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**Regional Centre for
East Asia and the Pacific**

PALERMO ON THE PACIFIC RIM

A stylized map of the Asia Pacific region, showing the outlines of Asia, Australia, and the Pacific Islands. The map is rendered in a dark blue color against a lighter blue background.

**ORGANISED CRIME OFFENCES
IN THE ASIA PACIFIC REGION**

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PALERMO ON THE PACIFIC RIM

ORGANISED CRIME OFFENCES IN THE ASIA PACIFIC REGION

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His principal areas of research include criminal law, organised crime, narco-trafficking, terrorism, international criminal law, and immigration and refugee law. His recent works focuses on trafficking in persons, organised crime legislation, the illicit trade in timber and timber products, and the illicit market for amphetamine-type stimulants. His work has been cited by other scholars, in government publications, and judicial decisions, including the High Court of Australia. He is a frequent commentator on organised crime and criminal law on national television, radio, and in newspapers.

Foreword

If crime crosses all borders, so must law enforcement. If the rule of law is undermined not only in one country but in many, then those who defend it cannot limit themselves to purely national means. If the enemies of progress and human rights seek to exploit the openness and opportunities of globalisation for their purposes, then we must exploit those very same factors to defend human rights, and defeat the forces of crime, corruption, and trafficking in human beings.

UN Secretary-General Mr. Kofi Annan at a ceremony marking the opening for signature of the United Nations Convention against Transnational Crime, Palermo, Italy, 12 December 2000.

Transnational organised crime is one of the major threats to human security. It impedes the social, economic, political, and cultural development of societies both in the Asia-Pacific region and around the world. It is a hydra-like phenomenon which manifests itself in different activities, including the trafficking of drugs, persons, forest products and endangered species, the smuggling of migrants, money laundering and cybercrime to name but a few.

UNODC sees one of its roles as working closely with national governments, organisations, academics, and civil society to build the knowledge and understanding of the problem. It is vital to first ensure that we have a solid understanding of the problem before we attempt to assist either at ground level through the building of technical capacity to counter transnational organized crime, or at a regional level through the strengthening of international cooperation towards the same end.

Our work falls squarely under the framework of the United Nations *Convention against Transnational Organised Crime*, which entered into force in September 2003, and which is dealt with extensively in this report. The Convention commits States Parties to introduce a range of measures, including the creation of domestic criminal offences to counter the problem, to adopt new frameworks for mutual legal assistance, extradition, law enforcement cooperation and technical assistance, and to provide training.

Many countries on the Pacific Rim have attempted to tackle the problem of organized crime through the introduction of specific legislation. This study – the first in our new Study Series, designed to bring to light recent research from the academic community – urges caution on that front. It also makes some specific recommendations for strengthening the criminal justice response over the long haul.

Perhaps most importantly, it calls for all jurisdictions in the Asia-Pacific region to work in a more harmonized and compatible manner when they criminalise and prosecute organized crime. Borders constrain domestic law enforcement, but they are irrelevant to transnational criminal organisations. If the epigram from Mr. Annan cited above could be consolidated into a short phrase, it would perhaps say: *“It takes a network to defeat a network”*. It is towards this goal that we are working.

Gary Lewis
Regional Representative
UNODC Regional Centre for East Asia and the Pacific
Bangkok, Thailand
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Executive Summary

Offences designed to penalise criminal organisations constitute the most recent and perhaps most ambitious strategy to fight organised crime. The common feature of these offences is that they are designed to target the structure, organisation, members, and associates of organised crime groups. Their shared rationale is the view that disrupting criminal activities and arresting individual offenders does not dismantle the criminal organisations that stand behind these illegal activities.

Four main types of organised crime offences are identified in this study. 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 nations;
2. The **participation model** stipulated by the *Convention against Transnational Organised Crime*, and also adopted in Canada, New Zealand, New South Wales, PR China, Macau, Taiwan, the Pacific Islands, and California;
3. The **enterprise model** based on the US *RICO Act*, which is also used in many US States, and the Philippines;
4. The **labelling/registration model** of Hong Kong, Singapore, Malaysia, Japan, New South Wales, and South Australia.

We must recognise the failure of the “organised crime laws” to win the “war on organised crime”.

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 organised crime continues to exist in every society in the region, regardless of the existence of specialised offences. Critics can argue that these “organised crime laws” failed to increase the feeling of safety within the community and did not, as some predicted, smash criminal organisations straight away.

The organised crime laws 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.

Moreover, the introduction of these special offences to penalise associations with criminal organisations marks a significant extension to criminal liability. The limits of this extension are often unclear and the various organised crime laws can lack sufficient safeguards to prevent their misuse. 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.

The study concludes that if the fight against organised crime is indeed a war, then the organised crime laws have not been able to secure a victory. Their mission has not been accomplished.

The organised offences cannot thus be seen as the ultimate solution to a phenomenon that has emerged in diverse places and circumstances, and that has reached global dimensions.

We must reduce our expectations of what can result from the organised crime laws.

Since it is unrealistic to expect that these offences achieve what no other strategy has ever accomplished, expectations must be lowered. The new offences must, at best, be viewed as a new tool to prevent and suppress organised crime in innovative ways by seeking to criminalise persons that have, thus far, been immune from prosecutions despite the persons' intimate involvement in very serious offences.

The study shows that — if designed carefully — the organised crime offences can create one 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. This, in turn, may help to destroy the larger criminal enterprises these leaders control.

We should recognise the significant impact and potential utility of the Convention on Transnational Organised Crime.

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. It marks a turning point in the commitment of the community of states to cooperate against transnational crime.

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 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 30 July 2009, 147 countries of the 192 UN member states had ratified it, with additional countries lined up to follow suit.

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.

1. To differentiate between different types and levels of involvement in a criminal group.

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, legislatures should criminalise persons who deliberately finance criminal organisations, especially if they seek to gain material or other benefit in return.

2. To create offences that target the involvement of criminal organisations in already-existing substantive offences.

Legislatures should explore the creation of offences (or aggravations to offences) targeting 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 factor to offences commonly associated with organised crime, justifying the imposition of higher penalties.

3. To improve the definition of ‘criminal organisation’ to reflect the unique characteristics of organised crime.

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 with the purpose to gain illicit profits or other material benefits.

The way ahead: A broader need to improve trans-jurisdictional cooperation in the fight against transnational organised crime

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. No-one can predict whether the economic rise and integration of many countries in the region will be accompanied by a further increase in organised crime.

However, in order to prevent and suppress organised crime more effectively throughout the region and close existing loopholes, it is important that all jurisdictions in the Asia Pacific region 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. Insofar as possible, the countries of the region should strive for the creation of more balanced and more consistent approaches. Although there is, to date, limited evidence of “jurisdiction-shopping” by organised crime groups, in the absence of a coordinated response, organised crime can be predicted to move among jurisdictions unless all jurisdictions in the region join forces.

It is possible that it will be a combination of innovative policing (including swifter procedures, tougher enforcement of existing laws, and better criminal intelligence), better know-how and equipment, and closer collaboration between countries which – in addition to the organised crime laws – will ultimately result in a reduction of organised crime activity.

Whether or not the Asia Pacific region succeeds over organised crime — or surrenders to it — is the collective responsibility of the whole region. In the end, it is the combined political will of all governments and civil societies in the region that will determine the future of the response to organised crime in the Asia Pacific. Whether or not there will be a Palermo on the Pacific Rim is ultimately up to us.