties, including imprisonment, fines, and forfeiture of assets, §1963, but also result in civil remedies, §1964. Accordingly, reference is often made to 'criminal' and 'civil' *RICO*.

Criminal penalties, §1963

Any person, natural or legal, found guilty for an offence under §1962(a)–(d) may be sentenced to up to 20 years imprisonment and fined up to USD 250,000 per racketeering count, §1963(a). These sentences may be imposed consecutive to any other material offence or conspiracy.[1133]

1128 Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 881 with further references.

1129 *National Organisation for Women v Scheidler* 510 US 249, 261 (1994), a case involving an anti-abortion group; see further Jason Reichelt, 'Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element' (1995) 81 *Cornell Law Review* 224 at 246.

1130 994 F Supp 501, 511 (DNY 1998). Cf *US v Ellison* 793 F.2d 942, 950 (8th Cir), a case involving the leader of a group involved in a serious of arson attacks that had no direct financial benefit to the leader and his organisation.

1131 Cf Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 308.

1132 Cf *US v Juvenile Male* 118 F.3d 1344, 1349 (9th Cir, 1997).

1133 For further analysis of the criminal sanctions, see, for example, Angela Veng Mei Long, *The Disruption of International Organised Crime* (2007) 96; Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 907–909.

In addition, §1963(a)(1)–(3) provides for the forfeiture of all proceeds of crime and any additional interest gained through the pattern of racketeering activity. §1963(b)–(m) define relevant terms and set out details of the process to seize relevant property.[1134] These provisions are seen my many as the principal feature — and perhaps greatest accomplishment — of *RICO*. Wise, for instance, remarked that:

> The idea of depriving criminals of assets related, directly or indirectly, to their criminal activity was a new idea, or at least a newly-revived old idea, at the time *RICO* was enacted. *RICO* furnished a prototype for subsequent criminal forfeiture legislation. [...] It is fair to say that, in this regard, *RICO* started a world-wide trend that can be traced to the example set by the United States in 1970.[1135]

Civil remedies, §1964

§1964 contains a range of civil remedies for government and private litigants.[1136] These may be ordered by US district courts to prevent or restrain the commission of an offence under §1962(a)–(d). A court may, for instance:

> order any person to divest himself of any interest, direct or indirect, in any enterprise; impose reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavour as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or order dissolution or reorganisation of any enterprise, making due provision for the rights of innocent persons.[1137]

The ability to pursue civil remedies under *RICO* has been described as 'future-oriented and preventive, rather than punitive. In fact, a judge may issue whatever injunction or other remedial order necessary to prevent further racketeering by the defendants.'[1138] Wise portrays these provisions for private civil enforcement as 'distinctively American — more distinctively American than apple pie or the death penalty.'[1139]

Importantly, any person, natural or legal, injured in his or her business or property by a §1962 offence may file a law suit against the perpetrator in any US district court and may thus recover threefold any damages he or she sustained and the cost of the

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1134 For further analysis of the forfeiture provisions, see, for example, Angela Veng Mei Long, *The Disruption of International Organised Crime* (2007) 96; Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 904–906; Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1146–49; Barry Tarlow, 'RICO Revisited' (1983) *Georgia Law Review* 291 at 306–308.

1135 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 304, 310.

1136 For further analysis of the civil remedies and the process of civil *RICO*, see, for example, Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 909–916; Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1150–1157; Barry Tarlow, 'RICO Revisited' (1983) *Georgia Law Review* 291 at 303–305.

1137 18 USC §1964(a). See further Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 2–3.

1138 Sabrina Adamoli et al, *Organised Crime around the World* (1998) 136.

1139 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 309.

suit, §1964(c). This means that '[t]he victims of the Mafia family (such as the extorted businessman and the debtors of loan sharking) can sue the Godfather for damages in a civil action under section 164.'[1140] The Attorney-General may also instigate proceeding under §1964(a).[1141]

Generally, *RICO* proceedings begin in the criminal courts before additional civil remedies are pursued. Civil actions, however, do not require a criminal conviction on the underlying predicate offence, because *RICO* requires only that the criminal activities are chargeable or indictable under the state or federal law and not that the defendant has already been charged or indicted.[1142]

23.1.7 Case examples

Over nearly forty years of operation, *RICO* has been used successfully to prosecute a number of high profile leaders of criminal organisations and has incapacitated a diverse range of criminal syndicates.

Most noteworthy among the *RICO* cases are prosecutions of senior leaders and associates of La Cosa Nostra, the American branch of the Sicilian Mafia. It has been reported that in the mid 1980s, 23 Italian organised crime families had been identified across the United States with approximately 1700 'made members' and up to ten times that number of associates.[1143] Each family exclusively controlled its own geographic area. Turf wars among them were not uncommon. The families are generally patriarchal organisations, headed by a 'boss' with superior authority over the family and who obtains significant portions of all generated profits. Each family boss is supported by one underboss and several consiglieres and capos (caporegimes) who each control small teams of 'crew' and 'soldiers', also referred to as 'made members'.[1144]

Starting in 1980 with the prosecution of Mafioso Mr Frank Balistieri (or Tieri), the then leader of the Milwaukee La Cosa Nostra clan,[1145] US authorities were able to convict dozens of key Cosa Nostra bosses, and disable all five notorious New York crime families through *RICO* convictions.[1146] According to Thomas Gabor, 'by 1985, about two-thirds of the alleged Mafia bosses in the US were under indictment or convicted.'[1147] A number of cases continued throughout the 1990s and beyond.[1148]

1140 Angela Veng Mei Long, *The Disruption of International Organised Crime* (2007) 92.

1141 18 USC §1964(b).

1142 *Sedima SPRL v Imrex Co*, 470 US 479, 488–492 (1985): '[T]here is no requirement that a private action under §1964(c) can proceed only against a defendant who has already been convicted of a predicate act or of a RICO violation.' Cf *US v Turkette* 452 US 576, 580–587 (1981).

1143 James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 135 citing then FBI Director William Webster's testimony before the US President's Commission on Organised Crime.

1144 James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 137–138.

1145 *Balistieri v US* 517 F.Supp 935 (ED Wis 1981) *US v Tieri* 636 F.2d 1206 (2d Cir 1980). See further Barry Tarlow, 'RICO Revisited' (1983) *Georgia Law Review* 291 at 322

1146 James Jacobs et al, *Busting the Mob* (1994) 5. For a full list see James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 177.

1147 Thomas Gabor, *Assessing the Effectiveness of the Organised Crime Control Strategies* (2003) 21.

1148 For a full list see James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 182–185.

One of the first successful Mafia prosecutions involved the Colombo family. In April 1985, Carmine Persico, the leader of the Colombo family, also known as the 'Snake', and seven of his associates were indicted and later convicted under §1962(c) and §1962(d) for their roles in 'leading, managing, and participating in the Colombo Family racketeering enterprise, a professional criminal organisation that is one of the New York City constituent units of the American Mafia'.[1149] Several associates were also charged with various substantive offences, including extortion, loan sharking, and bribery.

The Bonnano family was involved in a range of corrupt business practices, and several high-ranking members of the group were indicted for extortion, bank fraud, and securities fraud in 1997.[1150] Mr Carmine Gallante, the family boss of the Bonnanos, and two of his associates were killed and this murder constituted the predicate offence in the *RICO* prosecution *US v Salerno*,[1151] known as the Commission Case (see below). Another 24 members of the Bonnano family and another Sicilian Mafia faction stood trial for their involvement in an international drug trafficking ring, known as the 'pizza connection' as they had used pizza restaurants as front for their heroin business.[1152]

The principal criminal activity of the Gambino Crime Family of La Cosa Nostra was the operation of illegal gambling venues, loan sharking, and labour racketeering (by way of defrauding labour unions of their pension and welfare funds), which generated tens of millions of dollars of illegal revenue. To facilitate this illegal business, members of the organisation engaged in a variety of violent crimes and coercive tactics including threats, extortion, bribery, conspiracy to murder, and fraud. Mr Paul Castellano, along with other members of the group, was killed by Mr John Gotti jr, who himself was a capo in the Gambino family. Gotti, along with 22 other members of the Gambino Crime Family were indicted in sixty counts with various crimes arising out of their membership in and association with the organisation.[1153] Gotti has also been convicted for the murder of Castellano and his associates.

The New York Genovese family made millions of dollars from various loan sharking, illegal gambling and kidnapping activities. The family was headed by Mr Vincente Gigante who was convicted in July 1997 for *RICO* conspiracy, extortion conspiracy, labour payoff conspiracy, and two counts of conspiracy to murder in aid of racketeering.[1154] Other members of the Genovese family stood trial in the late 1990s for their involvement in extortion, securities fraud, and bank fraud.[1155]

Mr Anthony Salerno, the boss of the Genovese family in the early 1980s, was the principal defendant in *US v Salerno*,[1156] the so-called Commission case, which was the result of a massive investigation of New York's crime families that began in 1980 and, at times, involved as many as 200 FBI agents. The central allegation in this *RICO* prosecution was that the families constituted a criminal enterprise, referred to as the Commission that received kickbacks from a cartel of concrete contractors (known as 'The Club') and whose members were involved in predicate acts such as extortion, loan-sharking, and murder. Each family was indicted under *RICO*, charging the participation of the leaders in their enterprises. The jury found that

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1149 *US v Persico* 832 Fd 705 at 707–708.
1150 *US v Gangi* Ind 97 Crim 1215 [SDNY, 1997].
1151 *US v Salerno* 868 F.2d 524 [2d Cir 1989].
1152 *US v Badalementi* 84 CR 236 [SDNY 1987]; cf James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 152–153, 170.
1153 *US v John Gotti jr*, 1998 WL 568974 [2d Cir 1998].
1154 *US v Gigante* 982 F Supp 140 [EDNY 1997].
1155 *US v Gangi* Ind 97 Crim 1215 [SDNY, 1997].
1156 *US v Salerno* 868 F.2d 524 [2d Cir 1989].

senior Cosa Nostra figures had indeed authorised, aided, and abetted a series of predicate acts. The defendants in this case received sentences of 100 years each.[1157] These convictions were hailed as one of the greatest successes of *RICO*. James Jacob & Lauryn Gouldin, for instance, remarked:

> The government's success in the Commission case demonstrates the advantages of RICO, which allowed prosecutors to bring to a single trial the elite of New York City Cosa Nostra. The requirement that the government prove the existence of an enterprise provided prosecutors the opportunity to introduce devastating evidence on the history, structure, and operations of the Cosa Nostra crime families.[1158]

Other notorious Mafia bosses who have been convicted for *RICO* violations include Mr Angelo Burno, head of the Bruno-Scarfo family in Philadelphia that engaged in labour racketeering, Mr Anthony Accetturp, boss of the Lucchese family, and Mr Frank Costello, head of the Luciano family, who was among a small number of Cosa Nostra figures who are said to have introduced organised crime into Las Vegas and skimmed money from casino profits.[1159]

There have also been attempts to use *RICO* as a tool in the prosecution of outlaw motorcycle gangs. The case of *US v Barger* 931 F.2d 359 (6th Cir, 1991), for instance, involved 21 members of the Hells Angels who were charged for a conspiracy to place a bomb outside a clubhouse in order to kill members of a rival Chapter. The principal defendant was Mr Sonny Barger of the Oakland, CA, division of the Hells Angels. The case, however, failed because the prosecution was unable to convince the jury that the 'pattern of racketeering activity' was part of the club's policy,

A number of *RICO* prosecutions involved members of Asian organised crime groups. In *US v Thai* 29 F.3d 785 (2nd[d] Cir, 1994) members of a New York-based Vietnamese criminal organisation by the name of "Born to Kill" or "Canal Boys" stood trial for their involvement in robberies, extortion, and other violent crimes carried out in Connecticut, New York, and Tennessee. The case of *US v Louie* 625 F.Supp 1327 (SDNY 1985) involved a *RICO* prosecution against members of a Chinese group called 'Ghost Shadows' that carried out extortion, theft, and other offences in Manhattan in the late 1970 and early 1980s. There have also been a number of *RICO* cases against members of the Russian Mafia.[1160]

23.1.8 Evaluation

Since its inception in 1970, *RICO* has gained much praise and also faced grave criticism by academic scholars, practitioners, prosecutors, and law enforcement agencies. The literature is equally divided between those sources that point to the remarkable successes of the legislation, and those that question the very basic rationale and foundations of it. But it is too simplistic to characterise a statute as complex as *RICO* as either good or bad and the following observations seek to provide a more nuanced evaluation.

1157 See further, James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 144–145; Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 2.

1158 James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 170.

1159 James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 148–149.

1160 See, for example, *US v Elson* 968 F.Supp 900 (SDNY 1997); *US v Morelli, US V Roizman* (a.k.a. Little Igor) 169 F.3d 798 (3rd Cir 1999).

Initially, uptake of the new *RICO* tools was very slow. The first significant *RICO* cases went before the courts ten years after the introduction of the Act and the first civil law suit was filed only in 1982. James Jacobs et al note that '[i]t took investigators and prosecutors some years to become familiar and comfortable with the new law.'[1161] But one important observation about *RICO* is that, in contrast to most of the organised crime offences explored in this study, *RICO* is not a fall-back statute, but a mechanism that is now used very frequently on a day-to-day basis. James Jacobs & Lauryn Gouldin noted that '[s]ince 1980, practically every significant organised crime prosecution has been brought under RICO.'[1162]

The high frequency of *RICO* prosecutions is generally attributed to the wide and flexible application of many *RICO* provisions. Much of the commentary and criticism has centred on *RICO*'s ability to adapt to different types of organised crime,[1163] while others argue that *RICO* is dangerously broad and vague. Ethan Gerber, for instance, remarks that 'the expansive interpretation of *RICO*'s already broad language by the courts has caused its enforcement to be as infamous for its abuses as it is lauded for its accomplishments.' [1164]

RICO's flexibility derives from the fact that the legislation does not define terms such as 'organised crime' or 'criminal organisation'.[1165] Gerber views this lack of set definitions as '*RICO*'s greatest failure' which makes 'it is difficult to identify exactly what type of behaviour *RICO* prohibits'.[1166] Instead, the vocabulary used in *RICO* is based on terms that are fluent and courts have been given a mandate to interpret these terms liberally.[1167] Accordingly, there have been numerous cases in which *RICO* charges were used against individuals and groups that would not typically be regarded as organised crime and *RICO* has been applied in 'situations that Congress could have neither desired nor foreseen.'[1168]

The great flexibility with which the legislation operates is also *RICO*'s principal advantage over traditional conspiracy offences and their confined elements that left many key leaders of criminal organisation immune from prosecution. '*RICO* strikes directly at the organisational structure that allowed conspiracies to succeed', notes Michael Goldsmith.[1169] *RICO* has removed the immunity that conspiracy provided for many directors of criminal organisations. 'Under *RICO*', note Jacobs et al,

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1161 James Jacobs et al, *Busting the Mob* (1994) 10, 11.

1162 James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 170; cf Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 1.

1163 See, for example, Mike Cormaney, 'RICO in Russia' (1997) 7 *Transnational Law & Contemporary Problems* 261 at 285.

1164 Ethan Gerber, '"A RICO you can't refuse": New York's Organised Crime Control Act' (1988) 53 *Brooklyn Law Review* 979 at 981.

1165 Cf Mike Cormaney, 'RICO in Russia' (1997) 7 *Transnational Law & Contemporary Problems* 261 at 285.

1166 Ethan Gerber, '"A RICO you can't refuse": New York's Organised Crime Control Act' (1988) 53 *Brooklyn Law Review* 979 at 992.

1167 §1961, see further Section 23.1.1 above.

1168 Ethan Gerber, '"A RICO you can't refuse": New York's Organised Crime Control Act' (1988) 53 *Brooklyn Law Review* 979 at 992, 981, 989; see also Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 838; Larry Newman, 'RICO and the Russian Mafia' (1998) 9 *Indiana International and Comparative Law Review* 225 at 244.

1169 Michael Goldsmith, 'RICO and Enterprise Criminality' (1982) 88 *Columbia Law Review* 774 at 774.

> the crime boss can practically be automatically charged with participating in an enterprise (his crime family) through racketeering activity (the crimes committed by his underlings). No matter what the underlying crimes proved against him, the sentencing law is structured so that the boss can be imprisoned for a very long time, probably for life.'[1170]

RICO has avoided some of the criticism and weaknesses of the participation offence as the *RICO* offences are not primarily concerned with the role and status an accused occupies within a criminal organisation. 'Guilt by association' is thus a lesser point of contention than in the other jurisdictions discussed in this study. Instead, criminal liability under *RICO* is largely based on conduct manifested in the requirements of 'pattern of racketeering activity' and 'collection of an unlawful debt'.[1171] The list of racketeering activities set out in §1961(1)(A)–(G) contains many offences typically associated with organised crime and also creates clear and familiar boundaries for criminal liability.[1172] The problem associated with this approach, however, is that this list is, on the one hand, inflexible and does not allow rapid responses to new and emerging organised crime activities as statutory amendments take considerable time. On the other hand, additions made to the list of racketeering activities have raised concerns over creating a list that is so broad to be almost meaningless. Gerard Lynch notes:

> Rather than attempting to define even a broad concept of organised crime in terms of its structural characteristics, Congress' solution [...] was to define the problem functionally. Organised crime is as organised crime does. In other words, anyone who performed the criminal acts considered typical of organised crime would be treated the same as the Mafia capo.[1173]

A further advantage that has been stressed by many commentators is *RICO*'s ability to 'present a complete picture of a large-scale, ongoing, organised-crime group engaged in diverse rackets and episodic explosions of violence.'[1174] The *RICO* offences enable the combination of multiple offences in a single charge and/or a single trial 'to show the nature of an enterprise, putting forward a context within which offences occurred.'[1175] Separate trials of organised crime members can be joined (or severed) relatively easily which 'allows the prosecutor to attack the entire beast of organised crime instead of feebly hacking at it one tentacle at a time.'[1176] 'Under RICO, the criminal enterprise replaces the individual as the cornerstone of each trial', notes Michael Goldsmith.[1177] Michael Levi & Alaster Smith remark that:

> RICO legislation enables the introduction of the general weight of the evidence, e.g. prior involvement in a series of robberies and the general previous bad character of the accused. The defendant may find himself/herself facing charges involving a variety of

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1170 James Jacobs et al, *Busting the Mob* (1994) 22.

1171 Mike Cormaney, 'RICO in Russia' (1997) 7 *Transnational Law & Contemporary Problems* 261 at 285. See Sections 23.1.3 and 23.1.4 above.

1172 See further Section 23.1.3 above.

1173 Gerard Lynch, 'RICO: The Crime of Being a Criminal, Part I & II' (1987) 87(4) *Columbia Law Review* 661at 688.

1174 James B Jacobs et al, *Busting the Mob* (1994) 11. See also Larry Newman, 'RICO and the Russian Mafia' (1998) 9 *Indiana International and Comparative Law Review* 225 at 245–246; Barry Tarlow, 'RICO Revisited' (1983) *Georgia Law Review* 291 at 417–423.

1175 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 4. See Section 23.1.3 above.

1176 Ethan Gerber, '"A RICO you can't refuse": New York's Organised Crime Control Act' (1988) 53 *Brooklyn Law Review* 979 at 987; see also Mike Cormaney, 'RICO in Russia' (1997) 7 *Transnational Law & Contemporary Problems* 261 at 284.

