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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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4.2.2	Facilitating or committing of one or more serious offences, s 467.1(1)(b)	66
4.2.3	Material benefit, s 467.1(1)(b).....	67
4.3	Relevant Offences	68
4.3.1	Participation in activities of criminal organisation, s 467.11(1)	69
4.3.2	Commission of offence for criminal organisation, s 467.12(1).....	71
4.3.3	Instructing commission of offence for criminal organisation, s 467.13(1).....	73
4.4	Bills C-14 and C-15, 2009	76
4.5	Observations and Remarks	77
5	New Zealand	81
5.1	Former s 98A Crimes Act 1961 (NZ), 1997-2002	81
5.2	Section 98A Crimes Act 1961 (NZ), 2002–2009	83
5.2.1	Organised criminal group.....	83
5.2.2	Participation offence	86
5.2.3	Observations.....	88
5.3	Gangs and Organised Crime Bill 2009	89
6	Australia	92
6.1	Introduction.....	92
6.1.1	Organised crime in Australia: A snapshot.....	92
6.1.2	Criminal law in Australia.....	93
6.2.	New South Wales	94
6.2.1	Crimes Legislation Amendment (Gangs) Act 2006	94
6.2.2	Crimes (Criminal Organisations Control) Act 2009	104
6.3	Queensland	110
6.3.1	Organised criminal group.....	110
6.3.2	Participation in an organised criminal group	111
6.3.3	Further remarks	114
6.4	South Australia	115
6.4.1	Declared organisations	116
6.4.2	Control orders	119
6.4.3	Criminal association offences	120
6.4.4	Observations.....	121
6.5	Federal Initiatives	124
6.5.1	Australia’s ratification of the Convention against Transnational Organised Crime.....	124
6.5.2	Parliamentary inquiry into legislative arrangements to outlaw serious and organised crime groups 2008	125
6.5.3	Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.....	128
7	China.....	130
7.1	Context and Background	130
7.1.1	Patterns of organised crime in China.....	130
7.1.2	Criminal law in China	132
7.2.	Extension of Criminal Liability, Article 26.....	133
7.3	Offence for Criminal Syndicates, Article 294	134
7.3.1	Criminal organisations of a syndicate/triad nature	135
7.3.2	Organising, leading, participating in a criminal syndicate	139
7.4	Observations	141
8	Hong Kong SAR.....	142
8.1	Organised Crime in Hong Kong.....	142
8.1.1	Opium and other illicit drugs	142
8.1.2	Criminal organisations in Hong Kong.....	143
8.2	Organised and Serious Crime Ordinance.....	145
8.2.1	Definition of organised crime	146

8.2.2	Other provisions.....	148
8.3	Societies Ordinance	148
8.3.1	Unlawful societies	150
8.3.2	Offences associated with unlawful societies.....	150
8.4	Remarks	155
9	Macau SAR.....	157
9.1	Context and Overview	157
9.1.1	Organised crime in Macau	157
9.1.2	Criminal law in Macau.....	157
9.2	Criminal Associations, Penal Code (Macau)	159
9.3	Secret Societies/Associations, Organised Crime Law 1997 (Macau) ..	159
9.3.1	Definition of secret society/associations	159
9.3.2	Offences relating to secret societies/associations,	160
9.3.3	Specific Offences, arts 3–13 Organised Crime Law 1997 (Macau) ..	161
9.4	Observations	162
10	Taiwan.....	164
10.1	Organised Crime in Taiwan	164
10.2	Criminal Code (Taiwan).....	166
10.3	Organised Crime Control Act 1996.....	167
10.3.1.	Definition of criminal organisation	167
10.3.2	Creating/controlling criminal organisations	169
10.3.3	Participating in a criminal organisation	170
10.3.4	Financing criminal organisations.....	170
10.3.5	Offences for public officials	170
10.3.6	Other provisions.....	171
10.4	Remarks	171
11	Singapore.....	172
11.1	Conspiracy Provisions	172
11.1.1	Criminal conspiracy.....	172
11.1.2.	Abetment by conspiracy.....	173
11.1.3	Observations.....	174
11.2	Societies Act.....	175
11.2.1	Meaning of societies	175
11.2.2	Criminal offences for unlawful societies and triads	176
11.2.3	Remarks.....	177
12	Malaysia	178
12.1	Organised Crime in Malaysia	178
12.2	Criminal Conspiracy Laws	178
12.3	Societies Act 1966.....	179
13	Brunei Darussalam.....	181
14	Indonesia.....	182
15	Philippines.....	183
15.1	Patterns of Organised Crime in the Philippines.....	183
15.2	Racketeer Influenced and Corrupt Organisation Laws	184
15.2.1	Participation offence	185
15.2.2	Proceeds of crime and money laundering offences.....	186
15.2.3	Observations.....	187
16	Vietnam	188
16.1	Organised Crime	188
16.1.1	Organised crime in Vietnam.....	188
16.1.2	Vietnamese organised crime abroad	188
16.2	Organised Crime in Vietnam's Criminal Law	189
17	Cambodia.....	191
18	Lao PDR.....	192
19	Thailand	193

19.1	Organised Crime in Thailand	193
19.2	Organised Crime Offences	193
20	Japan	195
20.1	Yakuza & Boryokudan: Organised Crime in Japan	195
20.2	Organised Crime under Japan's Criminal Law	198
20.2.1	Law to Prevent Unjust Acts by Organised Crime Group Members 1991	199
20.2.2	Law for Punishment of Organised Crimes, Control of Crime Proceeds and Other Matters 2000	201
20.2.3	Remarks.....	201
21	Republic of Korea (South Korea)	205
21.1	Organised Crime in South Korea.....	205
21.2	Organised Crime Legislation	206
21.2.1	Organisation of criminal group, art 114(1) Criminal Code (ROK)	206
21.2.2	Criminal organisation offences, art 4 Act on the Aggravated Punishment of Violence	207
22	Pacific Islands	209
22.1	Patterns of Organised Crime in the South Pacific	209
22.2	Criminal Law in the Pacific Islands	211
22.2.1	Sources.....	211
22.2.2	Conspiracy	212
22.3	Organised Crime Laws	213
22.3.1	Adoption of the Palermo Convention	213
22.3.3	Regional initiatives: Pacific Islands Forum.....	214
22.3.4	Cook Islands	218
23	United States of America	222
23.1	RICO: Racketeer Influenced and Corrupt Organisations Act	222
23.1.1	Purpose and background.....	222
23.1.2	RICO offences, §1962	223
23.1.3	Pattern of racketeering activity.....	228
23.1.4	Collection of an unlawful debt.....	231
23.1.5	Enterprise.....	232
23.1.6	Criminal penalties and civil remedies.....	234
23.1.7	Case examples	236
23.1.8	Evaluation	238
23.2.	Continuing Criminal Enterprise (CCE).....	242
23.2.1	Definition of continuing criminal enterprise	242
23.2.2	Offences and penalties	243
23.3	State RICO	243
23.4	New York: Organised Crime Control Act 1986	245
23.4.1	Background and purpose.....	245
23.4.2	Criminal enterprise.....	246
23.4.3	Enterprise corruption.....	247
23.4.4	Observations.....	251
23.5	California: Street Terrorism Enforcement and Prevention Act.....	252
23.5.1	Background and purpose.....	252
23.5.2	Criminal street gang.....	253
23.5.3	Criminal offences	255
23.5.4	Gang conspiracy offence	257
23.5.5	Other provisions.....	258
23.5.6	Observations.....	258
PART 4	261	
CONCLUSION	261
24	Observations	262
24.1	The Need and Rationale of Organised Crime Offences	262

24.2	Models of Organised Crime Offences	263
24.2.1	The conspiracy model.....	264
24.2.2	The participation model.....	265
24.2.3	The RICO model.....	269
24.2.4	The labelling/registration model.....	272
24.2.5	Other models	276
24.2.6	Evidence	276
24.2.7	Penalties	277
24.3	Definition of Organised Crime	278
24.3.1	Structural elements	278
24.3.2	Purpose of the organisation.....	281
24.3.3	Activities of the organisation	283
24.3.4	Enterprise.....	284
24.3.5	Observations.....	285
24.4	Limits of Liability	286
24.5	Implementation and Enforcement.....	291
24.6	Research, Data, and Literature	294
25	The Way Ahead	295
	Bibliography	301

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.

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UNODC Regional Centre for East Asia and the Pacific
Bangkok, Thailand
31 August 2009

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
FSM	Federated States of Micronesia
HKD	Hong Kong Dollar
ICCPR	International Covenant for Civil and Political Rights
INCB	International Narcotics Control Board
KMT	Kuomintang
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)
PIF	Pacific Islands Forum
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
SPCOC	South Pacific Chiefs of Police Conference
STDM	Sociedade de Turismo e Diversoes de Macau
STEP	Street Terrorism Enforcement and Prevention (Act (CA))
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.

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

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.

PART 1

**INTRODUCTION,
BACKGROUND, AND
CONTEXT**

1. Introduction

This study analyses organised crime legislation in the Asia Pacific region. It examines domestic offences criminalising participation in criminal organisations and equivalent provisions penalising the existence and operation of organised crime. 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 study 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 limited 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 Asia Pacific, 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 adequately 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 1970¹ and art 416bis

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.

'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

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'.⁴ 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."⁵

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.⁶ 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 its 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

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

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

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

⁵ *Ibid*, at 304.

⁶ UNODC, *United Nations Convention against Transnational Organized Crime*, www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (status as on 26 Sep 2008; accessed 29 July 2009).

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 offences proposed by the *Palermo Convention* and the various provisions adopted in domestic laws are designed to prevent the formation, expansion, and activities of criminal organisations and suppress any association with and support of these entities. These laws raise concerns about extensions to criminal liability and many critics argue that they create guilt by association. Questions arise 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:

[J]ust how much has an individual to do in order to be included in the net of those who are regarded as accountable under the criminal law for bringing an offence about. [...] [J]ust what and how much must she or he know, believe or suspect for it to be just to regard her or him as blameworthy? And what if she or he has a change of mind? Should it be possible to withdraw from the involvement in the criminal enterprise, thereby avoiding liability for it, especially once an offence has been embarked upon; and, if so, how?⁷

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', 'gangsterism' 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, each containing several chapters.

Part 1 includes an introductory chapter that canvasses the background and significance of organised crime as well as the purpose, structure, and methodology of

⁷ Estelle Baker, 'The legal regulation of transnational organised crime', in Adam Edward & Peter Gill (eds), *Transnational Organised Crime: Perspectives on Global Security* (2003) 183 at 189.

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 statutes, 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 August 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.⁸

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 often 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.⁹

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',¹⁰ remarks Michael Goldsmith.

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.¹¹ '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 than individual action toward the same end.'¹² According to Estelle Baker, the 'truly invidious character' of criminal organisations stems 'from the potential of such organisations to accumulate a concentration of illicit power of such magnitude that they can begin to challenge the authority of the state.'¹³ 'In the same manner, society has an immense interest in preventing crime committed by gangs', remarks Raffy Astvasadoorian.¹⁴

⁸ Ronald Keith & Zhihui Lin, *New Crime in China* (2006) 94.

⁹ See also Frank Verbruggen, 'On Containing Organised Crime Using "Container Offences"', in HJ Albrecht & C Fijnaut (eds), *The Containment of Transnational Organised Crime* (2002) 113 at 116–117.

¹⁰ Goldsmith, 'RICO and Enterprise Criminality', at 775.

¹¹ Fred Abbate, 'The Conspiracy Doctrine: A Critique', in Michael J Gorr & Stirling Harwood (eds), *Controversies in Criminal Law* (1992) 55 at 55.

¹² Ethan Gerber, "'A RICO you can't refuse': New York's Organised Crime Control Act' (1988) 53 *Brooklyn Law Review* 979 at 1003.

¹³ Baker, 'The legal regulation of transnational organised crime', at 187.

¹⁴ Raffy Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence' (1998) 19 *Journal of Juvenile Law* 272 at 298-299.

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:

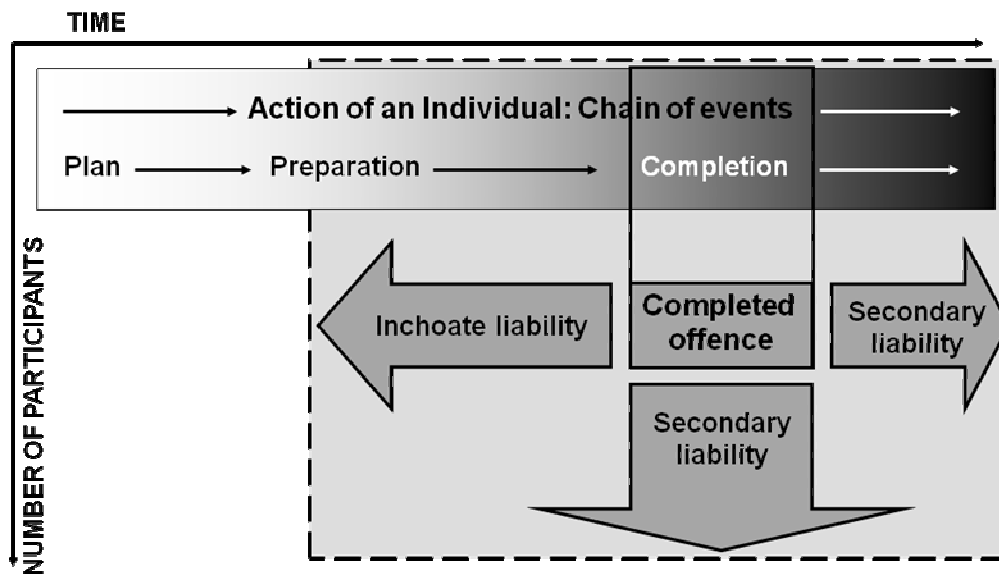
- 1 proof of the voluntary occurrence of the (physical/external) elements specified in the offence an accused is charged with;
- 2 proof of mental elements of that offence (if required) to make a person criminally responsible for that conduct; and also
- 3 absence of any defences (justifications or excuses) that would negative criminal responsibility for the offence.¹⁵

Absence of one or more elements of an offence does 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).¹⁶

¹⁵ 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.

¹⁶ 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.

Figure 1 Extensions of criminal liability¹⁷

These extensions of criminal liability are not without controversy. In particular, it is questionable how punishment can be justified and warranted for inchoate offences if no crime is completed and no harm occurs. In relation to secondary liability it is also debatable just how remotely a person can be connected to a criminal offence and still be liable for his/her connection to it.¹⁸

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 trying the same.
- Third, it is argued that criminal law should focus on culpability rather than outcome.¹⁹ 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'.²⁰

¹⁷ Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008) 94.

¹⁸ See further Section 2.3.3 below.

¹⁹ H L A Hart, 'The House of Lords on Attempting the Impossible', in C F H Tapper (ed), *Crime, Proof and Punishment; Essays in Memory of Sir Rupert Cross* (1981) 149–166.

²⁰ Gillies, *Criminal Law*, 670. See further Schloenhardt, *Queensland Criminal Law*, 94–95.

2.1.1 Inchoate liability

Attempt and other inchoate offences such as incitement and conspiracy²¹ 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').²² 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 is 'sufficiently proximate' and not 'merely preparatory' is considered punishable.²³ 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.²⁴

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.²⁵

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.²⁶ 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.

²¹ Conspiracy is discussed separately in Section 2.1.3 below.

²² See further, Schloenhardt, *Queensland Criminal Law*, 96 with further references.

²³ *Britten v Alpogut* [1987] VR 929 at 939 per Murphy J.

²⁴ See further, Schloenhardt, *Queensland Criminal Law*, 107–112; Bronitt & McSherry, *Principles of Criminal Law*, 404–408; Gillies, *Criminal Law*, 673–679.

²⁵ *R v Smith* [1975] AC 476.

²⁶ See, for example, s 4(1) *Criminal Code* (Qld).

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.²⁷ 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'.²⁸

Secondary liability may arise for conduct that occurred before or during the commission of the principal offence, hence the term '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.²⁹

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'.³⁰

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 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.³¹

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.³² 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 is outside the scope of the accused's contemplation.³³

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

²⁷ Bronitt & McSherry, *Principles of Criminal Law*, 341–344; David Lanham et al, *Criminal Laws in Australia* (2006) 480–482.

²⁸ McSherry & Naylor, *Australian Criminal Laws*, 426.

²⁹ Schloenhardt, *Queensland Criminal Law*, 126.

³⁰ *R v Russell* [1933] VR 59 at 67 per Cussen ACJ. See further Bronitt & McSherry, *Principles of Criminal Law*, 349–358; Lanham et al, *Criminal Laws in Australia*, 492–499.

³¹ Cf Louis Waller & CR Williams, *Criminal Law* (10th ed, 2005) para 10.67.

³² *Giorgianni v R* (1985) 156 CLR 473 at 487–488 per Gibbs CJ.

³³ R Graham Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (7th ed, 2008) paras 9.12–9.13. Cf Bronitt & McSherry, *Principles of Criminal Law*, 358–364; Lanham et al, *Criminal Laws in Australia*, 499–509.

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 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,³⁴ especially those 'who plan and organise crimes but take no part in their actual commissions'.³⁵ 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.³⁶

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';³⁷ it exists even without preparation of the contemplated offence.³⁸ 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.³⁹ 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.⁴⁰

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

³⁵ Waller & Williams, *Criminal Law*, para 10.66.

³⁶ 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.

³⁷ David Watt & Michelle Fuerst, *2008 Tremeeear'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', Colvin & McKechnie, *Criminal Law in Queensland and Western Australia*, para 19.22.

³⁸ *R v Trudel* (1984) 12 CCC (3d) 342.

³⁹ 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.

⁴⁰ Schloenhardt, *Queensland Criminal Law*, 118.

Elements of conspiracy

In essence, liability for conspiracy arises when two or more persons enter into an agreement to commit an unlawful act⁴¹ with the intention to commit that unlawful act.⁴² Unlike attempt, there is no requirement to demonstrate that the accused came close ('proximate') to the completion of the substantive offence.⁴³

At the heart of liability for conspiracy is the agreement to commit a criminal offence or to effect an unlawful purpose.⁴⁴ 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.⁴⁵ While the agreement cannot exist without communication between the conspirators, there is no requirement that the parties to the agreement know each other. All that is required is that each conspirator is committed to the agreed objective. There is no requirement regarding the level of involvement of a conspirator in the agreement. The agreement may envisage that all conspirators equally take some action towards the agreed goal, but a conspirator may also be part of the agreement without carrying out any conduct towards the common objective.⁴⁶

The agreement between the conspirators imports an intention that the unlawful act or purpose of the agreement be done.⁴⁷ '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'.⁴⁸

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.⁴⁹ 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.⁵⁰ At common law,⁵¹ in Canada,⁵² New Zealand,⁵³ Queensland,⁵⁴ Victoria,⁵⁵ and Western Australia,⁵⁶

⁴¹ *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.

⁴² 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.

⁴³ Glanville Williams, *Criminal Law: the general part* (2nd ed, 1961) 710.

⁴⁴ '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.

⁴⁵ *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).

⁴⁶ Cf Bronitt & McSherry, *Principles of Criminal Law*, 416–424; Brown et al, *Criminal Laws*, 1092–1103; Colvin & McKechnie, *Criminal Law in Queensland and Western Australia*, para 19.22; Lanham et al, *Criminal Laws in Australia*, 469–470, 471–475.

⁴⁷ *R v Rogerson* (1992) 174 CLR 268; *R v O'Brien* (1954) 110 C.C.C. 1

⁴⁸ MJ Shanahan et al, *Carter's Criminal Law of Queensland* (16th ed, 2006) s 541.20; cf *Gerakiteys v R* (1984) 153 CLR 317

⁴⁹ Donald Stuart, *Canadian Criminal Law* (5th ed, 2007) 705.

⁵⁰ 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.

⁵¹ '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.

⁵² 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

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.⁵⁷ 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.⁵⁸

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*⁵⁹ 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 prosecution to prove what occurred in a private meeting between conspirators’⁶⁰ and because ‘the authorities generally do not learn of the conspiracy until it has been transacted, wholly or partly.’⁶¹

Conspiracy and organised crime

One of the practical advantages of conspiracy is that it allows merging of the prosecution of several charges against multiple persons,⁶² 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.⁶³ ‘The conspiracy prosecution’, remarks Clay Powell, ‘has the great advantage of combining all the isolated acts to put together the full picture.’⁶⁴ The difficulty resulting from this combining of offences and offenders is the complexity of conspiracy prosecutions and trials. Douglas Meagher notes: ‘Where the number charged exceeds five or six, the trial tends to become unmanageable’.⁶⁵

was no effort towards achieving the common purpose once agreement is proved.’ Stuart, *Canadian Criminal Law*, 688-689.

⁵³ *R v Gemmell* [1985] 2 NZLR 740 at 743. Cf *R v Johnston* (1986) 2 CRNZ 289; *R v Sanders* [1984] 1 NZLR 636.

⁵⁴ Sections 541, 542 *Criminal Code* (Qld)

⁵⁵ Section 321(1), (2) *Crimes Act* 1958 (Vic).

⁵⁶ *Poulters’ Case* (1611) 77 ER 813. Colvin & McKechnie, *Criminal Law in Queensland and Western Australia*, para 19.22.

⁵⁷ ‘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.

⁵⁸ *R v Gudgeon* (1995) 133 ALR 379; cf Shanahan et al, *Carter’s Criminal Law of Queensland*, s 541.20.

⁵⁹ See Section 3.3.1 below.

⁶⁰ McSherry & Naylor, *Australian Criminal Laws*, 390. Cf *R v Gassyt* (1998) 127 CCC (3d) 546; AP Simester & WJ Brookbanks, *Principles of Criminal Law* (2nd ed, 2002) 265.

⁶¹ Peter Gillies, ‘Secondary Offences and Conspiracy’ (1991) 15 *Criminal Law Journal* 157 at 161.

⁶² Cf *ibid*, at 162.

⁶³ Cf *R v Shepherd* (1988) 37 A Crim R 303 at 309-310.

⁶⁴ Powell, ‘Conspiracy Prosecutions’, at 43.

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

In practice, conspiracy charges frequently involve criminal groups involved in the trafficking, supply, or sale of illicit drugs.⁶⁶ 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.⁶⁷

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,⁶⁸ 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.'⁶⁹ 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.⁷⁰ Mere knowledge or recklessness of the agreement does not suffice to establish liability for conspiracy.⁷¹ Furthermore, some criminal organisations engage in a diverse range of illegal transactions that cannot be tied together as a single common agreement.⁷²

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 organisations create a "corporate veil" to insulate them from liability',⁷³ 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.⁷⁴

Third, senior members of criminal organisation may give instructions about the general type and nature of criminal activity to be carried out, but this 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

⁶⁶ 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.

⁶⁷ Cf Adamoli et al, *Organised Crime around the World*, 132.

⁶⁸ Michael Levi & Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales* (2002) 16.

⁶⁹ *Ibid.*, at 148.

⁷⁰ Cf Meagher, *Organised Crime*, 64.

⁷¹ *R v Alexander* (2005) 206 CCC (3d) 233; *R v Roche* (2004) 192 CCC (3d) 557.

⁷² See, for example, *US v Elliot* 571 F.2d 880 (5th Cir.1978), as case in which the members 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.

⁷³ Christopher Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime' (1998) 69 *International Review of Penal Law* 69 at 78.

⁷⁴ Peter Hill, *The Japanese Mafia* (2003) 148–149. See Section 2.2 below for case examples.

closely related crimes, it does not contemplate the activities of a multi-faceted criminal enterprise.⁷⁵

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.⁷⁶

2.2 Case Examples

'[T]he explanation for why transnational organised crime poses such a profound challenge for criminal law regulation is that it makes a bad "fit" with the propositions that have just been sketched out',⁷⁷ notes Estelle Baker. 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 Alphonse 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 1933.⁷⁸ The planning of the so-called Valentine's Day massacre of 1929, in which seven members of a rival gang were brutally murdered in a machine gun fire, has also been attributed to Al Capone.⁷⁹ 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.⁸⁰ 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.⁸¹ 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

⁷⁵ Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 16.

⁷⁶ Hocking, *The Law of Criminal Conspiracy*, 377.

⁷⁷ Baker, 'The legal regulation of transnational organised crime', at 186.

⁷⁸ Anecdotally, the term money laundering is often attributed to Al Capone as he used a number of laundrettes to disguise the true origin of his funds and also worked with associates who would transfer proceeds of his crime to Switzerland and to other offshore banks. The term money laundering was, however, not used during the Prohibition era and appears to originate in newspaper articles published in relation to the Watergate scandal during Richard Nixon's US presidency.

⁷⁹ Lauren Bergreen, *Capone, The Man and the Era* (1996) 308-309.

⁸⁰ John Kobler, *Capone: The Life and World of Al Capone* (1971) 214-215.

⁸¹ 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.

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.⁸²

The only crime Al Capone was ever convicted for was tax evasion as his unlawful income was subject to income tax.⁸³ He was imprisoned for this offence between 1932 and 1939, first in Atlanta (GA) and from 1934 in Alcatraz, San Francisco (CA).⁸⁴ 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.

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.⁸⁵ 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,⁸⁶

⁸² Ibid, at 610.

⁸³ *United States v Sullivan* (274 US 259); *Capone v US* (1932) 56 F.2d 927; cf Bergreen, *Capone, The Man and the Era*, 440-492.

⁸⁴ For further reading see Howard Abadinsky, *Organized Crime* (8th ed, 2007) 85-94.

⁸⁵ See further Lee Lamothe & Adrian Humphreys, *The Sixth Family* (2006) 2-9.

⁸⁶ See also Section 23.1.7 below.

Italy, and various offshoots in the Caribbean.⁸⁷ Gradually, Rizzuto 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.⁸⁸ 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.⁸⁹

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 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 2009.⁹⁰

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 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:

⁸⁷ Tom Blickman, 'The Rothschilds of the Mafia on Aruba' (1997) 3(2) *Transnational Organized Crime* 50 at 52, 53, 60, 63; Lamothe & Humphreys, *The Sixth Family*, 9-20.

⁸⁸ Ingrid Peritz, 'Reputed patriarch of Canadian crime family walks free' (17 Oct 2008) *The Globe and Mail*, A5.

⁸⁹ See further Lamothe & Humphreys, *The Sixth Family*, 29-362.

⁹⁰ Mark Lander, 'Clinton says demand for illegal drugs in the US "fuels the drug trade" in Mexico' (26 Mar 2009) *New York Times*, 5.

- A provider of food or lodging to criminal organisations whose business has quadrupled since the crime group began to use his services.⁹¹
- A motor mechanic who fixes motorbikes for an outlaw motorcycle gang, being aware of the criminal activities the gang is involved in.⁹²
- A person buying (or selling) t-shirts bearing the logo of a criminal organisation.⁹³
- 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.'⁹⁴

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

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

A major problem with addressing organised crime is to criminalise conduct sufficiently to reach far enough into the organised criminal hierarchy to implicate leadership and the “soldiers” of organised crime — those engaged in the day-to-day “crime wars” (the robbers, pushers, “hit-men”, pimps) without endangering human rights.⁹⁵

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

⁹¹ Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', at 79.

⁹² 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.

⁹³ Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minister for Justice)). See Section also 8.3.2 below.

⁹⁴ *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 111 per Holmes J.

⁹⁵ Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', at 78.

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 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 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.⁹⁶

Canadian scholar Kent Roach also argues that outlawing membership in an organisation infringes on the freedom of association.⁹⁷ 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?'⁹⁸

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.'⁹⁹

⁹⁶ Wise, 'RICO and its Analogues', at 321.

⁹⁷ Kent Roach, 'Panicking over Criminal Organizations: We Don't Need Another Offence' (2000) 44(1) *Criminal Law Quarterly* 1 at 2.

⁹⁸ Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', at 79.

⁹⁹ 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, 2000,¹⁰⁰ 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.¹⁰¹ Today, the Convention has 147 Signatories and all 147 Signatories have ratified it.¹⁰² The Convention entered into force on September 29, 2003.¹⁰³

The *Convention* is supplemented by three protocols: the *Protocol against the Smuggling of Migrants by Land, Air, and Sea*,¹⁰⁴ the *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children*,¹⁰⁵ and the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition*.¹⁰⁶ The principal *Convention* is frequently referred to as the 'parent convention' as it is intended to set out general rules about organised crime that also impact on the application and interpretation of the three protocols, a 'system which can easily be supplemented by additional protocols in the future which then may focus on other specific, maybe new, upcoming areas of transnational organised crime.'¹⁰⁷

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.'¹⁰⁸ The Convention has two main goals:¹⁰⁹ 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.

¹⁰⁰ 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).

¹⁰¹ See *ibid*, Annex I for the full text of the Convention in its final form. The text has also been reprinted in (2001) 40 ILM 335.

¹⁰² UNODC, www.unodc.org/unodc/en/treaties/CTOC/signatures.html (accessed 23 July 2009).

¹⁰³ Cf Article 38 *Convention against Transnational Organised Crime*.

¹⁰⁴ 40 ILM 384 (2001).

¹⁰⁵ 40 ILM 377 (2001).

¹⁰⁶ UN Doc A/55/255 (31 May 2001).

¹⁰⁷ Michael Kilchling, 'Substantive Aspects of the UN Convention against Transnational Organised Crime', in HJ Albrecht & C Fijnaut (eds), *The Containment of Transnational Organised Crime* (2002) 83 at 87.

¹⁰⁸ 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.

¹⁰⁹ See further, Andreas Schloenhardt, 'Transnational Organised Crime and International Law: The Palermo Convention' (2005) 29 *Criminal Law Journal* 350-364.

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.¹¹⁰

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. 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.¹¹¹

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 1994.¹¹² 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'.¹¹³

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 crime¹¹⁴ and the development of appropriate countermeasures.¹¹⁵ 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.¹¹⁶

¹¹⁰ Vlassis, 'The United Nations Convention against Transnational Organized Crime and its Protocols', 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.

¹¹¹ Blickman, 'The Rothschilds of the Mafia on Aruba', at 55.

¹¹² UN General Assembly, *Crime Prevention and Criminal Justice*, UN Doc A/RES/48/103 (20 Dec 1993). See further Peter Gastrow, 'The Origin of the Convention', in HJ Albrecht & C Fijnaut (eds), *The Containment of Transnational Organised Crime* (2002) 19 at 24-27.

¹¹³ 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).

¹¹⁴ 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).

¹¹⁵ The background papers to the conference (UN Docs E/CONF.88/1-6) have also been reprinted in M Cherif Bassiouni & 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.

¹¹⁶ See *Convention against Transnational Organized Crime* 40 ILM 353 at [5] (2001); and UN ECOSOC, *World Ministerial Conference against Organized Transnational Crime*,

The conference concluded the *Naples Political Declaration and Global Action Plan against Organised Transnational Crime* (hereinafter the *Naples Declaration*)¹¹⁷ 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).¹¹⁸ In December 1994, the UN General Assembly endorsed the *Naples Declaration*,¹¹⁹ thus opening the way for the elaboration of an international convention against transnational organised crime under the auspices of the UN.¹²⁰

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.¹²¹ 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, 1997.¹²² 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.¹²³ The expert group met in Warsaw, February 2-6, 1998¹²⁴ 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 1998.¹²⁵ The

'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.

¹¹⁷ *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).

¹¹⁸ See further Vlassis, 'The United Nations Convention against Transnational Organized Crime and its Protocols', at 78-80; McClean, *Transnational Organized Crime*, 3-4; Vlassis, 'Challenges in the Development of International Criminal Law', at 910-911.

¹¹⁹ UN General Assembly, *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc A/RES/49/159 (23 Dec 1994) [3].

¹²⁰ See further McClean, *Transnational Organized Crime*, 6-8; Vlassis, 'Challenges in the Development of International Criminal Law', at 912-914; Gastrow, 'The Origin of the Convention', at 27-29.

¹²¹ 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 Vlassis, 'The United Nations Convention against Transnational Organized Crime and its Protocols', at 80-82; McClean, *Transnational Organized Crime*, 6-7; Vlassis, 'Challenges in the Development of International Criminal Law', at 914-915.

¹²² See further McClean, *Transnational Organized Crime*, 7-8.

¹²³ 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, McClean, *Transnational Organized Crime*, 8-9.

¹²⁴ See further, Vlassis, 'Challenges in the Development of International Criminal Law', 917-918.

¹²⁵ 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*

Commission then decided to establish an in-session 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.¹²⁶ 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:

- (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.¹²⁷

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 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 2001.¹²⁸ 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.’¹²⁹

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

transnational crime and other international instruments, UN Doc E/CN.15/1998/5 (18 Feb 1998).

¹²⁶ Vlassis, ‘The United Nations Convention against Transnational Organized Crime and its Protocols’, at 82-85.

¹²⁷ 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].

¹²⁸ 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 Vlassis, ‘The United Nations Convention against Transnational Organized Crime and its Protocols’, at 87-88; McClean, *Transnational Organized Crime*, 9–13.

¹²⁹ Vlassis, ‘The United Nations Convention against Transnational Organized Crime and its Protocols’, at 76, 88; Vlassis, ‘Challenges in the Development of International Criminal Law’, at 920–925.

(art 6),¹³⁰ corruption (art 8),¹³¹ and obstruction of justice (art 23). The *Legislative Guides* to the Convention stress 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 authorities. They constitute, therefore, the cornerstone of a global and coordinated effort to counter serious and well-organised criminal markets, enterprises, and activities.¹³²

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.¹³³

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.¹³⁴

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	<ul style="list-style-type: none"> • Structured group, art 2(c); • Three or more persons; • Existing for a period of time and acting in concert.
Activities	<ul style="list-style-type: none"> • [no element]
Objectives	<ul style="list-style-type: none"> • 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.