1177 Michael Goldsmith, 'RICO and Enterprise Criminality' (1982) 88 *Columbia Law Review* 774 at 774.

> different crimes, committed at different times and in different places, and prosecutors are required only to prove that all these crimes were committed by the defendant in furtherance of his/her participation in conducting the affairs of the same enterprise.[1178]

The ability to merge offences and offenders adds to the complexity of *RICO* trials. Investigations of and prosecutions of *RICO* violations require extensive, lengthy, and often very costly preparation. Trials are generally long and complicated and many jurors have found it difficult to understand the very cumbersome *RICO* provisions. *RICO* prosecutions also run the risk of resulting in 'megatrials' that may involve dozens of defendants.[1179] During these trials, juries sometimes lose track of particular defendants and their roles, which in turn can lead to the severance of trials.[1180]

The provisions relating to money laundering and asset forfeiture were among the most novel and innovative features when *RICO* was first introduced in 1970.[1181] Larry Newman, for instance, remarks:

> It is the prosecution's use of the criminal forfeiture feature that poses the greatest threat to a criminal organisation. Forfeiture removes the potential illegal profit from activities engaged in by organised crime groups and places the generated revenue from the forfeiture actions into a fund to further enhance law enforcement and compensate victims.[1182]

Since *RICO*'s inception, countries around the world have adopted extensive proceeds of crime legislation to deprive criminal organisations and their members of the profits their activity generate. In the United States, the relevant *RICO* provisions have gradually become less important as the Government added other and more comprehensive anti-money laundering laws outside the *RICO* statute.[1183]

Further innovative mechanisms introduced by *RICO* — that remain one of its most notorious features — are the provisions relating to civil forfeiture. Some commentators see these sections as the single most important tool to prevent and suppress organised crime, especially in instances when criminal convictions cannot be accomplished.[1184] Cormaney also points out that:

> Civil RICO allows private citizens, the people most directly hurt by organised crime, to protect their own interests in court if they are not sufficiently protected by the government. [...] Prosecutors on the state and federal level are starting to take advantage of the lesser burden of proof for civil actions and are attacking the economic base of organised crime instead of merely sending its members to prison.[1185]

1178 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 4.

1179 James Jacobs et al, *Busting the Mob* (1994) 11.

1180 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 4–6. Cf Dorean Koenig, 'The Criminal Justice System Facing the Challenge of Organised Crime' (1998) 44 *Wayne Law Review* 1351 at 1360.

1181 See further Section 23.1.6 above.

1182 Larry Newman, 'RICO and the Russian Mafia' (1998) 9 *Indiana International and Comparative Law Review* 225 at 243.

1183 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 4.

1184 Cf Larry Newman, 'RICO and the Russian Mafia' (1998) 9 *Indiana International and Comparative Law Review* 225 at 245.

1185 Mike Cormaney, 'RICO in Russia' (1997) 7 *Transnational Law & Contemporary Problems* 261 at 288.

There has been extensive debate about the breadth and scope of *RICO*'s applications, but all constitutional challenges against *RICO* relating to vagueness, retrospectivity (ex post facto), double jeopardy, violation of the freedom of association under the First Amendment, cruel and unjust punishment (Eighth Amendment), principles of equal protection, violation of due process, and intrusion of state sovereignty have been largely unsuccessful.[1186]

A related concern is the subtle transfer of powers from state jurisdictions to the federal government. The introduction of *RICO* has been described by some as a further 'federalisation of crime'.[1187] The practical impact of this shift has been diminished by the fact that many states have implemented laws identical to *RICO*.[1188] But this trend toward greater centralisation of criminal justice matters especially in relation to organised crime is not unique to the United States and can also be observed in Australia[1189] and, to a lesser degree, in Canada.

Finally, it has to be noted that after almost forty years of operations, *RICO* has not solved the causes of organised crime and it is difficult to say with certainty that *RICO* has reduced the levels of organised crime in the United States. Levi & Smith suggest that:

> RICO legislation was aimed more at breaking the political and economic stranglehold of organised crime in some areas, and at reducing organised crime takeover of legitimate business than at some of the more fundamental issues such as reducing crime levels. Those introducing it may have taken for granted that this would generate crime reduction also, but contemporary evidence and observations give grounds to doubt this simple relationship between levels of crime and levels of criminal organisation.[1190]

In summary, *RICO* has proven not to be the final solution in the 'war on organised crime', but it provides law enforcement agencies and prosecutors with an important and powerful tool against criminal organisations, their directors, members, and associates.

23.2. Continuing Criminal Enterprise (CCE)

Around the same time as the inception of *RICO*, Congress passed the *Comprehensive Drug Abuse Prevention and Control Act* in 1970 which introduced §848 entitled 'Continuing Criminal Enterprise' (CCE) into the US Code.[1191] The provisions under §848 include special offences, penalties, and forfeiture provisions for persons involved in ongoing, organised, large-scale drug trafficking activities. Like *RICO*, a defendant can be punished both for the CCE offence and also for the underlying offence.[1192]

1186 Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1137–1145; A Laxmidas Sawkar, 'From the Mafia to Milking Cows: State RICO Act Expansion' (1999) 41 *Arizona Law Review* 1133 at 1136; Barry Tarlow, 'RICO Revisited' (1983) *Georgia Law Review* 291 at 312–315.

1187 Craig Bradley, 'Racketeering and the Federalisation of Crime' (1984–1985) 22 *American Criminal Law Review* 213–266; Dorean Koenig, 'The Criminal Justice System Facing the Challenge of Organised Crime' (1998) 44 *Wayne Law Review* 1351 at 1362-1363. See also Gerard Lynch, 'RICO: The Crime of Being a Criminal, Part I & II' (1987) 87(4) *Columbia Law Review* 661at 714–717.

1188 See Section 23.3 below.

1189 See Chapter 6 above.

1190 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 18.

1191 Pub L No 95-513, tit II §408, 84 Stat 1265 (1970).

1192 See further Dorean Koenig, 'The Criminal Justice System Facing the Challenge of

23.2.1 Definition of continuing criminal enterprise

§848(c) sets out the definition of continuing criminal enterprise:

> [A] person is engaged in a continuing criminal enterprise if—
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
> (2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter—
> (A) which are undertaken by such a person in concert with five or more other persons with respect to which such person occupies a position of organiser, a supervisory position, or any other position of management, and
> (B) from which such person obtains substantial income or resources.

In short, the CCE provision is designed to capture senior members of criminal organisations that are involved in continuing series of federal drug-related felonies. The definition only applies to persons that occupy a directing or managerial position in the organisation.[1193] Further, the concept of CCE is limited to offences involving illicit drugs; it does not apply to other types of organised crime activity.

23.2.2 Offences and penalties

Under §848(a) it is an offence to engage in a continuing criminal enterprise as defined in subsection (c). The offence attracts a minimum penalty of 20 years imprisonment, a fine of up to USD 5,000,000, and forfeiture of relevant assets.[1194] For repeat offenders, the penalty involves a minimum prison term of thirty years, fines of up to USD 10,000,000, and forfeiture of any proceeds.

§848(b) further raises the penalties to life imprisonment if the accused 'is the principal administrator, organiser, or leader of the enterprise or is one several such principal administrators, organisers, or leaders' and the offence involves very large quantities of illicit drugs. Higher penalties apply if the illicit drug involved is methamphetamine, §848(s).

A further aggravation arises under §848(e)(1)(A) if the accused 'intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results.' Penalties for this offence may be between 20 years and life imprisonment, or death. The same penalties apply under §848(e)(1)(B) if a law enforcement officer is killed in the commission, furtherance, or concealment of a CCE offence.

23.3 State RICO

The application of the federal *RICO* Act is limited to offences that have some connection to interstate or foreign commerce.[1195] While the courts have interpreted this limitation quite liberally, the federal statute has no application for offences that are entirely within one state only. Moreover, federal cases have often focused on

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Organised Crime' (1998) 44 *Wayne Law Review* 1351 at 1367-1368.

1193 Dorean Koenig, 'The Criminal Justice System Facing the Challenge of Organised Crime' (1998) 44 *Wayne Law Review* 1351 at 1367-1368; Sabrina Adamoli et al, *Organised Crime around the World* (1998) 136.

1194 See 21 USC §853.

1195 See Section 23.1.5 above.

sophisticated national and international enterprises and have had little, if any impact on more localised enterprise criminality.[1196]

To close this loophole, most US States have introduced legislation similar — if not identical — to the *RICO* provisions in the US Code. In 1972, Hawai'i became the first state to introduce *RICO*,[1197] followed by similar laws in Pennsylvania in 1973,[1198] and Florida in 1977.[1199] By 1999, thirty states as well as Puerto Rico and the American Virgin Islands had *RICO*-style or similar anti-organised crime legislation (see Figure 44 below).

Figure 44 RICO and RICO-equivalent laws in US States (1999)[1200]

State	Title of Act	Reported in
Arizona	*Racketeering Act*	Ariz Rev Stat §§13-2301–13-2318
California	*Control of Profits of Organised Crime Act*	*Penal Code* (CA), §§186–186.8
Colorado	*Organised Crime Control Act*	Colo Rev Stat Ann §§18-17-101–18-17-109.
Connecticut	*Corrupt Organisation and Racketeering Act* (*CORA*)	Conn Gen Stat Ann §§53-393–53-403.
Delaware	*Racketeer Influenced and Corrupt Organisations Act*	Del Code Ann tit 11, §§1501–1511
Florida	*RICO (Racketeer Influenced and Corrupt Organisations Act)*	Fla Stat Ann §§772.101–772.190
Georgia	*RICO (Racketeer Influenced and Corrupt Organisations Act)*	Ga Code Ann §§16-14-1–16-14-15
Hawai'i	*Organised Crime Act*	Haw Rev Stat §§842-1–842-12
Idaho	*Racketeering Act*	Idaho Code §§18-7801–18-7805
Illinois	*Narcotics Profit Forfeiture Act 1992*	725 Ill Comp Stat §175/1–9
Indiana	*Racketeer Influenced and Corrupt Organisations Act*	Code Ann §§35-45-6-1–35-45-6-2
Louisiana	*Racketeering Act*	LA Rev Stat Ann §§15:1351–15:1356
Michigan	*Criminal Enterprises Act*	Mich Stat Ann §§28.356F–28.356X
Minnesota	[not known]	Minn Stat Ann §§609.901–609.912
Mississippi	*Racketeer Influenced and Corrupt Organisations Act*	Miss Code Ann §§97-43-1–97-43-11
Nevada	*Racketeering Act*	Nev Rev Stat Ann §§207.350–207.520
New Jersey	*RICO (Racketeer Influenced and Corrupt Organisations Act)*	NJ Stat Ann §§2C:41-1–2C:41-6.2
New Mexico	*Racketeering Act*	NM Stat Ann §§30-42-1–30-42-6
New York	*Organised Crime Control Act*	*Penal Law* (NY), §460.00–460.80
North Carolina	*Racketeer Influenced and Corrupt Organisations Act*	NC Gen Stat §§75D-1–75D-14
North Dakota	*Racketeer Influenced and Corrupt Organisations Act*	ND Cent Code §§12.1-06.1-01–12.1-06.1-08.
Ohio	*Corrupt Activities Act*	Ohio Rev Code Ann §§2923.31–2923.36

1196 Jason Reichelt, 'Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element' (1995) 81 *Cornell Law Review* 224 at 230-232.

1197 *Organised Crime Act* (HI), Haw Rev Stat §§842-1–842-12

1198 *Corrupt Organisations Act* (PA), 18 PA Const Stat Ann §911.

1199 *Florida RICO*, Fla Stat Ann §§772.101–772.190.

1200 A Laxmidas Sawkar, 'From the Mafia to Milking Cows: State RICO Act Expansion' (1999) 41 *Arizona Law Review* 1133 at note 6.

State	Title of Act	Reported in
Oklahoma	*Corrupt Organisations Prevention Act*	Okla Stat Ann tit 22, §§1401–1419
Oregon	*Racketeer Influenced and Corrupt Organisations Act*	Or Rev Stat §§166.715–166.735
Pennsylvania	*Corrupt Organisations Act*	PA Cons Stat Ann §911
Rhode Island	*Racketeer Influenced and Corrupt Organisations Act*	RI Gen Laws §§7-15-1–7-15-11
Tennessee	*Racketeer Influenced and Corrupt Organisations Act 1989*	Tenn Code Ann §§39-12-201–39-12-212
Utah	*Pattern of Unlawful Activity Act*	Utah Code Ann §§76-10-1601–76-10-1609
Washington	*Criminal Profiteering Act*	Wash Rev Code Ann §§9A.82.001–9A.82.904
Wisconsin	*Organised Crime Control Act*	Wis Stat Ann §§946.80–946.88

For the most parts, these state laws follow the design of the federal *RICO* provisions and use the same offences and elements to construct criminal and civil liability for relevant racketeering activity. In 1984, the Arizona Court of Appeal noted that the majority of state *RICO* statutes 'look to federal decisional law for guidance in construing and applying their statute'.[1201] It follows that the interpretation of common elements such as 'enterprise' and 'pattern' is relatively consistent and most states have adopted the same broad interpretation of terms used by federal courts.[1202]

The organised crime statutes (and their interpretation) of California, Illinois, New York, and Pennsylvania differ more significantly from the federal and other state *RICO* laws. Importantly, in these four states the application of relevant provisions is explicitly restricted to organised crime.[1203] In Illinois, the statute only applies to activities involving illicit drugs.[1204]

23.4 New York: Organised Crime Control Act 1986

23.4.1 Background and purpose

In 1986, after five years of debating and drafting, the State of New York introduced special legislation to criminalise the activities of and association with criminal organisations.[1205] The principal reason for the introduction of the *Organised Crime Control Act*, as stated in the legislative findings in §460.00 *Penal Law* (NY) — the quasi preamble to the *Organised Crime Control Act* — is

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1201 *Baines v Superior Court* 688 P.2d 1037 at 1040 (1984). See also similar decisions in Colorado (*People v Chaussee II* 847 P.2d 156 at 159 (1992)), Delaware (*Stroik v State* 671 A.2d 1335 at 1340 (1996)), and Florida (*State v Nishi* 521 So.2d 252 at 253–254 (1988).

1202 See further, A Laxmidas Sawkar, 'From the Mafia to Milking Cows: State RICO Act Expansion' (1999) 41 *Arizona Law Review* 1133 at 1135, 1151–1154; Jason Reichelt, 'Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element' (1995) 81 *Cornell Law Review* 224 at 239–244, 247–264.

1203 *Penal Code* (CA), §§186.1; *Penal Law* (NY), §460.00; *Corrupt Organisation Act* (PA), PA Cons Stat Ann §911, see also *Commonwealth v Bobitski* 632 A.2d 1294 at 1296, 1297 (PA 1993).

1204 *Narcotics Profit Forfeiture Act 1992* (IL), 725 Ill Comp Stat §175/1–9.

1205 For more on the history of the *Organised Crime Control Act 1986* (NY) see Kessler, Steven L, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act' (1990) 64 *Saint John's Law Review* 797 at 801–807.

> the inadequacy and limited nature of sanctions and remedies available to state and local law enforcement officials to deal with this intricate and varied criminal conduct. Existing penal law provisions are primarily concerned with the commission of specific and limited criminal acts without regard to the relationships of particular criminal acts or the illegal profits derived there from, to legitimate or illicit enterprises operated or controlled by organised crime. Further, traditional penal law provisions only provide for the imposition of conventional criminal penalties, including imprisonment, fines and probation, for entrenched organised crime enterprises. Such penalties are not adequate to enable the state to effectively fight organised crime.

The legislation shares some similarities with the *RICO* provisions in US federal and state statutes. But New York's *Organised Crime Control Act* is much more restrictive than *RICO* and the legislative material reflects the concerns over the breadth and vagueness of federal and state *RICO* laws and the danger of consequential human rights infringements:[1206]

> The *Organised Crime Control Act* is a statute of comparable purpose but tempered by reasonable limitations on its applicability, and by due regard for the rights of innocent persons. Because of its more rigorous definitions, this Act will not apply to some situations encompassed within comparable statutes in other jurisdictions.[1207]

At the heart of the *Organised Crime Control Act* are the so-called 'enterprise corruption' offences in §460.20 and the definition of 'criminal enterprise' in §460.10(3). These provisions are discussed in the following Sections. Not further discussed here are the mechanisms related to asset forfeiture under §460.30.[1208]

23.4.2 Criminal enterprise

The New York law uses the term 'criminal enterprise' to define criminal organisations. §460.10(3) states that 'criminal enterprise' means

> a group of persons sharing a common purpose engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure, and criminal purpose beyond the scope of individual criminal incidents.

This definition combines elements relating to the structure and purpose of the criminal group. Like federal *RICO*,[1209] a criminal enterprise may be a criminal organisation or also legitimate enterprise.[1210]

1206 *People v Capaldo* 572 NY.S.2d 989 at 990 (1991); Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 5.

1207 §460.00 *Penal Law* (NY).

1208 See further Steven Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act' (1990) 64 *Saint John's Law Review* 797 at 815–822.

1209 See Section 23.1.5 above.

1210 §§460.10(2), 175.00 *Penal Law* (NY).

Figure 45 'Criminal enterprise', §460.10(3) *Penal Law* (NY).

Terminology Elements	**Criminal enterprise**
Structure	• A group of persons • Associated in an ascertainable structure distinct from a pattern of criminal activity • Continuity of existence and structure [...] beyond the scope of individual criminal incidents
Activities	• [no element]
Objectives	• Purpose of engaging in criminal conduct • Criminal purpose goes beyond the scope of individual criminal incidents

Structural elements

The definition of criminal enterprise requires that a group of persons associate in a form that is structured and continuing beyond the commission of individual criminal acts. The statute does not set out a particular type of organisational structure and the legislative findings in §460.00 confirm that 'the concept of criminal enterprise should not be limited to traditional criminal syndicates or crime families'.

Purpose of the criminal enterprise

The purpose of the criminal enterprise has to be repeated or ongoing criminal conduct. The formation of a criminal group for a single criminal activity does not suffice. The criminal conduct envisaged by the criminal enterprise may include any type of criminal conduct. The legislative findings in §460.00 indicate that this may include

> such criminal endeavours as the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, arson for profit, hijacking, labour racketeering, loan sharking, extortion and bribery, the illegal disposal of hazardous wastes, syndicated gambling, trafficking in stolen securities, insurance and investment frauds, and other forms of economic and social exploitation.

Unlike some other jurisdictions discussed in this study, the definition is not limited to profit-generating activity or to violent crime. The legislative findings further note that criminal enterprises may also 'include persons who join together in a criminal enterprise [...] for the purpose of corrupting such legitimate enterprises or infiltrating and illicitly influencing industries.' New York's *Organised Crime Control Act 1986* thus applies to 'groups that have both legitimate and illegitimate purposes, like a social club that "fronts" for a criminal gang, or a pawn shop that is the centre of a fencing operation, can constitute criminal enterprises'.[1211]

23.4.3 Enterprise corruption

The criminal offences relating to organised crime are set out in §460.20(1) *Penal Law* (NY). They are referred to as 'enterprise corruption':

> A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he:

[1211] §460.00 *Penal Law* (NY).

(a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or
(b) intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or
(c) participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise.

Unlike federal *RICO*,[1212] New York's *Penal Law* does not contain a fourth offence for conspiracy to commit criminal enterprise corruption as this was regarded 'insufficient to justify the prosecution under the new law.'[1213] Further, §460.25 creates significant limitations to the enterprise corruption offences by declaring a range of activities not to be unlawful.[1214]

Figure 46 Elements of §460.20(1) *Penal Law* (NY) offences[1215]

	Physical elements	Mental elements
§460.20(1)(a)	• Conducting or participating in the affairs of an enterprise	• Intention to conduct or participate
	• By participating in a pattern of criminal activity	• intent to participate in or advance the affairs of the criminal enterprise • mental element of predicate criminal act (if any)
	• Employed by or associated with a criminal enterprise	• Knowledge of existence of criminal enterprise • Knowledge of the nature of the criminal enterprise's activities.
§460.20(1)(b)	• Acquiring or maintaining any interest in or control of an enterprise	• Intention to acquire or maintain an interest
	• By participating in a pattern of criminal activity	• intent to participate in or advance the affairs of the criminal enterprise • mental element of predicate criminal act (if any)
	• Employed by or associated with a criminal enterprise	• Knowledge of existence of criminal enterprise • Knowledge of the nature of the criminal enterprise's activities.
§460.20(1)(c)	• Participating in a pattern of criminal activity	• intent to participate in or advance the affairs of the criminal enterprise • mental element of predicate criminal act (if any)
	• invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise	• knowledge of the investment
	• Employed by or associated with a criminal enterprise	• Knowledge of existence of criminal enterprise • Knowledge of the nature of the criminal enterprise's activities.

1212 18 USC §1962(1)(d), see Section 23.1.2 above.
1213 Steven Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act' (1990) 64 *Saint John's Law Review* 797 at 811.
1214 See further, Steven Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act' (1990) 64 *Saint John's Law Review* 797 at 814.
1215 Cf Steven Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act' (1990) 64 *Saint John's Law Review* 797 at 807–813.

Racketeering activity

One common element of the offences set out in paragraphs (a), (b), and (c) is the accused's 'participation in a pattern of racketeering activity'. The term 'racketeering activity' is further defined in §460.10(4) as

> conduct engaged in by persons charged in an enterprise corruption count constituting three or more criminal acts that:
> (a) were committed within ten years of the commencement of the criminal action;
> (b) are neither isolated incidents, nor so closely related and connected in point of time or circumstance of commission as to constitute a criminal offence or criminal transaction, as those terms are defined in section 40.10 of the criminal procedure law; and
> (c) are either:
> (i) related to one another through a common scheme or plan or
> (ii) were committed, solicited, requested, importuned or intentionally aided by persons acting with the mental culpability required for the commission thereof and associated with or in the criminal enterprise.

The subsection establishes a complex, 'cumbersome'[1216] formula consisting of three or more criminal acts that have been committed over a set period of time (ten years), are neither isolated nor so closely related to constitute a single criminal transaction, and are part of a common scheme or associated with a criminal enterprise. In short, the subsection seeks to raise the threshold for the enterprise corruption offences and exclude those 'relatively minor or isolated acts of criminality which, while related to an enterprise and arguably part of a pattern as defined in this article, can be adequately and more fairly prosecuted as separate offences.'[1217] Moreover, the required mental elements for the racketeering activity seek to ensure that the legislation is applied only 'to those who knowingly and voluntarily seek to advance an organised criminal enterprise by their misconduct.'[1218]

Criminal act

Only the criminal offences set out in §460.10(1) *Penal Law* (NY) can constitute a basis of the racketeering activity. The section lists an extensive set of felonies under the *Penal Law* (NY) relating to fraud, violent crime, property offences, bribery, gambling, prostitution, trafficking in persons, illicit drugs, child pornography, firearms, and money laundering.[1219] Offences under other New York state laws relating to taxation, alcohol, tobacco, environmental conservation, hazardous substances, securities et cetera may also constitute a predicate offence.[1220] A conspiracy or an attempt to commit any of these offences may also constitute a criminal act under the legislation. The fact that any such acts may occur outside New York is irrelevant.

Participation in a pattern of racketeering activity

The phrase 'participation in a pattern of racketeering activity' is further defined in §460.20(2):

1216 Steven Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act' (1990) 64 *Saint John's Law Review* 797 at 823.
1217 §460.00 *Penal Law* (NY).
1218 Steven Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act' (1990) 64 *Saint John's Law Review* 797 at 811.
1219 §460.10(1)(a) *Penal Law* (NY).
1220 §460.10(1)(b) *Penal Law* (NY).

> For purposes of this section, a person participates in a pattern of criminal activity when, with intent to participate in or advance the affairs of the criminal enterprise, he engages in conduct constituting, or, is criminally liable for pursuant to section 20.00 of this chapter, at least three of the criminal acts included in the pattern, provided that:
> (a) Two of his acts are felonies other than conspiracy;
> (b) Two of his acts, one of which is a felony, occurred within five years of the commencement of the criminal action; and
> (c) Each of his acts occurred within three years of a prior act.

Under this section, participation entails two elements:[1221]

(1) involvement, as principal or accomplice, in at least three criminal acts included in the 'pattern', two of which must be felonies other than conspiracy, and
(2) an intent to participate in or advance the affairs of the criminal enterprise.

Furthermore, two of the acts must have occurred within five years of the commencement of the criminal action and each of the acts must have occurred within three years of a prior act. §460.10(4) requires three (unlike federal *RICO* not two) predicate acts which must be related through a common scheme or plan or 'were committed, solicited, requested, importuned or intentionally aided by persons acting with the mental culpability required for the commission thereof and associated with or in the criminal enterprise'.

In each case, the prosecutor must demonstrate the accused's association with the criminal organisation. This requirement is seen by many as 'probably the most fundamental distinction between [the *Organised Crime Control Act*] and other RICO-type statutes.'[1222] Moreover, the mental element, the intention to participate, ensures that the pattern of racketeering activity and the criminal enterprise are distinct.[1223] This requirement, too, differs from federal *RICO*, where the enterprise and the pattern of racketeering activity may in some cases be identical or overlap.[1224]

Interviews with New York prosecutors revealed that the legislation is often used in instances where the accused hold facilitative roles, for example:

> those who provide false identification to make credit card and other documentary fraud easier; [...] securities brokers; look-outs for burglary gangs; and mechanics who change the Vehicle Identification Numbers on trucks. All of these are acts that viewed as individual incidents might not attract significant sentences but when part of a racketeering crime-facilitative role should do so. The legislation also makes some people vulnerable to enforcement who otherwise might not be prosecuted, since acts committed overseas or outside the State can qualify as predicates for the purpose of the legislation.[1225]

23.4.4 Observations

New York's anti-organised crime laws have received considerable support and praise in the literature but also by state prosecutors. The legislature carefully addressed the many concerns about the *RICO* provisions in the US Code and in the statutes of

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1221 Cf Steven Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act' (1990) 64 *Saint John's Law Review* 797 at 812–813.

1222 Steven Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act' (1990) 64 *Saint John's Law Review* 797 at 810.

1223 Ethan Gerber, '"A RICO you can't refuse": New York's Organised Crime Control Act' (1988) 53 *Brooklyn Law Review* 979 at 991.

1224 See Section 23.1.5. above.

1225 Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 6.

many other states. The *Organised Crime Control Act* is construed much more tightly to avoid the dangers of vagueness and overbreadth and to ensure that the legislation only captures genuine criminal organisations. There is, thus far, no evidence to suggest that the legislation is too narrow or inflexible.

The legislative findings in §460.00 specifically recognise that 'the sophistication and organisation' of criminal enterprises 'make them more effective at their criminal purpose and [...] their structure and insulation protect their leadership from detection and prosecution.' More than perhaps any other offence explored in this study, New York's *Organised Crime Control Act 1986* is designed specifically to target the core organisers, participants, and associates of criminal organisations, rather than distant affiliates and persons operating at the fringes of organised crime.

The main difficulty with the *Organised Crime Control Act* is the rather complicated construction of the enterprise corruption offences. The elements of these offences are not models of clarity. On the other hand, the high threshold created by the various definitions and formulas and the inclusion of mental elements ensure the legislator's objective, to limit the Act's application to serious organised crime activities and exclude those marginal criminal acts that may be prosecuted under other, more general criminal statutes, is attained.

The New York law also has no express private civil remedy. Only the district attorney or affected state prosecutors may request such action: §§460.50, 460.60. The legislature thus avoided including one of the more notorious — and perhaps most controversial — features of the federal *RICO* provisions, that has often been used in cases only marginally related, if not completely unrelated, to organised crime.[1226]

To further limit the use of the *Organised Crime Control Act* provisions and to exercise close control over when it is appropriate to charge OCCA violations, New York law requires that in every case involving charges under §460.20 the relevant prosecutor must submit a statement to the Court 'attesting that she or he has reviewed the substance of the evidence presented to the grand jury and concurs in the judgement that the charge is consistent with the legislative findings set out in §460.00.'[1227]

23.5 California: Street Terrorism Enforcement and Prevention Act

23.5.1 Background and purpose

In 1988, the *California Street Terrorism and Prevention Act*,[1228] or *STEP Act*, inserted §§186.20–186.33 into the *Penal Code* (CA) in response to growing gang fighting and associated killings especially in Los Angeles County.[1229] §186.21 *Penal Code* (CA), which states the legislative intent for the *STEP Act*, notes that 'the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorise, and commit a multitude of crimes against the peaceful citizens of their neighbourhoods.' The gang 'wars' and associated violence were widely reported in the media and instilled a 'moral panic' in the community who demanded

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1226 See further Section 23.1.6 above.

1227 §200.65 *Criminal Procedure Law* (NY). Similar requirements exist in some jurisdictions in relation to conspiracy charges, see further Section 2.3 above.

1228 §186.20 *Penal Code* (CA).

1229 The street gang problem in Los Angeles at the time is further explored in David Truman 'The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs' (1995) 73 *Washington University Law Quarterly* 683 at 694-705.

that the State Government take swift and drastic action against the seemingly escalating situation.[1230]

From the outset it has to be noted that California's *STEP Act* was not intended to be a tool against sophisticated criminal enterprises that engage in criminal activity to make profit or gain other benefits. The Act's primary purpose is the suppression of street gangs.[1231] The *STEP Act* is designed 'to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organised nature of street gangs, which together, are the chief source of terror created by street gangs.'[1232] However, the Californian Act has served as a model for organised crime legislation in some jurisdictions outside the United States such as New Zealand[1233] and Canada.[1234]

The *STEP Act*, which is loosely modelled after the federal *RICO Act*, combines criminal offences for involvement in so-called 'criminal street gangs' with sentence enhancers and forfeiture provisions. The following Sections explore the core terms and offences under the Act.

23.5.2 Criminal street gang

The mechanisms set out in the *STEP Act* apply to 'criminal street gangs' as defined in §186.22(f) *Penal Code* (CA):

> As used in this chapter, "criminal street gang" means any ongoing organisation, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

The definition of gang in the Californian Act is largely identical with the term 'enterprise' used in the federal *RICO* Act.[1235] In fact, the California Court of Appeal felt that there was no difference between an 'enterprise' as used in *RICO* statutes and the word 'gang' as used in *STEP*.[1236]

The definition of 'criminal street gang' combines elements relating to the structure and identification of the group with elements relating to the group's activities. Unlike most other definitions of criminal organisation discussed in this study, §186.22(f) contains no references to specific objectives of the gang (see Figure 47 below).

1230 See further, Beth Bjerregaard, 'Antigang Legislation and Its Potential Impact' (2003) 14(2) *Criminal Justice Policy Review* 171 at 174–176.

1231 Some authors, however, consider organised crime and criminal street gangs as the same; see, for example, David Truman 'The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs' (1995) 73 *Washington University Law Quarterly* 683 at 683.

1232 §186.21 *Penal Code* (CA).

1233 See Section 5.1 above.

1234 See Chapter 4 above

1235 18 USC §1962(c). See further Section 23.1.5 above.

1236 *People v Green* 227 Cal App 3d 692 at 702.

Figure 47 'Criminal street gang', §186.22(f) *Penal Code* (CA).

Terminology Elements	**Criminal street gang**
Structure	• organisation, association, or group of three or more persons, whether formal or informal • group is ongoing • having a common name or common identifying sign or symbol
Activities	• one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e); • members individually or collectively engage in or have engaged in a pattern of criminal gang activity
Objectives	• [no element]

Structural elements

The Californian definition requires the group to consist of at least three persons that, in another part of the definition, are referred to as 'members'. In *People v Green* 227 Cal App 3d 692 the California Court of Appeal held that this term 'refers to a person's relationship to an organisation that is not accidental or artificial'.

There is no requirement of any formal organisation or division of labour among them. It is, however, necessary that the group is ongoing and shares some common identity, for example by displaying signs or symbols to identify membership or association. The use of insignia, tattoos, or other emblems is a common feature of the youth and street gangs that are the main target of the Californian Act. It has been shown earlier that similar identifiers are also used by more sophisticated criminal organisations such as Chinese triads, Japanese boryokudan, and also outlaw motorcycle gangs.

Activities

The definition of criminal street gang further requires proof that the group is actually engaging in criminal activities. This is an important difference to other definitions of criminal organisations discussed in this study and also to conspiracy provisions which focus on the group's objective rather than on its actual activities. This requirement not only shifts the focus of the legislation, but also creates a different threshold for criminal street gangs: Gangs with the desire or plan to carry out crime but without any record of doing so will not fall into the Californian definition.

Criminal activities have to be the primary but not the sole activity of the group. §186.22(e)(1)–(25), (31)–(33) list a catalogue of criminal offences that can constitute the criminal activity of the gang. This includes violent, property, and firearms offences typically associated with criminal street gangs, but also more sophisticated and planned offences such as money laundering, identity fraud, and extortion. Common types of organised crime, such as narcotrafficking, trafficking in persons, illegal gambling et cetera are not included in the *STEP Act*.

Pattern of criminal gang activity

To constitute a criminal street gang, it is further required that one or more of its members, individually or in concert, engage in (or have in the past engaged in) a so-

called ‘pattern of criminal gang activity’. This term shares obvious similarities with the *RICO* pattern of racketeering requirement in that it establishes a formula containing several types of offences committed over certain time periods.[1237] Under §186.22(e)

> "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offences, provided at least one of these offences occurred after the effective date of this chapter and the last of those offences occurred within three years after a prior offence, and the offences were committed on separate occasions, or by two or more persons.

The offences that follow this phrase include 33 different categories of offences ranging from carjacking, to arson, firearms offences, rape, property offence, money laundering, and torture. As mentioned earlier, many of these offences reflect known types and patterns of street gang crime that triggered the introduction of the *STEP Act.*

23.5.3 Criminal offences

Participation in a criminal street gang

Under §186.22(a) *Penal Code* (CA) it is an offence to actively participate in a criminal street gang and to promote and further the gang’s criminal conduct. In short, the offence ‘prohibits active gang members from associating with one another to commit certain enumerated crimes’.[1238] This creates double liability as ‘STEP not only charges gang members for an actual felony committed, but also charges gang members for the new substantive crime of being an active gang member who intends, promotes or aid one of the enumerated crimes under section 186.22(a).’[1239]

The offence consists of multiple physical and mental elements to restrict the application of the offence to persons who are knowingly and deliberately involved in the criminal gang and its activities (see Figure 48 below). The threshold of this offence is considerably higher than similar offences in those jurisdictions that have adopted laws based on the Californian model.[1240]

1237 See Section 23.1.3 above.

1238 Raffy Astvasadoorian, ‘California’s Two-prong Attack against Gang Crime and Violence’ (1998) 19 *Journal of Juvenile Law* 272 at 272.

1239 Alexander Molina, California’s Anti-Gang Street Terrorism Enforcement and Prevention Act’ (1993) 22 *Southwestern University Law Review* 457 at 467.

1240 See, for example, New Zealand, Section 5.1 above.

Figure 48 Participating in a criminal street gang', §186.22(a) *Penal Code* (CA)[1241]

Physical elements	Mental elements
• Active participation	
• Criminal street gang, §186.22(f) • Members of the gang engage in or have engaged in a pattern of criminal gang activity	• Knowledge
• Promoting, furthering, or assisting in any felonious criminal conduct by member of the gang	• Wilful intent
Penalty	Imprisonment in a county jail for a maximum period of one year or imprisonment in a state prison for up to three years.

A principal physical element of this offence is the requirement of 'active participation' in a criminal street gang. In 1991, in *People v Green* 227 Cal App 3d 692 the California Court of Appeal found that:

> To be convicted of being an active participant in a street gang, a defendant must have a relationship with a criminal street gang which is (1) more than nominal, passive, inactive or purely technical; and (2) the person must devote all, or a substantial part of his time and efforts to the criminal street gang.

This decision created a very high threshold and severely limited the application of the offence. Accordingly, '[a] person cannot be charged under STEP merely for passively supporting the goals and ideals of a street gang. [...] No conduct other than assisting a gang to commit a crime is proscribed under STEP.'[1242]

To overrule the decision in *People v Green* and broaden the application of the offences, in the late 1990s the Californian legislator inserted §186.22(i) into the *Penal Code*:

> In order to secure a conviction or sustain a juvenile petition, pursuant to subdivision (a) it is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

It is thus clear, that a person accused for participating in a criminal street gang under §186.22(a) does not need to be a gang member to be an active participant. It is also no longer required that an accused must make a substantial time commitment to a gang to satisfy the element of active participation.[1243] In 2000, the California Supreme Court further confirmed that to establish active participation it suffices that the accused 'simply has more than mere passive or nominal participation'.[1244]

1241 Cf Alexander Molina, California's Anti-Gang Street Terrorism Enforcement and Prevention Act' (1993) 22 *Southwestern University Law Review* 457 at 461; David Truman 'The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs' (1995) 73 *Washington University Law Quarterly* 683 at 709.

1242 Raffy Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence' (1998) 19 *Journal of Juvenile Law* 272 at 286.

1243 Lizabeth de Vries, 'Guilt by Association' (2002) 37 *University of San Francisco Law Review* 191 at 199–200.

1244 *People v Castenada* 3 Pd.3d 278 at 283–284

Soliciting or recruiting for a criminal street gang

§186.26(a) makes it an offence to solicit or recruit another person to actively participate in a criminal street gang.

Figure 49 Soliciting or recruiting for a criminal street gang', §186.26(a) *Penal Code* (CA)

Physical elements	Mental elements
• Soliciting or recruiting another • Criminal street gang, §186.22(f)	Intention either: • Person solicited or recruited participate in a pattern of criminal street gang activity, §186.22(e); or • Person solicited or recruited promote, further, or assist in any felonious conduct by members of the criminal street gang.
Penalty	Imprisonment in a state prison for up to three years.

Threats and coercion to participate in a criminal street gang

It is an offence under §186.26(b) *Penal Code* (CA) to threaten or coerce another person to actively participate in a criminal street gang.

Figure 50 Threats and coercion to participate a criminal street gang', §186.26(b) *Penal Code* (CA)

Physical elements	Mental elements
• Threatening another person with physical violence • Twice or more within a 30-day period • Criminal street gang, §186.22(f)	• Intention to coerce, induce, or solicit any person to actively participate in a criminal street gang.
Penalty	Imprisonment in a state prison for up to four years.

If the coercion involves physical violence, the offence attracts a penalty of up to five years imprisonment, §186.26(c). If the coerced person is a minor the penalty will be increased by a further three years imprisonment, §186.26(d) *Penal Code* (CA).

Firearms-related offences

§186.28(a) creates special offences for persons (individuals and corporations) who 'knowingly supply, sell, or give possession or control of any firearm to another' person, knowing that the person will use the firearm in a pattern of criminal gang activity.

Sentencing provisions

§186.22(b) enhances the sentence for certain felonies, if that felony was committed for the benefit of, at the direction of, or in association with any criminal street gang if the accused has the specific intent to promote, further, or assist in any criminal conduct by gang members. If the offence is a public offence rather than a felony, paragraph (d) increases the penalty accordingly.

23.5.4 Gang conspiracy offence

In 1998, the *Gang Violence and Crime Prevention Act* (CA), also referred to as Proposition 21, added a further gang-related offence to the Californian *Penal Law*. This Act extended the existing conspiracy provisions by inserting a new §182.5 to criminalise gang conspiracy:

> [A]ny person who actively participates in any criminal street gang, as defined in subdivision (f) of Section 186.22, with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, as defined in subdivision (e) of Section 186.22, and who wilfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony and may be punished as specified in subdivision (a) of Section 182.

Figure 51 Gang conspiracy, §182.5 *Penal Code* (CA)[1245]

Physical elements	Mental elements
• Active participation	
• Criminal street gang, §186.22(f) • Members of the gang engage in or have engaged in a pattern of criminal gang activity	• Knowledge
• Promoting, furthering, or assisting in, or benefiting from any felonious criminal conduct by member of the gang	• Wilful intent

This offence is, for the most part, identical with the gang participation offence in §186.22(a) *Penal Code* (CA). The only difference is the inclusion of 'benefiting from felonious criminal activity' in the offence definition. This extension may appear as a minor point, but Lizabeth de Vries notes that:

> Unlike aiding and abetting, the newly criminalised conduct of "benefiting from" does not include in its legal definition any specific intent to further the gang's criminal activities. [...] [T]he defendant who benefits from a gang's acts need not have any specific intent to contribute to the gang's crimes, but only to intend to benefit himself. This element therefore fails to satisfy due process.[1246]

In her view, §182.5 operates as an alternative to the usual conspiracy provisions: The active participation and knowledge elements substitute the usual requirement of an agreement, and the conduct elements relating to promoting, furthering et cetera substitute the overt act requirement.[1247] But in contrast to conspiracy, for liability under §182.5 to arise, 'the defendant need not personally participate in or agree to or even know of any crime being committed by any other gang member to be charged as a co-conspirator.'[1248]

23.5.5 Other provisions

In addition to the criminal offences and sentence enhancers, §186.22a(a) sets out measures to forfeit firearms and other weapons kept by criminal street gangs and

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[1245] Cf Lizabeth de Vries, 'Guilt by Association' (2002) 37 *University of San Francisco Law Review* 191 at 210–211.