¹³⁰ 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.

¹³¹ Clark, ‘The United Nations Convention against Transnational Organized Crime’, at 175-176.

¹³² UNODC, Division for Treaty Affairs, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) [hereinafter *Legislative Guides*] 17.

¹³³ See further Schloenhardt, ‘Transnational Organized Crime and International Criminal Law’, at 956–960.

¹³⁴ For more on the development and history of this definition see McClean, *Transnational Organized Crime*, 38–40.

The following paragraphs explore the individual elements of this definition in more detail.¹³⁵

3.2.1 Structured group of three or more persons

The definition in art 2(a) focuses specifically on sophisticated criminal organisations and on the people that constitute that organisation, rather than focusing on the activities the organisation and its members engage in.¹³⁶

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.¹³⁷ Acts committed by individuals or less than three persons,¹³⁸ or acts done by three persons not ‘acting in concert’ also fall outside the scope of the Convention.¹³⁹ Signatories to the Convention are, however, free to raise or lower the number of members required by this definition.¹⁴⁰

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.’¹⁴¹ 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.¹⁴²

¹³⁵ See also McClean, *Transnational Organized Crime*, 41–42; Schloenhardt, ‘Transnational Organized Crime and International Criminal Law’, at 950–952.

¹³⁶ Cf Freedman, ‘The New Law on Criminal Organizations in Canada’, at 192.

¹³⁷ 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; McClean, *Transnational Organized Crime*, 43.

¹³⁸ 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, ‘Organized Crime and Terrorist Criminal Activities’ (1990) 4(1) *Emory International Law Review* 9 at 10: ‘By definition, organised crime cannot be committed by a single individual’.

¹³⁹ McClean, *Transnational Organized Crime*, 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.’

¹⁴⁰ 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.

¹⁴¹ *Travaux Préparatoires*, para 4. Cf Orlova & Moore, ‘“Umbrellas” or “Building Blocks”?: Defining International Terrorism and Transnational Organised Crime in International Law’, at 282; McClean, *Transnational Organized Crime*, 43.

¹⁴² *Legislative Guides*, 14.

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.¹⁴³ The Convention recognises that the ongoing existence of criminal organisations is generally independent from individual criminal activities; organised crime is characterised by criminal activities on a sustained, repeated basis. Furthermore, the continued existence of large criminal organisations is largely independent from individual members; their operations generally continue after individuals are arrested, die, or otherwise leave the organisation.¹⁴⁴

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.'¹⁴⁵ 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. '[T]he law ends up by embracing groups of subjects involved in highly differentiated criminal activities that vary according to the countries in which they operate', notes Vincenzo Militello.¹⁴⁶ 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.'¹⁴⁷ 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

¹⁴³ Cf Gianluca Fiorentini & Sam Peltzman, 'Introduction' in Gianluca Fiorentini & Sam Peltzman (eds), *The Economics of Organised Crime* (1995) 3; G Fitzgerald (1989) in Paul Dickie & Phil Wilson, 'Defining Organised Crime — An Operational Perspective' (1993) 4(3) *Current Issues in Criminal Justice* 215 at 217.

¹⁴⁴ Cf Bassiouni, 'Organized Crime and Terrorist Criminal Activities', at 11; McClean, *Transnational Organized Crime*, 41; Hill, *The Japanese Mafia*, 149.

¹⁴⁵ 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); McClean, *Transnational Organized Crime*, 42.

¹⁴⁶ Vincenzo Militello, 'Participation in an Organised Criminal Group as International Offence', in HJ Albrecht & Cyrille Fijnaut (eds), *The Containment of Transnational Organised Crime* (2002) 97 at 102.

¹⁴⁷ Clark, 'The United Nations Convention against Transnational Organized Crime', at 169.

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.¹⁴⁸

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.¹⁴⁹ 'Because domestic laws, and not international standards, determine this aspect of the definition, some states may change the penalties in their domestic criminal statutes to remove crimes from the scope of the Convention,'¹⁵⁰ notes Jennifer Smith. Carrie-Lyn Donigan Guymon suggests that 'this provision would be more meaningful if there were a more definitive list of what constitutes serious crime',¹⁵¹ a point also supported by Militello.¹⁵²

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'.¹⁵³

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.¹⁵⁴ The *Legislative Guides* specifically state that '[t]his is to ensure that organisations trafficking in human beings or child pornography for sexual and not monetary reasons are not excluded'.¹⁵⁵

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'¹⁵⁶ seem unwarranted. Indeed, the *Legislative Guides* to the Convention note that the definition is intended to exclude groups with purely political or social motives:

¹⁴⁸ Freedman, 'The New Law on Criminal Organizations in Canada', at 196. See also Orlova & Moore, "Umbrellas" or "Building Blocks"?: Defining International Terrorism and Transnational Organised Crime in International Law', at 284.

¹⁴⁹ Cf *Legislative Guides*, 14.

¹⁵⁰ Jennifer Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity' (2009) 97 *Georgetown Law Journal* 1111 at 1119.

¹⁵¹ Carie-Lyn Donigan Guymon, 'International Legal Mechanisms for Combating Transnational Organised Crime' (2000) 18 *Berkeley Journal of International Law* 53 at 95.

¹⁵² Militello, 'Participation in an Organised Criminal Group as International Offence', at 102.

¹⁵³ Orlova & Moore, "Umbrellas" or "Building Blocks"?: Defining International Terrorism and Transnational Organised Crime in International Law', at 283. See also McClean, *Transnational Organized Crime*, 41.

¹⁵⁴ *Travaux Préparatoires*, para 3.

¹⁵⁵ *Legislative Guides*, 13 (with reference to the *Travaux Préparatoires*).

¹⁵⁶ Orlova & Moore, "Umbrellas" or "Building Blocks"?: Defining International Terrorism and Transnational Organised Crime in International Law', at 283

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).¹⁵⁷

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.¹⁵⁸

In summary, the definition of organised criminal group under the *Palermo Convention* captures some of the established characteristics of criminal organisations and allows enough flexibility to target a diverse range of associations and to respond to the ever changing features and structures of organised crime. On the other hand, the definition in art 2 is seen by many as no more than the lowest common denominator, ‘referring to almost every kind of formation, thus rendering it almost meaningless’.¹⁵⁹ Alexandra Orlova and James Moore have described the definition as ‘a conceptually weak compromise definition that is, at once, overly broad and under inclusive.’¹⁶⁰ In a recent paper, Jennifer M Smith commented that:

The United Nations (UN) Convention against Transnational Organised Crime will not be a completely effective mechanism to counter organised crime either, because it lacks international standards to define organised crime and an international mechanism to enforce and punish organised crime.¹⁶¹

Donigan Guymon remarks that:

Perhaps one of the most significant failures of the drafters of the UN Convention thus far has been the removal from the draft of any attempt to describe or define the activities of international organised crime, a key element of an effective international convention addressing transnational organised crime.¹⁶²

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.’¹⁶³

¹⁵⁷ *Legislative Guides*, 13.

¹⁵⁸ McClean, *Transnational Organized Crime*, 40.

¹⁵⁹ Orlova & Moore, “‘Umbrellas’ or “‘Building Blocks’?: Defining International Terrorism and Transnational Organised Crime in International Law’, at 283.

¹⁶⁰ *Ibid*, at 304. See also Militello, ‘Participation in an Organised Criminal Group as International Offence’, at 103.

¹⁶¹ Smith, ‘An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity’, at 1115.

¹⁶² Donigan Guymon, ‘International Legal Mechanisms for Combating Transnational Organised Crime’, at 93. See further Section 24.3.3 below.

¹⁶³ Keith Morrell, Director, United Nations, Criminal Law and Treaty Division, Department of Foreign Affairs and International Trade, Canada (23 Oct 2003) cited in Orlova & Moore, “‘Umbrellas’ or “‘Building Blocks’?: Defining International Terrorism and Transnational Organised Crime in International Law’, at 285.

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

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

[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

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

[...]

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).¹⁶⁴ 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).¹⁶⁵ Article 34, however, requires that the 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').¹⁶⁶

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,¹⁶⁷ 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 agreement¹⁶⁸).¹⁶⁹ Figure 3 below, however, shows that several jurisdictions have opted to use both models simultaneously.

¹⁶⁴ See further, McClean, *Transnational Organized Crime*, 51–52.

¹⁶⁵ See further, *ibid*, 52–56.

¹⁶⁶ Cf Schloenhardt, 'Transnational Organized Crime and International Criminal Law', at 953–954.

¹⁶⁷ See the discussion of conspiracy in Section 2.1.3 above.

¹⁶⁸ See, for example, art 115 *Penal Code* (Italy).

¹⁶⁹ Vlassis, 'The United Nations Convention against Transnational Organized Crime and its Protocols', at 92; Freedman, 'The New Law on Criminal Organizations in Canada', at 197; Clark, 'The United Nations Convention against Transnational Organized Crime', at 170-171; Orlova & Moore, "'Umbrellas" or "Building Blocks"?: Defining International Terrorism and Transnational Organized Crime in International Law', 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)¹⁷⁰

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

¹⁷⁰ 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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 that under their domestic law require proof of an overt act in furtherance of the agreement.¹⁷¹

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.¹⁷²

A second and more subtle difference of procedural significance can be found in art 5(2) which facilitates the proof of the mental elements.¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵

¹⁷¹ See Section 2.1.3 above. See also art 5(3) *Convention against Transnational Organised Crime*. Cf *Legislative Guides*, 23; Clark, 'The United Nations Convention against Transnational Organized Crime', at 171; McClean, *Transnational Organized Crime*, 62–63, 66–67.

¹⁷² See also *Legislative Guides*, 24.

¹⁷³ See also art 3(3) *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*.

¹⁷⁴ See Section 2.1.3 above.

¹⁷⁵ McClean, *Transnational Organized Crime*, 60.

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 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.¹⁷⁶

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.¹⁷⁷ 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’).¹⁷⁸

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	<ul style="list-style-type: none"> • Taking an active part in <ul style="list-style-type: none"> 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	<ul style="list-style-type: none"> • Intention [to actively participate] (art 5(1) <i>château</i>); • Knowledge of <ul style="list-style-type: none"> ○ Aim and general criminal activity of the organised criminal group, or ○ 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)).¹⁷⁹ 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

¹⁷⁶ 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.

¹⁷⁷ Articles 450–451 *Penal Code* (France); arts 416, 416bis *Penal Code* (Italy). See also arts 140, 265 *Penal Code* (The Netherlands). See further Wise, ‘RICO and its Analogues’, at 314–320.

¹⁷⁸ See Figure 3 above.

¹⁷⁹ See Section 3.2 above.

accused knows that his/her contribution will contribute to achieving a criminal aim.¹⁸⁰ 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.¹⁸¹

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.¹⁸² 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).¹⁸³

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'.¹⁸⁴

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.¹⁸⁵

¹⁸⁰ Freedman, 'The New Law on Criminal Organizations in Canada', at 198; Clark, 'The United Nations Convention against Transnational Organized Crime', at 172.

¹⁸¹ McClean, *Transnational Organized Crime*, 64.

¹⁸² See further, *Legislative Guides*, 24.

¹⁸³ McClean, *Transnational Organized Crime*, 62.

¹⁸⁴ Donald Stuart, 'Politically Expedient but Potentially Unjust Criminal Legislation against Gangs' (1998) 69 *International Review of Penal Law* 245 at 249.

¹⁸⁵ See Section 2.1.3 above.

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

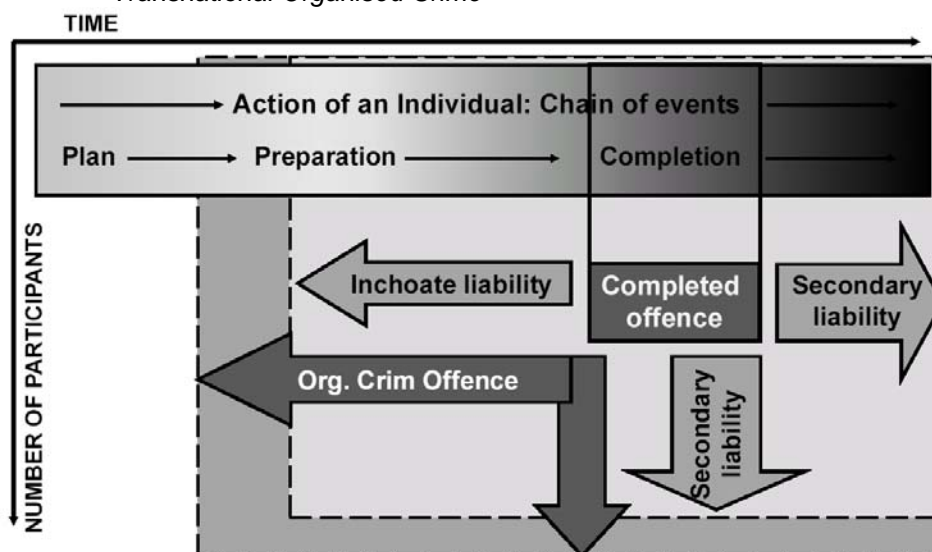


Figure 6 illustrates that art 5 (1)(a)(ii) extends the spectrum of criminal liability in two ways: First, it can attach criminal responsibility to events that occur well before the preparation (and sometimes before the planning) of specific individual offences. Second, it can create liability for participants 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* achieves this by extending criminal liability beyond existing concepts of attempt and accessory 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.¹⁸⁶ This provision, notes Donigan Guymon ‘takes a significant step in recognising that those chiefly responsible for organised crime are often not the perpetrators alone, but the other links in the hierarchical chain of command.’¹⁸⁷ 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.¹⁸⁸

¹⁸⁶ *Legislative Guides*, 25. Cf Clark, ‘The United Nations Convention against Transnational Organized Crime’, at 172-173; McClean, *Transnational Organized Crime*, 64–65.

¹⁸⁷ Donigan Guymon, ‘International Legal Mechanisms for Combating Transnational Organized Crime’, at 95.

¹⁸⁸ Cf arts 6, 8, 23 *Convention against Transnational Organized Crime*. See further Clark,

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.¹⁸⁹ 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.¹⁹⁰ 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.'¹⁹¹

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*.

'The United Nations Convention against Transnational Organized Crime', at 176; McClean, *Transnational Organized Crime*, 126–129.

¹⁸⁹ See Section 2.3 above.

¹⁹⁰ Cf Vlassis, 'The United Nations Convention against Transnational Organized Crime and its Protocols', at 76.

¹⁹¹ McClean, *Transnational Organized Crime*, 30.

PART 3
DOMESTIC LAWS

4 Canada

Organised crime in Canada 'operates in all communities, from major urban centres to rural areas'.¹⁹² 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.'¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶ Human trafficking in Canada remains a much 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.¹⁹⁷ 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.¹⁹⁸

¹⁹² Criminal Intelligence Service Canada (CISC), *Report on Organized Crime, 2008* (2008) 12.

¹⁹³ *Ibid*, at 14.

¹⁹⁴ UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix B; CISC, *Report on Organized Crime, 2008*, 12, 14. See also Section 4.1 below

¹⁹⁵ UNODC, *2008 World Drug Report* (2008) 84–85, 111–113, 156, 166.

¹⁹⁶ *Ibid* at, 128, 141; CISC, *Report on Organized Crime, 2008*, 21, 24–26;

¹⁹⁷ See further, CISC, *Report on Organized Crime, 2008*, at 20–21.

¹⁹⁸ *Ibid*, at 27–31, 14.

4.1 Background of Canada's Organised Crime Laws

In 1997, together with New Zealand,¹⁹⁹ 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.²⁰⁰ 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'.²⁰¹ 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.²⁰²

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.²⁰³ The explosion of a car bomb in Hochelaga-Maisonneuve in Montréal, in August 1995, which killed an innocent youth,²⁰⁴ 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.²⁰⁵ Québec mayors and the Québec Minister for Justice and Attorney-General Serge Menard asked the Federal Government to act against biker gangs by criminalising membership in them.²⁰⁶

¹⁹⁹ See Chapter 5 below.

²⁰⁰ See further Paul Cherry, *The Biker Trials: Bringing down the Hells Angels* (2005) 1-47.

²⁰¹ '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).

²⁰² UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries*, 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).

²⁰³ Canada, *Parliamentary Debates*, House of Commons, 28 March 1995 (Hon Allan Rock, Minister for Justice and Attorney-General).

²⁰⁴ 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.

²⁰⁵ Canada, Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 48 – Evidence, 5 Mar 1997 (Senator Roberge).

²⁰⁶ 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); Roach, 'Panicking over Criminal Organizations: We Don't Need Another Offence', at 1; Stuart, 'Politically Expedient but Potentially Unjust Criminal Legislation against Gangs', at 247.

4.1.1 Bill C-95 (1997)

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

to provide that everyone 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.²⁰⁷

This Bill lacked sufficient support to pass.²⁰⁸ It was then modified and tabled as a new private member's Bill in the Senate on June 18, 1996,²⁰⁹ but this proposal also failed. Both Bills proposed to insert a definition of 'criminal organisations' into the *Criminal Code (Canada)*,²¹⁰ 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.²¹¹ 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.²¹²

A Government-sponsored *National Forum on Organised 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.²¹³ Specific provisions relating to criminal organisations were eventually added to the *Criminal Code* on April 17, 1997²¹⁴ with the *Bill to amend the Criminal Code (criminal organisations) and to amend other Acts in consequence* (Bill C-95) which received royal assent on April 25, 1997.²¹⁵

This Act was set out as 'the government's first step in developing an integrated plan to combat' criminal gang activity.²¹⁶ It sought to 'provide better means to deal with gang-related violence and crime' by focussing on three specific objectives:²¹⁷

²⁰⁷ Bill C-203, an *Act to amend the Criminal Code (Criminal Organisations)*, summary p 1a.

²⁰⁸ See further Canada, *Parliamentary Debates*, House of Commons, 6 May 1996 (Mr Réal Ménard, Hochelaga-Maisonneuve, BQ).

²⁰⁹ Bill S-10, an *Act to amend the Criminal Code (Criminal Organisations)*.

²¹⁰ Proposed s 462.51 *Bill to amend the Criminal Code (criminal organisation)* 1996 (Canada).

²¹¹ Ibid, proposed s 462.52.

²¹² Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 48 – Evidence, 5 Mar 1997 (Senators Bryden, Lewis).

²¹³ 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); Stuart, *Canadian Criminal Law*, 731.

²¹⁴ Canada, Department of Justice, *Federal Government introduces national anti-gang measures*.

²¹⁵ 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.

²¹⁶ Canada, Department of Justice, *Fact Sheet: Bill C-95 – National Anti-Gang Measures* (May 1997), available at www.justicecanada.ca/eng/news-nouv/fs-fi/c95.html (accessed 31 July 2009).

²¹⁷ *Act to amend the Criminal Code (criminal organisations) and to amend other Acts in*

- 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 1988.²¹⁸

Figure 7 Elements of former s 467.1 *Criminal Code* (Canada), 1997-2001²¹⁹

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’²²⁰) shown in Figure 7 above have been referred to as a ‘5-5-5’ pattern²²¹ 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.’²²²

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.

consequence 1997 (Canada), Preamble.

²¹⁸ The *STEP Act* provisions are modelled on the US *Racketeer Influenced and Corrupt Organisations* (‘RICO’) Act, 18 USC 1961; see further Moon, ‘Outlawing the Outlaws’, at 461-463. See further Section 23.5.3 below.

²¹⁹ 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.

²²⁰ From the French *gangstérisme* meaning organised crime/criminal organisation.

²²¹ Freedman, ‘The New Law on Criminal Organizations in Canada’, at 202.

²²² Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 6.

By limiting the definition in this way, only those people assisting in groups which are engaged in serious crimes that form a pattern of criminal activity will be subject to the increased power of investigations these proposals contemplate.²²³

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.²²⁴ 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.'²²⁵ 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'²²⁶ and by adding a special offence in ss 82, 231 *Criminal Code* (Canada) for unlawful possession of explosive substances.²²⁷ The introduction of the new offences was accompanied by new powers for the forfeiture of proceeds of crime in ss 490.1-490.9.²²⁸ The new legislation also included a peace bond designed to target gang leadership (s 810),²²⁹ 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).²³⁰

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.²³¹ Christopher Blakesley, for instance, commented that:

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.²³²

The new offence and law enforcement powers were seen as unnecessary, and creating 'guilt by association'.²³³ There have also been concerns about possible violations of the Canadian Constitution and the *Charter of Rights and Freedom*.

²²³ Canada, *Parliamentary Debates*, Senate, 23 April 1997, issue 94 (Hon Richard J Stanbury).

²²⁴ 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).

²²⁵ Ibid; Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 48 – Evidence, 5 Mar 1997, (Senator Carstairs (Chair)); Stuart, *Canadian Criminal Law*, 732.

²²⁶ *Act to amend the Criminal Code (criminal organisations) and to amend other Acts in consequence* 1997 (Canada), Preamble.

²²⁷ See further Stuart, 'Politically Expedient but Potentially Unjust Criminal Legislation against Gangs', at 254-255

²²⁸ See further ibid, at 255.

²²⁹ See further ibid, at 253-254.

²³⁰ See further ibid, at 251-253.

²³¹ 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 ibid 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*); Moon, 'Outlawing the Outlaws', at 458.

²³² Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', at 93.

²³³ Stuart, 'Politically Expedient but Potentially Unjust Criminal Legislation against Gangs', at 248; Stuart, *Canadian Criminal Law*, 732.

Many considered the legislation as too vague, grossly disproportionate, and wider than necessary to achieve its objective,²³⁴ but all challenges of the legislation before the courts remained unsuccessful.²³⁵

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.²³⁶ 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.²³⁷

Only a small number of prosecutions were carried out under former s 467.1 and even fewer convictions have been recorded.²³⁸ 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.²³⁹

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'.²⁴⁰ A Sub-Committee on Organised Crime was formed in April 2000 and an interim report was released six months later which made eighteen recommendations to combat criminal groups more effectively.²⁴¹

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.²⁴² 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*

²³⁴ Section 7 *Charter of Rights and Freedom* (Canada). Cf Stuart, 'Politically Expedient but Potentially Unjust Criminal Legislation against Gangs', at 255-262 with reference to *Heywood* (1994) 34 C.R. (4th); Moon, 'Outlawing the Outlaws', at 454, 468-470; Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', at 86, 93.

²³⁵ *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).

²³⁶ See the discussion in Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 7.

²³⁷ Cf *R v Terezakis* [2007] BCCA 384.

²³⁸ Mark K Levitz & Robert Prior, 'Criminal Organization Legislation: Canada's Response' (2003) 61(3) *The Advocate* 375 at 375.

²³⁹ The problem of mass trials is further discussed in Section 4.4 below.

²⁴⁰ Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combating Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELD=e24_&COM=162 (accessed 10 July 2009).

²⁴¹ *Ibid.*

²⁴² A personal story of this event was later published by Michel Auger, *The Biker Who Shot Me: Recollections of a Crime Reporter* (2002).

on *Organised Crime* and, inter alia, agreed to review legislative and regulatory tools.²⁴³

Bill C-24 was presented to Parliament in 2001 and entered into force on January 7, 2002.²⁴⁴ 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 OMCs to other criminal organisations in pursuit of profit and to other groups involved in the perpetration of economic crime.²⁴⁵

The *Act to amend the Criminal Code (organised crime and law enforcement) and to make consequential amendments to other Act* of December 18, 2001²⁴⁶ 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 467.13.²⁴⁷ 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 it created new offences for intimidating witnesses, jurors, prosecutors, judges, guards, journalists, and politicians.²⁴⁸ Moreover, the amendment brought Canada’s organised crime provisions in line with the *Convention against Transnational Organised Crime*.²⁴⁹

4.2 Criminal Organisations

Section 467.1(1) *Criminal Code* (Canada) defines ‘criminal organisation’ as²⁵⁰

a group, however organised, that
(a) is composed of three or more persons in or outside Canada; and

²⁴³ 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).

²⁴⁴ Stuart, *Canadian Criminal Law*, 737.

²⁴⁵ *R v Lindsay* (2004) 182 CCC (3d) 301.

²⁴⁶ Chapter 32 (Bill C-24).

²⁴⁷ The Bloc Québécois 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).

²⁴⁸ Section 423.1 *Criminal Code* (Canada).

²⁴⁹ Canada, Department of Justice, *Newsroom: Federal Action against Organized Crime*. Canada signed the *Convention against Transnational Organised Crime* on 14 Dec 2000 and ratified it on 13 May 2002; UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008). The amending Act, however, made no specific reference to the Convention.

²⁵⁰ See also s 2 *Criminal Code* (Canada) ‘criminal organization’.

- (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'²⁵¹ version of the definition of criminal organisation introduced into s 2 *Criminal Code* (Canada) in 1997.²⁵² The 2001 amendment broadened the definition of criminal organisation by removing the 5-5-5 requirement,²⁵³ reducing the minimum number of participants to three,²⁵⁴ and expanding the scope of offences that define criminal organisations to all serious crimes.²⁵⁵

The current definition of criminal organisation in s 467.1(1) combines a structural/organisational element with criteria that relate to the purpose and/or activities of the group.²⁵⁶ These elements are discussed separately in the following sections.

Figure 8 'Criminal organisation', s 467.1(1) *Criminal Code* (Canada)²⁵⁷

Terminology Elements	Organised Criminal Group
Structure	<ul style="list-style-type: none"> a group composed of three or more persons in or outside Canada.
Activities or objectives	<ul style="list-style-type: none"> 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.²⁵⁸ Groups that have been found by the courts to be criminal organisations include, for example, the Hell's Angels Motorcycle Club,²⁵⁹ the Bonanno Family of La Cosa Nostra,²⁶⁰ and also a number of locally operating drug trafficking networks.²⁶¹

²⁵¹ Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 375.

²⁵² 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'.

²⁵³ Cf Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combating Organised Crime* (Oct 2000) Recommendation 5.

²⁵⁴ Cf *ibid*, Recommendation 3.

²⁵⁵ Cf *ibid*, Recommendation 4.

²⁵⁶ Cf *R v Lindsay* (2004) 182 C.C.C. (3d) 301 at para 56 per Fuerst J.

²⁵⁷ Cf *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.

²⁵⁸ *Ciarniello v R* [2006] BCSC 1671 at para 67 per W F Ehrcke J.

²⁵⁹ *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).

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.²⁶² '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.'²⁶³ 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.'²⁶⁴ Mackenzie JA in *R v Terezakis* [2007] noted:

The underlying reality is the criminal organisations have no incentive to conform to any formal structure recognised in law, in part because the law will not assist in enforcing illegal obligations or transactions. That requires a flexible definition that is capable of capturing criminal organisations in all their protean forms. [...] Nonetheless, the persons who constitute "the group, however, organised" cannot be interpreted so broadly as to ensnare those who do not share its criminal objectives.²⁶⁵

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.²⁶⁶

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.'²⁶⁷ 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'²⁶⁸ 'would not be considered a criminal organisation.'²⁶⁹

²⁶⁰ *United States v Rizzuto* (2005) 209 CCC (3d) 325. See also Section 23.1.7 below.

²⁶¹ *R v Trang* [2001] ABQB 623.

²⁶² Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 377-378; Freedman, 'The New Law on Criminal Organizations in Canada', at 205.

²⁶³ *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 76 per Holmes J.

²⁶⁴ *R v Terezakis* [2007] BCCA 384 at para 33 per Mackenzie JA.

²⁶⁵ *Ibid.*, at para 34.

²⁶⁶ Cf Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 378.

²⁶⁷ 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.

²⁶⁸ Schloenhardt, *Migrant Smuggling*, 98.

²⁶⁹ Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 379.

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.'²⁷⁰

Facilitating or committing serious offences may either be the purpose of the organisation or its main activity.²⁷¹ 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).²⁷²

'Serious offence' is further defined in s 467.1(1) as 'an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more'. In addition, other offences may be prescribed by regulation; under s 467.1(4) 'the Governor in Council may make regulations prescribing offences that are included in the definition of "serious offence"'. The definition of serious crime is flexible enough to cover a great range of criminal activities without identifying specific types of criminal acts. In *R v Lindsay* (2004) 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.'²⁷³

The definition of serious crime excludes groups involved in relatively minor crime from the scope of s 467.1,²⁷⁴ but the fact that the Governor-General may prescribe other offences opens up an avenue to add crimes without parliamentary review.²⁷⁵

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.²⁷⁶

In practice, most cases that have arisen under s 467.1, involve criminal groups that engage in the trafficking and sale of illicit drugs.²⁷⁷ 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

²⁷⁰ *R v Terezakis* [2007] BCCA 384 at para 56 per Chiasson JA.

²⁷¹ The terms are understood in their usual meaning: *R v Lindsay* (2004) 182 C.C.C. (3d) 301 at para 58 per Fuerst CJ.

²⁷² Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 378, 379.

²⁷³ *R v Lindsay* (2004) 182 CCC (3d) 301.

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

²⁷⁵ Stuart, *Canadian Criminal Law*, 738.

²⁷⁶ Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 378-379.

²⁷⁷ 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)

instances in which a criminal organisation provides protection or security for illegal activities, for instance, illegal gambling, illegal brothels, et cetera.²⁷⁸ 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 legal enterprises.²⁷⁹ 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 groups²⁸⁰ if that dissent amounts to a serious offence.

In *R v Accused No 1* (2005) Justice Holmes further held that the definition may also

include persons who do not personally engage in or support or subscribe to the serious offence of the group, so long as they are part of the 'group' and that the group has as one of its main purposes or activities the facilitation or commission of a serious offence or offences.²⁸¹

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.²⁸² This view was supported on appeal.²⁸³

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.²⁸⁴ 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 (i.e. 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.'²⁸⁵

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

²⁷⁸ Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 378-379.

²⁷⁹ 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* (2004) 182 C.C.C. (3d) 301.

²⁸⁰ Roach, 'Panicking over Criminal Organizations: We Don't Need Another Offence', at 2.

²⁸¹ *R v Accused No 1* (2005) 134 C.R.R. (2d) 274 at para 61 per Holmes J.

²⁸² *Ibid.*, at paras 63, 66 per Holmes J.

²⁸³ *R v Terezakis* [2007] BCCA 384 at para 56 per Chiasson JA.

²⁸⁴ *R v Lindsay* (2004) 182 C.C.C. (3d) 301 at para 58 per Fuerst J.

²⁸⁵ Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 378.

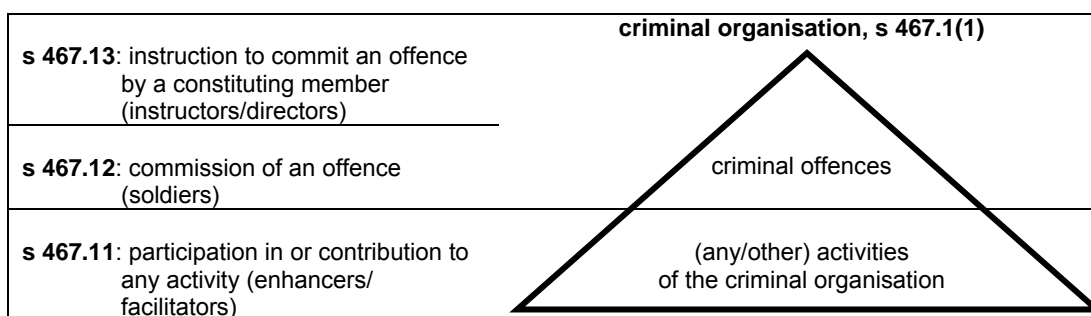
of Ontario confirmed in *R v Lindsay* (2004) that the objective of the legislation, hindering the organised criminal pursuit of profit, was legitimate and ‘does not trench on legitimate ‘non-regulated’ or “non-criminal conduct”’.²⁸⁶

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.²⁸⁷

The three sections are set out in a hierarchy depending on the accused’s level of involvement in the organisation. At the bottom of this hierarchy is the ‘enhancer’ or ‘facilitator’ offence which creates liability for mere participation in and contribution to the activities of criminal organisations, s 467.11. This is followed by the more serious offence in s 467.12 which criminalises the commission of an offence for a criminal organisation. Section 467.13 creates the most serious offence for directing criminal organisations. Sections 467.11(2), 467.12(2), and 467.13(2) all exempt certain matters that would otherwise have to be proven by the prosecution.²⁸⁸

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’.²⁸⁹ 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.²⁹⁰

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).

²⁸⁶ *R v Lindsay* (2004) 182 C.C.C. (3d) 301 at par 44 per Fuerst J. Cf Skinnider, *Some Recent Criminal Justice Reforms in Canada*, 8.

²⁸⁷ Moon, ‘Outlawing the Outlaws’, at 463. See also Stuart, ‘Politically Expedient but Potentially Unjust Criminal Legislation against Gangs’, who argues (at 262-263) that ‘the consecutive penalty provisions in Bill C-95 offend the constitutional requirement of proportional punishment’.

²⁸⁸ David Watt & Michelle Fuerst, *Tremear’s Criminal Code* (2007) 830.

²⁸⁹ *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.

²⁹⁰ Cf *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.

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’ offence²⁹¹ — 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).²⁹²

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.

Figure 10 Elements of s 467.11 *Criminal Code* (Canada)

467.11(1)	Elements of the offence	
Physical elements	<ul style="list-style-type: none"> • 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: <ul style="list-style-type: none"> (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)): <ul style="list-style-type: none"> (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	<ul style="list-style-type: none"> • 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)): <ul style="list-style-type: none"> (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	

²⁹¹ Freedman, ‘The New Law on Criminal Organizations in Canada’, at 201.