[1246] Lizabeth de Vries, 'Guilt by Association' (2002) 37 *University of San Francisco Law Review* 191 at 214.

[1247] Lizabeth de Vries, 'Guilt by Association' (2002) 37 *University of San Francisco Law Review* 191 at 211.

[1248] Lizabeth de Vries, 'Guilt by Association' (2002) 37 *University of San Francisco Law Review* 191 at 213.

allows for buildings used by criminal street gangs to be declared public or private nuisances.

§186.22a(b) enables prosecutors to request civil injunctions in order to prohibit members of criminal gangs from engaging in certain legitimate activities such as gathering in public, possessing a mobile (cellular) phone, et cetera.[1249]

23.5.6 Observations

At the time of its inception, the *STEP Act* was seen as a drastic measure needed during dramatic times. Concerned over the seemingly escalating gang violence in southern Californian cities, the public demanded that swift and serious action be taken. The offences and other provisions introduced by the *STEP Act* were designed as swift and temporary measures, and, as Raffy Astvasadoorian remarked,

> [t]he STEP Act was never considered to be the final solution for gang crime in California. But the legislator introduced the legislation to give law enforcement agencies and prosecutors an additional tool to prevent and suppress gang-related crime.[1250]

The legislation was a clear message that criminal activities by street gangs would not be tolerated and it responded to the public's demand for higher sentences for gang related offences. But '[p]erhaps most important,' notes Beth Bjerregaard, 'such legislation provides the community with a sense that something is being done to tackle the problem.'[1251]

The Californian legislator was mindful of the fact that the *STEP Act* measures may be seen as extreme, unconstitutional, and infringing civil liberties. It was anticipated that the legislation would only be needed for a few years to deal with a temporary crisis. Accordingly, the original provisions included a sunset clause in §186.27 *Penal Code* (CA). After withstanding several court challenges, this section was repealed in 1996, also because it was felt the measures were needed for longer than originally planned. Today, 21 years after its introduction, the *STEP Act* provisions have become a permanent feature of California's criminal law. Furthermore, several other US jurisdictions have adopted legislation similar (and in some cases identical) to California's law,[1252] for example, Arkansas,[1253] Florida,[1254] Georgia,[1255] Illinois,[1256] Indiana,[1257] Iowa,[1258] Louisiana,[1259] Minnesota,[1260] Missouri,[1261] Nevada,[1262] Oklahoma,[1263] and South Dakota.[1264]

1249 See further, Raffy Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence' (1998) 19 *Journal of Juvenile Law* 272 at 286-289.

1250 Raffy Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence' (1998) 19 *Journal of Juvenile Law* 272 at 273.

1251 Beth Bjerregaard, 'Antigang Legislation and Its Potential Impact' (2003) 14(2) *Criminal Justice Policy Review* 171 at 174.

1252 See further, David Truman 'The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs' (1995) 73 *Washington University Law Quarterly* 683 at 710-712.

1253 Ark Code Ann §5-75-104.

1254 Fla Stat Ann §874.03.

1255 Ga Code Ann §16-15-3.

1256 740 Ill Comp Stat Ann 147/10.

1257 Ind Code Ann §35-45-9-1.

1258 Iowa Code Ann §723A.1.

1259 La Rev Stat Ann §15:1404.

1260 Minn Sta Ann §609.229.

1261 MO Rev Stat §578.421.

1262 Nev Rev Stat §193.168.

1263 Okla Stat Ann, tit 21, §856D-F.

Many critics remain sceptical about the purpose, scope, and application of the *STEP Act*. Some commentators have described the Act as an aggressive and dangerous law.[1265] Much of the criticism is centred on arguments that the Act creates guilt by association and violates human rights and civil liberties. However, fears over vagueness, overbreadth, and violation of due process by the legislation have generally been regarded as unfounded,[1266] and the legislation and its equivalents in other States have thus far survived all challenges before the courts.[1267]

A great number of articles, and some judicial decisions, also discuss potential violations of the freedom of association under the First Amendment by the participation offence and other *STEP Act* provisions. But most authors agree that the legislation contains sufficient safeguards and there appears to be general consensus that the threshold created by relevant provisions ensures that the offences do not create guilt by association.[1268] Specifically, membership in a criminal gang alone is not a criminal offence under §186.22.[1269] The legislation also does not criminalise mere association with criminals, which has constitutional protection.[1270] The Court of Appeal of California confirmed that the main provisions limit the application of the *STEP Act* to 'association to engage in criminal conduct' which is not protected by constitutional rights:[1271] '[T]he conduct that STEP seeks to outlaw is presently criminal in itself.'[1272] 'Because the STEP Act does not regulate speech or association, but conduct – and then only criminal conduct – it is not overly broad.'[1273]

1264 DC Codified Laws §22-10-14.

1265 Alexander Molina, California's Anti-Gang Street Terrorism Enforcement and Prevention Act' (1993) 22 *Southwestern University Law Review* 457 at 457, 458.

1266 Carol Martinez, 'The Street Terrorism Enforcement and Prevention Act' (1997) 28 *Pacific Law Journal* 711 at 713; Raffy Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence' (1998) 19 *Journal of Juvenile Law* 272 at 276, 282-286; Alexander Molina, California's Anti-Gang Street Terrorism Enforcement and Prevention Act' (1993) 22 *Southwestern University Law Review* 457 at 471-476; Beth Bjerregaard, 'Antigang Legislation and Its Potential Impact' (2003) 14(2) *Criminal Justice Policy Review* 171 at 178.

1267 *People v Green* 227 Cal App 3d 692; *People v Gamez* 235 Cal App 3d 957; *In re Alberto R* 1 Cal Rptr 2d 348 (Ct App, 1991); cf *Jackson v State* 634 NE 3d 532 (Ind Ct App, 2994), *Helton v State* 624 NE 2d 499 (Ind Ct App, 1993), *State v Walker* 506 NW 2d 430 (Iowa, 1993).

1268 Alexander Molina, California's Anti-Gang Street Terrorism Enforcement and Prevention Act' (1993) 22 *Southwestern University Law Review* 457 at 465–466; Carol Martinez, 'The Street Terrorism Enforcement and Prevention Act' (1997) 28 *Pacific Law Journal* 711 at 713; Raffy Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence' (1998) 19 *Journal of Juvenile Law* 272 at 275, 278-282; David Truman 'The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs' (1995) 73 *Washington University Law Quarterly* 683 at 717; Lizabeth de Vries, 'Guilt by Association' (2002) 37 *University of San Francisco Law Review* 191 at 202–204.

1269 Cf *Scales v US* 367 367 US 203 at 224–225 (1961).

1270 *NAACO v Claiborne Hardware Co*, 458 US 886 ay 908 (1992). See also Raffy Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence' (1998) 19 *Journal of Juvenile Law* 272 at 280.

1271 *People v Gamez* 235 Cal App 3d 957 at 971-972; *People v Green* 227 Cal App 3d 692 at 700 (1991).

1272 Raffy Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence' (1998) 19 *Journal of Juvenile Law* 272 at 299.

1273 David Truman 'The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs' (1995) 73 *Washington University Law Quarterly* 683 at 714, with reference to *People v Gamez* 235 Cal App 3d 957.

PART 4
CONCLUSION

24 Observations

Organised crime is not a new phenomenon and is not restricted to any one part of the world. Organised crime emerges around the world in different places at different times. Organised crime can be found throughout the Asia Pacific region and it frequently transcends borders. Many countries in the region have a history of organised crime dating back several centuries, while other parts of the Asia Pacific have only recently come into contact with organised crime and with the illicit goods and services that criminal organisations supply.

It is impossible to estimate, let alone collect, accurate figures about organised crime, about the individuals and groups engaged in it, and about their level of criminal activity. This study has shown that the countries in the region have seen organised crime come and go and that the rises and falls of organised are somewhat cyclical depending on economic, political, and demographic developments.

The history of organised crime in the Asia Pacific also demonstrates that no single country, no single strategy, no policy, no law, no law enforcement measure, and no penalty — however harsh — has been successful in eliminating and eradicating the problem of organised crime. The profits generated by the trafficking of illicit drugs, the smuggling of arms and ammunition, by human trafficking, migrant smuggling, trafficking in fauna, flora, and other natural resources, the illicit trade in art and antiques, the smuggling of tobacco, stolen vehicles and other contraband, and by activities such as loan sharking, illegal gambling, and unlawful prostitution amount to billions of dollars, threatening the livelihood of individuals and whole communities, and exceeding the GDP of many economies in the region. When combined with corruption, money laundering, extortion and outright violence, organised crime has the ability to threaten and undermine governance, politics, and commerce, and to put basic human rights at risk.

New ideas are needed to prevent and suppress organised crime more effectively.

24.1 The Need and Rationale of Organised Crime Offences

The subject of this study, the offences designed to penalise criminal organisations, is the most recent and perhaps most ambitious strategy to fight organised crime. Many countries in the region and around the world have introduced specific offences designed to sanction the involvement in criminal organisations. While different models have been adopted around the region, the common feature of these offences is that they are designed to target the structure, organisation, members, and associates of organised crime groups. Unlike substantive offences such as drug trafficking, migrant smuggling, trafficking in persons, arms smuggling, and the like, the offences analysed in this study are not concerned with the actual activities that constitute organised crime, but with the organisational functions and purposes of criminal organisations.

The shared rationale of organised crime offences is the realisation that disrupting criminal activities and arresting individual offenders does not dismantle the criminal organisations that stand behind these offences. ‘As the law stands now’, remarks Michael Moon ‘the Crown may prosecute and eliminate individual members, but the organisation continues; new people move into the vacated spot, and the enterprise carries on.’[1274] It is now widely accepted ‘that previous efforts against organised

[1274] 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*

crime have failed because the focus has been on individual prosecutions rather than on organisational foundations.'[1275]

Organised crime offences are prophylactic. The creators of these offences argue that these provisions directly target the criminal network and that any disruption to the network may, in turn, prevent and suppress its criminal activities and deter existing and potential associates.[1276] The penalisation of the criminal organisation has been justified on the basis of crime prevention: it reduces the risk that the organisation will engage in criminal activity. It allows law enforcement agencies to intervene earlier, long before a criminal group commits specific offences. The offences are aimed at criminalising persons who are deliberately establishing, joining, supporting, or otherwise supporting groups that pursue criminal objectives. These persons are seen as blameworthy because they possess the intention to inflict harm, be it directly or indirectly, even if the desired harm never materialises.[1277]

24.2 Models of Organised Crime Offences

The analysis of domestic and international laws in Chapters 3–23 has shown that different jurisdictions in the region have adopted different models of organised crime offences. Sabrina Adamoli et al note that 'different countries have in fact responded according to the specific local threats raised by the criminal groups they have to deal with. [...] [M]any countries punish organised crime according to their own perception of the problem.'[1278]

Minor variations aside, four main types of organised crime offences can be identified.[1279] These include:

1. The conspiracy model, found in the *Convention against Transnational Crime* and in jurisdictions such as Australia, Singapore, Malaysia, Brunei Darussalam, and several Pacific Island countries;[1280]
2. The participation model stipulated by the *Convention against Transnational Organised Crime*, and also adopted in Canada, New Zealand, New South Wales (Australia), PR China, Macau, Taiwan, the Pacific Islands, and California (USA);[1281]
3. The enterprise model based on the US *Racketeer Influenced and Corrupt Organisation* (*RICO*) *Act*, which is also used in many US States, and the Philippines;[1282]
4. The labelling/registration model of Hong Kong, Singapore, Malaysia, Japan, New South Wales, and South Australia;[1283]

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451 at 459.

1275 Michael Goldsmith, 'RICO and Enterprise Criminality' (1982) 88 *Columbia Law Review* 774 at 775.

1276 Cf Eduard Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 304 citing James Jacobs

1277 See further Section 2.1 above.

1278 Sabrina Adamoli et al, *Organised Crime around the World* (1998) 136.

1279 Cf the distinction of three models in 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 494.

1280 See Sections 3.3.1, 2.1.3, 11.2, 12.2, 22.2.2, and Chapter 13 above.

1281 See Sections 3.3.2, 4.3, 5.2.2, 6.2.1, 7.3.2, 9.3.2–9.3.3, 10.3.1–10.3.6, 22.3.3–22.3.4,and 23.5.3 above.

1282 See Sections 23.1, 23.3, 23.4, and 15.2 above,

1283 See Sections 8.3.2, 11.32., 12.3, 20.2.1, 6.2.2, and 6.4 above.

Jurisdictions, such as Indonesia, Cambodia, Thailand, Lao PDR, Vietnam, and some Pacific Islands do not, or not yet, have these offences.[1284] Other jurisdictions in the Asia Pacific region penalise criminal organisations in more than one way, using a combination of several models.

24.2.1 The conspiracy model

The criminal laws of Canada, New Zealand, Australia, Hong Kong, Singapore, Malaysia, Brunei, the Philippines, the United States, and many Pacific Islands have special provisions creating criminal liability for conspiracies.[1285] The conspiracy model can be found predominantly in those jurisidictions that have their origin in English common law. This model is also one of two alternatives set out in art 5(1)(a) *Convention against Transnational Organised Crime*. Conspiracy provisions are less common in those jurisdictions that base their criminal law on Soviet or Continental European traditions.

It has been shown that conspiracy charges are sometimes used in the prosecution of criminal groups involved in the trafficking, supply, or sale of illicit drugs. These cases usually involve defendants that have possession or other immediate access to the drugs or — in other words — that are physically involved in the commission of the crime. Proving the elements of conspiray is, however, more difficult for persons who are more distantly connected to the actual execution of individual crimes or to the agreement that forms the basis of their conspiracy.[1286]

Importantly, in those jurisdictions where conspiracy charges require proof of an overt act it is often impossible to target the leaders of criminal organisations who are not involved in physically executing their plans and thus do not engage in any overt activity.[1287] Further, conspiracy charges cannot be used against persons that are not part of the agreement. 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.[1288] Mere knowledge or recklessness as to the existence of the agreement does not suffice to establish liability for conspiracy.[1289]

Given these pratical and long-standing difficulties of conspiracy charges it is perhaps surprising that international law in art 5(1)(a)(i) *Palermo Convention* stipulates the conspiracy model as one of two possible ways to penalise persons involved in organised crime groups.[1290] Among those Signatories that have chosen to adopt the conspiracy model set out in art 5(1)(a)(i), many also continue to require proof of some overt act in furtherance of the agreement, thus severely limiting the application of this offence. It has to be acknowledged though that many countries remain opposed to extending criminal liability beyond the parameters of the traditional criminal law and reject the idea of criminalising mere participation in or association with a criminal organisation.[1291] The inclusion of the conspiracy model into international law thus accommodates this view and opens up the *Palermo Convention* to a greater number of Signatories.

1284 See Chapters 14, 16, 17, 18, 19, and 22.3 above.

1285 See further Section 2.1.3, 8.2, 11, 12.2, 13, 15.2, and 22.2.2 above.

1286 See further Section 2.1.3 above, with reference to Sabrina Adamoli et al, *Organised Crime around the World* (1998) 132 and relevant case law

1287 See further Section 2.1.3 with reference to Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 78; Peter Hill, *The Japanese Mafia* (2003) 148–149.

1288 Cf Douglas Meagher, *Organised Crime* (1983) 64.

1289 *R v Alexander* (2005) 206 CCC (3d) 233; *R v Roche* (2004) 192 CCC (3d) 557.

1290 See further Section 3.3.1 above.

1291 David McClean, *Transnational Organized Crime* (2007) 60.

To overcome some of the limitations of conspiracy, Singapore amended its criminal law following the adopton of the *Convention against Transnational Organised Crime*. As a result, the scope of the conspiracy provision in s 120A *Penal Code* (Singapore) is now much broader than the conspiracy model in art 5(1)(a)(i) and, in fact, much wider than any organised crime offence anywhere else in the Asia Pacific region.[1292] Similar observations can be made about the conspiracy provisions in Malaysia and Brunei which are based on the Singapore model.[1293]

24.2.2 The participation model

Historically, offences proscribing the participation in a criminal organisation could only be found in jurisdictions with Continental European criminal law systems. In these countries, notes Edward Wise, the 'laws proscribing criminal associations are a surrogate for the doctrine of conspiracy, which does not exist outside of the common law world.'[1294] Over the last twenty years, however, a growing number of common law jurisdictions have also adopted this participation model. Starting in California in 1988, and followed in countries such as Canada and New Zealand in 1997, a great and diverse range of jurisdictions in the Asia Pacific region now criminalise various forms of participation in or other associations with criminal organisations. Article 5(1)(a)(ii) of the *Convention against Transnational Crime* also sets out the participation model as as an alternative to conspiracy.

Physical elements

At the heart of this type of organised crime offence is the participation in a criminal organisation. The two basic physical elements 'participation' and 'criminal organisation' are common to all jurisdictions that have adopted this model,[1295] but there are subtle, yet important, differences in how these elements are expressed.

'Participation' is the preferred term used in most jurisidictions, such as international law, Canada, New Zealand, New South Wales (Australia), Taiwan, the Pacific Islands, and California.[1296] None of these jurisdictions, however, define the term 'participation' and it is open to the courts to interpret its meaning. This lack of a definition is seen by some as 'a grave flaw' because it remains unclear to whom the offence actually applies.[1297]

In international law and under §186.22(a) *Penal Code* (CA), the participation must be 'active' and must relate to specific (criminal) activities of the organised criminal group. In California, the courts confirmed that this requires 'more than mere passive or nominal participation'.[1298] In contrast, in New Zealand participation extends to passive participation and participation by mere presence,[1299] though it has been suggested to limit the offence to 'active' participation to ensure that the legislation is construed strictly.[1300] It remains debatable which is the preferred approach: A

1292 See further Section 11.1.3 above.
1293 See further Section 12.2 and Chapter 13 above.
1294 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 312.
1295 See Figure 53 below.
1296 See further Section 3.3.2, 4.3.1, 5.2.2, 6.2.1, 10.3.3, 22.3.3, 22.3.4, and 23.5.3 above.
1297 See further Section 5.2.2 above.
1298 *People v Castenada* 3 Pd.3d 278 at 283–284
1299 *R v Mitford* [2005] 1 NZLR 753 at para 59.
1300 Timothy Mullins, 'Broader Liability for Gang Accomplices: Participating in a Criminal

broader interpretation may allow for more flexible (and more frequent) use of this provision and cater more adequately for different types of participation. But on the other hand, passive participation by non-members may be seen as too remotely connected to any actual criminal activity and thus not warranting criminalisation.[1301]

New Zealand, the Cook Islands, and also the Pacific Islands Forum's *Counter Terrorism and Transnational Organised Crime Model Provisions* limit the participation to members, associate members, and prosepective membes of criminal organisations.[1302] Accordingly, more randomly and remotely associated persons cannot be held liable for participating in a criminal organisation. But on the other hand, the inclusion of passive participation in these jurisdictions means that mere membership becomes a criminal offence. The same interpretation has been applied to art 3[1] 2nd alt *Organised Crime Control Act 1996* (Taiwan): Although Taiwan's participation offence contains no express requirement of membership, the provision is generally seen as creating liability for membership in a criminal organisation.[1303] Article 4 *Organised Crime Law 1997* (Macau) extends explicitly to 'membership or other relationships'. Membership in a criminal organisation is not an element of the offences in Canada and in New South Wales.[1304]

Definitions of criminal organisations and organised crime groups that form part of the participation offences are discussed separately in Section 24.3 below. It has to be noted, however, that for these offences the question whether the organisation involved is a criminal group has to be answered 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.[1305] Furthermore, the standard required to prove the existence of a criminal organisation is "beyond reasonable doubt". This in sharp contrast to the registration and labelling model discussed in Section 24.2.4.

Figure 53 Common elements of 'participation in a criminal organisation' offence

	Physical elements	Mental elements
1	• participation	• intention (to participate): Canada, California, China • recklessness: NZ, NSW, Cook Islands, PIF
2	• criminal organisation	• knowledge (about the nature/purpose of the organisation)

Mental elements

Among the jurisdictions that have adopted the participation model, there is some division about the mental elements that need to be established to prove the offence (see Figure 53 above). In international law, Canada, and California, the participation

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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.

1301 See further Section 5.2.2 above.

1302 Section 98A *Crimes Act 1961* (NZ); s 109A(1) *Crimes Act 1969* (Cook Islands); s 55(1) *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF).

1303 See further Section 10.3.3 above.

1304 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.

1305 *Ciarniello v R* [2006] BCSC 1671 at para 67 per W F Ehrcke J.

has to be intentional or with knowledge about the nature of the participation.[1306] China further requires proof that an accused has the intention that the participation contributes to the occurrence of specific criminal acts.[1307] These jurisdictions limit liability to deliberate, purposeful contributions to criminal organisations and exclude those persons who may make unwitting contributions.[1308]

The threshold of the mental element relating to the participation is lower in New Zealand, New South Wales, Cook Islands, and under the *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF). Here, it suffices to show that an accused is reckless. It is thus possible to hold those people criminally liable who have some awareness that their participation could or might contribute to the criminal activities of a criminal group, but who do not have certainty or actual knowledge about these consequeces.[1309] The inclusion of recklessness has been justified on the basis of deterrence: 'When in doubt stay away. It places a responsibility [on the accused] for their own actions. […] It will no longer be a defence to claim ignorance.'[1310] This position has been criticised for criminalising persons whose contributions to the activities of criminal organisations are not deliberate, thus setting the threshold of the mental elements too low (and the penalties too high).

There is general consistency among jurisdictions that, in relation to the second element, the criminal organisation, it is necessary to show that the accused had knowledge about the criminal nature or purpose of the organisation.[1311] In Canada, s 467.11(1) *Criminal Code* specifically requires proof of a purpose (or an intention) to enhance the ability of a criminal organisation to facilitate or commit an indictable offence.

Aggravations and variations

In addition to the basic participation offence, several jurisdictions have introduced separate provisions to capture other types of associations with criminal organisations. Frequently, these offences are aggravations to the participation offence and provide higher penalties to reflect the level of involvement in the criminal organisation and the blameworthiness of the defendant.

1306 See, for example, art 5(1)(a)(ii) *Convention against Transnational Organised Crime*, s 467.11(1) *Criminal Code* (Canada); §186.22(a) *Penal Code* (CA).

1307 Article 294[1] *Criminal Law* (China).

1308 See further Section 3.3.2 above.

1309 Section 98A(1)(a), (b) *Crimes Act 1961* (NZ); s 93T(1)(b) *Crimes Act 1900* (NSW); s 109A(1) *Crimes Act 1969* (Cook Islands); s 55(1) *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF).

1310 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Michael Daley, Moroubra) 1537.

1311 Article 5(1)(a)(ii) *Convention against Transnational Organised Crime*; s 98A(1) *Crimes Act 1961* (NZ); s 93T(1)(a) *Crimes Act 1900* (NSW); §186.22(a) *Penal Code* (CA).

Figure 54 Aggravations to the participation offence

Offences	California	Canada	China	Macau	NSW	Taiwan
Directing/leading	-	✕	✕	✕	-	✕
Recruiting	✕	-	-		-	-
Coerecion, extortion	✕	-	-	✕	-	-
Promoting/ spreading	-	-	✕	✕	-	-
Providing funds	-	-	-	✕	-	✕
Firearms offences	✕	✕	-	✕	-	-
Drug offences	-	✕	-	-	-	-
Assault	-	-			✕	-
Property damage	-	-			✕	-

The most significant aggravation is the offence for directors and leaders of criminal organisations. Canada, China, Macau, and Taiwan have specific provisions for persons who lead, direct, or establish a criminal organisation.[1312] Usually, the highest penalty is reserved for these offences. In Canada, where this provision specifically requires that the accused instruct others to commit criminal offences, the penalty is life imprisonment.[1313] These aggravations are important extensions of criminal liability as they have the ability to capture senior members of criminal organisations that may otherwise be immune from prosecutions. International law extends the participation offence in a similar way in art 5(1)(b) *Convention against Transnational Organised Crime*.[1314]

Various offences have been identified that criminalise specific types of support provided to criminal organisations. In California, for example, §186.26(a) *Penal Code* makes it an offence to solicit or recruit another person to actively participate in a criminal street gang,[1315] and under §186.26(b) it is an offence to threaten or coerce another person to participate. Macau and China criminalise specifically the promoting or spreading of criminal organisations.[1316] Providing financial assistance to criminal groups is a separate offence in Taiwan and Macau.[1317] 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 operation. Article 294 para [4] *Criminal Law 1997* (China) makes it an offence to harbour a criminal organisation.

Some jurisdictions provide aggravations that build on existing offences and provide higher penalties if it can be established that the offence was carried out on behalf or in support of criminal organisations. For example, the laws in California, Canada, and Macau have special offences for situations in which firearms are used by or

1312 Section 467.13 *Criminal Code* (Canada); art 294 *Criminal Law 1997* (China); art 2(3) *Organised Crime Law 1997* (Macau); art 154[1] *Criminal Code* (Taiwan); art 3[1] *Organsied Crime Control Act 1996* (Taiwan). Under art 288(1) *Penal Code* (Macau) it is a separate offence (not an aggravation) to establish or promote an 'organisation or association designed to or engaging in criminal conduct'.

1313 See further Section 4.3.3 above.

1314 See further Section 3.3.3 above.

1315 See also art 288(2) *Penal Code* (Macau)

1316 Article 294 *Criminal Law 1997* (China); art 2(1) *Organised Crime Law 1997* (Macau).

1317 Article 6 *Organised Crime Control Act 1996* (Taiwan); art 2(2) *Organised Crime Law 1997* (Macau).

supplied to criminal organisations.[1318] Canada also has a special provision for criminal organisations involved in certain drug offences, and a general offence for commiting any criminal offence on behalf of a criminal group.[1319] There is significant overlap between the Canadian offences. In New South Wales it is an offence to assault another, assault a police officer, or damage property 'intending by that activity to participate in any criminal activity of a criminal group'.[1320] Macau criminalises extortion and collecting protection money for a criminal association.[1321]

These special offences that complement the participation offence are significant for two reasons: First, they create liability for some perpetrators that cannot be held liable under the traditional concepts of conspiracy, secondary, or inchoate liability, especially if they occupy senior roles within the organisation. Second, these offences relate to particular roles that a person may occupy within the organisation or to actual offences he or she may commit on their behalf. Accordingly, the aggravations and the penalties are designed to reflect the involvement and blameworthiness of the accused more accurately.

Questions may, however, be raised about the specific selection of aggravations which appears to be somewhat unrelated to organised crime in some cases. In order to criminalise the roles and activities of organised crime more systematically, it would be desirable to identify the specific constituting roles of a criminal organisation and link them with offences that are closely associated with organised crime such as drug trafficking, firearms trafficking, or organised motor vehicle theft. Presently, only Canada and Taiwan criminalise these roles and activities in a way that is, in part, reflective of the hierarchy and activities of criminal organisations.

24.2.3 The RICO model

The model of organised crime offences adopted in the United States, and now also under consideration in the Philippines, commonly known as *RICO*, is based on the concept of enterprise criminality. Unlike the participation model, it is not primarily concerned with the involvement and role of individual accused in a criminal organisation. Unlike conspiracy, it does not require proof of an agreement between a group of co-conspiators. In simplistic terms, the *RICO* model focuses on actual criminal activities carried out by an enterprise and on activities that may infiltrate or otherwise influence an enterprise. *RICO* is predominantly concerned with conduct, not status. Under *RICO*, notes Gerard Lynch, '[o]rgansied crime is as organised crime does.'[1322]

In the *RICO* model the 'enterprise' is the equivalent to the term 'criminal group' or 'criminal organisation' used elsewhere, though there are important differences between the two concepts that are further explored in Section 24.3 below. The present Section analyses the offences and other activities that form part of the *RICO* model.

1318 §186.28(a) *Penal Code* (CA); s 244.2(3) *Criminal Code* (Canada); art 288(2) *Penal Code* (Macau).

1319 Section 5(3)(a) *Controlled Drugs and Substances Act 1996* (Canada); s 467.12 *Criminal Code* (Canada). See further Section 4.3.2 above.

1320 Section 93T(2), (3), (4) *Crimes Act 1900* (NSW); see further Section 6.2.1 above.

1321 Article 3 *Organised Crime Law 1997* (Macau).

1322 Gerard Lynch, 'RICO: The Crime of Being a Criminal, Part I & II' (1987) 87(4) *Columbia Law Review* 661at 688.

Pattern of racketeering activity

Central to liability under the *RICO* laws is proof of specific predicate offences referred to as 'racketeering activity'. In §1961(1)(A)–(G) US federal *RICO* sets out a long list of federal and state offences considered to be 'symptomatic of organised criminal activity.'[1323] In New York, the list of racketeering activities in §460.10(1) *Penal Law* contains a set of felonies relating to fraud, violent crime, property offences, bribery, gambling, prostitution, trafficking in persons, illicit drugs, child pornography, firearms, and money laundering.[1324] Under s 4(c) *Racketeer Influenced and Corrupt Organisations (RICO) Bill* (Philippines) racketeering activity refers to a list of several hundred offences under the *Penal Code* and several other laws of the Philippines.[1325]

In theory, these lists are designed to reflect those offences that are characteristic of organised crime, but closer analysis in earlier parts of this study has shown that the lists include many illicit activities which are seemingly unrelated to organised crime. The advantage of the use of predicates is that liability under the *RICO* model is based on recognised criminal offences and thus creates clear and familiar boundaries of criminal liability.[1326] The disadvantage associated with this approach, however, is that these statutory lists of criminal offences do not allow swift responses to new and emerging trends in organised crime as amendments to the list take considerable time. The practical problem — that no jurisdiction has yet been able to solve satisfactorily — is to find the right spectrum of offences that is neither too wide to be overencompassing nor too narrow to be prohibitively prescriptive.

The racketeering activity becomes a 'pattern' if it is carried out repeatedly over a set period. Under US federal law and under the Filippine model at least two predicate offences have to be committed within a ten-year period.[1327] The New York Code limits this to five years.[1328] The pattern requirement ensures that liability under *RICO* is limited to cases that involve the commission of multiple, repeated criminal offences, rather than isolated instances of criminal conduct. One of the principal rationales of the *RICO* model — and a significant advantage over the other models discussed here — is its ability to combine several prior offences into a new, separate *RICO* offence which reflects the organised crime nature of the criminal activity.

RICO offences

The actual criminal offences under *RICO* combine the pattern of racketeering activity with additional physical and mental elements. US federal *RICO*, New York's *Organised Crime Control Act 1996*, and the *RICO Bill* of the Philippines recognise three racketeering related offences:

- investing racketereering funds, 18 USC §1962(a), §460.20(1)(c) *Penal Law* (NY); s 5(3) *RICO Bill* (Philippines);
- illegally acquiring enterprise interest, 18 USC §1962(b), §460.20(1)(b) *Penal Law* (NY), s 5(4) *RICO Bill* (Philippines); and
- operation of an enterprise through racketeering, 18 USC §1962(c), §460.20(1)(a) *Penal Law* (NY);

1323 Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 89. See further Section 23.1.3 above.

1324 §460.10(1)(a) *Penal Law* (NY). See further Section 23.4.3 above.

1325 See further Section 15.2.1 above.

1326 See further Section 23.1.3 above.

1327 Section 4(d) *RICO Bill* (Philippines).

1328 §460.10(4) Penal Code (NY)

Under 18 USC §1962(d) is also an offence to conspire to commit any of the three offences in §1962(a), (b), and (c). New York's *Penal Law* does not recognise this offence. The *RICO Bill* (Philippines) has a separate offence in s 5(2) for receiving, hiding, and concealing any money or property that was acquired through a pattern of racketeering activity.[1329]

Other observations

It is noteworthy that apart from the proposed laws in the Philippines, the *RICO* model has not found many followers in the Asia Pacific region and, in fact, anywhere else in the world. Wise also finds 'no precise analogues for *RICO* in foreign legal systems, no exact clones, no word-for-word copies of its provisions in the legislation of other countries.'[1330] He explains this by the uniqueness of the legislation, noting that

> certain features of the RICO statute itself make it practically inimitable ... [and] certain features of *RICO* depend so closely on distinctive peculiarities of United States law that it would be more than usually obstruse to try to transpose them into other legal systems.[1331]

It is difficult to say with certainty whether *RICO* is adaptable to other legal systems. A principal criticism of *RICO* laws has been the fact that its definitions and elements are very cumbersome and overly complicated. *RICO* does not sit well with the traditional structures of substantive and procedural criminal law. One of the main innovative features of *RICO* is that it combines criminal offences with special law enforcement and proceeds of crime mechanisms, and also allows civil law suits to be brought against criminal organisations.

The basic concept of *RICO* offences, which combines existing predicate offences, with additional conduct elements and proof of an enterprise or criminal organisation, is, however, not fundamentally different to the concepts developed elsewhere. Wise notes that:

> The drafter of RICO took it for granted that they could not directly proscribe the status of being a member of a criminal organisation. Instead, they listed the crimes in which organised crime groups typically are supposed to engage, and then made it criminal to participate in a group that commits such crimes. *RICO*, in this respect, is not unlike conspiracy, which technically is defined in terms of an act — the act of agreeing to commit a crime — but which the courts treat 'as though it were a group rather than an act.' *RICO* has been used to greatest effect, like conspiracy, to prosecute those who commit crimes as part of a group. It goes beyond conspiracy, however, in that it permits the joinder of members of a group who are loosely connected with each other to be considered parties to a single conspirational agreement. It allows the prosecution to reach all members of the group in one trial, to expose the full scope of the organisation [...].[1332]

Further research is necessary to explore in more detail how *RICO* could be adopted in common law and civil law systems.

1329 See further Sections 15.2.2, 23.1.2, and 23.4.3

1330 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 303.

1331 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 306, 308.

1332 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 311 [emphases added, reference removed].

Opinions remain divided about the benefits and disadvantages of the *RICO* model. As highlighted earlier, many critics praise *RICO* for the wide and flexible application of many provisions and for *RICO*'s ability to adapt to different types of organised crime. Accordingly, *RICO* prosecutions are very frequent. Others have attacked *RICO* for the very same reasons, criticising this model for being vague and overly broad and pointing to past *RICO* prosecutions that were unrelated to organised crime.

Many commentators have pointed to New York's *Organised Crime Control Act 1986* as the best type of *RICO* law because it was designed specifically to address many of the shortcomings of federal *RICO*. Furthermore, the offences in New York are designed specifically to target the core organisers, participants, and associates of serious criminal organisations, rather than distant affiliates and persons operating at the fringes of organised crime.

24.2.4 The labelling/registration model

A further way to penalise criminal organisations and their associates can be found in Japan, Hong Kong, and a number Southeast Asian countries. In short, this fourth model creates a two-tier system: first, it establishes a system to prohibit certain organisations and, second, it criminalises associations with these organisations. The laws of these jurisdictions contain mechanisms to identify criminal organisations through a registration or labelling system. Once an organisation has been identified as a criminal group, certain associations with or connections to that organisation become criminal offences. In 2008 and 2009, two Australian jurisdictions have also adopted this model.

Two separate systems can be identified. Brunei, Hong Kong, Malaysia, and Singapore use a system of negative prohibition by way of registering legitimate organisations. The system of Japan, New South Wales, and South Australia is one of positive prohibition which involves the labelling of certain groups as criminal or illegal.

Negative prohibition: registration of organisation

Hong Kong's *Societies Ordinance*, which was conceived over one hundred years ago, Singapore's *Societies Act 1967*, Brunei's *Societies Order 2005*, and Malaysia's *Societies Act 1966* (which is largely identical to the Act in Singapore) require the registration of all 'societies' operating in their territory. These jurisdictions maintain a register of all organisations and deem unregistered organisations to be illegal. Moreover, certain groups are unable to gain registration if they are perceived to be a threat to national security, public safety, public order, or to the protection of rights and freedoms of others.[1333] Organisations that are not registered or ineligible for registration are deemed to be unlawful.[1334] Hong Kong and Singapore also make special provisions for triad societies and other groups using triad insignia or rituals.[1335] Each jurisdiction has set up administraitive units, which are often large

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[1333] Section 8(1)(a) *Societies Ordinance 1997* (Hong Kong); s 4(2)(b), (d) *Societies Act 1967* (Singapore). See further Sections 8.3.1, 11.2.1, and 12.3 above.

[1334] Section 18 *Societies Ordinance 1997* (Hong Kong); s 14(1) *Societies Act 1967* (Singapore); s 41(1) *Societies Act 1966* (Malaysia).

[1335] Section 18(3) *Societies Ordinance 1997* (Hong Kong); s 23 *Societies Act 1967* (Singapore)

bureaucracies, to process registrations.[1336] In some places, the registrars are employed or appointed by law enforcement or other security agencies.[1337]

Positive prohibition: labelling

The anti-organised crime laws of Japan and the Australian states of South Australia and New South adopt a model of positive prohibition by declaring or labelling certain groups as criminal. Unlike the registration system in place in Hong Kong and Southeast Asia, in these jurisdictions the system is set up only for criminal organisations.[1338]

Japan's *Law to Prevent Unjust Acts by Organised Crime Group Members*, the *Crimes (Criminal Organisations Control) Act 2009* of New South Wales, and South Australia's *Serious and Organised Crime (Control) Act 2008* create a system of labelling individual groups as criminal by way of proscribing or declaring them. Moreover, all three jurisdictions have also instituted mechanisms to place individual members and associates of criminal organisations under injunction or control orders which prohibits that person from engaging in certain activities or from associating with other members.[1339]

This system is essentially designed to outlaw groups and individuals that are seen as dangerous, violent, or as otherwise constituting a risk to public safety. The criteria used to determine whether an organisation ought to be banned are statutory requirements in Japan, and are a mixture of statutory and discretionary indicia in New South Wales and South Australia.[1340] This labelling approach shares similarities with laws dealing with terrorist organisations in that they create lists of prescribed organisations and criminalise support of or other associations with them.[1341]

In Japan, the power to proscribe criminal organisations is vested in prefectural Public Safety Commissions. In New South Wales, the Supreme Court can declare an organisation at the instigation of the Commissioner of Police. In South Australia, the Attorney-General exercises this function.

The rationale and method of this labelling model has been fiercely criticised. Many commentators have expressed concerns about the elements, indicia, standard of proof, and other methods used to outlaw organisations. Labelling an organisation as criminal effectively criminalises the very existence of a group on the basis of conduct in which that group may engage in the future. The administrative processes set up in Japan, South Australia, and New South Wales are also said to lack clarity, consistency, and safeguards, and create a risk of collusion between different branches of government and the judiciary. The set standards to establish the existence of a criminal organisation are also well below the standard of 'beyond reasonable doubt' used in criminal trials and the general rules of evidence do not apply. In the Australian jurisdictions, there is also concern over the use of classified

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1336 Section 8(1)-(4) *Societies Ordinance 1997* (Hong Kong); ss 3, 4(1) *Societies Act 1967* (Singapore)

1337 Section 8(1)-(4) *Societies Ordinance 1997* (Hong Kong).

1338 See further Sections 6.2.2, 6.4.1, and 20.2.1 above.

1339 Section 14 *Crimes (Criminal Organisations Control) Act 2009* (NSW); s 14 *Serious and Organised Crime (Control) Act 2008* (SA). See further Sections 6.2.2, 6.4.2, and 20.2.1 above.