²⁹² See Section 4.1 above.

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.²⁹³ 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.²⁹⁴

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.²⁹⁵ Accordingly, it has been remarked that this provision 'could target anyone' and not just members of the organisation.²⁹⁶

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.²⁹⁷ '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.'²⁹⁸

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'²⁹⁹ and essentially creates strict liability (absolute responsibility)³⁰⁰ for this

²⁹³ Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 379.

²⁹⁴ *Ibid*, at 381.

²⁹⁵ *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.

²⁹⁶ Stuart, *Canadian Criminal Law*, 740; Freedman, 'The New Law on Criminal Organizations in Canada', at 206.

²⁹⁷ Stuart, 'Politically Expedient but Potentially Unjust Criminal Legislation against Gangs', at 248; cf Stuart, 'Time to Recodify Criminal Law and Rise Above Law and Order Expediency', at 102.

²⁹⁸ Freedman, 'The New Law on Criminal Organizations in Canada', at 208.

²⁹⁹ William M Trudell, 'The Bikers Are Coming... The Bikers Are Coming...' (2001) 22(3) *For*

element.³⁰¹ 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).³⁰²

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.³⁰³

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.³⁰⁴ 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.'³⁰⁵ 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 467.11.³⁰⁶ 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.³⁰⁷

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 [...].'³⁰⁸ 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).³⁰⁹ 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.³¹⁰

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:

the Defence 28 at para 7.

³⁰⁰ Strict liability means, essentially, liability without the requirement proof a (subjective) fault element; see further Kent Roach, *Criminal Law* (3rd ed 2004) 186-198.

³⁰¹ Stuart, 'Time to Recodify Criminal Law and Rise Above Law and Order Expediency', at 102; Stuart, *Canadian Criminal Law*, 740.

³⁰² *R v Lindsay* (2004) 182 C.C.C. (3d) 301; Skinnider, *Some Recent Criminal Justice Reforms in Canada*, 8

³⁰³ Watt & Fuerst, *Tremeeear's Criminal Code*, 831; Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 381.

³⁰⁴ See Sections 2.1.2, 2.1.3 above.

³⁰⁵ Freedman, 'The New Law on Criminal Organizations in Canada', at 218.

³⁰⁶ Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 381.

³⁰⁷ Freedman, 'The New Law on Criminal Organizations in Canada', at 208.

³⁰⁸ 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.

³⁰⁹ Trudell, 'The Bikers Are Coming... The Bikers Are Coming...', at para 14.

³¹⁰ Freedman, 'The New Law on Criminal Organizations in Canada', at 208. See Section 3.3.2 above.

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)³¹¹; 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,³¹² or possessing illicit drugs for the purpose of trafficking for the benefit of, or in association with, a criminal organisation.³¹³

Figure 11 Elements of s 467.12 *Criminal Code* (Canada)

467.12	Elements of the offence
Physical elements	<ul style="list-style-type: none"> • commission of an indictable offence • benefit of/at the direction of/in association with a criminal organisation (s 467.1(1))
Mental elements	<ul style="list-style-type: none"> • intention to commit the offence for the benefit of, at 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 organisation, 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.³¹⁴ 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.³¹⁵ Unless the elements of the other indictable offence can be established, there will be no liability under s 467.12(1).³¹⁶

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] 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.³¹⁷ ‘In association with’ is said to connote a linkage with a criminal organisation or some form of

³¹¹ Ibid, at 209.

³¹² Levitz & Prior, ‘Criminal Organization Legislation: Canada’s Response’, at 383.

³¹³ *R v Giles* [2008] BCSC 367.

³¹⁴ David Watt & Michelle Fuerst, *Tremear’s Criminal Code* (2007) 831.

³¹⁵ See further Section 23.1.2 below.

³¹⁶ *R v Giles* [2008] BCSC 367 at para [236] per MacKenzie J.

³¹⁷ *R v Leclerc* [2001] J Q No 426; Levitz & Prior, ‘Criminal Organization Legislation: Canada’s Response’, at 384.

cooperative approach or contemplates where affiliation with the organisation enhances the ability to commit the offence.³¹⁸ It is left to the courts to determine the precise nature and parameters of the relationship between the accused and the criminal organisation.³¹⁹

As with s 467.11, an accused under s 467.12 need not be a member of the organisation.³²⁰ 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).

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.³²¹ 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.’³²²

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.³²³ 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 criminality³²⁴ as ‘the presence of the additional “criminal organisation” and mens rea requirements differentiates the participation offence from the predicate offence substantially [...]’³²⁵ 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’³²⁶ — makes specific provisions for directors and other key leaders of criminal organisations:

³¹⁸ *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 59 per Fuerst J; Levitz & Prior, ‘Criminal Organization Legislation: Canada’s Response’, at 384.

³¹⁹ *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 59 per Fuerst J.

³²⁰ *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.

³²¹ *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 64 per Fuerst J; cf Levitz & Prior, ‘Criminal Organization Legislation: Canada’s Response’, at 384.

³²² Trudell, ‘The Bikers Are Coming... The Bikers Are Coming...’, at para 11.

³²³ Freedman, ‘The New Law on Criminal Organizations in Canada’, at 209.

³²⁴ Cf *R v Kienapple* [1975] 1 S.C.R. 729 at 747-748.

³²⁵ Freedman, ‘The New Law on Criminal Organizations in Canada’, at 209, with reference to *R v Creighton* [1993] 3 S.C.R. 3.

³²⁶ *Ibid.*, at 214.

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.

Figure 12 Elements of s 467.13 *Criminal Code* (Canada)³²⁷

467.13 Elements of the offence	
Physical elements	<ul style="list-style-type: none"> • 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)): <ul style="list-style-type: none"> (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	<ul style="list-style-type: none"> • 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 organisation, 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.³²⁸ 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.³²⁹ The instructions need not be directed at a member of the organisation or at any specific person.³³⁰ 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’.³³¹ It is irrelevant whether or not the predicate offence instructed is actually committed.³³²

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

³²⁷ Cf *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.

³²⁸ 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.

³²⁹ *R v Accused No 1* (2005) 134 CRR (2d) 274 at paras 91, 93 per Holmes J; Freedman, ‘The New Law on Criminal Organizations in Canada’, at 216.

³³⁰ *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 96 per Holmes J.

³³¹ Levitz & Prior, ‘Criminal Organization Legislation: Canada’s Response’, at 384.

³³² *R v Terezakis* [2007] BCCA 384 at para 36 per Mackenzie JA.

large'.³³³ More recent case law and scholarship, however, have held that the offence requires that the accused is a member of the organisation.³³⁴

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) 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.³³⁵

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.'³³⁶ 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.'³³⁷ '[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.'³³⁸ 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.'³³⁹ 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.³⁴⁰

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

³³³ Freedman, 'The New Law on Criminal Organizations in Canada', at 216.

³³⁴ *R v Terezakis* [2007] BCCA 384 at paras 62 and 73 per Chiasson JA; Watt & Fuerst, *Tremeeear's Criminal Code*, 832.

³³⁵ *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.

³³⁶ *R v Terezakis* [2007] BCCA 384 at para 38 per Mackenzie JA.

³³⁷ Freedman, 'The New Law on Criminal Organizations in Canada', at 217.

³³⁸ *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*, at para 131 per Holmes J

for attaching life imprisonment to an offence that does not require proof of a specific intent.³⁴¹

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) that s 467.13 was constitutionally invalid and 'that s 467.13 is of no force and effect.'³⁴² In a more recent decision, the Saskatchewan Court of the Queen's Bench distanced itself from 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.³⁴³ 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.³⁴⁴ This new legislation does not amend the organised crime offence outlined above, but adds a suite of new provisions that provide aggravated penalties if certain existing offences are committed in connection with a criminal organisation.

Bill C-14 creates new offences in order to raise penalties for homicides and firearms offences if these activities are associated with criminal organisations. 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 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 introduces 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*.'

³⁴¹ Trudell, 'The Bikers Are Coming... The Bikers Are Coming...', at para 16.

³⁴² *R v Accused No 1* (2005) 134 CRR (2d) 274 at 153 per Holmes J.

³⁴³ *R v Smith* (2006) 280 Sask R 128 per Zarzeczny J.

³⁴⁴ *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).

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,³⁴⁵ some parts of Australia,³⁴⁶ and international law,³⁴⁷ the criminal offences are remarkably different and more diversified than those in operation elsewhere. The hierarchy of offences set out in ss 467.11-467.13 captures different types and levels of involvement with criminal organisations and offers higher penalties for those more closely associated with the group. Unlike most other jurisdictions, Canada's offences are more suitable to criminalise core directors of criminal organisations as well as persons who only provide rudimentary support. The Canadian provisions operate simultaneously as new offences for criminal organisations and as aggravations to already existing offences.

The criminal organisation offences initially 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.³⁴⁸ There are also cases that involved extortion, fraud, and money laundering.³⁴⁹

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;³⁵⁰ i.e. 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.³⁵¹

³⁴⁵ See Chapter 5 below.

³⁴⁶ See Chapter 6 below.

³⁴⁷ See Chapter 3 above.

³⁴⁸ 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.

³⁴⁹ See, for example, *R v Sbrolla* (2003) WL 23526433 (Ont S.C.J.); *R v Lindsay* (2004) 182 CCC (3d) 301.

³⁵⁰ Freedman, 'The New Law on Criminal Organizations in Canada', at 207.

³⁵¹ See Section 4.1.1 above.

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 OMCGs that wear clearly visible insignia and are structured very systematically. The danger created by the new laws is that all types of organisations with some connection to criminal activities could potentially fall within the definition in s 467.1. It is not surprising that most of the challenges before the courts to date have attacked the legislation for being too broad and overly vague.

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

Despite the breadth of the offences and the definition of criminal organisation, some critics argue that the provisions do not seem to capture sophisticated criminal networks loosely based on kinship rather than on firm hierarchical structures. Michael Moon, for instance, remarks: 'At best the legislation attacks the symptoms of organised crime, i.e. the activities of individual gang members, yet ignores the symptoms between them — the organisation within which these individuals commit their acts.'³⁵² Suggestions have been made that the legislation only targets the most visible and publicised, the very '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.'³⁵³

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.³⁵⁴ 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?³⁵⁵

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.

³⁵² Moon, 'Outlawing the Outlaws', at 466.

³⁵³ 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.

³⁵⁴ Stuart, *Canadian Criminal Law*, 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).

³⁵⁵ Freedman, 'The New Law on Criminal Organizations in Canada', at 176.

The biker gangs that 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'.³⁵⁶

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 Québec 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.'³⁵⁷

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.³⁵⁸ 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.³⁵⁹ 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.³⁶⁰ 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.'³⁶¹

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.³⁶²

³⁵⁶ CISC, *Report on Organized Crime, 2008*, 12; Criminal Intelligence Service Canada (CISC), *Organized Crime in Canada, 2006 Annual Report* (2006) 5–6.

³⁵⁷ Robert Matas & Ian Bailey, 'Let the War Begin' (11 April 2009) *The Globe and Mail* (Vancouver) S3

³⁵⁸ See, for example, Ingrid Peritz, 'Reputed patriarch of Canadian crime family walks free' (17 Oct 2008) *The Globe and Mail*, A5.

³⁵⁹ 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.

³⁶⁰ 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 10 July 2009).

³⁶¹ Stuart, 'Politically Expedient but Potentially Unjust Criminal Legislation against Gangs', at 264.

³⁶² 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.

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 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.³⁶³

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.³⁶⁴ The accused were later sentenced to terms between 15 and 20 years depending on their role in the criminal gang.³⁶⁵

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 organisation³⁶⁶ 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.'³⁶⁷ 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.³⁶⁸

³⁶³ Stuart, 'Time to Recodify Criminal Law and Rise Above Law and Order Expediency', at 96-97; Stuart, *Canadian Criminal Law*, 735-736.

³⁶⁴ *R v Stockford* [2001] QJ No 3834; *R v Stadnick* (2004) REJB 2004-70735 (unreported, 27 Sep 2004, Quebec Superior Court of Justice).

³⁶⁵ Anne-Marie Boisvert, 'Mega-trials: The Disturbing Situation in Quebec' (2004) 15 *Criminal Reports (Articles)* (6th) 178; see also Cherry, *The Biker Trials*.

³⁶⁶ *R v Lindsay* (2004) 182 CCC (3d) 301.

³⁶⁷ Stuart, *Canadian Criminal Law*, 731. Cf Canada, *Parliamentary Debates*, Senate, 23 April 1997, issue 94 (Hon Richard J Stanbury): 'Bill C-95 has been enthusiastically received by police organisations from across the country [...].'

³⁶⁸ Trudell, 'The Bikers Are Coming... The Bikers Are Coming...', 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.³⁶⁹ A recent Government paper has also identified the poaching and smuggling of paua shells as ‘a significant area for organised criminality.’³⁷⁰

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 Maori and Pacific Islanders. While many of these groups are no more than street gangs and disenfranchised youth, others, such as the Mongrel Mob and the rival 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.³⁷¹ 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. A further amendment proposed in February 2009 with the *Gang and Organised Crime Bill* is discussed in Section 5.3.

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’.³⁷² 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 Maori 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.³⁷³

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’

³⁶⁹ UNODC, *Amphetamines and Ecstasy: 2008 Global ATS Assessment* (2008) 53; *Gangs and Organised Crime Bill 2009* (NZ), Explanatory Note, 6.

³⁷⁰ *Gangs and Organised Crime Bill 2009* (NZ), Explanatory Note, 6.

³⁷¹ See Section Chapter 4 above.

³⁷² *Harassment and Criminal Associations Bill 1996* (No 215-1), Explanatory Note, ii.

³⁷³ *Ibid.* Cf Timothy Mullins, ‘Broader Liability for Gang Accomplices: Participating in a Criminal Gang’ (1996-99) 8 *Auckland University Law Review* 832 at 833; Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 8.

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 1988.³⁷⁴

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)³⁷⁵ 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.³⁷⁶ 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 the country.³⁷⁷ In contrast to the definition of 'organised criminal group' in the *Palermo Convention*,³⁷⁸ 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 [...]'.³⁷⁹

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 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 liability.³⁸⁰ Liability under former s 98A(2) was derivative as the source of liability was not the offence definition,³⁸¹ 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).³⁸²

³⁷⁴ The *STEP Act* provisions are modelled on the US *Racketeer Influenced and Corrupt Organisations ('RICO') Act*, 18 USC 1961; see further Mullins, 'Broader Liability for Gang Accomplices', at 833. See further Section 23.5 below.

³⁷⁵ Former s 98A(1)(c) *Crimes Act 1961* (NZ).

³⁷⁶ These requirements resemble the Canadian 5-5-5 rule introduced in 1997, see Section 4.1.1 above.

³⁷⁷ NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3.

³⁷⁸ See Section 3.2 above.

³⁷⁹ Mullins, 'Broader Liability for Gang Accomplices', at 836.

³⁸⁰ *Ibid*, at 834.

³⁸¹ IH Dennis, 'The Mental Element for Accessories' in Peter F Smith (ed), *Criminal Law: Essays in Honour of JC Smith* (1987) 40 at 41.

³⁸² Cf Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and*

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.³⁸³ The maximum penalty imposed by the courts for offences under former s 98A was a three-year sentence.³⁸⁴ 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 Section 98A Crimes Act 1961 (NZ), 2002–2009

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.'³⁸⁵ The new legislation expanded the application of the participation offence 'to align it more closely with the Convention'³⁸⁶ 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).³⁸⁷ Liability under s 98A may arise even if the conduct is lawful in a foreign country.³⁸⁸

5.2.1 Organised criminal group

'Organised criminal groups'³⁸⁹ are defined in s 98A(2) as groups of three or more people who have as one of their objectives to either obtain material benefits³⁹⁰ from

practice and their relevance to England and Wales, 9.

³⁸³ New Zealand, *Parliamentary Debates*, House of Representatives, 899, 16 Feb 2004, Questions for Written Answer (Hon Phil Goff, Minister for Justice), available at www.parliament.nz/en-NZ/PB/Debates/QWA/ (accessed 9 July 2009). See Figure 15 below.

³⁸⁴ Ibid.

³⁸⁵ New Zealand, *Parliamentary Debates*, House of Representatives, 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 9 July 2009).

³⁸⁶ *Transnational Organised Crime Bill 2002* (NZ), Explanatory Note, 2.

³⁸⁷ 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.

³⁸⁸ J Bruce Robertson (ed), *Adams on Criminal Law* (5th student ed, 2007) 253.

³⁸⁹ 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.'

³⁹⁰ The New Zealand Foreign Affairs, Defence and Trade Committee recommended 'substituting the term 'material benefits' for the phrase 'substantial income and assets'', New Zealand, Foreign Affairs, Defence and Trade Committee, *Transnational Organised*

offences punishable by at least four years imprisonment (s 98A(2)(a) and (b))³⁹¹ or to commit certain serious violent offences (s 98A(2)(c) and (d)).³⁹² The new definition applies to both domestic (s 98A(2)(a) and (c)) and transnational organised criminal groups (s 98A(2)(b) and (d)).³⁹³ 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.³⁹⁴

Figure 13 'Organised criminal group', s 98A(2) *Crimes Act 1961* (NZ)

Terminology	Organised Criminal Group
Elements	
Structure	<ul style="list-style-type: none"> • Three or more persons. Irrelevant whether or not (s 98A(3)): <ul style="list-style-type: none"> ○ 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	<ul style="list-style-type: none"> • [no element]
Objectives	Either: <ul style="list-style-type: none"> • 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.³⁹⁵ 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

Crime Bill 2002 (NZ), Commentary, 2.

³⁹¹ The New Zealand Foreign Affairs, Defence and Trade Committee considered retaining the structure of former s 98A by adding additional specific offences to the list in former s 98A(1) but preferred 'a generic provision that defines the offences caught by reference to the maximum penalty'; *ibid*, at 3.

³⁹² 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).

³⁹³ 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 10 July 2009).

³⁹⁴ Cf *S v R*, 13 May 2004, HC Gisborne, T032566, per Paterson J.

³⁹⁵ See Section 3.2 above.

structure and organisation exist between the persons involved in the group:³⁹⁶ '[T]he organised criminal group charged involves a degree of organisation for criminal purposes and planning' that is not already a feature of other special offences.³⁹⁷

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,³⁹⁸ and without a formal membership system.³⁹⁹ There has to be some link connecting the members although it is not required that all of them are communicating mutually.⁴⁰⁰ It is possible that lawful organisational structures may also be captured by this element of the definition.⁴⁰¹

While it is generally required to show that the group has some degree of continuity, permanence, or regularity,⁴⁰² 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.⁴⁰³

Proof of offending by members of the group does not suffice to prove the existence of an organised criminal group.⁴⁰⁴

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.⁴⁰⁵ 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.

³⁹⁶ Cf *R v Davies* [1995] 3 NZLR 530 at 534-535.

³⁹⁷ *R v Lasike & ORS* [2006] NZHC 1009 para 34 per Asher J.

³⁹⁸ *R v Cara* [2005] 1 NZLR 523 per Potter J.

³⁹⁹ *R v Robinson* 23 June 2006, HC Auckland CRI-2004-092-4373, per Asher J.

⁴⁰⁰ *R v Davies* [1995] 3 NZLR 530.

⁴⁰¹ Robertson (ed), *Adams on Criminal Law*, 252.

⁴⁰² *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 Robertson (ed), *Adams on Criminal Law*, 252.

⁴⁰³ *R v Cara* [2005] 1 NZLR 823 per Potter J.

⁴⁰⁴ *S v R* (13 May 2004, HC Gisborne, T032566, per Paterson J).

⁴⁰⁵ Robertson (ed), *Adams on Criminal Law*, 252, cf *R v Davies* [1995] 3 NZLR 530 at 534-535.

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 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	<ul style="list-style-type: none"> • participation (whether as a member or an associate member or prospective member) • in an organised criminal group (s 98A(2)).
Mental elements	<ul style="list-style-type: none"> • 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

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 accessory liability.⁴⁰⁶ 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.’⁴⁰⁷

⁴⁰⁶ Robertson (ed), *Adams on Criminal Law*, 254.

⁴⁰⁷ *Ibid.*

In the literature, the discussion of the participation element has focussed specifically on the example of a mechanic who repairs motorcycles for (members of) an OMCG. The question whether that person could (and should) be held liable for 'participation' in that gang has been controversial and cannot be answered definitively on the basis of the legislation.⁴⁰⁸ The lack of a definition of the term 'participation' in organised crime laws — not just in New Zealand⁴⁰⁹ — is seen by some as 'a grave flaw' because it is unclear to whom the offence applies.⁴¹⁰

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.⁴¹¹ The case law, however, reveals that the application of the participation offence may extend to passive participation or participation by mere presence.⁴¹² It has been suggested to limit the offence to 'active' participation to ensure that the legislation is construed strictly.⁴¹³ This would also bring the offence in line with art 5(1)(a)(ii) *Palermo Convention*.⁴¹⁴

Mental elements

Section 98A(1) requires that the accused knew the nature of the group he or she participated in, i.e. 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.'⁴¹⁵ An 'intention to promote or further' criminal conduct (former s 98A) is no longer a mental element of the offence.

⁴⁰⁸ 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.

⁴⁰⁹ See also New South Wales, Section 6.2.1 below.

⁴¹⁰ Mullins, 'Broader Liability for Gang Accomplices', 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).

⁴¹¹ New Zealand, *Parliamentary Debates*, House of Representatives, 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 9 July 2009); New Zealand, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3-4.

⁴¹² *R v Mitford* [2005] 1 NZLR 753 at para 59.

⁴¹³ Mullins, 'Broader Liability for Gang Accomplices', at 837 (in reference to former s 98A *Crimes Act 1961* (NZ)); cf New Zealand, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 4.

⁴¹⁴ See Section 3.3.2 above.

⁴¹⁵ Robertson (ed), *Adams on Criminal Law*, 210.

'The gist of this offence', notes Justice Baragwanath in *R v Mitford* [2005], 'is in knowingly taking part as a member of the group which has come together to commit the proscribed activity, whether or not any substantive offence has been committed.'⁴¹⁶ 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, i.e. has some awareness of the possibility that his or her participation may contribute to the occurrence of criminal activity.⁴¹⁷ 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.⁴¹⁸

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.⁴¹⁹

5.2.3 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',⁴²⁰ 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.'⁴²¹

⁴¹⁶ *R v Mitford* [2005] 1 NZLR 753 at para 50 per Baragwanath J.

⁴¹⁷ *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.

⁴¹⁸ Grice, NZ Law Society, *Submission on the Transnational Organised Crime Bill*.

⁴¹⁹ New Zealand, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3.

⁴²⁰ New Zealand, *Parliamentary Debates*, House of Representatives, 16 Feb 2004, 899, Questions for Written Answer (Hon Phil Goff, Minister for Justice), available at www.parliament.nz/en-NZ/PB/Debates/QWA/ (accessed 9 July 2009).

⁴²¹ *Ibid.*

Figure 15 Number of people prosecuted and convicted under s 98A *Crimes Act 1961* (NZ), 1997-2007⁴²²

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Prosecutions	0	0	8	3	2	2	70	156	42	54	24
Convictions	0	0	0	1	1	0	10	19	5	11	1

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.⁴²³ Of particular concern in New Zealand is the inclusion of recklessness as a possible mental element in 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.⁴²⁴

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 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.

5.3 Gangs and Organised Crime Bill 2009

In May 2007, the New Zealand Government first 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.'⁴²⁵ In reviewing the operation of s 98A the Government noted that:

⁴²² New Zealand, *Parliamentary Debates*, House of Representatives, 21 May 2007, 8498 Questions for Written Answer (Hon Phil Goff, Minister for Justice), available at www.parliament.nz/en-NZ/PB/Debates/QWA/ (accessed 9 July 2009); *Gangs and Organised Crime Bill 2009* (NZ), Explanatory Note, 9.

⁴²³ See Section 2.3 above.

⁴²⁴ See Sections 6.2.1 below.

⁴²⁵ New Zealand, *Parliamentary Debates*, House of Representatives, 16 May 2007, 8326, Questions for Written Answer (Hon Mark Burton, Minister for Justice), available at www.parliament.nz/en-NZ/PB/Debated/QWA/ (accessed 2 July 2007).

Section 98A has not been as effective as was hoped in dealing with those who participate in organised criminal and gang activities. There are a number of reasons for the low number of successful prosecutions under the section, including the complexity of the provision and the high evidential burden placed on the prosecution to prove the offence. The relatively low penalty, which does not adequately reflect the culpability of gang leaders who may organise serious criminal activity without themselves directly offending otherwise, is another factor. The low penalty combined with high evidential requirements contributes to the limits on the usefulness of the current section 98A.⁴²⁶

It was further remarked that:

The average prison sentence for [s 98A] between 2004 and 2007 was 2 years. That does not adequately reflect the culpability of those gang leaders who organised serious criminal activity, such as methamphetamine manufacturing and distribution, without directly offending themselves. [...] From 2004 to 2007 there were 339 prosecutions, but only 19 convictions — a total of 5 percent.⁴²⁷

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). This bill was superseded by the *Gangs and Organised Crime Bill 2009* (NZ) that was first introduced by the newly elected Government into Parliament on February 10, 2009. The stated purpose of this new proposal is to 'increase the penalty for participating in an organised criminal group, expand police surveillance powers in respect of gang communications, and provide greater powers to remove gang fortifications.'⁴²⁸

The new Bill, if passed, will make a number of changes to s 98A in order to

- clarify the evidential requirements on the prosecution to prove participation in an organised criminal group under section 98A; [and]
- increase the penalty for participation in an organised criminal group under section 98A from a maximum of 5 years' imprisonment to a maximum of 10 years' imprisonment.

It is also proposed to amend s 9(1) *Sentencing Act 2002* (NZ) to include participation and other involvement in an organised criminal group as an aggravating sentencing factor.⁴²⁹

To broaden the ambit of the offence and ease the evidential burden on the prosecution,⁴³⁰ proposed new s 98A(1) *Crimes Act 1961* (NZ) will slightly modify the elements of the participation offence (see Figure 16 below).

- (1) Every person commits an offence and is liable to imprisonment for a term not exceeding 10 years who participates in an organised criminal group—
- (a) knowing that 3 or more people share any 1 or more of the objectives (the particular objective or particular objectives) described in paragraphs (a) to (d) of subsection (2) (whether or not the person himself or herself shares the particular objective or particular objectives); and

⁴²⁶ *Gangs and Organised Crime Bill 2009* (NZ), Explanatory Note, 2.

⁴²⁷ New Zealand, *Parliamentary Debates*, House of Representatives, 10 Feb 2009, (652) 1098, *Gangs and Organised Crime Bill — First Reading* (Hon Simon Power, Minister for Justice).

⁴²⁸ *Ibid*, at 1.

⁴²⁹ Part 3 *Gangs and Organised Crime Bill 2009* (NZ).

⁴³⁰ *Ibid*, at 3, 8.

- (b) either knowing that his or her conduct contributes, or being reckless as to whether his or her conduct may contribute, to the occurrence of any criminal activity; and
- (c) either knowing that the criminal activity contributes, or being reckless as to whether the criminal activity may contribute, to achieving the particular objective or particular objectives of the organised criminal group.

If passed, the Bill will change the mental elements by requiring that the accused knows the shared criminal objectives⁴³¹ of at least three people. This element does not require that these three people constitute an organised criminal group. This substitutes the knowledge of the nature of the group element in the current s 98A(1).

Second, proposed s 98A(1)(b) maintains the requirement 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 without requiring that the participation makes an actual contribution to any criminal offence.

Third, proposed new s 98A(1)(c) further requires that the accused knows or is at least aware that the criminal activity may contribute to achieving the particular objective(s) of an organised criminal group.

Figure 16 Elements of proposed 98A(1) *Crimes Act 1961* (NZ)⁴³²

S 98A(1)	Elements of the offence
Physical elements	<ul style="list-style-type: none"> • participation • in an organised criminal group (s 98A(2)).
Mental elements	<ul style="list-style-type: none"> • knowledge that 3 or more people share any 1 or more of the objectives stated in s 98A(2)(a)-(d) (whether or not the person himself or herself shares the particular objective(s)), proposed s 98A(1)(a); • knowledge or recklessness as to whether the participation may contribute to the occurrence of criminal activity, proposed s 98A(1)(b); and • knowledge or recklessness that the criminal activity may contribute to achieving the particular objective(s) of the organised criminal group, proposed s 98A(1)(c).
Penalty	10 years imprisonment

The current draft of proposed s 98A(1) in the *Gangs and Organised Crime Bill 2009* (NZ) requires some further clarification. It is not clear whether or not the criminal activity referred to in proposed s 98(1)(c) is the same criminal activity referred to in proposed paragraph (b). Moreover, it is not clear whether an accused could or should be liable under the proposed new offence without knowing that the organised criminal group exists. It is also not evident how the proposed provision will make prosecutions under s 98A any easier as suggested by the Government.

At the time of writing, the *Gangs and Organised Crime Bill 2009* (NZ) had been referred to the Law and Order Committee for consideration. A report is expected to be released on August 10, 2009. It is widely expected that the Bill will pass as the Opposition Labour Party as expressed its support for this initiative.⁴³³

⁴³¹ See Section 5.2.1 above

⁴³² *Gangs and Organised Crime Bill 2009* (NZ).

⁴³³ New Zealand, *Parliamentary Debates*, House of Representatives, 10 Feb 2009, (652) 1098, *Gangs and Organised Crime Bill — First Reading* (Hon Clayton Cosggrove).

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.⁴³⁴

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.⁴³⁵ The levels of migrant smuggling and human trafficking in Australia are very 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.⁴³⁶ 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.⁴³⁷ 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.⁴³⁸ Recently, there has been growing attention on Middle Eastern organised crime, especially in Sydney's western suburbs but also in Queensland and Western Australia.⁴³⁹ The ACC notes that even today, 'some

⁴³⁴ Australian Crime Commission (ACC), *Organised Crime in Australia 2009* (2009) 5.

⁴³⁵ *Ibid.*, at 7–11.

⁴³⁶ John G Valentin, 'Present Issues for Organised Crime Control: The Australian Perspective' (1993) 44 *UNAFEI Resource Materials Series* 92 at 99–100.

⁴³⁷ 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*, Appendix B; Richard Basham, 'Asian Crime – A Challenge for Australia' (1999) 31 *Australian Journal of Forensic Science* 29 at 37–38; Valentin, 'Present Issues for Organised Crime Control', at 93–96.

⁴³⁸ Australia, Parliamentary Joint Committee on the National Crime Authority, *Asian Organised Crime in Australia*, paras 6.7–6.36; UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries*, Appendix B; Valentin, 'Present Issues for Organised Crime Control', at 97–98.

⁴³⁹ Australia, Parliamentary Joint Committee on the Australian Crime Commission (ACC), *Inquiry into the future impact of serious and organised crime on Australian society* (2007)

groups will prefer to deal predominantly with trusted members of their own ethos or ethnicity.⁴⁴⁰

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.⁴⁴¹ This is well manifested in the gangland killings that shocked Melbourne in the late 1990s and early 2000s.⁴⁴² There is also increasing evidence of greater internationalisation of Australian organised crime, demonstrated in 'greater partnerships between domestic (e.g. outlaw motorcycle gangs (OMCGs)) and transnational organised crime groups (e.g. Asian organised crime groups)'.⁴⁴³ 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.⁴⁴⁴

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.⁴⁴⁵ Research conducted in 2002 estimated that OMCGs 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'.⁴⁴⁶

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)⁴⁴⁷ and the Northern Territory.⁴⁴⁸

2.24–2.25; See further Section 6.2.1 below.

⁴⁴⁰ ACC, *Organised Crime in Australia 2009*, 5.

⁴⁴¹ Australia, Parliamentary Joint Committee on the ACC, *Inquiry into the future impact of serious and organised crime on Australian society*, paras 2.9–2.15; ACC, *Organised Crime in Australia 2009*, 5.

⁴⁴² For further reading see Gary Tippet & Ian Munro, *Lives of Crime: The Melbourne gangland murders and other tales of true crime* (2008).

⁴⁴³ UNODC, *Amphetamines and Ecstasy*, 51.

⁴⁴⁴ UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries*, Appendix B.

⁴⁴⁵ Australia, Parliamentary Joint Committee on the ACC, *Inquiry into the future impact of serious and organised crime on Australian society*, 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 25 July 2009). Cf ACC, *Organised Crime in Australia 2009*, 11.

⁴⁴⁶ UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries*, Appendix B.

⁴⁴⁷ Section 22 *Australian Capital Territory (Self-Government) Act 1988* (Cth).

⁴⁴⁸ Section 6 *Northern Territory (Self-Government) Act 1978* (Cth). See further Schloenhardt, *Queensland Criminal Law*, 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.⁴⁴⁹ South Australia introduced sweeping new measures, including offences, against criminal associations in 2008 which are fundamentally different compared to those in operation elsewhere.⁴⁵⁰ New South Wales followed with similar amendments in April 2009,⁴⁵¹ and in June 2009 a similar Bill was introduced in the Northern Territory.⁴⁵²

6.2. New South Wales

In September 2006, New South Wales became the first jurisdiction in Australia to have specific offences against criminal organisations. The *Crimes Legislation Amendment (Gangs) Act 2006*⁴⁵³ 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.