1340 Article 3 *Law to Prevent Unjust Acts by Organised Crime Group Members* (Japan); s 9(2) *Crimes (Criminal Organisations Control) Act 2009* (NSW).s 10(1) *Serious and Organised Crime (Control) Act 2008* (SA).

1341 See, fur example, Division 102 *Criminal Code* (Cth).

information in the labelling process which prevents groups from knowing the reasons why they have been banned.

Moreover, while this approach may be helpful in identifying and labelling some criminal organisations, it is of no use to act against flexible criminal networks that do not carry a particular name and have no formal organisational structure. It also creates the risk that outlawed groups will consolidate, move further underground, and engage in more clandestine, more dangerous, and more violent operations. This has clearly been the experience in Japan.[1342] Alternatively, other groups may simply resurface under a different name, thus circumventing the legislation.

Effect of prohibition/labelling

The effect of negative and positive prohibition of an organisation is that certain affiliations with the unlawful organisation are rendered illegal. The offences cover a wide range of roles that a person may occupy within the organisation and cover different types of support a person may provide to the organisation. Figure 55 below provides an overview of the main offences in relevant jurisdictions. These offences share many similarities with the aggravated offences under the participation model.[1343]

Figure 55 Unlawful/declared organisations; criminal offences

Offences	Hong Kong	Singapore	Malaysia	Japan	NSW	South Australia
Directing/leading	✕	✕	-	-	-	-
Recruiting	✕	✕	-	-	✕	-
Coerecion, extortion	-	-	-	✕	-	-
Promoting	-	✕	-	-	-	-
Providing/ collecting funds	✕		✕	-	-	-
Membership	✕	✕	✕	-	-	-
Claiming to be a member	✕	-	-	-	-	-
Providing premises	✕	✕	-	-	-	-
Visiting gang premises	-	-	-	-	-	✕
Associating with other members	-	-	-	-	✕	✕
Firearms possesion	-	-	-	-	-	✕

Hong Kong's ss 19-23 *Societies Ordinance 1997* and Singapore's ss 14-18 *Societies Act 1967* set out the most comprehensive range of criminal offences. Importantly, both jurisdictions have a special offence with the highest penalty for managers of unlawful societies and triads. It is also an offence to recruit for the organisation or provide them with premises for meetings or other activities. Providing and collecting funds for unlawful societies is an offence in Hong Kong and Malaysia.[1344]

1342 See further Section 20.2.3 above.
1343 See Figure 54 above.
1344 Section 43 *Societies Act 1966* (Malaysia).

Membership in a prohibited organisation is a separate offence in Hong Kong, Singapore, and Malaysia. South Australian and New South Wales laws set out a similar offence for 'associating with one or more other members of declared organisations'.[1345] These offences raise concerns over creating guilt by association as the conduct element of the offences ('being a member'/'associating') is not inherently criminal and may easily capture a range of lawful associations.[1346] Wise noted that:

> Concern has been expressed about the compatibility of such a crime 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 his associates'[1347]

In comparison to the other prohibition models, liability under Japan's *Law to Prevent Unjust Acts by Organised Crime Group Members* is much more restricted. A criminal offence will only be made out if a yakuza member makes threatening demands or is otherwise involved in extortion or racketeering activities on behalf of the group or if an injunction order is violated.[1348] While Japan's law has thus avoided criticism relating to overbreadth and guilt by associations, the limited scope of the *Anti-Boryokudan Law 1991* has come under attack for having 'nothing to do with punishing serious crimes committed by organised crime members'.[1349]

24.2.5 Other models

China's and Korea's criminal law set out provisions that share some similarities with the organised crime offences but do not fit into the other concepts outlined before. These provisions were also not set up for the purpose of capturing large-scale criminal enterprises.

In China and Korea said provisions are technically not criminal offences; they are mechanisms to modify secondary liability and conspiracy within the traditional parameters. For example, art 26 *Criminal Law 1997* (China) creates an avenue to hold organisers and other ringleaders criminally responsible as principals for any actual offences committed by a criminal group and to ensure they face the same penalty as those actually carrying out the crimes.[1350] Equally, art 114(1) *Criminal Code* (ROK) extends responsibility for substantive offences to persons who organise or join groups that have the purpose of carrying out that substantive crime.[1351]

24.2.6 Evidence

A number of jurisdictions allow the use of certain indicia as evidence to prove the association with or participation in a criminal organisation. This mechanism can be found in California, Canada, and Hong Kong, and was also proposed in Queensland (Australia).[1352]

1345 Section 35 *Serious and Organised Crime (Control) Act 2008* (SA); s 26 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

1346 See further Section 24.5 below.

1347 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 321.

1348 See further Section 20.2.1 above.

1349 Hitoshi Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime' (1998) 69 *International Review of Penal Law* 413 at 419.

1350 See further Section 7.2 above.

1351 See further Section 21.2.1 above.

1352 See further Sections 4.2.1, 6.3.2, and 8.3.1 above.

In California and Canada, these indicia include symbols and other insignia used by organised criminal groups.[1353] Hong Kong's *Societies Ordinance* refers to 'any books, accounts, writings, lists of members, seals, banners or insignia of or relating to any triad society'.[1354] The proposal in Queensland also listed clothing, patches, insignia or symbols relevant to the group, tattoos or brands that are identifying marks, and pictures or words relevant to the group.[1355]

These indicia are usually designed as a rebuttable presumption; they are not conclusive evidence. They can be used to show that a person is a member or associate of a criminal group, but the defendant can displace this presumption. The indicia also cannot be used as a basis for establishing a mental element.[1356]

The rationale of this approach is simple as it creates an easy way to connect a person to a criminal group. This approach is tailored specifically for Chinese triad and outlaw motorcycle gangs that traditionally identify their members through certain emblems, symbols, or through triad language.

This simplicity is also an obvious disadvantage of this concept as it fails to capture those persons who do not wear or use the insignia of a criminal gang, which is particularly true for more senior members of criminal organisations. Furthermore, this approach does not allow for a broad range of organisations to be captured. The use of evidence such as insignia, tattoos, and other marks and logos makes the legislation suitable only for use against criminal organisations with a clear visual presence and identity. But it is not helpful in targeting organisations that operate less visibly and keep their membership covert. It is easy for individuals and groups to evade prosecutions as many organisations do not use any symbols or a common language. Accordingly, the use of indicia as evidence lends weight to suggestions that some organised crime laws are only able to capture 'the slow and the stupid' and fail to cater for sophisticated individuals and the enterprises they engage in.[1357] It has been noted that this approach

> 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.[1358]

24.2.7 Penalties

The available penalties for the offences discussed in this study vary between jurisdictions. The penalties are mostly provided in the form of fines or imprisonment. In Taiwan, the punishment may also involve compulsory labour.[1359] Korea's *Act on the Aggravated Punishment of Violence* (ROK) in art 4 provides the death penalty for organisers, 'assistant leaders', and 'ordinary members' of criminal organisations and for any person providing or collecting funds for a criminal organisation. It is,

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1353 §186.22(f) *Penal Code* (CA); s 467.11(1), (3) *Criminal Code* (Canada).

1354 Section 28(2) *Socitieties Ordinance* (Hong Kong); see also s 2 *Organised and Serious Crime Ordinance 1994* (Hong Kong).

1355 Proposed s 545A(2) *Criminal Code* (Qld).

1356 Mark K Levitz & Robert Prior, 'Criminal Organization Legislation: Canada's Response' (2003) 61(3) *The Advocate* 375 at 381.

1357 See further Section 4.5 above.

1358 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice).

1359 Article 3[1] *Organised Crime Control Act 1996* (Taiwan).

however, not known whether this severe penalty has actually ever been imposed on a director or member of a criminal group.

Since the inception of *RICO* in 1970 in the United States, most jurisdictions have also instituted mechanisms to freeze and forfeit the assets of criminal organisations, including proceeds of their criminal activities.[1360]

Of particular interest are several alternative sanctions that can be found in a number of jurisdictions. In Macau and New South Wales (Australia), for instance, the penalties for relevant offences may be accompanied by prohibitions to engage in certain activities and professions. In Macau, this includes prohibitions to exercise public functions, work in public office, contact specific persons, and frequent specified places.[1361] In New South Wales, members of a declared organisation are barred from possessing or using a firearm, selling or supplying liquor, and from employment in a number of industries considered to be vulnerable to organised crime infiltration, such as the casino, racing, and security industry.[1362] Taiwan's *Organised Crime Control Act 1996* also provides a number of accessorial penalties such as prohibiting offenders from registering for public office.

The organised crime laws in Japan and the United States set out special judicial processes to allow victims as private litigants to recover lost assets and seek compensation or other civil remedies from criminal organisations (or their representatives).[1363] Under US federal *RICO*, the Attorney-General may also instigate these proceedings.[1364] The literature remains divided about the purpose and effectiveness of civil remedies. Some commentators see these mechanisms as the most important tool against organised crime, especially in instances when criminal convictions cannot be accomplished,[1365] while others see the use of civil remedies as indicative of a failure of the criminal justice system.[1366]

24.3 Definition of Organised Crime

The offences explored in this study are all based on a definition of criminal organisation. While the exact terminology varies in different jurisdictions between terms such as 'organised criminal group', 'unlawful society', 'declared organisation', and 'criminal enterprise', there is a degree of consistency between the elements used to define these terms. All jurisdictions require proof of one or more elements relating to the structure, management, size, and continuity of the organisation.[1367] Further, a separate element of the definitions relate to the purpose of the organisation.[1368] There are only very few definitions that involve proof of activities by the organisation.[1369] It is worthy to note that no jurisidiction specifically uses or defines the term 'organised crime'.

1360 18 USC §1963(a)(1)–(3).

1361 See also art 33 *Organised Crime Law 1997* (Macau).

1362 Section 27(6) *Crimes (Criminal Organisations Control) Act 2009* (NSW); see further Section 6.2.2 above.

1363 18 USC §1964; *Law to Prevent Unjust Acts by Organised Crime Group Members* (Japan).

1364 18 USC §1964(a); see further Section 23.1.6 above.

1365 Cf Larry Newman, 'RICO and the Russian Mafia' (1998) 9 *Indiana International and Comparative Law Review* 225 at 245.

1366 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 309.

1367 See Section 24.3.1 below.

1368 See Section 24.3.2 below.

1369 See Section 24.3.3 below.

24.3.1 Structural elements

Structure and Management

To ensure that the entities targeted by organised crime laws have a degree of cohesiveness and integration, all definitions of criminal organisation feature an element relating to the internal structure of the organisation. In a negative sense, this element excludes informal, random clusters of people from the scope of application.

The term 'structured group' in art 2(a) *Convention against Transnational Organised Crime*, for instance, is designed to capture 'groups with hierarchical or other elaborate structures and non-hierarchical groups where the role of members of the group need not be formally defined.'[1370] Similarly, in Canada, New Zealand, the Pacific Islands, and Macau, the words 'organised' and 'constituted' are used to ensure that the organisation has some internal cohesion and that there is a functional connection between the people involved in the group. On the other hand, neither definition requires proof of any hierarchical or other formal structure.[1371]

In New South Wales, there is no requirement whatsoever of any formal structure of the criminal group.[1372] Japan, China, and Taiwan, on the other hand, have very restrictive structural requirements, thus limiting the application of relevant provisions to formal, hierarchical organisations. Article 3 *Law to Prevent Unjust Acts by Organised Crime Group Members* (Japan), for instance, requires that the organisation has a hierarchical structure and is controlled by a leader.[1373] In China, a ruling by the Supreme People's Court has limited the term 'criminal organisation of a syndicate nature' in art 294[1] *Criminal Law 1997* (China) to groups with a 'tightly developed organisational structure that comes with internal rules of conduct and discipline, a significant membership, the presence of leaders, and long-standing members'.[1374] Under art 2 *Organised Crime Control Act 1996* (Taiwan) the criminal group also needs to maintain some hierarchical structure or other internal management system.[1375]

The various requirements relating to the structure and internal management of criminal organisations are reflective of different types of organised crime groups. 'The complexity of transnational organised crime', notes Louise Shelley, 'does not permit the construction of simple generalisations'.[1376] There is no single model of

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1370 *Travaux Préparatoires*, para 4. See further Section 3.2 above.

1371 Section 467.1(1) *Criminal Code* (Canada); s 98A(3) *Crimes Act 1961* (NZ); s 55(2) *Terrorism and Transnational Organised Crime Model Provisions* (PIF); s 109A(2), (3) *Crimes Act 1969* (Cook Islands); art 1(1), (2) *Organised Crime Law 1997* (Macau). See further Sections 4.2 , 5.2.1, 9.3.1; 22.3.3, and 22.3.4 above.

1372 See further Section 6.2.1 above.

1373 See further Section 20.2.1 above.

1374 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. See further Section 7.3.1 above.

1375 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1021. See further Section 10.3.1 above.

1376 Louise Shelley, 'Transnational Organized Crime' (1995) 48(2) *Journal of International*

transnational organised crime, 'there is no prototypical crime cartel'.[1377] The structure of criminal organisations depends on multiple factors such as the accessibility and barriers of illegal markets, the number of competitors, pricing and marketing strategies of different organisations, and their attitude towards the use of threats and violence. The analysis of criminal organisations in earlier parts of this study has shown that groups vary considerably in structure, size, geographical range, and diversity of their operations. They range from highly structured corporations to dynamic networks which change constantly in order to adapt to the environment in which they operate.[1378]

This explains why international criminal law and jurisdictions such as Canada, New Zealand, Macau, and the Pacific Islands have adopted definitions that allow flexible adaptation to different structures of organised crime, while excluding loose associations without any cohesiveness.

Size

Most jurisdictions further require a minimum number of three persons to constitute a criminal organisation.[1379] In Hong Kong, the minimum number is as low as two persons.[1380] Macau and South Australia have no mimum number and no other requirement relating to the size of the criminal organisation.

Japan takes a different approach by requiring that the criminal organisation involve a certain percentage of members with prior criminal 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.[1381] This model can also be found in earlier definitions of organised crime groups in Canada and New Zealand. But these jurisdictions have since abolished this element as it was seen as too cumbersome to establish and it was found that too few groups qualified for this type of threshold.[1382]

Continuity

A further characteristic of organised crime is the ongoing, sustained basis of criminal organisations and their operations. 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.[1383] Accordingly, the definition of organised crime group in the *Palermo*

Affairs 463 at at 464.

1377 Louise Shelley, 'Transnational Organized Crime' (1995) 48(2) *Journal of International Affairs* 463 at at 464.

1378 See also Gianluca Fiorentini & Sam Peltzman, 'Introduction' in Gianluca Fiorentini & Sam Peltzman (eds), *The Economics of Organized Crime* (1995) at 6; Mittie Southerland & Gary Potter, 'Applying Organization Theory to Organized Crime' (1993) 9(3) *Journal for Contemporary Criminal Justice* 251 at 251 George Vold, *Theoretical Criminology* (2nd ed, 1979) 343.

1379 Section 467.1(1)(a) *Criminal Code* (Canada); art 26 *Criminal Law 1997* (China); s 93S(1) *Crimes Act 1900* (NSW); 2 *Terrorism and Transnational Organised Crime Model Provisions* (PIF); s 109A(2) *Crimes Act 1969* (Cook Islands); art 2 *Organised Crime Control Act 1996* (Taiwan).

1380 Section 2 *Organised and Serious Crime Ordinance 1994* (Hong Kong).

1381 See further Section 20.2.1 above.

1382 See further Sections 4.1.1 and 5.1 above.

1383 See further M Cherif Bassiouni, 'Organised Crime and Terrorist Criminal Activities' (1990) 4 *Emery Int'l Law Review* 9 at 11; David McClean, *Transnational Organized*

Convention requires that the group 'exists for a period of time'.[1384] Article 4 of Korea's *Act on the Aggravated Punishment of Violence* also requires operations by or existence of the criminal organisation 'for a period of time'. These elements exlude from the definition those groups that form for or engage in single, ad hoc operations.

In contrast to the *Palermo Convention*, Korean law, and also the *RICO* statutes,[1385] no other jurisdiction requires any continuity or existence for a period of time. Under their definition, a spontaneous association of people can also be a criminal group. This allows the laws to be used against new organisations that have only been formed recently.

24.3.2 Purpose of the organisation

The purpose of criminal organisations is what sets them apart from legitimate enterprises, legal clubs, and associations. For that reason, the purpose element is a very important feature of definitions of organised crime groups.

Illicit profits

To highlight the profit-oriented nature of organised crime, most definitions contain an element relating to material benefit. The definition under art 2(a) *Convention against Transnational Organised Crime*, for instance, requires that the purpose of the group's activity is 'to obtain, directly or indirectly, a financial or other material benefit'.[1386]

The first objective in s 98A(2)(a), (b) *Crimes Act 1961* (NZ), s 93S(1) *Crimes Act 1900* (NSW), s 2 *Terrorism and Transnational Organised Crime Model Provisions* (PIF), and s 109A(2), (3) *Crimes Act 1969* (Cook Islands) also reflect this element of the *Palermo Convention*, targeting criminal organisations that aim to commit serious offences in order to make financial or other material profit. China's definition in art 294[1] *Criminal Law 1997*, Macau's art 1(1) *Organised Crime Law 1997*, and Japan's *Anti-Boryokudan Law* are expressed in similar terms by referring to illict profits and economic gain.

In Macau, it is necessary to show that the organisation seeks to gain illicit 'advantages or benefits' through particular criminal offences. The *Organised Crime Law 1997* (Macau) sets out a specific range of criminal offences that are commonly associated with organised crime.[1387] In New South Wales and in the Pacific Islands the sought profits also have to derive from certain serious or indictable offences.[1388]

The requirement to prove an illicit profit purpose distinguishes criminal organisations from groups pursuing political, religious, social, or ideological causes, such as terrorist organisations and other radical groups. For example, the Canadian case of *R v Lindsay* illustrated a scenario in which

> [t]hree people form a group to protest the degradation of the environment. One of their main activities is spray painting environmental slogans on office buildings. They are

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Crime (2007) 41; Peter Hill, *The Japanese Mafia* (2003) 149.

1384 Article 2(a) *Convention against Transnational Organised Crime*; see further Section 3.2 above.

1385 See further Section 24.3.4 below.

1386 See further Section 3.2.4 above.

1387 See further Section 9.3.1 above.

1388 See further Sections 6.2.1, 22.3.3 and 22.3.4 above.

> caught doing so, and charged with mischief over $5000. They admit having done the same thing on eight prior occasions.[1389]

The court noted that in this 'hypothetical, there is no material benefit likely to flow to the environmental protesters as a result of their commission of mischief. This group would be excluded from the definition of a criminal organisation.'[1390]

Other benefits

Several jurisdictions extend the 'purpose element' beyond monetary profits to other benefits. The *Palermo Convention* also extends to 'other material benefit' and the explanatory material notes that this may also include non-material gratification such as sexual services,[1391] 'to ensure that organisations [engaged in] trafficking in human beings or child pornography for sexual and not monetary reasons are not excluded'.[1392] In Canada, the benefit that the organisation is aiming for also need not be economic and the exact meaning of what may constitute a material benefit is left to judicial interpretation.[1393] In *R v Leclerc*, 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.[1394]

Other specific purposes

The meaning of criminal organisation is extended in a number of jurisdictions to capture those groups that engage in violent crime without any economic purpose. This is the case in New Zealand and New South Wales where organised criminal groups can also consist of syndicates aiming to commit 'serious violent offences' that involve the loss of life, serious bodily injury, or serious threats of bodily injury.[1395] These definitions encompass situations that may be purely emotional or spontaneous and go beyond the characteristics of an ongoing criminal enterprise operating for material gain.[1396]

In Hong Kong, the purpose of the criminal organisation has to be one of several serious offences that are frequently carried out by criminal organisations, such as murder, assault, kidnapping, importation of contraband, immigration and drug offences, gambling offences, triad offences, loan sharking, and offences involving firearms or other weapons. Most of these offences are usually committed in order to gain material profit or to facilitate the illegal operations of the criminal group.[1397]

1389 *R v Lindsay* (2004) 182 CCC (3d) 301 at para 47.
1390 *R v Lindsay* (2004) 182 CCC (3d) 301 at para 47.
1391 *Travaux Préparatoires*, para 3.
1392 *Legislative Guides*, 13 (with reference to the *Travaux Préparatoires*).
1393 *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 58 per Fuerst J.
1394 *R v Leclerc* [2001] JQ No 426 (Court of Québec – Criminal and Penal Division); see Section 4.2.3 above.
1395 Sections 98A(2)(c), (d), 312A(a) *Crimes Act 1961* (NZ); s 93S(1) *Crimes Act 1900* (NSW).
1396 See further Section 6.2.1 above.
1397 Schedule 1 *Organised and Serious Crime Ordinance* (Hong Kong); see further Section 8.2.1 above.