New South Wales added further legislation designed specifically to ban OMCs in April 2009. The *Crimes (Criminal Organisations Control Act) 2009*⁴⁵⁴ 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 NSW 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',⁴⁵⁵ to 'increase that feeling of safety within our community',⁴⁵⁶ and to 'prevent Sydney from turning into Chicago or Los Angeles.'⁴⁵⁷ In his second reading speech, Parliamentary Secretary Tony Stewart remarked that:

⁴⁴⁹ *Criminal Code (Organised Criminal Groups) Amendment Bill 2007*; see Section 6.3 below.

⁴⁵⁰ *Serious and Organised Crime Act 2008* (SA); see Section 6.4 below.

⁴⁵¹ See Section 6.2.2 below.

⁴⁵² *Serious Crime Control Bill 2009* (NT).

⁴⁵³ No 61 of 2006. The offences were renumbered by the *Crimes Amendment Act 2007* (NSW), No 38 of 2007.

⁴⁵⁴ No 6 of 2009.

⁴⁵⁵ NSW, *Hansard*, Legislative Assembly, 30 Aug 2006, 1142, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown).

⁴⁵⁶ NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1517, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Chris Hartcher, Gosford).

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.⁴⁵⁸

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.⁴⁵⁹

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.⁴⁶⁰

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.⁴⁶¹

⁴⁵⁷ NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1535, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Michael Daley, Maroubra).

⁴⁵⁸ NSW, *Hansard*, Legislative Assembly, 30 Aug 2006, 1142, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown); NSW, *Hansard*, Legislative Council, 19 Sep 2006, 1733 Crimes Legislation Amendment (Gangs) Bill, Second Reading (The Hon Eric Roozendaal). See also NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1524, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Kevin Greene, Georges River).

⁴⁵⁹ NSW, *Hansard*, Legislative Assembly, 30 Aug 2006, 1142, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown).

⁴⁶⁰ See further DGE Caldocott et al, 'Clandestine drug laboratories in Australia 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.

⁴⁶¹ NSW, *Hansard*, Legislative Assembly, 30 Aug 2006, 1142 Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown); cf NSW,

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'.⁴⁶² He noted that Middle Eastern organised crime has existed in New South Wales 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.⁴⁶³

Earlier attempts by the New South Wales 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).⁴⁶⁴

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).

The measures against organised crime are not the only feature of the *Crimes Legislation Amendment (Gangs) Act 2006* (NSW). The Act simultaneously introduced new provisions relating to public order which were a response to xenophobic riots that occurred in Cronulla in southeastern Sydney on December 11, 2005. The magnitude of these riots and subsequent revenge attacks, and the coverage these incidents gained in the international media, forced the New South Wales Government to amend existing public order offences (sometimes referred to as 'mob offences'),⁴⁶⁵ increase penalties for offences against law enforcement officers,⁴⁶⁶ and enhance related enforcement powers.⁴⁶⁷ 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'.⁴⁶⁸

Hansard, Legislative Assembly, 6 Sep 2006, 1523, *Crimes Legislation Amendment (Gangs) Bill*, Second Reading (Mr Kevin Greene, Georges River).

⁴⁶² NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1517, *Crimes Legislation Amendment (Gangs) Bill*, Second Reading (Mr Chris Hartcher, Gosford).

⁴⁶³ *Ibid.*

⁴⁶⁴ *Crimes (Sentencing Procedure) (Gang Leaders) Bill 2005*; cf NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1517, *Crimes Legislation Amendment (Gangs) Bill*, Second Reading (Mr Chris Hartcher, Gosford).

⁴⁶⁵ See new ss 60(1A), (2A), (3a), 60A(1), 195(2), 196(2), 197(2), 199(2), 200(2) *Crimes Act 1900* (NSW).

⁴⁶⁶ See ss 60B, 60C *Crimes Act 1900* (NSW).

⁴⁶⁷ See new s 87MA *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

⁴⁶⁸ NSW, *Hansard*, Legislative Council, 19 Sep 2006, 1756 *Crimes Legislation Amendment (Gangs) Bill*, Second Reading (Ms Lee Rhiannon). See also the comments in Dennis Miralis, 'Law & Order 2007-style' (Mar 2007) *NSW Law Society Journal* 54 at 54, 56.

Definition of 'criminal group'

At the heart of the New South Wales amendment stands the definition of the term 'criminal group' in s 93S(1) *Crimes Act 1900* which is in many parts identical to the definition of 'organised criminal group' in New Zealand.⁴⁶⁹ 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.'⁴⁷⁰

Figure 17 'Criminal group', s 93S(1) *Crimes Act 1900* (NSW)

Terminology Elements	Criminal Group
Structure	<ul style="list-style-type: none"> • Three or more persons. Irrelevant whether or not (s 93SJ(2)): <ul style="list-style-type: none"> ○ 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	<ul style="list-style-type: none"> • [no element]
Objectives	Either: <ul style="list-style-type: none"> • 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 New South Wales 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

⁴⁶⁹ See Section 5.2.1 above.

⁴⁷⁰ NSW, *Hansard*, Legislative Assembly, 30 Aug 2006, 1142 Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown).

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,⁴⁷¹ capturing two types of associations: (1) those that seek to profit from serious offences, and (2) those that seek to engage in serious violence.

The first possible objective of a criminal group is ‘obtaining material benefit from conduct that constitutes a serious indictable offence’ in New South Wales (para (a)) or an equivalent offence outside New South Wales (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 group 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 New South Wales (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,⁴⁷² 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.⁴⁷³ 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).⁴⁷⁴ In contrast to conspiracy, however, there is no requirement of any specific agreement among the three or more people to commit particular (identifiable) crimes.⁴⁷⁵ 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.⁴⁷⁶

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

⁴⁷¹ See Section 5.2.1 above.

⁴⁷² Cf *R v Bilaf Skaf* [2005] NSWCCA 297.

⁴⁷³ See Section 2.1.3 above.

⁴⁷⁴ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 19.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ See ‘participation in criminal groups’ below.

characteristics of organised crime. Concerns may arise over the breadth of the New South Wales definition although the legislator has assured that ‘the threshold used to define an organised criminal group is quite high’.⁴⁷⁷ The term ‘organised’ is, however, not used anywhere in the legislation. While it has been stated that ‘three kids spraying graffiti on a billboard could not be classified as an organised criminal group, but a 10-person car rebirthing operation would be,’⁴⁷⁸ 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 18 below.⁴⁷⁹ Offences under s 93T(1) are punishable by up to five years imprisonment.

Figure 18 Elements of s 93T(1) *Crimes Act 1900* (NSW)

S 98IK(1)	Elements of the offence
Physical elements	<ul style="list-style-type: none"> • participating in • a criminal group (s 93S(1)).
Mental elements	<ul style="list-style-type: none"> • 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

⁴⁷⁷ NSW, *Hansard*, Legislative Assembly, 30 Aug 2006, 1144, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown).

⁴⁷⁸ *Ibid.* 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 24 July 2009).

⁴⁷⁹ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 15.

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.⁴⁸⁰ The term is usually used in the context of complicity and accessorial liability — which are governed by common law in New South Wales — to describe any aiding, enabling, counselling, or procuring of a criminal offence. From the wording of s 93T(1) it is not clear whether the participation must actually have the consequence of contributing to the occurrence of any criminal activity, or whether any participation suffices, including acts unrelated or only remotely related to 'any crime, whether complete or incomplete, at any time in the future'.⁴⁸¹

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'.⁴⁸² 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'.⁴⁸³

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,⁴⁸⁴ 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.⁴⁸⁵ 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.⁴⁸⁶

⁴⁸⁰ NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1525, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Andrew Tink, Epping).

⁴⁸¹ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 16, 30-32.

⁴⁸² NSW, *Hansard*, Legislative Assembly, 30 Aug 2006, 1144, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown); cf NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 26.

⁴⁸³ Mullins, 'Broader Liability for Gang Accomplices', at 837.

⁴⁸⁴ See Section 4.3 above.

⁴⁸⁵ NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1525, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Andrew Tink, Epping; NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1529, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Malcolm Kerr, Cronulla).

⁴⁸⁶ NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1525, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Andrew Tink, Epping).

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 given to these distinctions.⁴⁸⁷

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

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

These are the so-called cleanskins, people with no criminal record who give criminals a legal front behind which to commit their crimes and minimise the risk of detection by law enforcement. They may be licensed hoteliers, real estate agents, smash repairers, pharmacists or public officials, who, in various ways, aid and abet ongoing criminal activity. And, of course, the bill targets the heavies — the people who actively commit ongoing criminal acts: the drug runners, the gun traffickers, the car rebirthers, the armed robbers and the standover men.⁴⁸⁸

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.'⁴⁸⁹ 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.⁴⁹⁰

Further, a person must be at least reckless — i.e. 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

⁴⁸⁷ NSW, *Hansard*, Legislative Council, 19 Sep 2006, 1753, Crimes Legislation Amendment (Gangs) Bill, Second Reading (The Hon Gordon Moyes).

⁴⁸⁸ NSW, *Hansard*, Legislative Assembly, 30 Aug 2006, 1144, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown).

⁴⁸⁹ NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1534, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mrs Dawn Fardell, Dubbo).

⁴⁹⁰ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 21.

might or could be a contribution will suffice.⁴⁹¹ 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.⁴⁹²

It has been argued that the inclusion of recklessness as an alternative mental element to knowledge in s 93T(b) assists in the deterrence of criminal activity by criminal groups. 'The message, particularly to young people,' stated Mr Michael Daley MP, 'is: When in doubt stay away. It places a responsibility for their own actions. [...] It will no longer be a defence to claim ignorance.'⁴⁹³ On the other hand, the mental elements for the offence under s 93T(1) have been criticised for being too broad and lacking clarity.⁴⁹⁴ 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.'⁴⁹⁵ 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.⁴⁹⁶

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,⁴⁹⁷ 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.'⁴⁹⁸ 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.⁴⁹⁹

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

⁴⁹¹ *La Fontaine v R* (1976) 136 CLR 62; *R v Crabbe* (1985) 156 CLR 464; *Bouhey v R* (1986) 161 CLR 10 at 21.

⁴⁹² NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 21.

⁴⁹³ NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1537, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Michael Daley, Moroubra).

⁴⁹⁴ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 33.

⁴⁹⁵ NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1533, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Paul Pearce, Coogee).

⁴⁹⁶ Miralis, 'Law & Order 2007-style', at 55.

⁴⁹⁷ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) paras 33-34.

⁴⁹⁸ NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1532, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Malcolm Kerr, Cronulla).

⁴⁹⁹ NSW, *Hansard*, Legislative Assembly, 6 Sep 2006, 1757, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Ms Lee Rhiannon).

commission of serious organised criminal harm, and raises related concerns about the adequate protection of individual liberties and freedom of association.⁵⁰⁰

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.'⁵⁰¹

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.'⁵⁰²

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'⁵⁰³.

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.

⁵⁰⁰ Saul, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*.

⁵⁰¹ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 35.

⁵⁰² NSW, *Hansard*, Legislative Assembly, 30 Aug 2006, 1143, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown).

⁵⁰³ *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 at 444 per James LJ; cf Bronitt & McSherry, *Principles of Criminal Law*, 503–504; McSherry & Naylor, *Australian Criminal Laws*, 158.

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.⁵⁰⁴ It requires proof that the person damaged or destroyed another person's property or threatened to do so. The physical acts need to be accompanied by an intention to participate in criminal activities of a criminal group. The structure of physical and mental elements is identical to subsection (2). As with the other aggravations, it suffices to show that the intention relates to 'any' criminal activity. It is not necessary to demonstrate that the intention (or the actions) is aimed at a specific criminal enterprise, but the intention must relate to criminal activities, not to other, legitimate conduct of the group.

Assaulting a law enforcement officer with intent to participate in a criminal group

The third and final aggravation in s 93T(4) mirrors the offence in subsection (2) with an additional physical element relating to the status of the person assaulted. Subsection (4) criminalises assaults of law enforcement officers whilst they are executing their duties, intending by that action to participate in any criminal activity of a criminal group. The meaning of law enforcement officers and their relevant duties are set out in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The offence also extends to assaults of officers who are off-duty in the situations specified in s 93T(5). These situations relate to instances in which the assault is deliberately targeting law enforcement officers.

One of the difficulties associated with the aggravating offences in s 93T(2)-(4) *Crimes Act 1900* (NSW) is again the uncertainty over the meaning of the term 'participation'. 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 New South Wales Parliament passed the *Crimes (Criminal Organisations Control) Bill 2009* 'for the purpose of disrupting and restricting the activities of criminal organisations and their members'⁵⁰⁵ and 'to give no second chance to those [who are part] of an illegal gang'.⁵⁰⁶ 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

⁵⁰⁴ Cf s 195 *Crimes Act 1900* (NSW).

⁵⁰⁵ *Crimes (Criminal Organisations Control) Act 2009* (NSW), long title; No 6 of 2009.

⁵⁰⁶ 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*.

(b) which are the subject of a declaration by an eligible Judge.⁵⁰⁷

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 Sunday, March 22, 2009 in which Mr Anthony Zervas, 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 New South Wales about 'an escalation in violence [involving] outlaw motorcycle gangs'.⁵⁰⁸ Within a few days of this incident, the New South Wales Government announced the introduction of the *Crimes (Criminal 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.⁵⁰⁹ In summary, the Act enables the New South Wales 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 recruit 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 Judge⁵¹⁰ 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.⁵¹¹

The judge may make a declaration of the organisation if he/she is satisfied, on the balance of probabilities,⁵¹² 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'.⁵¹³ The judge is not required to provide any grounds or reasons for the decision to declare an organisation.⁵¹⁴ A declaration remains in force for up to three years at which point an

⁵⁰⁷ *Crimes (Criminal Organisations Control) Bill 2009* (NSW), Explanatory Note, 1.

⁵⁰⁸ NSW Premier Mr Nathan Rees as cited in Clenell & Smith, 'NSW rushes in bikie law'.

⁵⁰⁹ See Section 6.4 below.

⁵¹⁰ Section 5 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

⁵¹¹ Sections 7, 8 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

⁵¹² Section 32(1) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

⁵¹³ Section 9(2) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

⁵¹⁴ Cf NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) para 52.

application for renewal is required, unless the declaration has been revoked.⁵¹⁵ All declarations are recorded in a register of criminal organisations, s 30.⁵¹⁶

The NSW 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)*.⁵¹⁷ While the involvement of the judiciary in the declaration process avoids one of the shortcomings of the South Australian law,⁵¹⁸ it raises concerns over a possible collusion between the executive and the Supreme Court as the Attorney-General has discretion which judge he chooses.⁵¹⁹

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,⁵²⁰ the Court may consider issuing a (confirmatory or final) control order if the court is satisfied, on the balance of probabilities,⁵²¹ that:

- (a) the person is a member of a particular declared organisation, and
- (b) sufficient grounds exist for making the control order.⁵²²

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.⁵²³ 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 another and with other members of declared organisations. Furthermore, controlled members are not allowed to

⁵¹⁵ Sections 11, 12 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

⁵¹⁶ See further Arlie Loughnan, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)' (2009) 20(3) *Current Issues in Criminal Justice* 457 at 459.

⁵¹⁷ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) para 13.

⁵¹⁸ See Section 6.4.4 below.

⁵¹⁹ Loughnan, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)', at 460. Cf the remarks by Mark Le Grand, 'Crimes against Legality' (25-26 Apr 2009) *The Weekend Australian*, 23.

⁵²⁰ Sections 15, 16 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

⁵²¹ Section 32(1) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

⁵²² Section 19(1) *Crimes (Criminal Organisations Control) Act 2009* (NSW). Cf Loughnan, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)', at 460.

⁵²³ Section 19(2) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

engage in a range of ‘prescribed activities’ set out in s 27(6).⁵²⁴ These activities relate to employment ‘in a number of industries that are vulnerable to organised crime’,⁵²⁵ 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.⁵²⁶

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 right to work under art 6(1) *International Covenant on Economic, Social, and Cultural Rights*.⁵²⁷

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 that are subject to interim control orders or control orders.

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.⁵²⁸ 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.’⁵²⁹ 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.⁵³⁰

⁵²⁴ Cf *Crimes (Criminal Organisations Control) Bill 2009* (NSW), Explanatory Note, 1.

⁵²⁵ NSW, *Hansard*, Legislative Assembly, 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.

⁵²⁶ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) paras 24, 29, 37.

⁵²⁷ *Ibid*, at paras 43, 46.

⁵²⁸ Section 26(3) *Crimes (Criminal Organisations Control) Act 2009* (NSW).

⁵²⁹ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) para 21.

⁵³⁰ *Ibid*, at para 42.

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 not require prove of subjective fault.⁵³¹

A further offence was added in May 2009 with the *Criminal Organisations Legislation Amendment Act 2009* (NSW).⁵³² 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.

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 New South Wales 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*,⁵³³ 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 rush to criminal law and process as a regulatory weapon of choice occluded alternative approaches, such as those focusing on social inclusion, and even a consideration of whether existing laws were sufficient to deal with the perceived problem. [...] [T]he new Act falls neatly into a pattern of reactive legislative action in criminal justice in NSW that had developed over recent years and now seems well entrenched,

notes one commentator.⁵³⁴ 'The processes of debate and review were displaced by populism and political grandstanding', notes another.⁵³⁵

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.⁵³⁶ A newspaper article also remarks 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.'⁵³⁷ Loughnan notes that 'the Act incorporates

⁵³¹ Ibid.

⁵³² No 23 of 2009.

⁵³³ See Section 6.4 below.

⁵³⁴ Loughnan, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)', at 458.

⁵³⁵ Le Grand, 'Crimes against Legality', at 23.

⁵³⁶ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009).

⁵³⁷ Le Grand, 'Crimes against Legality', at 23 [emphasis added].

some significant compromises of traditional safeguards for individuals accused of criminal offences.⁵³⁸

The Premier of New South Wales, 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.⁵³⁹

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.⁵⁴⁰ 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*. [...]

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.⁵⁴¹

There is some fear that the laws may not only be used against criminal organisations but also against sporting, ethnic, and religious groups.⁵⁴² 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'.⁵⁴³

Despite the many obvious flaws of the *Crimes (Criminal Organisations Control) Act 2009* (NSW) and the widespread concern over possible infringements of civil rights, the Government of the Northern Territory on June 11, 2009 proposed the introduction

⁵³⁸ Loughnan, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)', at 462.

⁵³⁹ Lisa Carty, 'No second chances as NSW gets tough for bikies on gangs' (30 Mar 2009) *Sydney Morning Herald*.

⁵⁴⁰ Clenell & Smith, 'NSW rushes in bikie law'.

⁵⁴¹ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 5 of 2009 (4 May 2009) paras 16, 19.

⁵⁴² NSW Law Society president Joe Catanzariti as cited in Alexandra Smith, 'Laws "won't stop bike violence"' (30 Mar 2009) *Sydney Morning Herald*, 2.

⁵⁴³ 'Bikie laws "an overreaction"' (2 Apr 2009) *ABC News*, www.abc.net.au/news/stories/2009/04/02/2533718.htm (accessed 31 July 2009), citing NSW Law Society president Joe Catanzariti.

of similar legislation with the *Serious Crime Control Bill 2009* (NT). It is expected that this Bill will be passed into law in the second half of 2009.

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.'⁵⁴⁴ Supporters of the Bill argued that 'Brisbane has more crime gangs than Chicago'⁵⁴⁵ and that the proposed legislation will 'help this State ensure that it does not become an attractive haven for organised crime.'⁵⁴⁶

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.'⁵⁴⁷ The legislative material also makes brief reference to the *Convention against Transnational Organised Crime*.⁵⁴⁸

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,⁵⁴⁹ 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 four years imprisonment⁵⁵⁰ (s 545A(2)(a) and (b)) or to commit serious violent offences (s 545A(2)(c) and (d)). 'Serious violent offence' is defined in s 545A(2) using the same criteria as the equivalent provision in New South Wales.⁵⁵¹ 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.

⁵⁴⁴ *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.

⁵⁴⁵ Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4012 (Mr Langbroek).

⁵⁴⁶ Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4011 (Dr B Flegg).

⁵⁴⁷ *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 1.

⁵⁴⁸ Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4015 (Mr M McArdle).

⁵⁴⁹ See Section 5.2.1 above.

⁵⁵⁰ 'The reasoning behind the reference to the 4 year offence is to capture the stealing type offences': *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 4.

⁵⁵¹ See Section 6.2.2 above.

Figure 19 'Organised criminal group', proposed s 545A(2) *Criminal Code* (Qld)

Terminology	Organised Criminal Group
Elements	
Structure	<ul style="list-style-type: none"> • Three or more persons. Irrelevant whether or not (s 545A(2)(e)-(g)): <ul style="list-style-type: none"> ○ 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	<ul style="list-style-type: none"> • [no element]
Objectives	Either: <ul style="list-style-type: none"> • 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.'⁵⁵² 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.⁵⁵³

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:

⁵⁵² Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4013 (Mr Lawlor).

⁵⁵³ Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4010 (Hon KG Shine, Attorney-General and Minister for Justice).

A person who participates as a member of a group knowing—
 (1) that it is an organised criminal group; and
 (2) that the person's participation contributes to the occurrence of any criminal activity of the group;
 commits a crime.
 Maximum penalty — 5 years imprisonment.

Figure 20 Elements of proposed s 545A(1) *Criminal Code* (Qld)

S 545A(1)	Elements of the offence
Physical elements	<ul style="list-style-type: none"> participating as a member (s 545A(2)) of a group
Procedural matters	Examples for people identifying themselves as members, s 545A(2).
Mental elements	<ul style="list-style-type: none"> 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.⁵⁵⁴

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 both 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.⁵⁵⁵ These include:

- Wearing clothing, patches insignia or symbols relevant to the group;
- Having a tattoo or brand that is an identifying mark, picture or word relevant to the group;
- Making statements about membership of or belonging to the group;
- Having a known association with members of the group.

These 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

⁵⁵⁴ Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4016 (Mr Messenger).

⁵⁵⁵ Cf Levitz & Prior, 'Criminal Organization Legislation: Canada's Response', at 378.

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.⁵⁵⁶

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.⁵⁵⁷

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.⁵⁵⁸

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.'⁵⁵⁹

This, however, would confirm concerns that mere membership in an organised criminal group is indeed a crime.⁵⁶⁰ 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 [...].'⁵⁶¹ Sensible interpretation of the legislation suggests that there should be no liability if no criminal activity by the group occurs, but there is nothing in the Bill that creates a requirement that the accused's participation actually makes a contribution to that activity.

The mental elements of the proposed offence require (a) that the person knows that the group in which he or she participates is an organised criminal group (i.e. he/she

⁵⁵⁶ Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4013 (Mr Lawlor). See also similar discussion in reference to insignia used by Chinese triads, see Sections 8.1.2 below.

⁵⁵⁷ Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4010 (Hon KG Shine, Attorney-General and Minister for Justice).

⁵⁵⁸ *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 2.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ Kerry Shine, Attorney-General and Minister for Justice (Qld) (pers comm, 5 Feb 2008, on file with author).

⁵⁶¹ Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4017 (Mr Messenger).

knows the objectives of the group) and (b) also knows that the participation contributes to the occurrence of any criminal activity of that group. Accidental participation and — in contrast to New South Wales — recklessness will not result in criminal liability under the Queensland proposal.

6.3.3 Further remarks

In summary, proposed s 545A *Criminal Code* (Qld) is more carefully drafted and more narrowly construed than the provisions in New South Wales. In comparison to the *Palermo Convention*, the Queensland proposal is broader in that the definition of organised criminal group also applies to groups engaging in serious violent offences and does not require any formal structure of the group.⁵⁶²

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.⁵⁶³

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 being imprisoned.

The Queensland Bill failed to pass the second reading in Parliament on October 31, 2007. 'The government opposes this Bill', stated then Attorney-General and Minister for Justice Kerry Shine,

as it is ill conceived, unnecessary and aims to extend the basic principles of criminal liability to guilt by association. The fundamental right of freedom of association is potentially eroded by this Bill because even innocent participation in an organised criminal group as defined may, in some way, contribute to the occurrence of criminal activity by the group. No specific act or omission by the accused is necessary and no specific criminal act or activity need be contemplated by the accused for the offence to be committed. [...]

A one-size-fits-all response is therefore not the answer to this complex problem. In any event, such an approach is unlikely to be effective in targeting organised criminal groups

⁵⁶² See further Section 3.2 above.

⁵⁶³ Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4013-4014 (Mr Johnson).

which may operate under the cover of legitimate business enterprises and with a high degree of sophistication.⁵⁶⁴

The Opposition expressed that it may re-introduce the failed Bill in 2008,⁵⁶⁵ but this did not occur. 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 2007.⁵⁶⁶ 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.’⁵⁶⁷ 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 activities⁵⁶⁸

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

⁵⁶⁴ Queensland, *Hansard*, Legislative Assembly, 31 Oct 2007, 4010 (Hon KG Shine, Attorney-General and Minister for Justice).

⁵⁶⁵ Personal communication with Mr Mark McArdle, Shadow Attorney-General, Shadow Minister Justice, Brisbane (Qld), 26 Nov 2007.

⁵⁶⁶ 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.

⁵⁶⁷ South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups* 7.

⁵⁶⁸ *Ibid*, at 7, 20.

of South Australia on May 8, 2008.⁵⁶⁹ The *Serious and Organised Crime (Control) Act 2008* (SA) entered into force on September 4, 2008.⁵⁷⁰

The stated purposes 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.⁵⁷¹

The legislation in South Australia, which is modelled in part after Hong Kong's *Societies Ordinance 1997*,⁵⁷² 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'.⁵⁷³ Instead, the Act provides that a retired judge will conduct annual reviews of all declarations and make this review available to Parliament, s 37 *Serious and Organised Crime (Control) Act 2008* (SA).

The criteria and methods used by the Attorney-General to determine whether to declare an organisation are not a model of clarity and are a complex mix of evidential indicia and administrative discretion. Figure 21 attempts to visualise the key points required to declare an organisation.

⁵⁶⁹ *Serious and Organised Crime (Control) Act 2008* (SA).

⁵⁷⁰ Unless renewed, the legislation will expire five years after the date it came into operation.

⁵⁷¹ South Australia, *Daily Hansard*, House of Assembly, 20 Nov 2007 (Hon MD Rann, Premier). Cf s 8 *Societies Ordinance 1997* (Hong Kong).

⁵⁷² See Section 8.3 below.

⁵⁷³ South Australia, *Daily Hansard*, House of Assembly, 26 Feb 2008 (Hon MJ Atkinson, Attorney-General).

Figure 21 'Declared organisations', s 10 *Serious and Organised Crime (Control) Act 2008* (SA)

Terminology Elements	Declared organisations
Structure	<ul style="list-style-type: none"> association of members (s 3) of the organisation (s 3)
Activities	<ul style="list-style-type: none"> organisation represents a risk to public safety or order
Objectives	<ul style="list-style-type: none"> organising, planning, facilitating, supporting or engaging in serious criminal activity.
Determination of purpose, s 10(4)	<p>AG may be satisfied of the purpose of the association regardless of whether or not</p> <ul style="list-style-type: none"> (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, [...]'.⁵⁷⁴ 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 (i.e. legitimate organisations).

Under the Act, it is necessary that the organisation has members. Unlike similar legislation elsewhere, there is no minimum number of members or associates. According to s 3, members also include:

- (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—

⁵⁷⁴ South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups* 24.

- (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 *Serious and Organised Crime (Control) Act 2008* (SA) 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).⁵⁷⁵

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,⁵⁷⁶ and those that involve persons with a criminal history (including gangs formed in prisons).⁵⁷⁷

⁵⁷⁵ Cf s 35(11)(a) *Serious and Organised Crime (Control) Act 2008* (SA).

⁵⁷⁶ Cf s 10(3)(a) and (c) *Serious and Organised Crime (Control) Act 2008* (SA).

⁵⁷⁷ 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 (i.e. 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 organisations 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.⁵⁷⁸

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

⁵⁷⁸ 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 10 July 2009).

hearing of a notice of objection.⁵⁷⁹ Accordingly, many if not most defendants will not know the reasons why a control order is sought against them.

Section 14 is designed to prohibit the person who is the subject of the control order to communicate with other known offenders, to visit certain premises (such as clubhouses of biker gangs), to associate with members of criminal organisations, and to possess 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.⁵⁸⁰ But the control order remains in operation during the appeal process and a privative clause protects any decision from further judicial review.⁵⁸¹

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 22 below.⁵⁸² The legislation exempts certain associations, such as those between close family members, lawful businesses, and those of educational or therapeutic nature from criminal liability, s 35(6).

Figure 22 Elements s 35(1), (2) *Serious and Organised Crime (Control) Act 2008* (SA)

S 35(1), (2)	Elements of the offence
Physical elements	<ul style="list-style-type: none"> • associating with another person; • at least six times over a 12-months period; • the other person is either <ul style="list-style-type: none"> ○ 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	<ul style="list-style-type: none"> • knowledge or recklessness that the other person was (s 35(2)): <ul style="list-style-type: none"> ○ 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 six occasions over a twelve 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).

⁵⁷⁹ Section 21 *Serious and Organised Crime (Control) Act 2008* (SA). Cf South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 27; *K Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4.

⁵⁸⁰ Section 19 *Serious and Organised Crime (Control) Act 2008* (SA).

⁵⁸¹ Sections 14, 16, 17, 41 *Serious and Organised Crime (Control) Act 2008* (SA)

⁵⁸² The *Serious and Organised Crime (Control) Act 2008* (SA) repealed the offence of consorting under former s 13 *Summary Offences Act 1953* (SA).

Membership is further defined in s 3 of the Bill to include prospective members, persons who identify themselves as belonging to the group, and persons treated by the group as belonging to it.⁵⁸³ 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 (six times or more over twelve 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.'⁵⁸⁴ The central focus of the offences in s 35 is solely on associations with certain people. The legislation does not conceal the fact 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 twelve 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.⁵⁸⁵

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, 2009.⁵⁸⁶ The first control order against a member of the Finks was issued on May 25, 2009.

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

⁵⁸³ See further Section 6.4.1 above.

⁵⁸⁴ South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 30.

⁵⁸⁵ Sections 248, 250 *Criminal Law Consolidation Act 1935* (SA).

⁵⁸⁶ South Australia, Attorney-General's Department, Michael Atkinson (Attorney-General), *Serious and Organised Crime (Control) Act 2008*.

organisations. This is also evident from a recent submission by the South Australian Government to a federal parliamentary inquiry.⁵⁸⁷ 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. '[T]he new anti "bikie" legislation', notes Arlie Loughnan, 'evidences a willingness to borrow from the anti-terrorism model for use in legislative regimes beyond the exigencies of terrorism.'⁵⁸⁸ 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 et cetera) while the South Australian Act vests the power to declare organisations in a single person. The 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.'⁵⁸⁹ 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.⁵⁹⁰ Ben Saul shares these

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.⁵⁹¹

The breadth of application and vagueness of the terminology used create a real danger that the legislation might be used excessively and is open to abuse that could detrimentally impact on a suite of groups, associations, and individuals that may be seen as undesirable by senior government officials. In the eyes of some, however, the legislation is not tough enough. The Director of Public Prosecutions in South Australia, Mr Stephen Pallaras, for instance, stated that 'the legislation wrongly targeted individuals rather than crime groups' and that he would prefer to see a 'blanket ban on any bikie gang'.⁵⁹²

⁵⁸⁷ South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 15.

⁵⁸⁸ Loughnan, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)', at 458.

⁵⁸⁹ South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 46.

⁵⁹⁰ Arthur Veno, 'Bikies suffer as politics of fear takes hold in SA' (26 Feb 2008) *The Advertiser* (Adelaide) 20.

⁵⁹¹ 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*.

⁵⁹² Jeremy Roberts, 'Bikie laws not tough enough: prosecutor' (9 May 2008) *The Australian*

The introduction of the South Australian laws has been closely monitored by neighbouring States and Territories. In 2009, the Northern Territory⁵⁹³ and New South Wales started to explore similar legislation.⁵⁹⁴ 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.'⁵⁹⁵

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 [...].⁵⁹⁶

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.⁵⁹⁷

As early as 2008, the Australian Crime Commission also noted that

there are indications that some outlaw groups have already relocated to other jurisdictions. [...] Such developments may or may not be in the community's overall interest. [...] [I]t may be disadvantageous for legislative or other initiatives to effectively pressure a group to move its operations to another jurisdiction or to adopt more effective covert measures.⁵⁹⁸

(accessed online).

⁵⁹³ *Serious Crime Control Bill 2009* (NT), second reading 11 June 2009.

⁵⁹⁴ 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.

⁵⁹⁵ South Australia, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 46

⁵⁹⁶ Christine Nixon, Victoria Police, Chief Commissioner, *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 25 July 2009).

⁵⁹⁷ 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 10 July 2009).

⁵⁹⁸ Australian Crime Commission (ACC), *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 25 July 2009).

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 six 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.⁵⁹⁹

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, 2000.⁶⁰⁰ 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.⁶⁰¹ 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 (xxvii) (references from the States) is another potential source of power. The Commonwealth has used the source of power in section 51 (xxvii) 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.⁶⁰²

⁵⁹⁹ See further Schloenhardt, *Queensland Criminal Law*, 32–35 with further references.

⁶⁰⁰ [2004] ATS 12.

⁶⁰¹ See further Brown et al, *Criminal Laws*, 956.

⁶⁰² Australia, Attorney-General's Department, *Answers to questions taken on notice, 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_cte/laoscg/submissions/sublist.htm (accessed 25 July 2009).

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.'⁶⁰³ 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 organised crime is so fragmented that it works to the advantage of the criminal and the disadvantage of law enforcement agencies.⁶⁰⁴

6.5.2 Parliamentary inquiry into legislative arrangements to outlaw serious and organised crime groups 2008

Background

In 2008, the federal Parliamentary Joint Committee on the Australian Crime Commission launched an *Inquiry into the legislative arrangements to outlaw serious and organised crime groups* that, inter alia, explores the question whether it is feasible and necessary to introduce new offences to criminalise organised crime in Australia. This inquiry is the result of a 2007 inquiry by the same Committee into *The future impact of serious and organised crime on Australian society* which

⁶⁰³ 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).

⁶⁰⁴ Australia, Parliamentary Joint Committee on the ACC, *Inquiry into the future impact of serious and organised crime on Australian society*, paras 6.93, 6.101.

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.’⁶⁰⁵ 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.⁶⁰⁶

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.⁶⁰⁷ 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.⁶⁰⁸ 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.’⁶⁰⁹

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.’⁶¹⁰

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;
- 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;

⁶⁰⁵ Ibid, Recommendation 6.

⁶⁰⁶ See further Section 6.4 above.

⁶⁰⁷ Australia, Parliamentary Joint Committee on the ACC, *Inquiry into the future impact of serious and organised crime on Australian society*, para 6.2.

⁶⁰⁸ Ibid, at paras 6.64–6.71.

⁶⁰⁹ Ibid, at para 6.79.

⁶¹⁰ Ibid, at paras 6.93, 6.101.

- 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 July 10, 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.⁶¹¹ 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 New South Wales.'⁶¹² 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.⁶¹³

Many law enforcement agencies, Police Ministers, and Police Commissioner also have reservations towards the introduction of organised crime offences. For

⁶¹¹ Jim Cox, Tasmania, Minister for Police and Emergency Management, *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).

⁶¹² David Campbell, NSW Minister for Police, *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).

⁶¹³ 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*, 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).

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.⁶¹⁴

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, cannot be resolved simply through legislation.⁶¹⁵

These observations are also reflected in the submission by Queensland's Crime and Misconduct Commission.⁶¹⁶ 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.'⁶¹⁷

6.5.3 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

Pressure has been mounting on the Australian Federal Government to introduce national measures against organised crime following the legislative developments in South Australia and New South Wales. Given the lack of widespread support for the introduction of new offences against criminal organisations, the Government presented the *Crimes Legislation Amendment (Serious and Organised Crime) Bill* to Parliament on June 24, 2009 which contains a range of new enforcement measures to prevent and suppress organised crime, rather than new criminal offences.

⁶¹⁴ Cox, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*.

⁶¹⁵ ACC, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*.

⁶¹⁶ Queensland, Crime and Misconduct Commission (CMC), *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).

⁶¹⁷ 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).

Specifically, the Bill proposes a great range of mechanisms for asset forfeiture, seizure of unexplained wealth, and other provisions relating to proceeds of crime.

Moreover, the *Crimes Legislation Amendment (Serious and Organised Crime) Bill* proposes an amendment to the *Criminal Code* (Cth) to extend liability in relation to persons who jointly commit crimes. This is to be achieved by introducing a new s 11.2A entitled 'joint commissions' which is based on the common law concept of 'joint criminal enterprise'. In essence, this provision is designed as an extension to liability for conspiracies in instances where an agreement between two or more persons is made and one of the co-conspirators actually commits an offence in furtherance of the agreement.

This proposal has no specific bearing for the issues discussed in this study. First, the concept of 'joint commission', similar to conspiracy-based charges, requires an accused to be party to an agreement (proposed s 11.2A(1) *Criminal Code* (Cth)) — a requirement that many members and associates of criminal organisation do not meet. A second difficulty is created by the fact that at least one of the parties to the agreement be involved in the physical execution of the offence that follows the agreement, proposed s 11.2A(2)(a) *Criminal Code* (Cth). This requirement will make it 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

It thus remains doubtful how the proposed amendments will assist significantly in the prevention and suppression of 'serious and organised crime', especially criminal organisations such as outlaw motorcycle gangs, Mafia and cartel-like syndicates, and the like. At the time of writing, the *Crimes Legislation Amendment (Serious and Organised Crime) Bill* has been referred to the Senate Legal and Constitutional Affairs Committee and it is not clear what, if any, amendments to the Bill will be required.

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.⁶¹⁸

After the Communists seized power in 1949, triads and other criminal syndicates were largely eradicated from China.⁶¹⁹ 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.⁶²⁰ At that time, the political momentum of triads ceased and since the Communist takeover the triads have become gradually more associated with organised crime.⁶²¹ Few triads remained in mainland China and their members were pushed further underground and their activities became more scattered.⁶²²

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

⁶¹⁸ Keith & Lin, *New Crime in China*, 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.

⁶¹⁹ 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.

⁶²⁰ See further Sections 8.1.2, 9.1.1, and 10.1 below. Cf Keith & Lin, *New Crime in China*, 92; Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 336–337; Ko-lin Chin, *Heijin — Organized Crime, Business, and Politics in Taiwan* (2003) 201–210.

⁶²¹ John Huey Long Song & John Dombink, 'Asian Emerging Crime Groups: Examining the Definition of Organized Crime' (1994) 19(2) *Criminal Justice Review* 228 at 235.

⁶²² Ming Xiang, 'Assessing and Explaining the Resurgence of China's Criminal Underworld', at 157–158.

mechanisms throughout China. These developments led to a resurgence of domestic syndicates⁶²³ 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.⁶²⁴ The illicit drug market in China, for instance, is said to be dominated by transnational criminal groups.⁶²⁵ 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.'⁶²⁶

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.⁶²⁷ Among the most notorious groups are the 14K,⁶²⁸ 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.⁶²⁹ 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.⁶³⁰ Other sources report that 'over the past 20 years, mafia-style gang crime has increased sevenfold'.⁶³¹ More recent reports cite Chinese sources that suggest that in the years between 2000 and 2004

⁶²³ 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*, Appendix B.

⁶²⁴ An Chen, 'Secret Societies and Organised Crime in Contemporary China', at 95–106; Mei Jianming, 'China's Social Transition and Organised Crime', at 207–211; Keith & Lin, *New Crime in China*, 90; Lintner, 'Chinese Organised Crime', 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', at 168–171.

⁶²⁵ UNODC, *Amphetamines and Ecstasy*, 37.

⁶²⁶ An Chen, 'Secret Societies and Organised Crime in Contemporary China', 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', at 171–173.

⁶²⁷ 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 Qing Zhang, 'Enterprise Crime and Public Order', in Ann Lodi & Zhang Longguan, *Enterprise Crime: Asian and Global Perspectives* (1992) 11 at 16.

⁶²⁸ 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 Lintner, 'Chinese Organised Crime', at 88.

⁶²⁹ Ko-lin Chin, *Heijin*, 201–210; Keith & Lin, *New Crime in China*, 100 (with reference to original sources in Mandarin); Xu Qing Zhang, 'Enterprise Crime and Public Order', at 16.

⁶³⁰ 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; Keith & Lin, *New Crime in China*, 93 (with reference to primary sources in Mandarin); cf Ming Xiang, 'Assessing and Explaining the Resurgence of China's Criminal Underworld', at 156.

⁶³¹ 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', at 156.

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.⁶³²

This apparent surge in organised crime activity — seen by some observers as ‘an organisational and potentially political threat to the communist regime’⁶³³ — led to the adoption of a policy and enforcement campaign in 2001 known as ‘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.⁶³⁴

7.1.2 Criminal law in China

China’s current criminal law shares many similarities with 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 as part of an extensive reform of China’s criminal justice system, substituting the *Criminal Law 1979* which had become largely obsolete.⁶³⁵

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

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.⁶³⁶

China’s current criminal law differentiates between two types of criminal association: criminal groups and criminal organisations of a triad/syndicate nature. Since the

⁶³² 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’, at 166.

⁶³³ An Chen, ‘Secret Societies and Organised Crime in Contemporary China’, at 79.

⁶³⁴ Trevaskes, ‘Severe and Swift Justice in China’, 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; Keith & Lin, *New Crime in China*, 95; Lewis, ‘China’s Implementation of the United Nations Convention against Transnational Organized Crime’, at 175.

⁶³⁵ See further, Cai Ding Jian, ‘China’s Major Reform in Criminal Law’ (1997) 11 *Columbia Journal of Asian Law* 213–218.

⁶³⁶ Yu Zhigang, Chinese People’s University, cited in Keith & Lin, *New Crime in China*, 94.

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).⁶³⁷

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.⁶³⁸

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 more members with a 'relatively' firm structure and with the purpose to jointly commit criminal offences (see Figure 23 below). Some observers equate this definition as the Chinese equivalent to the *Palermo's Convention* 'organised crime group'.⁶³⁹

⁶³⁷ Ding Mu Ying & Shan Chang Zong, 'The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China', at 269; Keith & Lin, *New Crime in China*, 97.

⁶³⁸ Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime', at 175.

⁶³⁹ Ming Xiang, 'Assessing and Explaining the Resurgence of China's Criminal Underworld', at 153.

Figure 23 'Criminal group', art 26[2] *Criminal Law 1997 (PRC)*⁶⁴⁰

Terminology	Criminal Group
Elements	
Structure	<ul style="list-style-type: none"> • three or more persons; • relatively stable organisation.
Activities	<ul style="list-style-type: none"> • [no element]
Objectives	<ul style="list-style-type: none"> • 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.'⁶⁴¹ 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*.⁶⁴²

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.⁶⁴³ 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.'⁶⁴⁴

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.⁶⁴⁵ The article contains a special offence relating to criminal syndicates.

⁶⁴⁰ Cf Ding Mu Ying & Shan Chang Zong, 'The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China', at 269.

⁶⁴¹ Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime', at 180.

⁶⁴² Keith & Lin, *New Crime in China*, 98. Cf An Chen, 'Secret Societies and Organised Crime in Contemporary China', at 83.

⁶⁴³ Keith & Lin, *New Crime in China*, 102; Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime', at 180.

⁶⁴⁴ Keith & Lin, *New Crime in China*, 97.

⁶⁴⁵ Zhang Xin Feng, 'Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime', at 249.

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', remarks Zhang Xin Feng⁶⁴⁶ Chinese authors have explained the type of organisation referred to in art 294 as 'underworld crime',⁶⁴⁷ 'the union of criminal organisation or an organised criminal network'. Underworld crimes are seen 'as the most serious organised crime [that] have a larger scale of organisation and cause more serious harm than the formal organised crime organisation.'⁶⁴⁸ Ding Mu Ying & Shan Chang Zong define underworld crimes as:

⁶⁴⁶ Ibid.

⁶⁴⁷ Zhao Guoling 'Organised Crime and Its Control in PR China', 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.'

⁶⁴⁸ Ding Mu Ying & Shan Chang Zong, 'The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China', at 270; cf Zhao Guoling 'Organised Crime and Its Control in PR China', at 301.

[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.⁶⁴⁹

Zhang Xin Feng notes that local criminal groups are generally more loosely structured based on family and kinship (frequently referred to as *guanxi*⁶⁵⁰) that can often be found in rural areas.⁶⁵¹ 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.⁶⁵²

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.'⁶⁵³ These explanations are designed to assist courts in the interpretation of art 294, but it is not binding on police, prosecutors, or other authorities.⁶⁵⁴ 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'.⁶⁵⁵ The key requirements of these documents are set out in the following table.

⁶⁴⁹ Ding Mu Ying & Shan Chang Zong, 'The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China', at 271.

⁶⁵⁰ Cf An Chen, 'Secret Societies and Organised Crime in Contemporary China', at 93.

⁶⁵¹ Cf Yiu Kong Chu, 'Global Triads: Myth or Reality?', in at 187.

⁶⁵² Zhang Xin Feng, 'Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime', at 250.

⁶⁵³ See Keith & Lin, *New Crime in China*, 102 (with reference to the original source in Mandarin).

⁶⁵⁴ Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime', at 181.

⁶⁵⁵ *Ibid.*, at 181–182.

Figure 24 Interpretation of 'Criminal organisation of a syndicate nature', art 294[1] *Criminal Law 1997 (China)*⁶⁵⁶

Terminology		Criminal organisation with a syndicate/underworld/triad nature
Elements		
Structure		<ul style="list-style-type: none"> 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		<ul style="list-style-type: none"> 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 of commercial establishments, organising violent brawls, trouble making, physical assault of innocents, and other criminal activities that seriously undermine social and economic order.
Objectives		<ul style="list-style-type: none"> 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.'⁶⁵⁷ It also marks a difference to criminal groups within the meaning of art 26 which includes small and loose associations.⁶⁵⁸

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.⁶⁵⁹

⁶⁵⁶ Supreme People's Court, *Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature* (2000), in Keith & Lin, *New Crime in China*, 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 Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime', at 181—182. Cf Ding Mu Ying & Shan Chang Zong, 'The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China', at 272; Ming Xiang, 'Assessing and Explaining the Resurgence of China's Criminal Underworld', at 153.

⁶⁵⁷ Zhao Guoling 'Organised Crime and Its Control in PR China', at 302 (with many case examples).

⁶⁵⁸ See Section 7.2 above.

⁶⁵⁹ Ding Mu Ying & Shan Chang Zong, 'The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China', at 271.

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 internal 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 syndicates 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.⁶⁶⁰ 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.⁶⁶¹

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 294.⁶⁶² 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.'⁶⁶³

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 purpose of its criminal activity is financial gain' (see Figure 24 above). 'The basic object of underworld crime', note Ding Mu Ying and Shan 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

⁶⁶⁰ Ibid.

⁶⁶¹ Schloenhardt, *Migrant Smuggling*, 109.

⁶⁶² Keith & Lin, *New Crime in China*, 103.

⁶⁶³ Ibid, at 104 (with reference to original source in Mandarin).

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.⁶⁶⁴

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].⁶⁶⁵

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'⁶⁶⁶ of up to three years fixed-term imprisonment,⁶⁶⁷ criminal detention (of up to six months),⁶⁶⁸ public surveillance,⁶⁶⁹ or 'supplementary punishment'⁶⁷⁰ by deprivation of political rights.⁶⁷¹

Figure 25 Elements of art 294[1] *Criminal Law 1997* (China)

Art 294[1]	Elements of the offence
(Physical) elements	<ul style="list-style-type: none"> • Organising, leading or taking active part in; • Criminal organisation of a syndicate/triad nature.
(Mental) elements	<ul style="list-style-type: none"> • Intention • Purpose: to commit criminal acts through violence, threats or other means [...] thus seriously disrupting economic or social order.
Penalty	<ul style="list-style-type: none"> ○ 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.⁶⁷²

⁶⁶⁴ Ding Mu Ying & Shan Chang Zong, 'The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China', at 271.

⁶⁶⁵ Ibid, at 269; Zhang Xin Feng, 'Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime', at 250.

⁶⁶⁶ Article 33 *Criminal Law 1997* (China).

⁶⁶⁷ Articles 45, 46 *Criminal Law 1997* (China).

⁶⁶⁸ Articles 42–44 *Criminal Law 1997* (China).

⁶⁶⁹ Articles 38–41 *Criminal Law 1997* (China).

⁶⁷⁰ Article 34 *Criminal Law 1997* (China).

⁶⁷¹ Articles 54–58 *Criminal Law 1997* (China).

⁶⁷² Keith & Lin, *New Crime in China*, 103; Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime', at 180.

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).⁶⁷³

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.⁶⁷⁴

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.'⁶⁷⁵

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.⁶⁷⁶ The Chinese translation of art 294 distinguishes between domestic, triad-style syndicates [para 1] and foreign 'mafia-type' organisations [para 2].⁶⁷⁷

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.

⁶⁷³ Articles 14-15 *Criminal Law 1997* (China).

⁶⁷⁴ Supreme People's Court, *Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature*, in Keith & Lin, *New Crime in China*, 102 (with reference to the original source in Mandarin).

⁶⁷⁵ Ibid.

⁶⁷⁶ See Section 7.1.1 above.

⁶⁷⁷ Zhang Xin Feng, 'Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime', at 249.

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.⁶⁷⁸

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.⁶⁷⁹ 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.⁶⁸⁰ But on the other hand, the previous discussion has shown that even Chinese scholars remain uncertain about the true boundaries of organised crime and about the distinction between criminal groups (art 26) and 'criminal organisations of a triad nature' (art 294).⁶⁸¹ 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.⁶⁸²

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 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.⁶⁸³

⁶⁷⁸ Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime', at 177, 183, 190.

⁶⁷⁹ Ibid, at 189.

⁶⁸⁰ See Section 7.3.1 above.

⁶⁸¹ Zhao Guoling 'Organised Crime and Its Control in PR China', at 306.

⁶⁸² Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime', at 182.

⁶⁸³ Zhao Guoling 'Organised Crime and Its Control in PR China', at 306.

8 Hong Kong SAR

Hong Kong, along with Macau,⁶⁸⁴ 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, 1984.⁶⁸⁵ 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, 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'.⁶⁸⁶ 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.⁶⁸⁷ 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 Kong⁶⁸⁸ 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 Laidler 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.⁶⁸⁹

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)⁶⁹⁰ and most amphetamine-type stimulants and their precursors (especially ephedrine) usually originate in mainland China.⁶⁹¹

⁶⁸⁴ See Chapter 9 below.

⁶⁸⁵ Signed at Beijing, Dec 19, 1984, 1399 UNTS 60.

⁶⁸⁶ 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 Eitel, *Europe in China*, 75-95.

⁶⁸⁷ 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.

⁶⁸⁸ See further Section 7.1.1 above.

⁶⁸⁹ Laidler, *The Hong Kong Drug Market*, 7.

⁶⁹⁰ See further, UNODC, *Amphetamines and Ecstasy*, 34.

⁶⁹¹ McCoy, 'From Free Trade to Prohibition: A Critical History of the Modern Asian Opium

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 its booming and liberal market economy.⁶⁹² 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.'⁶⁹³ Other writers have described Hong Kong as 'the undisputed capital of modern day triads'.⁶⁹⁴ 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.⁶⁹⁵ However, most observers agree that 'the reverse turned out to be the case'.⁶⁹⁶

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.⁶⁹⁷ It has been estimated that '1 out of every 20 persons [in Hong Kong] may be a triad member or affiliate'⁶⁹⁸ and that there are between 30,000 and 160,000 triad members in Hong Kong.⁶⁹⁹ The 14K, Who Shing Wo (the Wo groups), and Sun Yee On groups are among the most notorious Hong Kong triads.⁷⁰⁰ Their activities cover a great range of illegal undertakings including the smuggling of various contraband such as tobacco, artefacts, and motor vehicles,⁷⁰¹ migrant smuggling from China into Hong Kong but also to destinations further afield such as North America, Australia, and Europe;⁷⁰² trafficking in persons;⁷⁰³ prostitution and the

Trade', at 344; Laidler, *The Hong Kong Drug Market*, 9, 11; Yiu Kong Chu, 'Global Triads: Myth or Reality?', at 185.

⁶⁹² Huey Long Song & Dombrink, 'Asian Emerging Crime Groups', at 235. See further Section 7.1.1 above.

⁶⁹³ Jon Vagg, 'The Borders of Crime: Hong Kong-China Cross-Border Activity' (1992) 32(3) *British Journal of Criminology* 310 at 310.

⁶⁹⁴ 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.

⁶⁹⁵ See, for example, Huey Long Song & Dombrink, 'Asian Emerging Crime Groups', at 234.

⁶⁹⁶ Lintner, 'Chinese Organised Crime', at 84–85.

⁶⁹⁷ 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', at 49.

⁶⁹⁸ Huey Long Song & Dombrink, 'Asian Emerging Crime Groups', at 236.

⁶⁹⁹ Ko-Lin Chin, 'Triad Societies in Hong Kong', at 47; Cheong, *Hong Kong Triads in the 1990s*, 18. McKenna, 'Organised Crime in the Former Royal Colony of Hong Kong', at 206 cites reports stating that '1 out of every 20 residents of Hong Kong may be a member or affiliate of an organized criminal group'.

⁷⁰⁰ Yiu Kong Chu, 'Hong Kong Triads after 1997' (2005) 8(3) *Trends in Organised Crime* 5 at 9–11. Cf McKenna, 'Organised Crime in the Former Royal Colony of Hong Kong', at 207.

⁷⁰¹ Vagg, 'The Borders of Crime: Hong Kong-China Cross-Border Activity', at 311–319.

⁷⁰² Schloenhardt, *Migrant Smuggling*, 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?', at 190–191.

⁷⁰³ Lo Shiu Hing, 'Cross-Border Organised Crime in Greater South China', at 188.

brothel industry;⁷⁰⁴ illegal gambling, also including online betting and soccer gambling;⁷⁰⁵ loan sharking and debt collection;⁷⁰⁶ and large-scale credit card and identity card fraud.⁷⁰⁷

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.⁷⁰⁸ To increase profits, raise funds, and to conceal their criminal activities and proceeds of crime, the larger criminal organisations also operate multiple legitimate enterprises.⁷⁰⁹ Legal activities of triad societies in Hong Kong frequently involve local transport companies and the film industry.⁷¹⁰

In the literature and among law enforcement agencies, there is some disagreement about the structure and organisation of triads. Chinese triad societies are traditionally portrayed as strictly hierarchical organisations with firm membership structures, clear assignments of roles and duties, and strict codes of discipline. Lo Shiu Hing, for instance, found that triads are generally

led by a dragon head with the assistance of incense masters who are responsible for rituals and initiation, red poles who are fighters, straw sandals who deal with liaison and communication work, white fans who are the planners and administrators, and ordinary members.⁷¹¹

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.⁷¹² 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.⁷¹³

⁷⁰⁴ Ko-Lin Chin, 'Triad Societies in Hong Kong', at 52; Lintner, 'Chinese Organised Crime', at 89; Cheong, *Hong Kong Triads in the 1990s*, 7.

⁷⁰⁵ Jones & Vagg, *Criminal Justice in Hong Kong*, 361–362; Lintner, 'Chinese Organised Crime', at 89; Ko-Lin Chin, 'Triad Societies in Hong Kong', at 53; Lo Shiu Hing, 'Cross-Border Organised Crime in Greater South China', at 177; Cheong, *Hong Kong Triads in the 1990s*, 7.

⁷⁰⁶ Lo Shiu Hing, 'Cross-Border Organised Crime in Greater South China', at 187; Cheong, *Hong Kong Triads in the 1990s*, 6–7.

⁷⁰⁷ *HKSAR v Lee Tsung Lin* [2002] 2 HKLRD H9; Lo Shiu Hing, 'Cross-Border Organised Crime in Greater South China', at 186.

⁷⁰⁸ Cheong, *Hong Kong Triads in the 1990s*, 4–5; Ko-Lin Chin, 'Triad Societies in Hong Kong', at 53; Lo Shiu Hing, 'Cross-Border Organised Crime in Greater South China', at 176; McKenna, 'Organised Crime in the Former Royal Colony of Hong Kong', at 210.

⁷⁰⁹ Lo Shiu Hing, 'Cross-Border Organised Crime in Greater South China', at 178; Ip Pau Fuk, 'Organised Crime in Hong Kong'; Ko-Lin Chin, 'Triad Societies in Hong Kong', at 57. McKenna, 'Organised Crime in the Former Royal Colony of Hong Kong', at 209–210.

⁷¹⁰ Lo Shiu Hing, 'Cross-Border Organised Crime in Greater South China', at 177. See also Ip Pau Fuk, 'Organised Crime in Hong Kong'.

⁷¹¹ Cf Jones & Vagg, *Criminal Justice in Hong Kong*, 522; Lintner, 'Chinese Organised Crime', at 87, 89–90; Laidler, *The Hong Kong Drug Market*, 10; Ip Pau Fuk, 'Organised Crime in Hong Kong'; Cheong, *Hong Kong Triads in the 1990s*, 6.

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 263, 279–281; Lintner, 'Chinese Organised Crime', at 87; Lo Shiu Hing, 'Cross-Border

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.⁷¹⁴ 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.⁷¹⁵ Profits usually remain with local gangs and are not collected centrally.⁷¹⁶ 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:

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.⁷¹⁷

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.'⁷¹⁸

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*⁷¹⁹ and

Organised Crime in Greater South', at 178.

⁷¹⁴ 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; McKenna, 'Organised Crime in the Former Royal Colony of Hong Kong', at 207; Yiu Kong Chu, 'Global Triads: Myth or Reality?', at 184; Ip Pau Fuk, 'Organised Crime in Hong Kong'.

⁷¹⁵ Lo Shiu Hing, 'Cross-Border Organised Crime in Greater South China', at 177; Lintner, 'Chinese Organised Crime', at 91; Ko-Lin Chin, 'Triad Societies in Hong Kong', at 51.

⁷¹⁶ Ko-Lin Chin, 'Triad Societies in Hong Kong', at 51.

⁷¹⁷ Zhang & Ko-lin Chin, 'The Declining Significance of Triad Societies in Transnational Illegal Activities', at 478.

⁷¹⁸ Lintner, 'Chinese Organised Crime', at 89.

⁷¹⁹ Chapter 455, No 82 of 1994.

the *Societies Ordinance*.⁷²⁰ 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.⁷²¹

The principal purpose of this Ordinance is to enable law enforcement agencies to combat organised crime more effectively by using special powers of investigation.⁷²² Secondly, the Ordinance facilitates forfeiture and the seizure of illegitimate assets⁷²³ and contains special provisions regarding criminal procedure and the prosecution and sentencing of offenders.⁷²⁴ 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.⁷²⁵

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

⁷²⁰ See Section 8.3 below.

⁷²¹ Long title *Organised and Serious Crime Ordinance 1994* (Hong Kong)

⁷²² Sections 2-7, 24E *Organised and Serious Crime Ordinance 1994* (Hong Kong). Cf Cheong, *Hong Kong Triads in the 1990s*, 10.

⁷²³ Sections 8-24D, 25-26 *Organised and Serious Crime Ordinance 1994* (Hong Kong).

⁷²⁴ Sections 27-30 *Organised and Serious Crime Ordinance 1994* (Hong Kong).

⁷²⁵ The analysis is based on the official English versions of Hong Kong law provided by the Hong Kong Department of Justice.

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 of associations 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*.⁷²⁶

(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 (see Figure 26 below). 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 26 Definition of organised crime, s 2 *Organised and Serious Crime Ordinance* (Hong Kong), (b)

Terminology	Organised crime
Elements	
Structure	<ul style="list-style-type: none"> • association of two or more persons • substantial planning and organisation
Activities	[none required]
Objectives	<ul style="list-style-type: none"> • solely or partly in purpose of committing two or more Schedule 1 offences.

⁷²⁶ See Section 8.3 below.

(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 27 Definition of organised crime, s 2 *Organised and Serious Crime Ordinance* (Hong Kong), (c)

Terminology	Organised crime
Elements	
Structure	<ul style="list-style-type: none"> • Association of two or more persons • Substantial planning and organisations
Activities	<ul style="list-style-type: none"> • Commission of a Schedule 1 offence; • Offence involves <ul style="list-style-type: none"> (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 25.⁷²⁷

The remaining sections of the Ordinance, ss 3-32, 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,⁷²⁸ powers relating to the confiscation of property and proceeds of crime,⁷²⁹ restraining orders,⁷³⁰ and provisions for remittance agents and money chargers.⁷³¹

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

⁷²⁷ See further Alain Sham, 'Money laundering laws and regulations: China and Hong Kong' (2006) 9(4) *Journal of Money Laundering Control* 379 at 390–391.

⁷²⁸ Sections 3-6 *Organised Crime Ordinance 1994* (Hong Kong).

⁷²⁹ Sections 8-13, 16-23 *Organised Crime Ordinance 1994* (Hong Kong).

⁷³⁰ Sections 14, 15 *Organised Crime Ordinance 1994* (Hong Kong).

⁷³¹ Sections 24A–24E *Organised Crime Ordinance 1994* (Hong Kong).

as early as 1845.⁷³² 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.⁷³³

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.⁷³⁴ 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).⁷³⁵

The current *Societies Ordinance* was first introduced in 1949⁷³⁶ 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'.⁷³⁷ '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.⁷³⁸

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.

⁷³² *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 Eitel, *Europe in China*, 227–228; Jones & Vagg, *Criminal Justice in Hong Kong*, 23, 38; Ko-Lin Chin, 'Triad Societies in Hong Kong', at 58.

⁷³³ Bolton et al, 'The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong', at 264; Cheong, *Hong Kong Triads in the 1990s*, 3.

⁷³⁴ No 12 of 1845. See further Eitel, *Europe in China*, 228.

⁷³⁵ See further Bolton et al, 'The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong', at 265.

⁷³⁶ 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).

⁷³⁷ Section 2(1) *Societies Ordinance 1997* (Hong Kong).

⁷³⁸ A Chen, 'Editorial: Civil liberties in Hong Kong: freedoms of expression and association' (1989) 19 *Hong Kong Law Journal* 4 at 5–6.

8.3.1 Unlawful societies

The offences and prohibitions under the Ordinance apply to triad societies and unlawful societies as defined in s 18:

- (1) For the purposes of this Ordinance, 'unlawful society' (非法社團) means-
 - (a) a triad society, whether or not such society is a registered society or an exempted society and whether or not such society is a local society; or
 - (b) a society in respect of which, or in respect of whose branch, an order made under section 8 is in force.
- [(2) (Repealed 75 of 1992, s 11)]
- (3) Every society which uses any triad ritual or which adopts or makes use of any triad title or nomenclature shall be deemed to be a triad society.

This definition differentiates between two types of illegal societies. The first type involves triad societies which are not further defined in the ordinance. By virtue of subs (3) Groups using triad rituals et cetera are also treated as triads.⁷³⁹ 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.⁷⁴⁰ The prohibition may also be applied to political organisations.⁷⁴¹ 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.⁷⁴²

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 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.⁷⁴³ 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 28 provides a summary of the existing offences which are discussed separately in the following sections.

⁷³⁹ '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).

⁷⁴⁰ Section 8(1)(a) *Societies Ordinance 1997* (Hong Kong).

⁷⁴¹ Section 8(1)(b) *Societies Ordinance 1997* (Hong Kong).

⁷⁴² Section 8(1)-(4) *Societies Ordinance 1997* (Hong Kong).

⁷⁴³ Cheong, *Hong Kong Triads in the 1990s*, 9.

Figure 28 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 (1 st offence) -	S 20(2) 3yrs HKD100,000 (1 st offence) S 20(2) 3yrs HKD100,000 (1 st offence)
Allowing premises to be used	S 21(1) 1yr HKD50,000 (1 st offence)	S 21(2) 3yrs HKD100,000
Recruitment of members	S 22(1) 2yrs HKD50,000	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-bearer⁷⁴⁴ or any person professing or claiming to be an office-bearer and any person managing or assisting in the management of any 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.⁷⁴⁵ 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*.

⁷⁴⁴ 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 analogous position.

⁷⁴⁵ *Chung-Wai v R* [1980] HKLR 593 at 601 per Addison J.

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 at 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 Hogan CJ. It is also possible to participate in the offence under s 20(2) by way of aiding, abetting, or procuring.⁷⁴⁶

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.⁷⁴⁷

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

⁷⁴⁶ *HKSAR v Wong Fuk Tak & Others* [2000] HKLRD (Yrbk) 189.

⁷⁴⁷ 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.

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,⁷⁴⁸ while more modern interpretations suggest that members can terminate their membership.⁷⁴⁹ 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.⁷⁵⁰

A triad renunciation scheme was established in 1988 to allow non-active members to formally renounce their membership.⁷⁵¹ 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.⁷⁵² 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'.⁷⁵³

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 '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,⁷⁵⁴ wrongful beliefs by the accused that he/she is a member,⁷⁵⁵ or the use of triad language alone do not suffice to establish liability, though this may be used as supporting evidence.⁷⁵⁶ 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.

⁷⁴⁸ See Section 8.1.2 above.

⁷⁴⁹ H Litton, 'Editorial: So-called "Triad Experts"' (1986) 16 *Hong Kong Law Journal* 3 at 4-5.

⁷⁵⁰ *Cheng Chung-Wai v R* [1980] HKLR 593 at 600.

⁷⁵¹ Jones & Vagg, *Criminal Justice in Hong Kong*, 501.

⁷⁵² Cheong, *Hong Kong Triads in the 1990s*, 9.

⁷⁵³ *Ngchi-Wah v R* [1978] HKLR 101 at 103.

⁷⁵⁴ *Ibid*; *Cheng Chung-Wai v R* [1980] HKLR 593.

⁷⁵⁵ *Cheng Chung-Wai v R* [1980] HKLR 593.

⁷⁵⁶ Bolton et al, 'The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong', at 272; Litton, 'Editorial: So-called "Triad Experts"', at 4.

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*.⁷⁵⁷

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.

(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

⁷⁵⁷ 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.

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 as 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.⁷⁵⁸

⁷⁵⁸ Chen, 'Editorial: Civil liberties in Hong Kong', at 5.

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.⁷⁵⁹ 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 operatives⁷⁶⁰ or by so-called police triad experts who testify in order to confirm the accused's membership.⁷⁶¹ 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.⁷⁶² 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 triad member or office-bearer. 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.'⁷⁶³

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 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.

⁷⁵⁹ See also Cheong, *Hong Kong Triads in the 1990s*, 9.

⁷⁶⁰ See, for example, *HKSAR v Fu Ming Yung & Others* [2001] HKEC 1428; *HKSAR v Lam Yan Ming* [2004] HKEC 254.