Open-ended purposes

Some jurisdictions have adopted open-ended definitions that do not require proof of specific purposes of the criminal organisation. Under s 109A(2), (3) *Crimes Act 1969* (Cook Islands), for example, the purpose of the criminal organisation can be any offence punishable by ten years. In South Australia, the purpose of the association can relate to the 'organising, planning, facilitating, supporting or engaging in [any] serious criminal activity'.[1398] Article 26 *Penal Law 1997* (China) also 'does not require that the crime at issue be of a certain level of severity, nor does it specify that the goal be to obtain a financial or other material benefit.'[1399]

Canada's definition of the term 'organised crime group' has been the subject of some criticism, as the criminal purpose does not have to be the sole objective of the organisation. Section 467.1(1)(b) *Criminal Code* (Canada) states that the organised crime group must have 'as one of its main purposes or main activities the facilitation of one or more serious offences'. This means, first, that any serious offence — however natured — can be envisaged by the criminal group and, second, that facilitation of serious offences can be one of several purposes of the organisations.[1400] Judicial decisions in Canada also rejected the notion of specifying particular offences or purposes arguing '[t]here is no such thing as a "type" of crime "normally" committed by criminal organisations' and that 'the conduct targeted by the legislation does not lend itself to particularisation of a closed list of offences.'[1401] Similarly, in Taiwan, the purpose of criminal organisations has to relate predominantly (but not exclusively) to criminal activities; it is not limited to specific criminal acts or to activities that are economic or violent in nature.[1402] Because the criminal purpose in Canada and Taiwan does not have to be the sole objective or the organisation, it is also possible to capture legitimate organisations (and their members) that engage in illicit activities. These definitions thus have the ability to capture corporations that engage in criminal offences. But it also creates a danger that social and other legitimate groups may be targeted — a concern that has also been raised in relation to the definition in New Zealand.[1403]

The disadvantage of other non-profit oriented and open-ended definitions is that they shift the focus away from the immediate problem of organised crime. They create the possibility — and perhaps the danger — that the organised crime laws can also be used against politically motivated groups and terrorist organisations. This effect may be the express desire of some legislatures. International law, however, has recommended that 'groups with purely political or social motives' be excluded from the definition of organised crime group.[1404]

24.3.3 Activities of the organisation

Prior analysis has shown that the majority of definitions of criminal organisation are not contingent upon proof of any actual physical conduct or criminal activity by that organisation. One of the principal purposes of the organised crime laws is the prevention of substantive criminal offences. Organised crime offences are designed

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1398 See further Section 6.4.1 above.

1399 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.

1400 See Section 4.2.2 above.

1401 *R v Lindsay* (2004) 182 CCC (3d) 301.

1402 See further Section 10.3.1 above.

1403 J Bruce Robertson (ed), *Adams on Criminal Law* (5th student ed, 2007) 252.

1404 *Legislative Guides*, 13.

as extensions to inchoate and secondary liability in order to stop criminal groups and their members from carrying out planned crimes. Requiring proof that the organisation has (already) carried out a substantive offence would thus — at least in part — defeat this purpose.

It is then surprising that a number of jurisdictions include proof of actual joint activity by the group as an element of their respective definitions. For example, s 2 *Serious and Organised Crime Ordinance* (Hong Kong) requires commission of certain violent offences which involves either the loss (or threat of loss) of the life of any person, serious bodily or psychological harm to any person (or risk thereof), or serious loss of liberty of any person.[1405] The definition of 'criminal organisation of a syndicate nature' in art 294[1] *Criminal Law 1997* (China) also requires proof that certain offences such as corruption, extortion, or assaults have been committed by the group.[1406] The advantage of this approach is that it restricts the definition of criminal organisation to groups with a proven criminal history and that it bases the definition on other substantive offences that operate within the established parameters and boundaries of the criminal law. The disadvantage is that these definitions can only be applied after a group has already engaged in some potentially harmful conduct. Furthermore, the activities of criminal organisations are constantly changing and it is difficult to predict which new crimes new groups may engage in in the future. 'The chimerical quality of transnational organised crime', notes David McClean,

> with criminal groups switching their activities from one country to another and from one type of crime to another, and probably engaging in what appears to be wholly legitimate commerce and property speculation, presents a major challenge to law enforcement.[1407]

23.3.4 Enterprise

The term 'enterprise' used in US federal and state *RICO* laws warrants separate examination although it shares many similarities with the definitions used elsewhere. US legislation does not use terms such as 'organised crime group' or 'criminal organisation'. The definition of 'gang' in California's *STEP Act* is largely identical with the term 'enterprise' used in the federal *RICO* Act.[1408]

Importantly, US federal *RICO* and its equivalent State laws are deliberately designed to cover organised crime committed by criminal organisations as well as white-collar crime commited by corporations. In line with this objective, the term 'enterprise' includes 'any individual, partnership, corporation, association or other legal entity, [...]'.[1409] Both legitimate and illegitimate businesses can be the subject of *RICO* enforcement.[1410]

The relevant structural requirements are similar to those used to define criminal organisations elsewhere. In federal *RICO* it is necessary that the entity has a continuing association that can be formal or informal. It is not required to have a hierarchical structure or formal membership, but the enterprise needs to be more than a random, ad hoc group of individuals. Within the enterprise, there has to be some sort of decision-making structure and some mechanism to direct or otherwise

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1405 See further Section 8.2.1 above.
1406 See further Section 7.3.1 above.
1407 David McClean, *Transnational Organized Crime* (2007) 31.
1408 *People v Green* 227 Cal App 3d 692 at 702. See further Section 23.1.5 above.
1409 18 USC §1961(4).
1410 See further, Bridget Allison et al, 'Racketeer Influenced and Corrupt Organisations' (1997–98) 35 *American Criminal Law Review* 1103 at 1115–1117.

control the activities of the group.[1411] In New York, the definition of criminal enterprise requires a structured and continuing association that exists beyond the commission of individual criminal acts; the formation of a criminal group for a single criminal activity does not suffice.

Also in New York, the purpose of the criminal enterprise has to be repeated or ongoing criminal conduct. This may include any type of criminal conduct and is not limited to profit-generating activity or to violent crime. For US federal *RICO*, in contrast, the enterprise must have a joint purpose, but that purpose need not be an illegal objective or a profit-related goal.

24.3.5 Observations

Among the countries of the Asia Pacific region there is no consensus about the constituting elements of criminal organisations. Although the jurisdictions examined in this study structure their definitions in similar ways, the scope and application of terms such as 'organised crime group', 'enterprise', and 'criminal organisation' vary greatly. These differences are reflective of the wider contention about the meaning and nature of organised crime within legislative, judicial, law enforcement, and academic circles. There is no single concept, no 'one size fits all' model capable of capturing all types of criminal organisations and earlier parts of this study demonstrate the great diversity of groups that exist in the region.

In many jurisidictions, the organised crime laws are local responses to local problems. Definitions of criminal organisations are tailored accordingly to suit a particular phenomemon in a particular setting at a particular time. The provisions under the *Societies Ordinance* of Hong Kong, for example, 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, reflect well-known characteristics of local organised crime groups. Definitions in Canada and New Zealand were originally designed to suppress outlaw motorcycle gangs and some elements of the definition of organised crime group were cast specifically to reflect the structure of these gangs. Consequently, some critics note that these definitions only capture the most visible groups but are ill-suited to capture other types of criminal organisations with less public structures and clandestine activities.[1412]

China and Hong Kong differentiate between different types of criminal organisations and their size and level of sophistication. The toughest restrictions and highest penalties are reserved for those organisations that are seen as most menacing: Chinese triads. Other criminal groups and unlawful societies are criminalised more leniently in comparison. In Macau, the legislation reflects the specific features and dimensions of traditional and local criminal organisations, but also captures the wider aspects of organised crime.

The definition in international law and most other domestic laws is cast more widely to cover a diverse range of structures ranging from strict hierarchies to network-type criminal organisations. This allows enough flexibility to target a diverse range of associations and to respond to the ever-changing features and structures of organised crime.[1413]

[1411] See further Section 23.1.5 above. See also s 4(b) *Racketeer Influenced and Corrupt Organisations (RICO) Bill* (Philippines); Section 15.2.1 above.

[1412] See further Section 4.5 above.

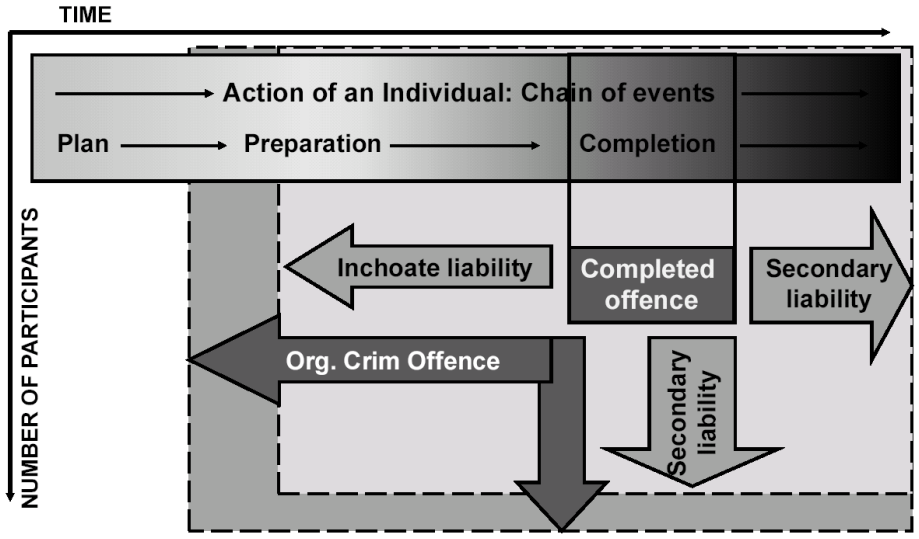
[1413] See Section 3.2 above.

While the flexibility of these definitions creates a clear advantage, concerns arise about how loosely a group of people can be associated and still be regarded as one criminal entity. In New South Wales and New Zealand, for instance, there are no safeguards to prevent using the legislation against a group of youth spraying graffiti. Spontaneous, random, and perhaps even accidental associations of people can be criminal groups as long they pursue one of the stated objectives. Some definitions are capable of capturing many groups involved in criminal activities even though these activities are not done for financial or other material gain. It is, however, this economic goal that is the principal characteristic of organised crime and that also features prominently in the *Palermo Convention.*

24.4 Limits of Liability

The provisions explored in this study arose out of the frustration over the established limitations of criminal liability. The experience of most jurisdictions has been that the requirements of inchoate and secondary liability frequently frustrate prosecutions of persons involved in organised crime. Many directors, members, associates, and other supporters of criminal organisations cannot be held criminally responsible for their role or activities within the paradigm of traditional concepts of criminal liability. Accordingly, the organised crime offences are designed to extend criminal responsibility beyond the usual boundaries.

Figure 56 Extensions of criminal liability



This extension is also the principal point of contention. Edward Wise notes that:

> 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 [...] 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 his associates. [...] Every system of law has had 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.[1414]

[1414] Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at 321.

Regardless of the model adopted, the common feature of the offences discussed in this study is the fact that they step outside the usual paradigm of criminal responsibility. This enables the criminalisation of persons more distantly connected to any criminal offence. Figure 56 above illustrates once more how the organised crime offence extends the spectrum of criminal liability in two ways:[1415] First, it can attach criminal responsibility to events that occur well before the preparation (and sometimes before the planning) of specific individual offences (the time line). Second, it can create liability for participants that are more remotely connected to individual offences than those persons currently liable under existing models of secondary liability (the participant line). In essence, these extensions are achieved by reducing the requirements that relate to the physical involvement in a criminal offence. For the most parts, the provisions discussed here do not require proof of any actual criminal activity. Liability arises on the basis of loose associations and intentions, rather than on the basis of proven physical results or harmful conduct.

Organised crime and inchoate liability: the time line

Organised crime offences extend liability beyond the scope of inchoate offences. It enables the criminalisation of acts that occur at a point in time when liability for attempt would not yet arise. It also removes the need to prove an overt act which manifests the accused's intention to commit a specific offence (in those jurisdictions that have this requirement).[1416] Creating liability for involvement in criminal organisations thus results in penalising persons who engage in mere planning and preparation — or perhaps in no more than wishful thinking — but who never come proximate to the execution of any criminal offence. Moreover, nothing in any law explored in this study suggests that it is not possible to charge a person with 'attempting to associate with a criminal organisation' or 'inciting to participate in a criminal group', thus creating so-called double-inchoate liability that criminalises acts even further removed from any substantive criminal offence.

Organised crime and accessorial liability: the participant line

Organised crime offences also extend liability beyond the boundaries of accessorial and other forms of secondary liability; they 'appear to extend to conduct which would not be sufficient for party liability […].'[1417] The mental elements of accessorial liability generally require that an accused holds specific knowledge about individual offences other co-participants and principals are engaged in. In other words, traditionally accessorial liability cannot arise for offences the accused does not know of.[1418] The organised crime offences reduce this fault requirement by attaching liability to mere awareness. For most offences it suffices that an accused was aware that a group he or she associates with may engage in criminal activities, or that the group may have a goal to do so. Knowledge or certainty are not required. Neither is it necessary to show that the accused intended to further or support the organisation's goals and activities. Accordingly, it is possible, for instance, to hold liable a person who provides a criminal organisation with firearms, other equipment, money, or food, but who 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 — but they would be liable for a number of offences identified in this study.

1415 See also Figure 6 above.
1416 See further Section 2.1.1 above.
1417 J Bruce Robertson (ed), *Adams on Criminal Law* (4th student ed, 2005) 210.
1418 See further Section 2.1.2 above.

Guilt by association; overbreadth and vagueness

Virtually every model in every jurisdiction explored in this study has come under attack for creating guilt by association and potentially violating the presumption of innocence.[1419] There is a common perception around the region that the offences relating to participation and membership, association, and support of criminal groups penalise people simply for their connection to illegal entities, thus violating basic human rights and civil liberties, in particular art 22(1) *International Covenant on Civil and Poltitical Rights* (*ICCPR*).

For example, in Taiwan, the offences under the *Organised Crime Control Act 1996* have been criticised for possibly infringing on the freedom of association which is protected under Taiwan's Constitution.[1420] There have equally been some concerns in Japan that the bōtaihō may violate constitutionally guaranteed rights such as the freedom of association and also the principle of equality of all citizens.[1421] The same points have been made in Canada,[1422] New Zealand,[1423] Australia,[1424] and the United States.[1425]

The wide scope of many offences explored in this study has been criticised for overbreadth and many provisions and elements have been described as vague and their meaning as uncertain. This criticism is perhaps not surprising given the rationale and nature of these offences. Moreover, many jurisdictions cast their offences deliberately wide to allow flexible adaption to various types of groups and to capture different kinds of association. The common concern, however, has been that the breadth of the offences is so broad and the interpretation of terms so wide that almost any person, however distant, who associates with criminal organisations can be targeted by these laws.

It is interesting to note that despite these widespread concerns no constitutional or other judicial challenge of these laws has been successful and the courts have largely confirmed the validity of these laws and rejected allegations of overbreadth, vagueness, and human rights infringements. Canada, Japan, and the United States, including California, have experienced a raft of constitutional challenges since their respective anti-organised crime laws were introduced. While all four jurisdictions have adopted different models of organised crime offence, to date, no successful challenge has been brought against them.

For example, constitutional challenges against US federal and state *RICO* laws relating to vagueness, retrospectivity (ex post facto), double jeopardy, violation of the freedom of association under the First Amendment, cruel and unjust punishment, principles of equal protection, violation of due process, and intrusion of state sovereignty have all largely failed. Fears over vagueness, overbreadth, and violation of due process by the Californian laws have also generally been regarded as unfounded, and the *STEP* legislation and its equivalents in other US States have thus far survived all challenges before the courts.[1426] In Japan, where notorious

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1419 See further Section 2.3 above.
1420 'Taiwan: Introduction to the 'Organized Crime Control Act'' (1997) 68 *International Review of Penal Law* 1019 at 1028.
1421 See further, Peter Hill, *The Japanese Mafia* (2003) 169.
1422 See further Section 4.5 above.
1423 See firther Section 5.2.2 above.
1424 See further Sections 6.3.3 and 6.4.4 above.
1425 See further Section 23.1.8 above.
1426 See further Section 23.5.6 above.

crime groups have launched legal challenges against the *Anti-Boryokudan Law*, the courts have consistently upheld the statutory provisions.[1427] No court action against Canada's organised crime offences in s 467 *Criminal Code* has been successful, and the courts repeatedly confirmed the provisions' consistency with the Canadian *Charter of Rights and Freedoms*.[1428]

General vs specific offences

Concerns over exceeding the limits of criminal liability are probably most justified in relation to those provisions that seek to criminalise different types of involvement in a criminal group in a single offence, rather than separating them in different offences. Some jurisdictions have chosen vague and wide-ranging umbrella terms for a single offence which then captures a great range of diverse conduct.

For example, terms such as 'participating in' and 'associating with' criminal organisations are so broad that they allow the criminalisation of persons who are intimately involved with the group as well as those who are only distantly connected to them. Canada, for example, makes it an offence to 'participate in or contribute to any activity of a criminal organisation', s 467.11(1) *Criminal Code* (Canada). It does not define the terms 'participation' and 'contribution.' The meaning of these terms is even further expanded by setting out a range of situations that assist the courts in determining whether an accused is involved in the group in one of these ways.[1429] New Zealand, New South Wales (Australia), Taiwan, and the Pacific Islands also require proof of participation without further defining the term.[1430] In South Australia, the term 'associating' is used, and is defined in the broadest possible way to include any form of communication between the accused and the criminal group or one of its members.[1431] The *Palermo Convention* contains a slighty more restrictive offence of 'active participation in (criminal) activities'.[1432]

In New Zealand and South Australia, the participation/association offence is the only available offence; there are no additional provisions for persons occupying specific or senior roles in the organisation. This necessitates a very wide interpretation of this offence to capture both the core directors and leaders of a criminal organisation as well as persons more loosely associated with the group. In the absence of alternative and more suitable charges it is thus predictable that the courts will interpret these simplistic offences very broadly.

The design of these offences is rather poor as it risks creating guilt by association and guilt by participation without adequately recognising the types and level of involvement an accused has in the criminal organisation. Offences based on mere participation and association do not articulate clear boundaries of criminal liability and do not conclusively answer the question as to how remotely a person can be connected to a criminal group and still be liable for participation. The offences in operation in New Zealand, New South Wales, South Australia, the Pacific Islands, and s 467.11(1) *Criminal Code* (Canada) do not explain where participation and association begin and where they end. Moreover, nothing in the laws suggests that it is not possible to charge a person with attempted participation in a criminal group,

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1427 Peter Hill, 'The Changing Face of the Yakuza' (2004) 6(1) *Global Crime* 97 at 103; Peter Hill, *The Japanese Mafia* (2003) 202–204.

1428 See further Section 4.5 above.

1429 Section 467.11(1)(3) *Criminal Code* (Canada); see further Section 4.3.1 above.

1430 See further Sections 5.2.2, 6.2.1, 10.3.3, 22.3.3, and 22.3.4 above.

1431 Section 35 *Serious and Organised Crime (Control) Act 2008* (SA).

1432 Article 5(1)(a)(ii) *Convention against Transnational Organised Crime*; see further Section 3.3.2 above.

thus creating liability for acts even further removed from any actual criminal activity, any actual harm, or any potential social danger. 'This "remoteness of social danger"', notes Timothy Mullins,

> can undermine the justification for criminal liability to apply. Dawkins specifically regards attempts to aid as too remote to warrant a criminal sanction. […] In a properly minimalist system of criminal law, conduct that is too remote from social harm should not be criminalised.[1433]

It is instead more sensible to differentiate the various roles and duties a person may occupy in a criminal organisation and also recognise any special knowledge or intention that person may have. This allows the tailoring of specific offences which criminalise selected key functions within the organisation. Simultaneously, this excludes from liability those types of associations that are seen as too rudimentary to warrant criminalisation. By avoiding the use of broad and uncertain terms, these offences also escape criticism of vagueness and overbreadth and, in the medium and long term, are more likely to withstand constitutional and other judicial challenges. Furthermore, by requiring proof of special mental elements, the offence can recognise the individual guilt and blameworthiness an accused may have. This, in turn, can justify the imposition of severe penalties on persons acting with direct intention and knowledge, while allowing concessions and more lenient sentences for persons that act recklessly or negligently. This approach articulates clear boundaries of criminal liability while addressing the shortcomings of existing laws that are unable to hold directors, financiers and the like responsible.

Canada, China, South Korea, Macau, and Taiwan, for instance, have special offences for persons directing and leading criminal organisations. These offences generally attract the highest penalty to reflect the central function exercised by the perpetrator. It is equally desirable to target persons who support a criminal organisation with funds or weapons, which are separate offences in California, Canada, Macau, and Taiwan.[1434] The criminal nature of the conduct involved in these offences is undisputed and proper enforcement of these laws may, in turn, contribute to the prevention of other crimes and add to the deterrence of other offenders.

A number of jurisdictions also have special provisions that tie the accussed's association with a criminal organisation to other existing offences. These provisions, although designed as separate offences, essentially serve to increase penalties for that other substantive offence. For example, in California and Canada, certain firearms offences are aggravated if they are connected with a criminal group. Canada also has an aggravation for certain drug offences committed by criminal organisations, and New South Wales connects assaults and property damage to criminal groups in this way.

These offences may also serve as a model to criminalise other situations and other types of conduct usually connected with organised crime. It is, for example, conceivable to create new offences such as 'trafficking in persons on behalf of a criminal organisation', 'money laundering for the benefit of a criminal group', 'operating an illegal brothel in association with a criminal enterprise', and the like. These provisions operate within the established boundaries of criminal liability. They connect recognised criminal offences with added elements that reflect the connection with a criminal organisation. The higher penalties recognise the nature and dangers

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1433 Timothy Mullins, 'Broader Liability for Gang Accomplices: Participating in a Criminal Gang' (1996-99) 8 *Auckland University Law Review* 832 at 852.

1434 See further Section 24.2.2 above.

associated with organised crime and may deter some persons from commiting offences on behalf of a criminal group.

24.5 Implementation and Enforcement

The offences discussed in this study have no more than symbolic meaning if they are not properly implemented and consistently enforced. 'The answer lies in increasing policing and prosecutorial resources, not new offences', [1435] notes Kent Roach. The levels and methods used to police, investigate, and prosecute organised crime are beyond of the scope of this study, but it is integral that the creation of special offences against organised crime is accompanied by adequate enforcement powers, investigative techniques and equipment, and witness protection programs.

Law enforcement

Many if not most countries in the Asia Pacific region maintain specialised units or agencies to prevent and suppress organised crime. In some jurisdictions they are separate, stand-alone organisations with special powers tailored to investigate and disrupt criminal organisations more effectively. In other places, regular police forces have organised crime squads or other divisions with expert staff.

Some jurisdictions, however, have no identifiable anti-organised crime entity and the enforcement of relevant laws is left to regular police agencies — if it is carried out at all. In Taiwan, for example, the ambitious anti-organised laws have repeatedly been criticised for failing to create a specialised organisation for their enforcement. There is also no regional and international organisation that can assist in cross-border investigations of organised crime and facilitate the exchange of evidence, witnesses, and the extradition of offenders.

Costs

The lack and inconsistencies of enforcement action is in large parts the result of insufficient resources and, at times, a lack of political will. The enforcement of the offences discussed in this study is extremely expensive. The implementation of the offences creates new and large pools of offenders, especially if the offences apply to low ranking members and loose associates of criminal organisations. Few, if any, police agency in the region has the capacity to thoroughly investigate and arrest the great number of people that have some affiliation with organised crime groups. This was noted in two recent submissions to an Australian parliamentary *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*:[1436]

> [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. 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.[1437]

[1435] Kent Roach, 'Panicking over Criminal Organizations: We Don't Need Another Offence' (2000) 44(1) *Criminal Law Quarterly* 1 at 3.

[1436] See further Section 6.5.2 above.

[1437] Tasmania, Minister for Police and Emergency Management, Jim Cox, *Submission to the*

> [T]here 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.[1438]

The criminal justice and prison systems are also ill-equipped to efficiently deal with hundreds or thousands of new defendants. 'Would criminalisation result in trebling the overall prison population? Regardless of the cost of such a measure, would it be desirable?' asks Peter Hill.[1439] The complexity of investigations, prosecutions, and trials under the organised crime laws further adds to the costs. Police investigations and the preparation of prosecutions of organised crime are usually very extensive, lengthy, and often extremely expensive. Trials are generally long and complicated, especially if multiple defendants are involved. The costs and difficulties of mega-trials have also been highlighted in earlier parts of this study.[1440] It is thus understandable that most jurisdictions reserve their limited human and financial resources for the most serious offenders, the most heinous crimes, and for those cases that have some chance of resulting in convictions.

A further resource problem, especially for small and less affluent countries, are the costs associated with investigative techniques, forensics, technical equipment, witness protection, and international cooperation. The *Palermo Convention*, for example, requires State Parties to institute effective mechanisms and procedures and use adequate equipment to implement and enforce the provisions under the Convention. Many countries, however, consider these requirements as overly burdensome as they do not have the resources to comply with these demands. The Convention does provide for some technical and financial aid for developing countries, but many countries in the region still see little incentive to accede to this body of law, especially if they do not consider organised crime to be a national priority.

International cooperation

The effectiveness of the organised crime offences is further limited by the diversity and discrepancy of approaches to organised crime in the region. No two jurisdictions discussed in this study adopt identical offences and most of the models identified earlier are incompatible and frequently very conflicting. While the *Convention against Transnational Organised Crime* sought to harmonise and standardise organised crime offences around the world, few countries have adopted provisions that are compatible with the international model and some jurisdictions fail or refuse to adopt the Convention altogether.

Furthermore, there is no regional or international forum to coordinate anti-organised crime policies, legislation, and their enforcement. Jennifer Smith also notes that

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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 12 May 2009).

1438 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 12 May 2009).

1439 Peter Hill, *The Japanese Mafia* (2003) 174.

1440 See further Sections 4.5 and 23.1.8 above.

because the *Palermo Convention* 'lacks any measure to guarantee that parties fully implement its provisions or penalise violations, parties may disregard their obligations without repercussions from other parties or from an international body.'[1441] The United Nations and, in particular, the UN Office on Drugs and Crime (UNODC) in Vienna and its Regional Centre for East Asia and the Pacific in Bangkok are chief advocates for the *Palermo Convention* and assist countries in the implementation of the Convention and the three supplementing Protocols. But UNODC has no power to compel countries to adhere to the principles of international criminal law. The organisation is also not equipped to assist countries in the day-to-day prevention and suppression of organised crime and the practical bilateral and multilateral cooperation needed to investigate and prosecute individual cases. The Interpol organisation in Lyon and its databases have some role to play in this context, but Interpol also has no authority to compel individual countries and their agencies to adhere to international best practice.

Corruption

A further obstacle towards more effective implementation and enforcement of relevant organised crime offences is corruption. 'Weak states', notes Smith 'are unable to prosecute organised crime, and acquiescent, corrupt, and collusive states are unwilling to prosecute benefactors or collaborators from the world of organised crime.'[1442] Bribery and corruption of government officials are widerspread in the region and affect developed and developing countries equally. In some parts of the Asia Pacific, criminal organisations exercise great influence over local constituencies and it was shown in earlier parts of this study how organised crime groups have infiltrated politics, law enforcement, and commercial businesses in several jurisdictions. Hill remarks:

> If the existence of organised crime is beneficial to key constituencies, possibly including judicial, political, and law enforcement personnel either at street or at administrative level, are all of the actors seriously committed to the enactment, implementation, and enforcement of such measures? Given these possibilities, it is no great jump to postulate that the introduction of new "countermeasures" may have a purely symbolic role.[1443]

The *Palermo Convention* has recognised the connection between organised crime and corruption by stipulating specific provisions, including offences, to prevent and suppress bribery of government officials by criminal organisations.[1444] A separate United Nations *Convention against Corruption* has since been created. Many countries, however, have been slow in implementing these provisions into their domestic systems, and some administrations continue to turn a blind eye to corrupt practices.

24.6 Research, Data, and Literature

During the course of this study it has become obvious that the lack of comprehensive data, in-depth research, and sound legal analysis is a further obstacle in combating organised crime more effectively. One of the most immediate responses to the perceived threat of organised crime in the Asia Pacific region and around the world

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1441 Jennifer Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal* 1111 at 1119.

1442 Jennifer Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal* 1111 at 1115-1116.

1443 Peter Hill, *The Japanese Mafia* (2003) 147.

1444 Article 8 *Convention against Transnational Organised Crime*.

must be the collection of information and intelligence on this phenomenon, including: the causes, characteristics, dimensions, levels, and patterns of organised crime, the structure and operations of criminal organisations, the role played by national governments, regional organisations and the international community, and the legal frameworks that exist at domestic and international levels.

This study attempts to shed some light into offences that have been developed in the Asia Pacific region to criminalise the existence of, participation in, and association with criminal organisations. More work needs to be done on the many aspects associated with organised crime, the persons engaged therein, and the people that fall victim thereto. Other global studies need to follow in other areas of law and in other fields of social science. Academic knowledge needs to be combined with the findings of law enforcement investigations. Further fieldwork should be undertaken and more complete and comprehensive data should be collected to explore the complexities of organised crime. The results of this research need to be woven into a more coherent strategy as part of future policy change and law reform.

25 Conclusion

In the so-called 'war on organised crime', offences targeting the structures and participants of criminal organisations are seen by some as the ultimate weapon. But the expectation that these offences achieve what no other law, no policy, no law enforcement strategy — however harsh — has ever accomplished has not been met with success.

This is perhaps not surprising given that the introduction of these laws was often driven by particular incidents or political interests, and not by empirical research. Anti-organised crime measures are frequently politically motivated, 'ad hoc responses to calls by interest groups to be tougher'.[1445] 'There are no votes in being soft on crime',[1446] notes Donald Stuart. Many countries legislated before they investigated. In jurisdictions such as Canada and New South Wales, the introduction of the laws was rushed and reactionary.[1447]

Organised crime continues to exist in every society in the region, regardless of the existence of specialised offences. Critics can argue that these laws failed to 'increase the feeling of safety within the community' and did not, as some predicted, 'smash criminal organisations straight away'.[1448] If the fight against organised crime is indeed a war, then the offences discussed in this study have not been able to secure a victory. Their mission has not been accomplished.

General remarks

Importantly, the offences discussed in this study do not address the causes of organised crime and it is difficult to say with certainty that organised crime has been reduced even where law enforcement and prosecutions were swift and penalties harsh. It is more likely that any success in arrests and convictions has been offset by other persons and organisations going deeper underground. This also reduced any chance of cooperation between gang members and police and made the infiltration of these groups and the use of informants considerably harder.

Moreover, the introduction of special offences to penalise associations with criminal organisations has come at considerable cost. The organised crime laws mark a significant extension to criminal liability. The limits of this extension are, however, not clear and the legislation lacks sufficient safeguards to prevent their misuse. There is a real risk that this type of legislation can be used against any segment of society that may be seen as undesirable and dangerous. The offences have the potential to criminalise legitimate organisations and their members, infringe upon basic human rights and civil liberties, and create guilt by association. 'In seeking to address [organised crime] problems', notes Dorean Koenig,

> the solutions themselves have become problems. They have threatened to change the nature of the system of criminal justice [...] by greatly increasing the reach of the criminal law and enhancing sentences, while lessening the mens rea requirements.[1449]

1445 Donald Stuart, 'Politically Expedient but Potentially Unjust Criminal Legislation against Gangs' (1998) 69 *International Review of Penal Law* 245 at 246.

1446 Donald Stuart, 'Politically Expedient but Potentially Unjust Criminal Legislation against Gangs' (1998) 69 *International Review of Penal Law* 245 at 246.

1447 See further Section 4.1.1 above.

1448 See Sections 6.2.1 and 6.2.2 above.

1449 Dorean Koenig, 'The Criminal Justice System Facing the Challenge of Organised Crime'

In short, the organised crime offences are considered by many as complete failures and as dangerous and unnecessary violations of civil rights. Instead, the solutions are seen in swifter procedures, tougher enforcement, and better criminal intelligence. According to Roach,

> the answer lies in increasing policing and prosecutorial resources, not new offences. […] There may be a need for some amendments relating to investigative powers and forfeiture, but we do not need another offence. We have plenty.[1450]

It is, however, too shortsighted and simplistic to view the organised offences as the ultimate weapon and expect immediate solutions to a phenomenon that has emerged in diverse places and circumstances and that has reached global dimensions. It is naïve to think that the introduction of organised crime offences will immediately cause criminal organisations to 'drive apart' and 'make it impossible for them to continue as a group' so that the 'gangs will simmer out'.[1451] The uptake of these offences will naturally be very slow as police and prosecutors are cautious when using new laws as they do not want to jeopardise their cases. This has been the experience in the United States, where the first significant cases went before the courts ten years after the introduction of the *RICO Act*. The experiences in Canada and New Zealand have been similar.

It is premature to judge the effectiveness of the laws discussed in this study. Some legislative changes have only occurred very recently and only future research will be able to reveal whether these laws have made any real impact on the levels and patterns of organised crime. This, however, raises the question about how such success can be measured. Interdictions, seizures, and forfeitures are not tangible proof of progress as they may equally be (1) the result of increased law enforcement activity or (2) the consequence of greater levels of organised crime. Furthermore, the relationship, if any, between high level convictions and community safety has yet to be established empirically.

The new offences are, at best, a new tool to prevent and suppress organised crime in innovative ways. They seek to criminalise persons that have thus far been immune from prosecutions despite the persons' intimate involvement in very serious offences. This legislation has the purpose, if not the duty, to enable the prosecution of organised crime in new and meaningful ways. This study has shown that — if designed carefully — the organised crime offences create an avenue to hold key directors, managers, and financiers of criminal organisations responsible. After almost a century of failed investigations and frustrated prosecutions, these laws constitute an opportunity to bring the Al Capones, Pablo Escobars, and Nicolo Rizzutos of the world to justice.[1452] This, in turn, may destroy the larger criminal enterprises these leaders control.

Furthermore, despite its many flaws, the creation of the *Convention against Transnational Organised Crime* in 2000 is a milestone in the fight against criminal organisations. The framework proposed by the Convention offers a new set of tools that can assist investigators, courts, and prosecutors in addressing many aspects of organised crime more effectively. It also allows for the universal criminalisation of organised crime. The criminal offences under the *Palermo Convention* are accompanied by a set of measures that enhance investigations and law enforcement

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(1998) 44 *Wayne Law Review* 1351 at 1377.

1450 Kent Roach, 'Panicking over Criminal Organizations: We Don't Need Another Offence' (2000) 44(1) *Criminal Law Quarterly* 1 at 3.

1451 NSW Premier M Rees cited in Lisa Carty, 'No second chances as NSW gets tough for bikies on gangs' (30 Mar 2009) *Sydney Morning Herald*, see further Section 6.2.2 above.

1452 See Section 2.2 above.

cooperation, both domestically and internationally. It is very encouraging to see that the Convention has found widespread support and adoption around the world. As of April 15, 2009, 147 countries of the 192 UN member states have ratified it, with further countries expected to follow.[1453]

Specific recommendations

While this study is not designed to develop model legislation or draft alternative frameworks to prevent and suppress organised crime, a number of key recommendations emerge from the analysis.

First, insofar as the specific offences relating to organised crime are concerned, it is advisable to create a set of provisions that differentiate between different types and levels of involvement in a criminal group. Separate offences should be designed to distinguish the various roles and duties a person may have within a criminal organisation. The offences should also recognise any intention or special knowledge an accused may have. Specifically, countries that have not already done so should consider introducing a special offence for organisers, leaders, and directors of criminal organisation who have the intention to exercise this function and have a general knowledge of the nature and purpose of the organisation. Furthermore, it is suggested that legislatures should criminalise persons who deliberately finance criminal organisations, especially if they seek to gain material or other benefit in return.

Second, legislatures should explore the creation of offences (or aggravations to offences) that target the involvement of criminal organisations in already existing substantive offences. This may include crimes such as 'selling firearms to a criminal organisation', 'trafficking drugs on behalf of a criminal organisation', or 'recruiting victims of human trafficking for a criminal organisation'. Here, the organised crime element operates as an aggravating element to offences commonly associated with organised crime which can justify the imposition of higher penalties.

Third, any definition of 'criminal organisation' or of similar terms should be designed to reflect the unique characteristics of organised crime. Such a definition must also ensure that this legislation is not used against legitimate groups, political parties, or organisations pursuing religious or ideological causes, no matter how criminal their pursuits may be. The prevention and suppression of organised crime offences must not be used as a pretext to eliminate political rivals, outlaw social groups, or to combat terrorism. Any definition of 'criminal organisation' must therefore reflect the structural features and the specific purposes of organised crime. It is desirable to limit this definition to organisations with a proven functional connection between the persons constituting the group, a continuing existence, and the purpose to gain illicit profits or other material benefits.

The way ahead

A recent paper noted that:

> 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

[1453] UNODC, www.unodc.org/unodc/en/treaties/CTOC/signatures.html (accessed 15 Apr 2009). See further Section 3 above.

> which they operate, based on assessments of profit, risk, and potential cost — that is, penalty or loss of profit.[1454]

To prevent and suppress organised crime more effectively throughtout the region and close existing loopholes, it is important that all jurisdictions in the Asia Pacific work in concert to create some compatibility in the ways in which they criminalise and prosecute organised crime. 'Borders constrain domestic law enforcement, but borders are irrelevant to transnational criminal organisations. [...] It is time for the international community to hit back',[1455] remarks Jennifer Smith. Insofar as possible, the countries of the region should strive for the creation of more balanced and more consistent approaches. Furthermore they should encourage and assist those countries that currently not have specific offences to accede to this body of law. Organised crime will simply be displaced into other jurisdictions, however small, unless all jurisdictions in the region join forces.

With or without the organised crime offences, it is difficult to foresee the future of organised crime in the Asia Pacific. The history of organised crime in the region has shown that criminal organisations operate in a dynamic environment and rapidly adapt to new markets, new laws, and new enforcement measures. Nobody can predict whether the economic rise and integration of many countries in the region will be accompanied by a further increase in organised crime; or whether innovative policing, better know-how and equipment, closer collaboration between the countries, and better laws will ultimately lead to a reduction of organised crime activity.

In the absence of more comprehensive data, better research, and a deeper understanding of the causes of organised crime it is difficult, if not impossible, to identify and measure any success. Whether or not the Asia Pacific region succeeds over organised crime — or surrenders to it — is the collective responsibility of the whole region. 'Inevitably the issues of transnational organised crime and various expressions will be the subject of continued work: the international community must strive to match the ingenuity of the criminals,'[1456] remarks David McClean. In the end, it is the combined political will of all governments and civil societies in the region that will determine the future of organised in the Asia Pacific. Whether or not there will be a Palermo in the Pacific is ultimately up to us.

[1454] 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.

[1455] Jennifer Smith, 'An International Hit Job: Prosecuting Organized Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal* 1111 at 1116, 1113.

[1456] David McClean, *Transnational Organized Crime* (2007) 31.

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