⁷⁶¹ See also Cheong, *Hong Kong Triads in the 1990s*, 9. See, for example, *HKSAR v Mak Chi Hing* [2001] HKEC 140.

⁷⁶² Chen, 'Editorial: Civil liberties in Hong Kong', at 6.

⁷⁶³ Litton, 'Editorial: So-called "Triad Experts"', at 7.

9 Macau SAR

9.1 Context and Overview

9.1.1 Organised crime in Macau

In Macau, organised crime has been closely associated with the gambling industry 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.⁷⁶⁴ 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,⁷⁶⁵ including embezzled funds from mainland China.⁷⁶⁶ 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.⁷⁶⁷ There have also been frequent allegations about prostitution, loan sharking, extortion, and the collection of protection money from people associated with the casino industry.⁷⁶⁸ 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 during the 1980s and 90s.⁷⁶⁹

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 Diversões 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.⁷⁷⁰ Triad members have also allegedly participated in regional elections or have otherwise attempted to influence political processes.⁷⁷¹

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

⁷⁶⁴ Mary-Anne Toy, 'A bet bigger than Vegas' (1 Apr 2006) *The Age*.

⁷⁶⁵ Angela Veng Mei Leong, 'Macau Casinos and Organised Crime' (2004) 74 *Journal of Money Laundering* 298 at 300.

⁷⁶⁶ Toy, 'A bet bigger than Vegas'..

⁷⁶⁷ Lo Shiu Hing, 'Cross-border Organized Crime in Greater South China', at 176.

⁷⁶⁸ Angela Veng Mei Leong, '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', at 187-188.

⁷⁶⁹ Lo Shiu Hing, 'Cross-border Organized Crime in Greater South', at 180-182.

⁷⁷⁰ Veng Mei Leong, 'The 'Bate-Ficha' Business and Triads in Macau Casinos', at 83-84; Veng Mei Leong, 'Macau Casinos and Organised Crime', at 298, 301; Toy, 'A bet bigger than Vegas'.

⁷⁷¹ Lo Shiu Hing, 'Cross-border Organized Crime in Greater South China', at 189.

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*.⁷⁷² 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.⁷⁷³ In accordance with Macau's *Basic Law*, China has extended the application of the *Convention against Transnational Organised Crime* to Macau.⁷⁷⁴

Macau's criminal law, including its general principles, are guided by the *Penal Code (Macau) (Código Penal)*⁷⁷⁵ 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 complicity⁷⁷⁶ and attempts,⁷⁷⁷ but has no separate offence for conspiracy. The Code does, however, contain a special offence entitled 'criminal associations' (*associação criminosa*) in art 288.⁷⁷⁸

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,⁷⁷⁹ but it was never rigorously enforced.⁷⁸⁰ Following a wave of violent turf wars between rival triads and political assassinations in the mid 1990s,⁷⁸¹ 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.⁷⁸² 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 in Section 9.3.1 below. This definition is followed in art 2 by an offence for directing, promoting or otherwise associating with secret societies/associations.⁷⁸³ Articles 3 to 13 contain a range of other specific offences relating to organised crime.⁷⁸⁴

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*.

⁷⁷² Signed at Beijing, 13 Apr 1987, 1498 UNTS 228.

⁷⁷³ 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.

⁷⁷⁴ Macau SAR, *Advise of the Chief Executive No 30/2004* (31 Aug 2004).

⁷⁷⁵ No 11 of 1995.

⁷⁷⁶ See arts 20–24 *Penal Code (Macau)*.

⁷⁷⁷ See arts 20–24 *Penal Code (Macau)*.

⁷⁷⁸ See Section 9.2 below.

⁷⁷⁹ No 5 of 1978.

⁷⁸⁰ Veng Mei Leong, 'Macau Casinos and Organised Crime', at 301; Adamoli et al, *Organised Crime around the World*, 142.

⁷⁸¹ Adamoli et al, *Organised Crime around the World*, 141; Luke, 'The Imminent Threat of China's Intervention in Macau's Autonomy', at 740, 747; Lo Shiu Hing, 'Cross-border Organized Crime in Greater South China', at 182.

⁷⁸² No 6 of 1997.

⁷⁸³ See Section 9.3.2 below.

⁷⁸⁴ See Section 9.3.3 below.

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 29 Definition of secret societies/associations, art 1(1) *Organised Crime Law 1997* (Macau)

Terminology	Association or secret society (<i>associação ou sociedade secreta</i>)
Elements	
Structure	<ul style="list-style-type: none"> • 'constituted organisation' Irrelevant whether or not (art 1(2)): <ol style="list-style-type: none"> (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	<ul style="list-style-type: none"> • 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,⁷⁸⁵ offences against the person,⁷⁸⁶ abduction and kidnapping,⁷⁸⁷ rape,⁷⁸⁸ trafficking in persons, extortion,⁷⁸⁹ exploitation of the prostitution of others, loan sharking (usury),⁷⁹⁰ robbery,⁷⁹¹ 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.

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

⁷⁸⁵ Articles 128–134 *Penal Code* (Macau).

⁷⁸⁶ Articles 137–142 *Penal Code* (Macau).

⁷⁸⁷ Articles 147–149 *Penal Code* (Macau).

⁷⁸⁸ Article 154 *Penal Code* (Macau).

⁷⁸⁹ Article 216 *Penal Code* (Macau).

⁷⁹⁰ Article 219 *Penal Code* (Macau).

⁷⁹¹ Article 204 *Penal Code* (Macau).

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 societies/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 Macau⁷⁹² 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* 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, the list of criminal activities set out in art 1(1)(a)–(v) that also severely restricts the application of the *Organised Crime Law*. The statute singles out an exhaustive list of crime types and only applies to organisations seeking to engage in one of these offences. The legislator has thus set clear boundaries for the application of the law. A group of youth spraying graffiti on a wall or engaging in

⁷⁹² See also art 33 *Organised Crime Law 1997* (Macau).

some other property damage is thus outside the scope of this statute. On the other hand, any new and emerging crime types engaged in by associations or secret societies will require statutory amendment which may involve a lengthy bureaucratic process and may prevent flexible law enforcement responses.

A second, albeit minor problem stems from the apparent overlap between the offence for criminal associations in art 288 *Penal Code* (Macau) and the provisions under the *Organised Crime Law 1997*. The distinction between criminal associations (art 288 *Penal Code*) and associations or secret societies (art 1 *Organised Crime Law 1997*) is not fully clear and there is some uncertainty 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 connected to 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 triad 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.⁷⁹³ As the KMT leadership retreated to Taiwan and established an independent Republic of China, they were followed by many supporters, including the Green Gang.⁷⁹⁴

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.⁷⁹⁵

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 jiaotao groups and gangs were arrested.⁷⁹⁶

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.⁷⁹⁷ 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.⁷⁹⁸

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

⁷⁹³ See further Section 7.1.1 above.

⁷⁹⁴ Keith & Lin, *New Crime in China*, 91–92; Lintner, 'Chinese Organised Crime', at 87–88; Ko-Lin Chin, 'Triad Societies in Hong Kong', at 54; Cheong, *Hong Kong Triads in the 1990s*, 227.

⁷⁹⁵ Ko-lin Chin, *Heijin*, 3, 6.

⁷⁹⁶ *Ibid*, at 168.

⁷⁹⁷ *Ibid*, at 194–197. See further Sections 14.1, 18.1 below.

⁷⁹⁸ Ko-lin Chin, *Heijin*, 169.

maximum security prison on a remote island.⁷⁹⁹ 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.⁸⁰⁰ 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 group established operations and businesses in Guangdong, Shenzhen, and the Pearl River Delta, and later spread to Shanghai and across mainland China.⁸⁰¹ Other Taiwanese groups such as the Four Seas group, the Celestial Alliance and the Tian Dao Mun have also moved into eastern parts of the mainland, especially Shanghai and Fujian province.⁸⁰²

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 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.⁸⁰³ 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 [led] 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.⁸⁰⁴

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, 1996.⁸⁰⁵

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 'jiatao' 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.⁸⁰⁶ The United Bamboo gang (or 'Bamboo United'), the Four Seas group, and the Celestial Alliance have

⁷⁹⁹ Ibid, at 171–172.

⁸⁰⁰ Ibid, at 197–201. See further Section 16.1 below.

⁸⁰¹ Lintner, 'Chinese Organised Crime', at 92; Ko-lin Chin, *Heijin*, 204–209.

⁸⁰² Yiu Kong Chu, 'Global Triads: Myth or Reality?', at 187; Ko-lin Chin, *Heijin*, 203–204, 209–210.

⁸⁰³ Ko-lin Chin, *Heijin*, 5, 13–20; Zhang & Ko-lin Chin, 'The Declining Significance of Triad Societies in Transnational Illegal Activities', at 481.

⁸⁰⁴ 'Taiwan: Introduction to the "Organized Crime Control Act"' (1997) 68 *International Review of Penal Law* 1019 at 1020. See further, Ko-lin Chin, *Heijin*, 84–157.

⁸⁰⁵ See further Section 10.3 below; cf 'Taiwan: Introduction to the "Organized Crime Control Act"', at 1020–1021.

⁸⁰⁶ Ko-lin Chin, *Heijin*, 11, 21–22.

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.⁸⁰⁷

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.⁸⁰⁸ 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.⁸⁰⁹

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.⁸¹⁰ 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.⁸¹¹

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 than 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).

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.

⁸⁰⁷ Lintner, 'Chinese Organised Crime', at 89; Ko-lin Chin, *Heijin*, 33–43, 178. See further Section 7.1.1 above.

⁸⁰⁸ Zhang & Ko-lin Chin, 'The Declining Significance of Triad Societies in Transnational Illegal Activities', at 471; Ko-lin Chin, *Heijin*, 46–59.

⁸⁰⁹ Zhang & Ko-lin Chin, 'The Declining Significance of Triad Societies in Transnational Illegal Activities', at 471. See further, Ko-lin Chin, *Heijin*, 63–83.

⁸¹⁰ Articles 25–31 *Criminal Code* (Taiwan).

⁸¹¹ 'Taiwan: Introduction to the "Organized Crime Control Act"', at 2016–1027.

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'.⁸¹² 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.⁸¹³

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.⁸¹⁴

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,⁸¹⁵ 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 labour, (4) deprivation of the right to hold public office, and (5) the use of informants.⁸¹⁶ 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.⁸¹⁷ Further, the *Organised Crime Control Act 1996* includes special sanctions for persons liable under the Act⁸¹⁸ and contains some enhanced enforcement powers in relation to tracing and confiscation of property.⁸¹⁹

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

⁸¹² Ibid, at 1020.

⁸¹³ Ibid, at 1023, 1027.

⁸¹⁴ Ibid, at 1020; Ko-lin Chin, *Heijin*, 163.

⁸¹⁵ See Section 10.1 above.

⁸¹⁶ 'Taiwan: Introduction to the "Organized Crime Control Act"', at 1023–1026.

⁸¹⁷ Articles 4, 5, 8, 13, 14 *Organised Crime Control Act 1996* (Taiwan).

⁸¹⁸ Articles 4, 5, 8, 13, 14 *Organised Crime Control Act 1996* (Taiwan).

⁸¹⁹ Article 7 *Organised Crime Control Act 1996* (Taiwan). See further 'Taiwan: Introduction to the "Organized Crime Control Act"', at 1024.

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 30 below).

Figure 30 Definition of ‘Criminal organisation’, art 2 *Organised Crime Control Act 1996* (Taiwan)

Terminology	Criminal organisation
Elements	
Structure	<ul style="list-style-type: none"> • Internal management system; • Three or more persons; • Collective, habitual, and forcible or violent in nature.
Activities	<ul style="list-style-type: none"> • Involved in racketeering;
Objectives	<ul style="list-style-type: none"> • 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’⁸²⁰), 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 labour unions’.⁸²¹

The purpose of criminal organisations has to relate — exclusively or predominantly — to criminal activities;⁸²² 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 2.⁸²³

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.

⁸²⁰ ‘Taiwan: Introduction to the “Organized Crime Control Act”’, at 1021.

⁸²¹ *Ibid*, at 1021.

⁸²² *Ibid*, at 1022.

⁸²³ *Ibid*, at 1022.

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 *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, i.e. 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.⁸²⁴

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 scheme⁸²⁵ in that it seeks to encourage members of criminal groups to come forward and collaborate with investigative authorities, assist in the prosecution of other members and directors, and, in return, avoid punishment.

⁸²⁴ Ibid, at 1025.

⁸²⁵ See Section 8.3 above.

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.⁸²⁶ 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 labour organisations or their members or agents.⁸²⁷

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 than 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.

Article 4 also provides that public officials found establishing, directing, or participating in criminal organisations (art 3[1] and [2]) will face increased sentences.

⁸²⁶ 'Taiwan: Introduction to the "Organized Crime Control Act"', at 1028.

⁸²⁷ *Ibid*, at 1029.

10.3.6 Other provisions

In addition to the provisions outlined in the previous sections, Taiwan's *Organised Crime Control Act 1996* provides a number of accessory penalties such as prohibiting offenders from registering for public office.⁸²⁸

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 informants, 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.'⁸²⁹

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.'⁸³⁰

Other concerns have been expressed over the harsh punishment inflicted on persons convicted in relation to criminal organisations, including imprisonment, heavy fines, and compulsory 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.⁸³¹ 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.⁸³²

⁸²⁸ Articles 13, 14 *Organised Crime Control Act 1996* (Taiwan). See further, 'Taiwan: Introduction to the "Organized Crime Control Act"', at 1025–1026.

⁸²⁹ Ko-lin Chin, *Heijin*, 179 with further references.

⁸³⁰ 'Taiwan: Introduction to the "Organized Crime Control Act"', at 1030; Ko-lin Chin, *Heijin*, 179–180.

⁸³¹ Ko-lin Chin, *Heijin*, 182–184.

⁸³² *Ibid*, at 185–188.

11 Singapore

Organised crime in Singapore is a phenomenon that is not well documented and quite poorly researched. As a major shipping port and transit point for airtravel in Southeast Asia, the country is particularly vulnerable to the importation and exportation of contraband and its financial sector has been used for money laundering of overseas fund. The patterns and levels of organised crime and the existence of criminal organisations are, however, not comprehensively examined in open-source material.

Singapore has a very comprehensive and efficient law enforcement system and the severity of penalties and punishment for serious crime, especially offences relating to illicit drugs, are notorious. The country's legal and criminal justice system combines many British and other western influences with elements from India, Malaysia, and Brunei Darussalam.

11.1 Conspiracy Provisions

Singapore's domestic criminal law (like that of Malaysia and Brunei Darussalam)⁸³³ 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, 2007.⁸³⁴ 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*⁸³⁵ 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.⁸³⁶ In addition to these provisions, Singapore's *Societies Act 1967* contains offences for associations with so-called 'unlawful societies', including triads.⁸³⁷

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:

⁸³³ See Chapters 12 and 13 below.

⁸³⁴ UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008).

⁸³⁵ Bill No 33 of 2007.

⁸³⁶ Bill No 38 of 2007.

⁸³⁷ See Section 11.3 below.

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.⁸³⁸

Physical elements

The principal physical element of s 120A is the agreement between two or more persons. 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; a 'meeting of the minds' suffices.⁸³⁹ The agreement only needs to be reached in principle and not in detail.⁸⁴⁰ It is also possible for a person to join the agreement at a later stage.⁸⁴¹

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).⁸⁴²

Fault element

The fault element of criminal conspiracy requires that any party to the agreement must have the intention to carry out the agreement.⁸⁴³

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

⁸³⁸ See Section 2.1.3 above.

⁸³⁹ Cf *Ang Ser Kuang v Public Prosecutor* [1998] 2 SLR 209.

⁸⁴⁰ Cf *Nomura Taiji & Ors v Public Prosecutor* [1998] 2 SLR 173 para 110.

⁸⁴¹ *R v Chew Chong Jin* [1956] MLJ 185.

⁸⁴² 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.

⁸⁴³ See further Yeo et al, *Criminal Law in Malaysia and Singapore*, paras 34.61–34.67; Chan Wing Cheong et al, *Fundamental Principles of Criminal Law*, 537–541.

concepts of aiding and abetting but also extends further to so-called ‘abetment by conspiracy’ which stems from the *Penal Code* (India).⁸⁴⁴ In practice, the introduction of s 120A made the offence of abetment by conspiracy largely redundant.⁸⁴⁵

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 upon 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.⁸⁴⁶

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).

11.1.3 Observations

The scope of Singapore’s conspiracy provision is significantly broader than the criminal organisation offences found in other jurisdictions. It is 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 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.⁸⁴⁷

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

⁸⁴⁴ *Er Joo Nguang & Anor v Public Prosecutor* [2000] 2 SLR 645 at 656.

⁸⁴⁵ Yeo et al, *Criminal Law in Malaysia and Singapore*, para 34.50.

⁸⁴⁶ See further Section 2.1.3 above, and *ibid* paras 34.13–34.17.

⁸⁴⁷ Yeo et al, *Criminal Law in Malaysia and Singapore*, para 34.52.

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?⁸⁴⁸

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 than 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.⁸⁴⁹

11.2 Societies Act

In addition to the conspiracy provisions in the *Penal Code*, Singapore's *Societies Act 1967*⁸⁵⁰ contains a range of criminal offences that apply to persons associated with triads and 'unlawful societies'. Similar to the *Societies Ordinance* in Hong Kong,⁸⁵¹ 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.⁸⁵²

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. The registrars are appointed by the designated Minister, ss 3, 4(1) *Societies Act 1967* (Singapore). Registration of 'specified societies'⁸⁵³ 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, 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

⁸⁴⁸ Ibid, para 34.67.

⁸⁴⁹ Cited in Chan Wing Cheong et al, *Fundamental Principles of Criminal Law*, 532.

⁸⁵⁰ Chapter 311.

⁸⁵¹ See Section 8.3 above.

⁸⁵² Section 2(a)–(g) *Societies Act 1967* (Singapore).

⁸⁵³ Schedule B *Societies Act 1967* (Singapore).

society. 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 31 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.⁸⁵⁴ Any property belonging to unlawful societies may be seized and forfeited.⁸⁵⁵

Figure 31 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)	Inciting, inducing, inviting another to become a member	3 years SGD 5,000
S 16(2)	Using violence, threats etc to induce another	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 duty 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.

⁸⁵⁴ Section 30(1) *Societies Act 1967* (Singapore).

⁸⁵⁵ Section 32 *Societies Act 1967* (Singapore).

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.⁸⁵⁶

⁸⁵⁶ 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 Malacca Strait and elsewhere in Southeast Asian waters,⁸⁵⁷ though most piratical attacks in the region are opportunistic and not part of systematic, organised criminal enterprises.⁸⁵⁸ There are also some reports linking the illicit trafficking in timber in Malaysia to criminal elements, including criminal organisations.⁸⁵⁹

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.⁸⁶⁰ While there have been some reports linking political corruption and nepotism to criminal groups,⁸⁶¹ 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 two years later on September 24, 2004.⁸⁶² 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*,⁸⁶³ which were originally introduced on December 18, 1948.⁸⁶⁴ Unlike Singapore, however, no

⁸⁵⁷ 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.

⁸⁵⁸ Stefan Eklöf, *Pirates in Paradise: A Modern History of Southeast Asia's Maritime Marauders* (2006) 44–51.

⁸⁵⁹ Andreas Schloenhardt, *The Illegal Trade in Timber and Timber Products in the Asia Pacific Region* (2008) 59.

⁸⁶⁰ 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.

⁸⁶¹ *Ibid*, at 279-285.

⁸⁶² UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008).

⁸⁶³ Act No 574.

⁸⁶⁴ 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*:⁸⁶⁵

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.⁸⁶⁶

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.

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. Malaysia has no special provisions relating to participation in criminal organisations.

12.3 Societies Act 1966

Malaysia's *Societies Act 1966* follows the same principles as similar legislation in Singapore and Hong Kong,⁸⁶⁷ 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).

⁸⁶⁵ See Section 11.1 above.

⁸⁶⁶ *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.

⁸⁶⁷ 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.⁸⁶⁸ Activities such as drug trafficking, trafficking in persons, and illegal gambling are frequently attributed to migrant workers in Brunei.⁸⁶⁹ 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,⁸⁷⁰ 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, 2008.⁸⁷¹ 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.⁸⁷² 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.

⁸⁶⁸ Cf Ernesto U Savona et al, *Organised Crime across the Borders* (1995) 23.

⁸⁶⁹ Personal communication with members of the Royal Brunei Police Force, Singapore, April 22, 2008.

⁸⁷⁰ Cf Savona et al, *Organised Crime across the Borders*, 23.

⁸⁷¹ UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008).

⁸⁷² See Sections 11.2 and 12.2 above.

14 Indonesia

At present, Indonesia does not have specific legislation on organised crime. 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 persons).⁸⁷³

Indonesia signed the *Convention against Transnational Organised Crime* on December 12, 2000 and ratified it on April 20, 2009.⁸⁷⁴ 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.⁸⁷⁵

⁸⁷³ 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.

⁸⁷⁴ UN, Treaty Collection, *Chapter XVIII Penal Matters, 12 United Nations Convention against Transnational Organised Crime*, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en#EndDec (accessed 27 May 2009).

⁸⁷⁵ 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. 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 in the Philippines. The main source of information is the Philippine Centre 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.⁸⁷⁶ 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.⁸⁷⁷ Further, 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.⁸⁷⁸ The smuggling of firearms and other contraband have also been described as 'rampant'. According to other research papers published by the Philippine Centre on Transnational Crime, 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.⁸⁷⁹ 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.⁸⁸⁰

Information about the types and size of criminal organisations is not always consistent. In 2003, the Philippine Centre 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.⁸⁸¹ Another paper released by the Centre in the same year, however, identified '83 big time drug syndicates operating in the

⁸⁷⁶ See generally, James Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime* (2007) 9–10.

⁸⁷⁷ UNODC, *Amphetamines and Ecstasy*, 43.

⁸⁷⁸ 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 21 July 2009).

⁸⁷⁹ 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/ocitp.htm (accessed 21 July 2009); cf Savona et al, *Organised Crime across the Borders*, 24.

⁸⁸⁰ Eklöf, *Pirates in Paradise: A Modern History of Southeast Asia's Maritime Marauders*, 35–44.

⁸⁸¹ Philippine Center on Transnational Crime, 'Organized Crime in the Philippines'.

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.'⁸⁸²

In the 2003 report, the Philippine Centre 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 Francisco 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.⁸⁸³ 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.⁸⁸⁴

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*.⁸⁸⁵ The *Penal Code* (Philippines) 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].⁸⁸⁶

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.⁸⁸⁷ Since about 1998 there have been a series of bills before the Philippines' House of Parliament designed

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.⁸⁸⁸

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

⁸⁸² Philippine Center on Transnational Crime, 'Technical Issues in Regional and Global Cooperation against Organized Crime'.

⁸⁸³ Philippine Center on Transnational Crime, 'Organized Crime in the Philippines'.

⁸⁸⁴ David Kaplan & Alec Dubro, *Yakuza: Japan's Criminal Underworld* (2003) 252–255; Savona et al, *Organised Crime across the Borders*, 11. See further Section 20.1 below.

⁸⁸⁵ 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* (status as on 26 Sep 2008).

⁸⁸⁶ Philippine Center on Transnational Crime, 'Organized Crime in the Philippines'.

⁸⁸⁷ See Section 23.1 below.

⁸⁸⁸ Section 2 *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

Convention against Transnational Organised Crime that it criminalises participation in an organised crime,⁸⁸⁹ 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 *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,⁸⁹⁰ containing extensive provisions directed at the activities of criminal organisations,⁸⁹¹ powers to order the forfeiture and seizure of assets⁸⁹² and regulate the restitution of property and compensation of victims of organised crime.⁸⁹³ 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.

Figure 32 Elements of proposed s 5(1) *Racketeer Influenced and Corrupt Organisations (RICO) Bill* (Philippines)

s 5(1)	Elements of the offence
Physical elements	<ul style="list-style-type: none"> • participation; • enterprise • [enterprise] conducting a pattern of racketeering activity <ul style="list-style-type: none"> ○ Pattern, s 4(d) ○ Racketeering activity, s 4(c)
Mental element	<ul style="list-style-type: none"> • knowledge
Penalty, s 6	<ul style="list-style-type: none"> • 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.

⁸⁸⁹ 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.

⁸⁹⁰ 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* (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]

⁸⁹¹ Sections 5, 4(c) *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

⁸⁹² Sections 7, 9, 13-14 *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

⁸⁹³ Sections 15, 17 *Racketeer-Influenced and Corrupt Organisations Bill* (Philippines).

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.⁸⁹⁴

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) *RICO Bill* (Philippines) 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) of the *RICO Bill* racketeering activity refers to a long list featuring several hundred offences under the *Penal Code* of the Philippines and several other penal laws relating, for example, to corruption, firearms, illegal gambling, fencing, illegal logging, illegal fishing, illicit drugs, fraud, immigration offences et cetera. The list of specific offences and statutes set out in s 4(c) covers a remarkable spectrum of illicit activity ranging from offences typically associated with organised crime to crimes such as ‘economic exploitation of the disabled and mendicants.’ Racketeering may also refer to offences relating to corruption and to offences frequently referred to as white-collar crime, such as bank and insurance fraud, and falsification of securities.

The racketeering activity becomes a ‘pattern’ if it is carried out 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) *RICO Bill* (Philippines) 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.

⁸⁹⁴ 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.

A further offence for acquiring or maintaining any interest in or control of a business enterprise through a pattern of racketeering activity is set out in proposed 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. The Bill is loosely based on the *Racketeer Influenced and Corrupt Organisations (RICO) Act* in US federal law.⁸⁹⁵

At the heart of the proposed law 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. In addition, 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.

⁸⁹⁵ See further Section 23.1 below.

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.⁸⁹⁶

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.⁸⁹⁷

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.⁸⁹⁸ 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.⁸⁹⁹

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 illegal 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.⁹⁰⁰

⁸⁹⁶ UNODC Country Office Vietnam, *Vietnam, Country Profile* (2005) 10, citing official Vietnamese sources.

⁸⁹⁷ *Ibid*, at 8, 23–24.

⁸⁹⁸ *Ibid*, at 27.

⁸⁹⁹ *Ibid*, at 28.

⁹⁰⁰ Huey Long Song & Dombrink, 'Asian Emerging Crime Groups', 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 diasporas 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,⁹⁰¹ while in Canada and Australia, Vietnamese groups are often associated with large scale cannabis cultivation and distribution.⁹⁰²

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.⁹⁰³ 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.⁹⁰⁴

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 in 2006 by UNODC in cooperation with the Department of Criminal and Administrative Laws of the Ministry of Justice.⁹⁰⁵

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'

⁹⁰¹ Huey Long Song & Dombrink, 'Asian Emerging Crime Groups', at 239.

⁹⁰² Personal communication with State Drug Command, Queensland Police Service, Brisbane, July 7, 2006; RCMP-GRC, Ottawa (Ont), July 30, 2008.

⁹⁰³ UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008).

⁹⁰⁴ UNODC Country Office Vietnam, *Vietnam, Country Profile*, 32–33.

⁹⁰⁵ 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'⁹⁰⁶ 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.⁹⁰⁷

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.⁹⁰⁸

⁹⁰⁶ Ibid, at 16.

⁹⁰⁷ Ibid, at 16.

⁹⁰⁸ Ibid, at 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 illegal enterprises.⁹⁰⁹

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.⁹¹⁰ 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.⁹¹¹

Cambodia signed the *Convention against Transnational Organised Crime* on November 11, 2001, and ratified the Convention on December 12, 2005.⁹¹² 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),⁹¹³ but has not provided any further information in this regard and it is not clear where that offence can be found in Cambodian law.⁹¹⁴

⁹⁰⁹ Ko-lin Chin, *Heijin*, 198–200. See further Section 10.1 above.

⁹¹⁰ Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime*, 10.

⁹¹¹ *Ibid.*, at 10–11.

⁹¹² UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008).

⁹¹³ 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.

⁹¹⁴ 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, 2003.⁹¹⁵ 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.⁹¹⁶

⁹¹⁵ UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008).

⁹¹⁶ 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.⁹¹⁷ 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.⁹¹⁸

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.⁹¹⁹ 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 Prime Minister 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.⁹²⁰

⁹¹⁷ Finckenauer & Ko-Lin Chin, *Asian Transnational Organized Crime*, 10.

⁹¹⁸ Ibid, at 10.

⁹¹⁹ UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008).

⁹²⁰ Thailand, *Thailand Country Report* (to the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, April 18-25, 2005) (2005) 4.

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 assistances in criminal matters, and also create greater awareness in the community and private sector about organised crime.⁹²¹

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.⁹²²

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.⁹²³

⁹²¹ Ibid, at 4–59.

⁹²² Ibid, at 61.

⁹²³ 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 (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 card game 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.⁹²⁴

Historically, boryokudan comprised groups of outsiders including people involved in gambling, low-level crime, or protection rackets.⁹²⁵ 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.⁹²⁶ 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.⁹²⁷ Peter Hill notes that 'the yakuza apparently enjoyed a position of wealth, security and acceptance, inconceivable for organised crime groups in other advanced democracies.'⁹²⁸ 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.⁹²⁹

The yakuza took great advantage of 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.⁹³⁰ Over the years, the yakuza became

⁹²⁴ In this report, the two terms are used interchangeably.

⁹²⁵ 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.

⁹²⁶ 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.

⁹²⁷ 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 Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 3–27.

⁹²⁸ Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō', at 2. See further Hill, *The Japanese Mafia*, 36–42.

⁹²⁹ Maguire, 'Crime, Crime Control and the Yakuza in Contemporary Japan', at 140.

⁹³⁰ Hill, 'The Changing Face of the Yakuza', at 98; Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 31–55; Maguire, 'Crime, Crime Control and the Yakuza in

increasingly influential across Japan and — particularly in the decade of Japan's 'bubble economy' — became more and more involved in the stock market, real estate, and politics. John Huey Song Long and John Dombrink note 'an unusual relationship of Japan's organised crime groups to that society and to its legitimate institutions' and observe that boryokudan 'evolved into wealthy and sophisticated, even semi-legitimate, societal institutions with a strong political presence.'⁹³¹ At that time, the yakuza also became involved in an activity known as sokaiya, a unique form of corporate blackmail,⁹³² and in corporate crimes such as money lending (sarakin), debt collecting and loss cutting, auction obstruction, and bankruptcy management.⁹³³ 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.⁹³⁴

Boryokudan are generally made up of several smaller entities and sub-groups which — in combination — form a hierarchical, 'quasi-feudal',⁹³⁵ 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).⁹³⁶

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.⁹³⁷ 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.⁹³⁸ It is estimated that 'the yakuza generate USD 50 billion annually from their activities.'⁹³⁹

Contemporary Japan', at 135–136.

⁹³¹ Huey Long Song & Dombrink, 'Asian Emerging Crime Groups', at 232. See also Ko Shikata, 'Yakuza — organised crime in Japan' (2006) 9(4) *Journal of Money Laundering Control* 416 at 417; Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 56–108, 175–195.

⁹³² See further, Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 159–164; Hill, 'The Changing Face of the Yakuza', at 99; Hill, *The Japanese Mafia*, 124–128.

⁹³³ Maguire, 'Crime, Crime Control and the Yakuza in Contemporary Japan', at 137; Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō', at 6–8; Hill, *The Japanese Mafia*, 116–136.

⁹³⁴ Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 223–323; Huey Long Song & Dombrink, 'Asian Emerging Crime Groups', at 232–233.

⁹³⁵ Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō', at 2.

⁹³⁶ Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime', at 414; Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō', at 2; Hill, 'The Changing Face of the Yakuza', at 107; Hill, *The Japanese Mafia*, 64–91; Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity', at 1116–1117.

⁹³⁷ 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; Hill, 'The Changing Face of the Yakuza', at 99.

⁹³⁸ Ritch, 'They'll make you an offer you can't refuse: A comparative analysis of international organised crime', at 583–585; Shikata, 'Yakuza — organised crime in Japan', at 416.

⁹³⁹ Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity', at 1117.

Figure 33 Organised crime groups and membership in organised crime groups, Japan 2000-2005⁹⁴⁰

	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 ⁹⁴¹	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 2005.⁹⁴² About half or 43,300 are seen as regular members. Since 2001, there are 24 'designated organised crime groups' in Japan,⁹⁴³ 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),⁹⁴⁴ Inagawa-kai (稲川会, designated since June 1992),⁹⁴⁵ and the Sumiyoshi-kai (住吉会, designated since June 1992).⁹⁴⁶ Their members account for over 76 percent of all organised crime group members in Japan.⁹⁴⁷

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%).⁹⁴⁸

⁹⁴⁰ 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).

⁹⁴¹ Designated organised crime groups under the *Law to Prevent Unjust Acts by Organized Crime Group Members 1991* (Japan).

⁹⁴² See also Hill, 'The Changing Face of the Yakuza', 106.

⁹⁴³ 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. Saeki ('Japan: The Criminal Justice System Facing the Challenge of Organized Crime', at 416) notes that 24 boryokudan groups were designated between 1992 and 1996.

⁹⁴⁴ For more on the Yamaguchi-gumi see, for example, UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries*, Appendix B; Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 113-123.

⁹⁴⁵ For more on the Inagawa-kai see, for example, Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 135-143.

⁹⁴⁶ For more on the Sumiyoshi-kai see, for example, *ibid*, at 123-135.

⁹⁴⁷ Japan, Ministry of Justice, *White Paper on Crime 2006*.

⁹⁴⁸ Japan, Ministry of Justice, *White Paper on Crime 2005*. Cf Huey Long Song &

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.⁹⁴⁹

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.⁹⁵⁰ 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.⁹⁵¹

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.⁹⁵²

20.2 Organised Crime under Japan's Criminal Law

Japan's *Criminal Code* of 1907⁹⁵³ is modelled after the *Criminal Law* of Germany that was conceived in the late 20th century. Part I of the Japanese Code sets out the general principles of criminal liability which includes standard provisions relating to complicity such as liability of joint principals (art 60), accessorial liability (art 62), and also incitement (art 61). The Code does not contain provisions relating to conspiracy and there are no specific offences for participating in criminal organisations. Outside the *Criminal Code*, there is some sentencing legislation which allows for the imposition of higher penalties on 'acts of intimidation, assault, and destruction of property committed by several individuals, or by showing the force of an enterprise or a group'.⁹⁵⁴

Japan signed the *Convention against Transnational Organised Crime* on December 12, 2000.⁹⁵⁵ The *Palermo Convention* was approved during the 156th session of the Diet, the Japanese Parliament, on May 14, 2003.⁹⁵⁶

Dombrink, 'Asian Emerging Crime Groups', at 232; Shikata, 'Yakuza — organised crime in Japan', at 416.

⁹⁴⁹ Takemura, 'Recent Trends of Organised Crime around Japan and (South) East Asia', at 246, 249.

⁹⁵⁰ Hill, 'The Changing Face of the Yakuza', at 111–112.

⁹⁵¹ Ko-lin Chin, *Heijin*, 194; Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 260–262. See further Section 10.1 above.

⁹⁵² UNODC, *Amphetamines and Ecstasy*, 34; Hill, 'The Changing Face of the Yakuza', at 105; Takemura, 'Recent Trends of Organised Crime around Japan and (South) East Asia', at 247.

⁹⁵³ Act No 45 of 1907.

⁹⁵⁴ Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime', at 419; the title and English translation of this Act were unavailable at the time of writing.

⁹⁵⁵ UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008).

⁹⁵⁶ Japan, Ministry of Foreign Affairs, *Treaties submitted to the 156th session of the Diet*,

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 1990⁹⁵⁷ 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*).⁹⁵⁸

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.⁹⁵⁹ Since its introduction, the *bōtaihō* has seen two significant amendments in 1993 and 1997.⁹⁶⁰

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.'⁹⁶¹ Membership in a criminal organisation is not a criminal offence in Japan. At the heart of the legislation is the proscription (or 'designation') of criminal organisations. The power to designate a group is vested in the Public Safety Commissions of Japan's 47 prefectures which are independent administrative panels that supervise local police forces and their activities. The Commissions hold public hearings and, with the consent of Japan's National Public Safety Commission, can declare an organisation that meets the statutory requirements a 'designated organised crime group' or an 'alliance of designated organised crime group'. The organisations under consideration may partake in the hearings and also have the right to have the decision by the Commissions judicially reviewed.⁹⁶² 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'.⁹⁶³ The Public Safety Commissions may designate

available at www.mofa.go.jp/policy/treaty/submit/session156/agree-7.html (accessed 28 Aug 2008).

⁹⁵⁷ The draft of the anti-boryokudan law is discussed in Hill, *The Japanese Mafia*, 155–157.

⁹⁵⁸ No 77 of 1991. An English (or other) translation of the Act was not available at the time of writing.

⁹⁵⁹ Hill, *The Japanese Mafia*, 138–146; Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō', at 8–9; Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 210.

⁹⁶⁰ See further Hill, *The Japanese Mafia*, 163–166.

⁹⁶¹ Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime', at 417; Hill, 'The Changing Face of the Yakuza', at 102. See also Shikata, 'Yakuza — organised crime in Japan', at 419, who refers to the Act as 'executive law, rather than a justice law'.

⁹⁶² Japan, Ministry of Justice, *White Paper on Crime 2005*; Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime', at 415, 416; Hill, 'The Changing Face of the Yakuza', at 102; Hill, *The Japanese Mafia*, 159.

⁹⁶³ Hill, *The Japanese Mafia*, 158.

boryokudan groups using criteria set out in a definition of ‘designated boryokudan’ in art 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.⁹⁶⁴

- 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.⁹⁶⁵
- 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.⁹⁶⁶

The existence of a criminal organisation alone does not create any criminal offences. Liability only arises if orders made under the Law are violated,⁹⁶⁷ 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 with the 1993 and 1997 reforms) is set out in art 9.⁹⁶⁸ The Law allows for injunction orders to be issued against members of organised crime groups who engage in threatening or coercive activities. These orders may be made at the request of victims.⁹⁶⁹ 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.⁹⁷⁰ Additionally, an organised crime group member who is likely to repeatedly violate provisions under the *Law to Prevent Unjust Acts by Organised Crime Group Members* may be placed under a recurrence preventive order. The law also allows victims of organised crime to recover any lost property and seek compensation from the criminal organisation.⁹⁷¹ 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.⁹⁷²

⁹⁶⁴ Cf Blakesley, ‘The Criminal Justice System Facing the Challenge of Organized Crime’, at 74–75, fn 13.

⁹⁶⁵ Cf similar requirements in s 467.1 *Criminal Code* (Canada) (now amended), see Section 4.1.1 above.

⁹⁶⁶ Saeki, ‘Japan: The Criminal Justice System Facing the Challenge of Organised Crime’, at 416; cf Hill, ‘Heisei Yakuza: Burst Bubble and Bōtaihō’, at 9; Hill, ‘The Changing Face of the Yakuza’, at 102; Hill, *The Japanese Mafia*, 158–159.

⁹⁶⁷ Shikata, ‘Yakuza — organised crime in Japan’, at 419.

⁹⁶⁸ The complete list of activities is set out in Hill, *The Japanese Mafia*, 160.

⁹⁶⁹ Hill, ‘Heisei Yakuza: Burst Bubble and Bōtaihō’, at 9; Hill, ‘The Changing Face of the Yakuza’, at 102.

⁹⁷⁰ Hill, ‘Heisei Yakuza: Burst Bubble and Bōtaihō’, at 10; Hill, *The Japanese Mafia*, 165.

⁹⁷¹ Japan, Ministry of Justice, *White Paper on Crime 2005*; Saeki, ‘Japan: The Criminal Justice System Facing the Challenge of Organised Crime’, at 416, 417.

⁹⁷² Hill, ‘The Changing Face of the Yakuza’, at 102; Hill, *The Japanese Mafia*, 161–163.

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 Shinrikyo sect on March 20, 1995. While not connected to organised crime, this terrorist incident raised concerns about the operation of secret organisations in Japan.⁹⁷³

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*⁹⁷⁴ 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.⁹⁷⁵

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.

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.⁹⁷⁶ 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.'⁹⁷⁷

Japan's organised crime laws adopt a unique model that is partly inspired by the US *RICO Act*⁹⁷⁸ but also includes features of laws that proscribe organisations and criminalise activities committed on their behalf.⁹⁷⁹ Mere membership and participation in a criminal organisation are, however, not criminalised.

⁹⁷³ See further Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 206–209; Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime', at 419.

⁹⁷⁴ 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.

⁹⁷⁵ Japan, Ministry of Justice, *White Paper on Crime 2002*.

⁹⁷⁶ Cf Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime', at 418.

⁹⁷⁷ Hill, *The Japanese Mafia*, 168 [emphases removed].

⁹⁷⁸ See Section 23.1 below.

⁹⁷⁹ Cf Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō', at 9.

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'.⁹⁸⁰ 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'.⁹⁸¹ 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. 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.⁹⁸²

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.⁹⁸³

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.⁹⁸⁴ 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.⁹⁸⁵ Some more recent reports suggest that boryokudan have difficulties finding new and younger members.⁹⁸⁶ 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.⁹⁸⁷ 'Would criminalisation result in trebling the overall prison population? Regardless of the cost of such a measure, would it be desirable?', asks Hill.⁹⁸⁸

⁹⁸⁰ Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime', at 419.

⁹⁸¹ Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 211.

⁹⁸² Hill, *The Japanese Mafia*, 167.

⁹⁸³ Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime', at 416, 417.

⁹⁸⁴ Cf Shikata, 'Yakuza — organised crime in Japan', at 419.

⁹⁸⁵ Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 211–212.

⁹⁸⁶ Hill, 'Heisei Yakuza: Burst Bubble and *Bōtaihō*', at 11.

⁹⁸⁷ See Section 20.1 above.

⁹⁸⁸ Hill, *The Japanese Mafia*, 174.

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).⁹⁸⁹ 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.⁹⁹⁰ 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.⁹⁹¹

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.⁹⁹² Hill also highlights the fact that the functions of Public Safety Commissions are often carried out by police.⁹⁹³ 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.⁹⁹⁴

While the number of yakuza supporters today is small in comparison to the 1960s, the introduction of the anti-organised crime laws also resulted in a further consolidation of boryokudan. The number of criminal organisations may have dropped, but the existing syndicates are larger and more sophisticated than ever before.⁹⁹⁵ 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.⁹⁹⁶ 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 its 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, loan sharking, and theft.⁹⁹⁷ There have also been suggestions that the yakuza is increasingly resorting to violence. Saeki, for instance, expressed concern that

⁹⁸⁹ See further, *ibid*, at 169.

⁹⁹⁰ *Ibid*, at 202–204; and Hill, 'The Changing Face of the Yakuza', at 103.

⁹⁹¹ Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime', at 416, 417; Hill, *The Japanese Mafia*, 169–170.

⁹⁹² Hill, *The Japanese Mafia*, 170.

⁹⁹³ *Ibid*, at 171. This problem was also noted in the context of Hong Kong's anti-Triad laws, see Sections 8.3 and 8.4 above.

⁹⁹⁴ Hill, *The Japanese Mafia*, 171.

⁹⁹⁵ Hill, 'The Changing Face of the Yakuza', at 99, 110; Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 212.

⁹⁹⁶ Takemura, 'Recent Trends of Organised Crime around Japan and (South) East Asia', at 246.

⁹⁹⁷ Shikata, 'Yakuza — organised crime in Japan', at 417; Hill, 'The Changing Face of the Yakuza', at 103–104; Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō', at 10, 15; Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 212; Hill, *The Japanese Mafia*, 196–

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.⁹⁹⁸

This view is shared by other observers.⁹⁹⁹ The new measures may have also led to a displacement of criminal activities and may have contributed to Japanese organisations exploring opportunities abroad.¹⁰⁰⁰ On the other hand, some authors have noted that the laws have significantly reduced the violence used by different gangs against each other.¹⁰⁰¹

201; Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity', at 1118.

⁹⁹⁸ Saeki, 'Japan: The Criminal Justice System Facing the Challenge of Organised Crime', at 418.

⁹⁹⁹ Hill, 'The Changing Face of the Yakuza', at 100; Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō', at 3–4.

¹⁰⁰⁰ Kaplan & Dubro, *Yakuza: Japan's Criminal Underworld*, 212.

¹⁰⁰¹ Hill, 'Heisei Yakuza: Burst Bubble and Bōtaihō', at 10, 12; Hill, 'The Changing Face of the Yakuza', 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 Korean 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 or are not accessible from abroad.

The available documentation generally suggests that levels of organised crime in South Korea were historically 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.¹⁰⁰² 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 1963.¹⁰⁰³ 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.¹⁰⁰⁴ 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.¹⁰⁰⁵

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.¹⁰⁰⁶ The 'rise' of organised crime has been

¹⁰⁰² 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.

¹⁰⁰³ 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.

¹⁰⁰⁴ 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', at 92.

¹⁰⁰⁵ Savona et al, *Organised Crime across the Borders*, 30; Yong Kwan, 'Transnational Organised Crime and the Countermeasures in Korea', at 61; Seungmug Lee, 'Organised Crime in South Korea', at 66.

¹⁰⁰⁶ See further, Yook Sang Jung, 'Organised Crime in Contemporary Korea: International Implications', 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.'¹⁰⁰⁷

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.¹⁰⁰⁸ 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.¹⁰⁰⁹

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.¹⁰¹⁰

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.

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.¹⁰¹¹

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 discussed in this study. The Korean offence is not limited to groups planning or

¹⁰⁰⁷ Savona et al, *Organised Crime across the Borders*, 23.

¹⁰⁰⁸ See further, Yong Kwan, 'Transnational Organised Crime and the Countermeasures in Korea', at 64–68.

¹⁰⁰⁹ Seungmug Lee, 'Organised Crime in South Korea', at 67, 69. For earlier figures see Yook Sang Jung, 'Organised Crime in Contemporary Korea: International Implications', at 93.

¹⁰¹⁰ UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008).

¹⁰¹¹ Seungmug Lee, 'Organised Crime in South Korea', 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, 'Transnational Organised Crime and the Countermeasures in Korea', at 68.

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. It is understood that the Ministry of Justice in Seoul is currently examining what, if any, amendments to Korea's criminal law are necessary to fully comply with the Convention requirements.

According to reports from South Korea, approximately 700 persons are convicted annually for the forming and joining a criminal organisation.¹⁰¹²

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 34 below).¹⁰¹³ These elements share many similarities with other definitions of criminal organisations in international and domestic laws discussed elsewhere in this study.¹⁰¹⁴

Figure 34 'Criminal organisation', art 4 *Act on the Aggravated Punishment of Violence* (ROK)

Terminology	Organised Criminal Group
Elements	
Structure	<ul style="list-style-type: none"> • Organisation is composed of multiple members • Hierarchical structure • (acting in concert) for a period of time
Activities	<ul style="list-style-type: none"> • Members of the organisation act in concert (for a period of time)
Objectives	<ul style="list-style-type: none"> • Committing certain violent offences (one or more)

In arts 5–8 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;

¹⁰¹² Yong Kwan, 'Transnational Organised Crime and the Countermeasures in Korea', at 68.

¹⁰¹³ *Ibid*, at 68.

¹⁰¹⁴ See, for example, Canada (Section 4.2.1 above) and New Zealand (Section 5.2.1); *Convention against Transnational Organised Crime* (Section 3.2).

- (iii) Imprisonment of not less than two years for ordinary members; and
- (iv) Imprisonment of not less than three years for those persons who collect or provide funds for such an organisation.¹⁰¹⁵

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.

¹⁰¹⁵ Yong Kwan, 'Transnational Organised Crime and the Countermeasures in Korea', 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’.¹⁰¹⁶ Among the most significant types of organised crime in the South Pacific are narcotrafficking, migrant smuggling, and firearms trafficking.¹⁰¹⁷ 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.¹⁰¹⁸ Evidence about trafficking in persons, illegal gambling, tobacco smuggling, and electronic crime is so far only anecdotal.¹⁰¹⁹

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.¹⁰²⁰ In 2001, for instance, the International Narcotics 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

¹⁰¹⁶ Ron Crocombe, *Asia in the Pacific Islands* (2007) 177.

¹⁰¹⁷ The following analysis is based on Andreas Schloenhardt, ‘Drugs, Sex and Guns: Organised Crime in the South Pacific’ in Neil Boister & Alberto Costi (eds), *Droit Pénal International dans le Pacifique/Regionalising International Criminal Law in the Pacific*, (2007) 159–184.

¹⁰¹⁸ See, for example, Andreas Schloenhardt ‘Transnational Crime and Island State Security in the South Pacific’ in Eric Shibuya & Jim 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 at 1, Jack A Blum et al, *Financial Havens, Banking Secrecy and Money Laundering* (1998); Savona et al, *Organised Crime across the Borders*, 90–91; Ron Crocombe, *The South Pacific* (7th ed 2008) 329–333.

¹⁰¹⁹ Pacific Islands Forum (PIF) Secretariat, *Transnational Crime Strategic Assessment* (2006) 32–34.

¹⁰²⁰ UNODC, *Amphetamines and Ecstasy*, 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; PIF Secretariat, *Transnational Crime Strategic Assessment*, 19.

traffickers continue to move cocaine from South America to Australia through the Pacific islands.¹⁰²¹

In recent years, evidence of manufacturing of, and trafficking in, psychotropic substances has added a new dimension to this problem.¹⁰²²

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.¹⁰²³ 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.¹⁰²⁴

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.¹⁰²⁵ 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.'¹⁰²⁶ There is some limited evidence about small levels of trafficking in persons for employment in the garment and sex industries.¹⁰²⁷ In 2003, one of the largest cases of 'modern day slavery' was 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.¹⁰²⁸

¹⁰²¹ 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).

¹⁰²² Ibid, at paras 622, 638,; UNODC Regional Centre for East Asia and the Pacific, *Regional Profile on Drugs and Crime in the Pacific Islands* (2003) 18-21; Crocombe, *The South Pacific*, 63, 336.

¹⁰²³ 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, Schloenhardt, *Migrant Smuggling*, 146.

¹⁰²⁴ 'Authorities confirm existence of people smuggling ring' (2001) 5 *UNDCP Eastern Horizons* 15.

¹⁰²⁵ UNODC Regional Centre for East Asia and the Pacific, *Regional Profile on Drugs and Crime in the Pacific Islands* (2003) 23.

¹⁰²⁶ PIF Secretariat, *Transnational Crime Strategic Assessment*, 28; cf McCusker, 'Transnational Crime in the Pacific Islands', at 1, 5.

¹⁰²⁷ PIF Secretariat, *Transnational Crime Strategic Assessment*, 28.

¹⁰²⁸ Jennifer Burn et al, 'Combating Human Trafficking: Australia's Responses to Modern Day Slavery' (2005) 79 *Australian Law Journal* 529 at 543.

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 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.¹⁰²⁹

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.¹⁰³⁰ 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.¹⁰³¹

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.

22.2.1 Sources

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 1902,¹⁰³² followed by New Guinea in 1921.¹⁰³³ The *Criminal Code* (PNG)

¹⁰²⁹ Philip Alpers, *Gun-running in Papua New Guinea: From Arrows to Assault Weapons in the Southern Highlands* (2005) 99.

¹⁰³⁰ Crocombe, *Asia in the Pacific Islands*, 178, 180.

¹⁰³¹ John Hill, 'Transnational crime proves problematic in the Pacific Islands' (Dec 2006) *Jane's Intelligence Review* 50 at 52.

¹⁰³² *Criminal Code Ordinance* 1902.

¹⁰³³ *Laws Repeal and Adopting Ordinance* 1921; *Laws Repeal and Adopting Ordinance* 1924.

came into operation with Papua New Guinea's independence in 1975,¹⁰³⁴ replacing previous laws but many similarities to the Queensland Code remain. The criminal codes of Fiji,¹⁰³⁵ Kiribati,¹⁰³⁶ Solomon Islands,¹⁰³⁷ and Tuvalu¹⁰³⁸ 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 12.¹⁰³⁹ 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.¹⁰⁴⁰

The criminal laws of the Cook Islands,¹⁰⁴¹ Niue,¹⁰⁴² Samoa,¹⁰⁴³ and Tokelau¹⁰⁴⁴ 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.¹⁰⁴⁵ 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.¹⁰⁴⁶

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.

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,¹⁰⁴⁷ Fiji,¹⁰⁴⁸ Kiribati,¹⁰⁴⁹ Micronesia,¹⁰⁵⁰ Papua New Guinea,¹⁰⁵¹ Samoa,¹⁰⁵² Solomon Islands,¹⁰⁵³ Tonga,¹⁰⁵⁴ Tuvalu,¹⁰⁵⁵ and Vanuatu¹⁰⁵⁶ have special provisions creating criminal liability for conspiracies. Minor

¹⁰³⁴ *Criminal Code Act 1974* (Qld), No 78 of 1974.

¹⁰³⁵ *Penal Code* (Fiji), cap 17.

¹⁰³⁶ *Penal Code* (Kiribati), cap 67.

¹⁰³⁷ *Penal Code* (Solomon Islands), cap 26.

¹⁰³⁸ *Penal Code* (Tuvalu), cap 8.

¹⁰³⁹ See further Eric Colvin, 'Criminal Responsibility under the South Pacific Codes' (2002) 26 *Criminal Law Journal* 98–113.

¹⁰⁴⁰ *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.

¹⁰⁴¹ *Crimes Act 1969* (Cook Islands).

¹⁰⁴² Part V—Criminal Offences *Niue Act 1996*.

¹⁰⁴³ *Crimes Ordinance 1961* (Samoa).

¹⁰⁴⁴ *Tokelau Crimes Regulations 1975* adopting the criminal law provisions of the *Niue Act 1966*.

¹⁰⁴⁵ *Criminal Offences Act Cap 18* (Tonga).

¹⁰⁴⁶ See further Colvin, 'Criminal Responsibility under the South Pacific Codes', at 99.

¹⁰⁴⁷ Section 333 *Crimes Act 1969* (Cook Islands).

¹⁰⁴⁸ Sections 385–387 *Penal Code* (Fiji).

¹⁰⁴⁹ Section 376–378 *Penal Code* (Kiribati).

¹⁰⁵⁰ *Code of the Federated States of Micronesia*, Title 11: Crimes, § 201.

¹⁰⁵¹ Sections 515–517 *Criminal Code* (PNG).

¹⁰⁵² Section 97 *Crimes Ordinance 1961* (Samoa). Conspiracy in Samoa is limited to conspiracy to defraud.

¹⁰⁵³ Sections 376–378 *Penal Code* (Solomon Islands).

¹⁰⁵⁴ Section 15 *Criminal Offences Act Cap 18* (Tonga).

¹⁰⁵⁵ Section 376–378 *Penal Code* (Tuvalu).

¹⁰⁵⁶ Section 29 *Penal Code* (Vanuatu).

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 obstruct 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.¹⁰⁵⁷ The differences between the offences lie, for the most part, in their application. Some jurisdictions limit liability to conspiracies to commit criminal offences,¹⁰⁵⁸ while others extend liability to conspiracies to effect 'any unlawful purpose'.¹⁰⁵⁹

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 July 23, 2009, only the Cook Islands,¹⁰⁶⁰ Kiribati, Micronesia, Nauru, and Vanuatu¹⁰⁶¹ were Signatories to the *Palermo Convention*. France enacted the *Palermo Convention* in 2002¹⁰⁶² 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.¹⁰⁶³

¹⁰⁵⁷ See further Findlay, *Criminal Laws of the South Pacific*, 88–91.

¹⁰⁵⁸ See, for example, s 333 *Crimes Act 1969* (Cook Islands); s 15 *Criminal Offences Act* Cap 18 (Tonga); s 29 *Penal Code* (Vanuatu).

¹⁰⁵⁹ See, for example, s 387 *Penal Code* (Fiji); s 517(g) *Criminal Code* (PNG).

¹⁰⁶⁰ See further Section 22.3.4 below.

¹⁰⁶¹ *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.

¹⁰⁶² Law No 2002-1040 of 6 Aug 2002.

¹⁰⁶³ 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 Depository on the basis of appropriate consultation with that territory'; see www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 23 July 2009).

Figure 35 Adoption of the *Convention against Transnational Organised Crime*, South Pacific (current as on 23 July 2009).¹⁰⁶⁴

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.¹⁰⁶⁵ The *Honiara Declaration on Law Enforcement Cooperation (Honiara Declaration)*,¹⁰⁶⁶ adopted by the PIF 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.¹⁰⁶⁷ In 2000, the South Pacific Chiefs of Police Conference (SPCOC) also agreed on a common framework for weapons control, known as the *Nadi Framework*. In 2002, the *Nasonini Declaration*, the PIF's anti-terrorism strategy, followed.¹⁰⁶⁸

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.¹⁰⁶⁹ A major

¹⁰⁶⁴ Available at www.unodc.org/unodc/en/treaties/CTOC/countrylist.html (accessed 23 July 2009).

¹⁰⁶⁵ Hill, 'Transnational crime proves problematic in the Pacific Islands', at 50.

¹⁰⁶⁶ 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).

¹⁰⁶⁷ 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*.

¹⁰⁶⁸ 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).

¹⁰⁶⁹ Boister, 'Regional Cooperation in the Suppression of Transnational Crime in the South

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 PIF 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.¹⁰⁷⁰

The PIF 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.¹⁰⁷¹

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 2008.¹⁰⁷² The *Model Provisions* are based on New Zealand's counter-terrorism and anti-organised crime laws and contain elements of the United Nations' counter-terrorism and organised crime conventions and related UN Security Council resolutions.¹⁰⁷³ 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*

Pacific', at 56–78; Boister, 'New Directions for Regional Cooperation in the Suppression of Transnational Crime in the South Pacific'.

¹⁰⁷⁰ Boister, 'New Directions for Regional Cooperation in the Suppression of Transnational Crime in the South Pacific'.

¹⁰⁷¹ Personal communication with Ms Daiana Buresova, Legal Drafting Officer, Pacific Islands Forum Secretariat, Suva, 26 Sep 2008.

¹⁰⁷² Hereinafter *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF).

¹⁰⁷³ 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'.

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*.¹⁰⁷⁴

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.¹⁰⁷⁵ 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.¹⁰⁷⁶

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).

¹⁰⁷⁴ See arts 2(1), 5(1)(a)(ii) *Convention against Transnational Organised Crime*; see further Section 3.2 above.

¹⁰⁷⁵ *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.

¹⁰⁷⁶ Personal communication with Ms Daiana Buresova, Legal Drafting Officer, Pacific Islands Forum Secretariat, Suva, 26 Sep 2008.

Figure 36 'Organised criminal group', ss 2, 55(2) *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF)

Terminology Elements	Organised Criminal Group
Structure	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • [no element]
Objectives	<ul style="list-style-type: none"> • 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 (see Figure 36 above). 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.¹⁰⁷⁷ 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.

¹⁰⁷⁷ 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,¹⁰⁷⁸ but it is noted that 'if a country has a conspiracy offence, that may be used instead of the provision'.¹⁰⁷⁹ As mentioned earlier, the criminal codes of the Cook Islands, Fiji, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Vanuatu contain conspiracy provisions.¹⁰⁸⁰

Figure 37 Elements of s 55(1) *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF)

S 55(1)	Elements of the offence
Physical elements	<ul style="list-style-type: none"> • participation (whether as a member, associate member, or prospective member); • organised criminal group, s 2
Mental elements	<ul style="list-style-type: none"> • 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 (i.e. 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, accidental 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*,¹⁰⁸¹ and following its accession to the *Convention against Transnational Organised Crime*, a new s 109A entitled 'participating in organised criminal group'

¹⁰⁷⁸ See art 5(1)(a)(i) *Convention against Transnational Organised Crime*; see further Section 3.3 above.

¹⁰⁷⁹ Notes to s 55 *Counter Terrorism and Transnational Organised Crime Model Provisions* (PIF) (July 2007 draft) [copy held with author].

¹⁰⁸⁰ See Section 22.2.2 above.

¹⁰⁸¹ See Section 22.3.1 above.

was inserted into the *Crimes Act 1969* in 2003.¹⁰⁸² The introduction of this offence was part of a comprehensive suite of amendments relating to organised crime, corruption, and money laundering. This was followed by the *Crimes Amendment Act 2004* (Cook Islands) which introduced new offences relating to migrant smuggling and trafficking in persons.¹⁰⁸³

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) (see Figure 38 below).¹⁰⁸⁴

¹⁰⁸² *Crimes Amendment Act 2003* (Cook Islands), No 6 of 2003.

¹⁰⁸³ No 5 of 2004; ss 109B–109Q *Crimes Act 1969* (Cook Islands).

¹⁰⁸⁴ See Section 5.2.1 above.

Figure 38 'Organised criminal group', s 109A(2), (3) *Crimes Act 1969* (Cook Islands)

Terminology		Organised Criminal Group
Elements		
Structure		<ul style="list-style-type: none"> • Three or more persons. Irrelevant whether or not (s 109A(3)): <ul style="list-style-type: none"> ○ 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		<ul style="list-style-type: none"> • [no element]
Objectives		Either: <ul style="list-style-type: none"> • 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 lays in paragraphs 109A(2)(c) and (d). The definition extends to groups of three or more people that have as their objective the commission of offences punishable by ten years imprisonment or more. In New Zealand, this element is limited to so-called 'serious violence offences'. The Cook Islands, in contrast, do not limit the definition in that way. This difference is, however, of marginal relevance as there are very few offences that attract a penalty of ten years imprisonment that are not serious offences involving violence and are also not 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) 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.

Figure 39 Elements of s 109A(1) *Crimes Act 1969* (Cook Islands)

S 98A(1)	Elements of the offence
Physical elements	<ul style="list-style-type: none"> • participation (whether as a member or an associate member or prospective member) • in an organised criminal group (s 109A(2)).
Mental elements	<ul style="list-style-type: none"> • 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, 2005.¹⁰⁸⁵

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*.¹⁰⁸⁶ 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*)¹⁰⁸⁷ was enacted by the US Congress in 1970 in an attempt to eradicate organised crime.¹⁰⁸⁸ 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.¹⁰⁸⁹ *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.¹⁰⁹⁰

At that time, US federal criminal law only 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.

¹⁰⁸⁵ UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008).

¹⁰⁸⁶ See further Section 23.2 below.

¹⁰⁸⁷ *Racketeer Influenced and Corrupt Organisations* 18 USC §§1961–1968 [hereinafter *RICO*].

¹⁰⁸⁸ Title IX *Organised Crime Control Act 1970* (US), Pub L 91-452, 84 Stat 922.

¹⁰⁸⁹ US, President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society, Report* (1967).

¹⁰⁹⁰ 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.

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 provisions to increase the punishment for 'organised crime offenders'.¹⁰⁹¹ 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.¹⁰⁹² This necessitated the introduction of *RICO* which is now, forty years later, widely seen as a milestone in the prevention and suppression of 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'.¹⁰⁹³

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.¹⁰⁹⁴

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',¹⁰⁹⁵ 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'.¹⁰⁹⁶ 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.¹⁰⁹⁷ *RICO* does not criminalise membership in a criminal organisation per se, 'although', notes Wise, 'it may have that effect'.¹⁰⁹⁸

¹⁰⁹¹ S. 30, 91st Cong, 1st Sess §801 (now 18 USC §3575 (1976)).

¹⁰⁹² See further Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO', at 840.

¹⁰⁹³ James Jacobs et al, *Busting the Mob* (1994) 9; Adamoli et al, *Organised Crime around the World*, 135.

¹⁰⁹⁴ *Organised Crime Control Act 1970* (US), Pub L 91-452, 84 Stat 922, 923.

¹⁰⁹⁵ Wise, 'RICO and its Analogues', at 303.

¹⁰⁹⁶ See further Barry Tarlow, 'RICO Revisited' (1983) *Georgia Law Review* 291 at 308–311.

¹⁰⁹⁷ 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.

¹⁰⁹⁸ Wise, 'RICO and its Analogues', at 303.

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 multifarious harms.’¹⁰⁹⁹ 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.’¹¹⁰⁰

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 40 below).¹¹⁰¹ 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.¹¹⁰²

Figure 40 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 <ul style="list-style-type: none"> • 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 <ul style="list-style-type: none"> • 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 <ul style="list-style-type: none"> • 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 <ul style="list-style-type: none"> • 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 distinguishing feature of the four offences is the conduct element of each provision. 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.

¹⁰⁹⁹ Ibid, at 306.

¹¹⁰⁰ Bradley, ‘Racketeers, Congress, and the Courts: An Analysis of RICO’, at 844–845.

¹¹⁰¹ For an alternative structure of *RICO* elements, see, for example, Allison et al, ‘Racketeer Influenced and Corrupt Organisations’, 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.’

¹¹⁰² *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).

§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:

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 41 below). §1962(a) is limited to investments by an accused who has participated as a principal in the racketeering activity.¹¹⁰³

- (1) The illegal income has to be received in one of two ways: either from a pattern of racketeering activity,¹¹⁰⁴ or through collection of an unlawful debt.¹¹⁰⁵ 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).¹¹⁰⁶
- (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.¹¹⁰⁷ Most courts have held that §1962(a) does not require the accused to be separate from the enterprise.¹¹⁰⁸

Figure 41 Elements of RICO 18 USC §1962 (a)

Elements	
(1) Receiving any income	Income derives either <ul style="list-style-type: none"> • 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 <ul style="list-style-type: none"> • 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.

¹¹⁰³ 18 USC §2.

¹¹⁰⁴ 18 USC §1961(1), see Section 23.2.3 below.

¹¹⁰⁵ 18 USC §1961(6), see Section 23.2.4 below.

¹¹⁰⁶ Bradley, ‘Racketeers, Congress, and the Courts: An Analysis of RICO’, at 871 with reference to *US v Parness*, 503 F 2d 430 (2nd Cir, 1974).

¹¹⁰⁷ See Section 23.1.5 below.

¹¹⁰⁸ 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 (2nd Cir, 1994); *New Beckley Mining Corp v International 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).

§1962(a) is essentially an 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.¹¹⁰⁹

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 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.¹¹¹⁰

§1962(b): Illegal acquisition of enterprise interest

§1962 (b) makes it an offence to acquire or maintain an interest in an enterprise¹¹¹¹ through a pattern of racketeering activity¹¹¹² or through collection of an unlawful debt.¹¹¹³ This offence is aimed at cases in which criminal organisations commit racketeering acts to gain control of legitimate businesses.

Figure 42 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 <ul style="list-style-type: none"> • 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.¹¹¹⁴ Like subsection (a), §1962(b) rarely forms the basis of a *RICO* charge.¹¹¹⁵

§1962(c): Operation of an enterprise through racketeering

§1962(c) creates an offence for employees and associates of an enterprise¹¹¹⁶ to engage in that enterprise's activities through a pattern of racketeering activity¹¹¹⁷ or

¹¹⁰⁹ Goldsmith, 'RICO and Enterprise Criminality', at 795.

¹¹¹⁰ Amy Franklin et al, 'Racketeer Influenced and Corrupt Organisations' (2008) 45 *American Criminal Law Review* 871 at 890–891 with further references; Allison et al, 'Racketeer Influenced and Corrupt Organisations', at 1125–1126.

¹¹¹¹ See Section 23.1.5 below.

¹¹¹² 18 USC §1961(1), see Section 23.1.3 below.

¹¹¹³ 18 USC §1961(6), see Section 23.1.4 below.

¹¹¹⁴ 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).

¹¹¹⁵ Franklin et al, 'Racketeer Influenced and Corrupt Organisations', at 890–891; Allison et al, 'Racketeer Influenced and Corrupt Organisations', at 1126.

¹¹¹⁶ See Section 23.1.5 below.

through collection of an unlawful debt.¹¹¹⁸ In practice, the great majority of *RICO* indictments involve charges under §1962(c) or conspiracies to commit a subsection (c) offence.¹¹¹⁹

Figure 43 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 <ul style="list-style-type: none"> • 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.'¹¹²⁰ 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.'¹¹²¹ §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'.¹¹²²

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.¹¹²³ 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.'¹¹²⁴

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,'¹¹²⁵ even for outsiders if they 'exert sufficient control over the enterprise's affairs through illegal means to satisfy' the threshold of §1962(c).¹¹²⁶

¹¹¹⁷ 18 USC §1961(1), see Section 23.1.3 below.

¹¹¹⁸ 18 USC §1961(6), see Section 23.1.4 below.

¹¹¹⁹ Cf Lynch, 'RICO: The Crime of Being a Criminal, Part I & II', at 731.

¹¹²⁰ Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*.

¹¹²¹ Wise, 'RICO and its Analogues', at 311.

¹¹²² *Reves v Ernst & Young*, 507 US 170 (1993); cf Allison et al, 'Racketeer Influenced and Corrupt Organisations', at 1127–1128.

¹¹²³ 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 (2nd Cir, 1994); *New Beckley Mining Corp v International 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).

¹¹²⁴ Angela Veng Mei Long, *The Disruption of International Organised Crime* (2007) 92.

¹¹²⁵ Wise, 'RICO and its Analogues', at 311.

¹¹²⁶ Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', at 91, citing *US v Castro*, 89 F.3d 11th Cir 1996).

§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 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 1997, in *Salinas v US* the US Supreme Court held that ‘partners in the criminal plan must agree to pursue the same criminal objective’.¹¹²⁷

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.¹¹²⁸ ‘As a result,’ note 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.’¹¹²⁹

Mere association with a *RICO* enterprise, however, is not enough for liability under §1962(d).¹¹³⁰

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 44 Elements of ‘pattern of racketeering activity’, *RICO* 18 USC §1961(1), (5) [simplified]

Elements	
Racketeering activity, §1961(1)	Proof person committed an offence listed in §1961(1)(A)–(G)
Pattern, §1961(5)	<ul style="list-style-type: none"> • 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 with 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).

¹¹²⁷ *Salinas v US*, 522 US 52, 93 (1997).

¹¹²⁸ *Ibid*, at 65.

¹¹²⁹ Franklin et al, ‘Racketeer Influenced and Corrupt Organisations’, at 892–893.

¹¹³⁰ *US v Neapolitan*, 791 F 2d 489, 499 (7th Cir, 1986). For a more detailed analysis of this offence see, for example, Tarlow, ‘RICO Revisited’, at 383–398.

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. This is achieved by incorporating an element that requires proof of one or more specific criminal offences referred to as 'racketeering activity' or sometimes 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.'¹¹³¹

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.'¹¹³² 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,¹¹³³ (D) securities and bankruptcy fraud,¹¹³⁴ drug trafficking, (E) money laundering,¹¹³⁵ and (F) immigration offences such as migrant smuggling and trafficking in persons.¹¹³⁶
- (G) §1961(1)(G) extends the meaning of 'racketeering activity' to certain acts of terrorism. This subsection was added by the *USA PATRIOT Act* that followed the events of September 11, 2001.¹¹³⁷

It has been remarked that this list of offences 'encompasses virtually all serious criminal activity prohibited by either state or federal law'.¹¹³⁸ There has been some criticism of the fact that Congress keeps adding new offences to the list that can give

¹¹³¹ Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', 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)).

¹¹³² Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', at 89.

¹¹³³ 29 USC §§186, 501(c).

¹¹³⁴ 11 USC.

¹¹³⁵ *Currency and Foreign Transactions Reporting Act*.

¹¹³⁶ *Immigration and Nationality Act* §§277, 278.

¹¹³⁷ *Uniting and Strengthening America (USA) by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act 2001* (US).

¹¹³⁸ Adamoli et al, *Organised Crime around the World*, 135.

rise to a *RICO* charge.¹¹³⁹ James B Jacob et al, for instance, note that the list contains ‘virtually any serious federal felony and most state felonies’.¹¹⁴⁰

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.¹¹⁴¹ Liability for §1962(a)–(d) may arise even if the defendant has been acquitted for the underlying offence.¹¹⁴²

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’.¹¹⁴³ *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).¹¹⁴⁴ ‘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.’¹¹⁴⁵

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* (1985) that a pattern of racketeering requires proof that the predicate offences are (1) continuous, and (2) interrelated.¹¹⁴⁶ 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

¹¹³⁹ Veng Mei Long, *The Disruption of International Organised Crime*, 94.

¹¹⁴⁰ Jacobs et al, *Busting the Mob*, 10.

¹¹⁴¹ *BancOklahoma Mortgage Corp v Capital Title Co Inc*, 194 F 3d 1089, 1002 (10th Cir, 1999).

¹¹⁴² *US v Farmer*, 924 F 2d 657, 649 (7th Cir, 1991).

¹¹⁴³ Blakesley, ‘The Criminal Justice System Facing the Challenge of Organized Crime’, at 80.

¹¹⁴⁴ Dorean Koenig, ‘The Criminal Justice System Facing the Challenge of Organised Crime’ (1998) 44 *Wayne Law Review* 1351 at 1360.

¹¹⁴⁵ Bradley, ‘Racketeers, Congress, and the Courts: An Analysis of RICO’, at 850–851.

¹¹⁴⁶ *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 confirm the legislative material, see further Bradley, ‘Racketeers, Congress, and the Courts: An Analysis of RICO’, at 863, with reference to relevant Senate reports.

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.¹¹⁴⁷

The two elements of continuity and relationship were further developed in 1989 in *HJ Inc v Northwestern Bell Telephone Co.*¹¹⁴⁸ 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.¹¹⁴⁹

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.¹¹⁵⁰

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.'¹¹⁵¹ 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.¹¹⁵²

The practical application of the 'collection of an unlawful debt' 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) [...]'.¹¹⁵³ There is, however, one important difference between the 'pattern of racketeering activity' and the 'collection of unlawful debt' elements:

¹¹⁴⁷ See further, Franklin et al, 'Racketeer Influenced and Corrupt Organisations', at 878–880; Allison et al, 'Racketeer Influenced and Corrupt Organisations', at 1109–1115.

¹¹⁴⁸ *HJ Inc v Northwestern Bell Telephone Co*, 492 US 229 (1989).

¹¹⁴⁹ *Ibid*, at 239.

¹¹⁵⁰ *Ibid*, at 240.

¹¹⁵¹ *Ibid*, at 242.

¹¹⁵² *RICO* 18 USC §1961(6).

¹¹⁵³ Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO', at 867.

The pattern requires proof of at least two predicates, while liability for collection of unlawful debt may arise after a single violation.¹¹⁵⁴

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* legislation because 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.¹¹⁵⁵

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’¹¹⁵⁶ that affects interstate or foreign commerce. In *Handeen v Lemaire* (1997) 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.’¹¹⁵⁷

Nature/types of the enterprise

Both legitimate and illegitimate businesses can be subject to *RICO* legislation.¹¹⁵⁸ Since the Supreme Court’s decision in *US v Turkette* in 1981 it is widely accepted held that a wholly illegitimate group can constitute an enterprise under §1961(4).¹¹⁵⁹ 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*.’¹¹⁶⁰ In 1985 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.¹¹⁶¹ Accordingly, *RICO* can also ‘be used as a weapon against white collar crime and other forms of enterprise criminality.’¹¹⁶²

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.¹¹⁶³

¹¹⁵⁴ Ibid.

¹¹⁵⁵ A Laxmidas Sawkar, ‘From the Mafia to Milking Cows: State RICO Act Expansion’ (1999) 41 *Arizona Law Review* 1133 at 1139–1140.

¹¹⁵⁶ *US v Turkette*, 452 US 576, 583 (1981)

¹¹⁵⁷ *Handeen v Lemaire*, 112 F 3d 1339, 1351 (8th Cir, 1997).

¹¹⁵⁸ See further, Allison et al, ‘Racketeer Influenced and Corrupt Organisations’, at 1115–1117.

¹¹⁵⁹ *US v Turkette*, 452 US 576 (1981). Cf *HJ Inc v Northwestern Bell Tel Co*, 492 US 229, 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.

¹¹⁶⁰ Lynch, ‘RICO: The Crime of Being a Criminal, Part I & II’, at 699–700.

¹¹⁶¹ *Sedima SPRL v Imrex Co*, 473 US 479, 499–500 (1985).

¹¹⁶² Larry Newman, ‘RICO and the Russian Mafia’ (1998) 9 *Indiana International and Comparative Law Review* 225 at 241.

¹¹⁶³ Lynch, ‘RICO: The Crime of Being a Criminal, Part I & II’, at 706.

But *RICO* is also frequently used to prosecute persons without any affiliations with organised crime, and to prosecute persons involved in legitimate enterprises.¹¹⁶⁴ Further, there is general consensus that a government agency can also constitute an enterprise.¹¹⁶⁵

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,¹¹⁶⁶ though it suffices that the structure exists merely to carry out the predicate offences.¹¹⁶⁷ This overrules earlier decisions in which the pattern of racketeering activity was the enterprise and where there was no separate business.¹¹⁶⁸

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.'¹¹⁶⁹ Decisions do not need to be made by the same person; they may be delegated.¹¹⁷⁰

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.¹¹⁷¹ It is also not clear whether a single individual can constitute an enterprise.¹¹⁷²

¹¹⁶⁴ Thomas Gabor, *Assessing the Effectiveness of the Organised Crime Control Strategies* (2003) 20.

¹¹⁶⁵ See, for example, *US v Frumento*, 563 F 2d 1083 (3rd 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, Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO', at 858–861; Lynch, 'RICO: The Crime of Being a Criminal, Part I & II', at 697–699.

¹¹⁶⁶ *Chang v Chen*, 80 F 3d 1293 (9th Cir, 1996); *US v Rogers*, 89 F 3d 1326, 1337 (7th Cir, 1996); Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', at 90; Goldsmith, 'RICO and Enterprise Criminality', at 792.

¹¹⁶⁷ Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 3.

¹¹⁶⁸ See, for example, *US v Elliott*, 571 F 2d 880 (5th Cir, 1977), cer denied 439 US 953 (1978); *US v Rone*, 598 F 2d 564 (9th Cir, 1979). See further Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO', at 854–855.

¹¹⁶⁹ *US v Rogers*, 89 F 3d 1326, 1337 (7th Cir, 1996); *Richmond v Nationwide Cassel LP*, 52 F 3d 640, 644 (7th Cir, 1995); Franklin et al, 'Racketeer Influenced and Corrupt Organisations', at 881 with further references.

¹¹⁷⁰ Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 3.

¹¹⁷¹ Franklin et al, 'Racketeer Influenced and Corrupt Organisations', at 881; Allison et al, 'Racketeer Influenced and Corrupt Organisations', at 1121–1123.

¹¹⁷² In *von Bulow v von Bulow*, 634 F Supp 1284, 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.¹¹⁷³ 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.¹¹⁷⁴ In *US v Muiet* it was held that *RICO* does not require proof that a drug gang operated with financial purpose.¹¹⁷⁵

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.¹¹⁷⁶

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'.¹¹⁷⁷

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.¹¹⁷⁸

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)–

¹¹⁷³ Franklin et al, 'Racketeer Influenced and Corrupt Organisations', at 881 with further references.

¹¹⁷⁴ *National Organisation for Women v Scheidler*, 510 US 249, 261 (1994), a case involving an anti-abortion group; see further Reichelt, 'Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element', at 246.

¹¹⁷⁵ *US v Muiet*, 994 F Supp 501, 511 (DNY, 1998). Cf *US v Ellison*, 793 F 2d 942, 950 (8th Cir, 1986), 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.

¹¹⁷⁶ Cf Wise, 'RICO and its Analogues', at 308.

¹¹⁷⁷ Cf *US v Juvenile Male*, 118 F 3d 1344, 1349 (9th Cir, 1997).

¹¹⁷⁸ For further analysis of the criminal sanctions, see, for example, Veng Mei Long, *The Disruption of International Organised Crime*, 96; Franklin et al, 'Racketeer Influenced and Corrupt Organisations', at 907–909.

(m) define relevant terms and set out details of the process to seize relevant property.¹¹⁷⁹ These provisions are seen by 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 1970.¹¹⁸⁰

Civil remedies, §1964

§1964 contains a range of civil remedies for government and private litigants.¹¹⁸¹ 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.¹¹⁸²

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.’¹¹⁸³ Wise portrays these provisions for private civil enforcement as ‘distinctively American — more distinctively American than apple pie or the death penalty.’¹¹⁸⁴

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 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 1964.’¹¹⁸⁵ The Attorney-General may also instigate proceeding under §1964(a).¹¹⁸⁶

¹¹⁷⁹ For further analysis of the forfeiture provisions, see, for example, Veng Mei Long, *The Disruption of International Organised Crime*, 96; Franklin et al, ‘Racketeer Influenced and Corrupt Organisations’, at 904–906; Allison et al, ‘Racketeer Influenced and Corrupt Organisations’, at 1146–49; Tarlow, ‘RICO Revisited’, at 306–308.

¹¹⁸⁰ Wise, ‘RICO and its Analogues’, at 304, 310.

¹¹⁸¹ For further analysis of the civil remedies and the process of civil *RICO*, see, for example, Franklin et al, ‘Racketeer Influenced and Corrupt Organisations’, at 909–916; Allison et al, ‘Racketeer Influenced and Corrupt Organisations’, at 1150–1157; Tarlow, ‘RICO Revisited’, at 303–305.

¹¹⁸² 18 USC §1964(a). See further Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 2–3.

¹¹⁸³ Adamoli et al, *Organised Crime around the World*, 136.

¹¹⁸⁴ Wise, ‘RICO and its Analogues’, at 309.

¹¹⁸⁵ Veng Mei Long, *The Disruption of International Organised Crime*, 92.

¹¹⁸⁶ 18 USC §1964(b).

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.¹¹⁸⁷

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.¹¹⁸⁸ 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’.¹¹⁸⁹

Starting in 1980 with the prosecution of Mafioso Mr Frank Balistieri (or Tieri), the then leader of the Milwaukee La Cosa Nostra clan,¹¹⁹⁰ US authorities were able to convict dozens of key Cosa Nostra bosses, and disable all five notorious New York crime families through *RICO* convictions.¹¹⁹¹ According to Thomas Gabor, ‘by 1985, about two-thirds of the alleged Mafia bosses in the US were under indictment or convicted.’¹¹⁹² A number of cases continued throughout the 1990s and beyond.¹¹⁹³

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’.¹¹⁹⁴ Several associates were also charged with various substantive offences, including extortion, loan sharking, and bribery.

¹¹⁸⁷ *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).

¹¹⁸⁸ Jacobs & Gouldin, ‘Cosa Nostra: The Final Chapter?’, at 135, citing then FBI Director William Webster’s testimony before the US President’s Commission on Organised Crime.

¹¹⁸⁹ *Ibid*, at 137–138.

¹¹⁹⁰ *Balistieri v US*, 517 F Supp 935 (ED Wis 1981); *US v Tieri*, 636 F 2d 1206 (2d Cir, 1980). See further Tarlow, ‘RICO Revisited’, at 322

¹¹⁹¹ Jacobs et al, *Busting the Mob*, 5. For a full list see Jacobs & Gouldin, ‘Cosa Nostra: The Final Chapter?’, at 177.

¹¹⁹² Gabor, *Assessing the Effectiveness of the Organised Crime Control Strategies*, 21.

¹¹⁹³ For a full list see Jacobs & Gouldin, ‘Cosa Nostra: The Final Chapter?’, at 182–185.

¹¹⁹⁴ *US v Persico*, 832 F 2d 705, 707–708 (2nd Cir, 1987).

The Bonanno 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 1997.¹¹⁹⁵ Mr Carmine Gallante, the family boss of the Bonannos, and two of his associates were killed and this murder constituted the predicate offence in the *RICO* prosecution *US v Salerno* in 1989,¹¹⁹⁶ known as the Commission Case (see below). Another 24 members of the Bonanno 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.¹¹⁹⁷

The principal criminal activity of the Gambino 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 family were indicted in sixty counts with various crimes arising out of their membership in and association with the organisation.¹¹⁹⁸ 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.¹¹⁹⁹ Other members of the Genovese family stood trial in the late 1990s for their involvement in extortion, securities fraud, and bank fraud.¹²⁰⁰

Mr Anthony Salerno, the boss of the Genovese family in the early 1980s, was the principal defendant in *US v Salerno*,¹²⁰¹ 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 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.¹²⁰² These convictions were hailed as one of the greatest successes of *RICO*. James Jacob and Lauryn Gouldin, for instance, remarked:

¹¹⁹⁵ *US v Gangi*, Ind 97 Crim 1215 (SDNY, 1997).

¹¹⁹⁶ *US v Salerno*, 868 F 2d 524 (2nd Cir, 1989).

¹¹⁹⁷ *US v Badalamenti*, 84 CR 236 (SDNY 1987); cf James Jacobs & Gouldin, 'Cosa Nostra: The Final Chapter?', at 152–153, 170.

¹¹⁹⁸ *US v John Gotti jr*, 155 F 3d 144 (2d Cir 1998).

¹¹⁹⁹ *US v Gigante*, 982 F Supp 140 (EDNY 1997).

¹²⁰⁰ *US v Gangi*, Ind 97 Crim 1215 (SDNY, 1997).

¹²⁰¹ *US v Salerno*, 868 F 2d 524 (2nd Cir, 1989).

¹²⁰² See further, Jacobs & Gouldin, 'Cosa Nostra: The Final Chapter?', at 144–145; Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 2.

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.¹²⁰³

Other notorious Mafia bosses who have been convicted for *RICO* violations include Mr Angelo Bruno, head of the Bruno-Scarfo family in Philadelphia that engaged in labour racketeering, Mr Anthony Accetturo, 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.¹²⁰⁴

There have also been attempts to use *RICO* as a tool in the prosecution of outlaw motorcycle gangs. The case of *US v Barger* in 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.¹²⁰⁵

A number of *RICO* prosecutions involved members of Asian organised crime groups. In 1994 in *US v Thai* 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.¹²⁰⁶ The case of *US v Louie* (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.¹²⁰⁷ There have also been a number of *RICO* cases against members of the Russian Mafia.¹²⁰⁸

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.

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.'¹²⁰⁹ But today, one important observation about *RICO* is that — in

¹²⁰³ Jacobs & Gouldin, 'Cosa Nostra: The Final Chapter?', at 170.

¹²⁰⁴ Ibid, at 148–149.

¹²⁰⁵ *US v Barger*, 931 F 2d 359 (6th Cir, 1991).

¹²⁰⁶ *US v Thai*, 29 F 3d 785 (2nd Cir, 1994).

¹²⁰⁷ *US v Louie*, 625 F Supp 1327 (SDNY, 1985).

¹²⁰⁸ 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).

¹²⁰⁹ Jacobs et al, *Busting the Mob*, 10, 11.

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. In 1986, then US President Ronald Reagan wrote:

[J]urors are now convicting top-level mobsters and sending them away for long prison terms at a rate never before achieved. Since 1981, organised crime convictions have quadrupled. [...] [F]or the first time in our history we finally have the mob on the run.¹²¹⁰

In 1999, Jacobs and Gouldin confirmed that '[s]ince 1980, practically every significant organised crime prosecution has been brought under *RICO*.'¹²¹¹

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,¹²¹² 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.'¹²¹³

RICO's flexibility derives from the fact that the legislation does not define terms such as 'organised crime' or 'criminal organisation'.¹²¹⁴ 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'.¹²¹⁵ 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.¹²¹⁶ *RICO* has been applied in 'situations that Congress could have neither desired nor foreseen',¹²¹⁷ and there have been numerous cases in which *RICO* charges were used against individuals and groups that would not typically be regarded as organised crime.

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 organisations immune from prosecution. '*RICO* strikes directly at the organisational structure that allowed conspiracies to succeed', notes Michael Goldsmith.¹²¹⁸ *RICO* has removed the immunity that conspiracy provided for many directors of criminal organisations. 'Under *RICO*', note Jacobs et al,

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).

¹²¹⁰ Ronald Reagan, 'Declaring War on Organized Crime' (12 Jan 1986) *New York Times* 26.

¹²¹¹ Jacobs & Gouldin, 'Cosa Nostra: The Final Chapter?', at 170; cf Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 1.

¹²¹² See, for example, Mike Cormaney, 'RICO in Russia' (1997) 7 *Transnational Law & Contemporary Problems* 261 at 285.

¹²¹³ Gerber, "'A RICO you can't refuse": New York's Organised Crime Control Act', at 981.

¹²¹⁴ Cf Cormaney, 'RICO in Russia', at 285.

¹²¹⁵ Gerber, "'A RICO you can't refuse": New York's Organised Crime Control Act', at 992.

¹²¹⁶ §1961, see further Section 23.1.1 above.

¹²¹⁷ Gerber, "'A RICO you can't refuse": New York's Organised Crime Control Act', at 992, 981, 989; see also Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO', at 838; Newman, 'RICO and the Russian Mafia', at 244.

¹²¹⁸ Goldsmith, 'RICO and Enterprise Criminality', at 774.

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.¹²¹⁹

RICO has avoided some of the criticism and weaknesses of the participation offence discussed earlier 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'.¹²²⁰ 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.¹²²¹ 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.¹²²²

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.'¹²²³ 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.'¹²²⁴ 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.'¹²²⁵ 'Under *RICO*, the criminal enterprise replaces the individual as the cornerstone of each trial', notes Michael Goldsmith.¹²²⁶ 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 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.¹²²⁷

¹²¹⁹ Jacobs et al, *Busting the Mob*, 22.

¹²²⁰ Cormaney, 'RICO in Russia', at 285. See Sections 23.1.3 and 23.1.4 above.

¹²²¹ See further Section 23.1.3 above.

¹²²² Lynch, 'RICO: The Crime of Being a Criminal, Part I & II', at 688.

¹²²³ Jacobs et al, *Busting the Mob*, 11. See also Newman, 'RICO and the Russian Mafia', at 245–246; Tarlow, 'RICO Revisited', at 417–423.

¹²²⁴ Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 4. See Section 23.1.3 above.

¹²²⁵ Gerber, "'A RICO you can't refuse': New York's Organised Crime Control Act", at 987; see also Cormaney, 'RICO in Russia', at 284.

¹²²⁶ Goldsmith, 'RICO and Enterprise Criminality', at 774.

¹²²⁷ Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 4.

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.¹²²⁸ During these trials, juries sometimes lose track of particular defendants and their roles, which in turn can lead to the severance of trials.¹²²⁹

The provisions relating to money laundering and asset forfeiture were among the most novel and innovative features when *RICO* was first introduced in 1970.¹²³⁰ 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.¹²³¹

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.¹²³²

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.¹²³³ Mike 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.¹²³⁴

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.¹²³⁵

¹²²⁸ Jacobs et al, *Busting the Mob*, 11.

¹²²⁹ Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 4–6. Cf Koenig, ‘The Criminal Justice System Facing the Challenge of Organised Crime’, at 1360.

¹²³⁰ See further Section 23.1.6 above.

¹²³¹ Newman, ‘*RICO* and the Russian Mafia’, at 243.

¹²³² Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 4.

¹²³³ Cf Newman, ‘*RICO* and the Russian Mafia’, at 245.

¹²³⁴ Cormaney, ‘*RICO* in Russia’, at 288.

¹²³⁵ Allison et al, ‘Racketeer Influenced and Corrupt Organisations’, at 1137–1145; Laxmidas Sawkar, ‘From the Mafia to Milking Cows: State *RICO* Act Expansion’, at 1136; Tarlow,

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’.¹²³⁶ The practical impact of this shift has been diminished by the fact that many states have implemented laws identical to *RICO*.¹²³⁷ 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 and, to a lesser degree, in Canada.¹²³⁸

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 and 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.¹²³⁹

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 important and powerful tools 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.¹²⁴⁰ 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.¹²⁴¹

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—

¹²³⁶ ‘RICO Revisited’, at 312–315.
¹²³⁶ Craig Bradley, ‘Racketeering and the Federalisation of Crime’ (1984–1985) 22 *American Criminal Law Review* 213–266; Koenig, ‘The Criminal Justice System Facing the Challenge of Organised Crime’, at 1362–1363. See also Lynch, ‘RICO: The Crime of Being a Criminal, Part I & II’, at 714–717.
¹²³⁷ See Section 23.3 below.
¹²³⁸ See Chapters 4 and 6 above.
¹²³⁹ Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 18.
¹²⁴⁰ Pub L No 95-513, tit II §408, 84 Stat 1265 (1970).
¹²⁴¹ See further Koenig, ‘The Criminal Justice System Facing the Challenge of Organised Crime’, at 1367–1368.

- (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.¹²⁴² 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.¹²⁴³ 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.¹²⁴⁴ 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 sophisticated national and international enterprises and have had little, if any impact on more localised enterprise criminality.¹²⁴⁵

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

¹²⁴² Ibid, at 1367-1368; Adamoli et al, *Organised Crime around the World*, 136.

¹²⁴³ See 21 USC §853.

¹²⁴⁴ See Section 23.1.5 above.

¹²⁴⁵ Reichelt, ‘Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element’, at 230-232.

state to introduce *RICO*,¹²⁴⁶ followed by similar laws in Pennsylvania in 1973,¹²⁴⁷ and Florida in 1977.¹²⁴⁸ 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 45 below).

Figure 45 RICO and RICO-equivalent laws in US States (1999)¹²⁴⁹

State	Title of Act	Reported in
Arizona	<i>Racketeering Act</i>	ARIZ REV STAT §§13-2301–13-2318
California	<i>Control of Profits of Organised Crime Act</i>	<i>Penal Code</i> (CA), §§186–186.8
Colorado	<i>Organised Crime Control Act</i>	COLO REV STAT ANN §§18-17-101–18-17-109.
Connecticut	<i>Corrupt Organisation and Racketeering Act (CORA)</i>	CONN GEN STAT ANN §§53-393–53-403.
Delaware	<i>Racketeer Influenced and Corrupt Organisations Act</i>	DEL CODE ANN TIT 11, §§1501–1511
Florida	<i>RICO (Racketeer Influenced and Corrupt Organisations Act)</i>	FLA STAT ANN §§772.101–772.190
Georgia	<i>RICO (Racketeer Influenced and Corrupt Organisations Act)</i>	GA CODE ANN §§16-14-1–16-14-15
Hawai'i	<i>Organised Crime Act</i>	HAW REV STAT §§842-1–842-12
Idaho	<i>Racketeering Act</i>	IDAHO CODE §§18-7801–18-7805
Illinois	<i>Narcotics Profit Forfeiture Act 1992</i>	725 ILL COMP STAT §175/1–9
Indiana	<i>Racketeer Influenced and Corrupt Organisations Act</i>	IND CODE ANN §§35-45-6-1–35-45-6-2
Louisiana	<i>Racketeering Act</i>	LA REV STAT ANN §§15:1351–15:1356
Michigan	<i>Criminal Enterprises Act</i>	MICH STAT ANN §§28.356F–28.356X
Minnesota	[not known]	MINN STAT ANN §§609.901–609.912
Mississippi	<i>Racketeer Influenced and Corrupt Organisations Act</i>	MISS CODE ANN §§97-43-1–97-43-11
Nevada	<i>Racketeering Act</i>	NEV REV STAT ANN §§207.350–207.520
New Jersey	<i>RICO (Racketeer Influenced and Corrupt Organisations Act)</i>	NJ STAT ANN §§2C:41-1–2C:41-6.2
New Mexico	<i>Racketeering Act</i>	NM STAT ANN §§30-42-1–30-42-6
New York	<i>Organised Crime Control Act</i>	<i>Penal Law</i> (NY), §460.00–460.80
North Carolina	<i>Racketeer Influenced and Corrupt Organisations Act</i>	NC GEN STAT §§75D-1–75D-14
North Dakota	<i>Racketeer Influenced and Corrupt Organisations Act</i>	ND CENT CODE §§12.1-06.1-01–12.1-06.1-08.
Ohio	<i>Corrupt Activities Act</i>	OHIO REV CODE ANN §§2923.31–2923.36
Oklahoma	<i>Corrupt Organisations Prevention Act</i>	OKLA STAT ANN TIT 22, §§1401–1419
Oregon	<i>Racketeer Influenced and Corrupt Organisations Act</i>	OR REV STAT §§166.715–166.735
Pennsylvania	<i>Corrupt Organisations Act</i>	PA CONS STAT ANN §911

¹²⁴⁶ *Organised Crime Act* (HI), HAW REV STAT §§842-1–842-12

¹²⁴⁷ *Corrupt Organisations Act* (PA), 18 PA CONST STAT ANN §911.

¹²⁴⁸ *Florida RICO*, FLA STAT ANN §§772.101–772.190.

¹²⁴⁹ Laxmidas Sawkar, 'From the Mafia to Milking Cows: State RICO Act Expansion', at note 6.

State	Title of Act	Reported in
Rhode Island	<i>Racketeer Influenced and Corrupt Organisations Act</i>	RI GEN LAWS §§7-15-1–7-15-11
Tennessee	<i>Racketeer Influenced and Corrupt Organisations Act 1989</i>	TENN CODE ANN §§39-12-201–39-12-212
Utah	<i>Pattern of Unlawful Activity Act</i>	UTAH CODE ANN §§76-10-1601–76-10-1609
Washington	<i>Criminal Profiteering Act</i>	WASH REV CODE ANN §§9A.82.001–9A.82.904
Wisconsin	<i>Organised Crime Control Act</i>	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'.¹²⁵⁰ 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.¹²⁵¹

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, thus excluding their use against legitimate enterprises.¹²⁵² In Illinois, the statute only applies to activities involving illicit drugs.¹²⁵³

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.¹²⁵⁴ 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

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

¹²⁵⁰ *Baines v Superior Court*, 688 P 2d 1037, 1040 (1984). See also similar decisions in Colorado (*People v Chaussee II*, 847 P 2d 156, 159 (1992)), Delaware (*Stroik v State*, 671 A 2d 1335, 1340 (1996)), and Florida (*State v Nishi*, 521 So 2d 252, 253–254 (1988)).

¹²⁵¹ See further, Laxmidas Sawkar, 'From the Mafia to Milking Cows: State RICO Act Expansion', at 1135, 1151–1154; Reichelt, 'Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element', at 239–244, 247–264.

¹²⁵² *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, 1296, 1297 (PA, 1993).

¹²⁵³ *Narcotics Profit Forfeiture Act 1992* (IL), 725 ILL COMP STAT §175/1–9.

¹²⁵⁴ For more on the history of the *Organised Crime Control Act 1986* (NY) see Steven L Kessler, '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.

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:¹²⁵⁵

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.¹²⁵⁶

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 §460.30.¹²⁵⁷

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.

¹²⁵⁵ *People v Capaldo*, 572 NY S 2d 989, 990 (1991); Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 5.

¹²⁵⁶ §460.00 *Penal Law* (NY).

¹²⁵⁷ See further Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act', at 815–822.

Figure 46 'Criminal enterprise', §460.10(3) *Penal Law* (NY).

Terminology	Criminal enterprise
Elements	
Structure	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • [no element]
Objectives	<ul style="list-style-type: none"> • 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'. Like federal *RICO*,¹²⁵⁸ this may also encompass legitimate enterprises.¹²⁵⁹

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 waste, 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'.¹²⁶⁰

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':

¹²⁵⁸ See Section 23.1.5 above.

¹²⁵⁹ §§460.10(2), 175.00 *Penal Law* (NY).

¹²⁶⁰ §460.00 *Penal Law* (NY).

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:

- (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*,¹²⁶¹ 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.'¹²⁶² Further, §460.25 creates significant limitations to the enterprise corruption offences by declaring a range of activities not to be unlawful.¹²⁶³

¹²⁶¹ 18 USC §1962(1)(d), see Section 23.1.2 above.

¹²⁶² Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act', at 811.

¹²⁶³ See further, *ibid*, at 814.

Figure 47 Elements of §460.20(1) *Penal Law* (NY) offences¹²⁶⁴

	Physical elements	Mental elements
§460.20(1)(a)	<ul style="list-style-type: none"> • Conducting or participating in the affairs of an enterprise 	<ul style="list-style-type: none"> • Intention to conduct or participate
	<ul style="list-style-type: none"> • By participating in a pattern of criminal activity 	<ul style="list-style-type: none"> • intent to participate in or advance the affairs of the criminal enterprise • mental element of predicate criminal act (if any)
	<ul style="list-style-type: none"> • Employed by or associated with a criminal enterprise 	<ul style="list-style-type: none"> • Knowledge of existence of criminal enterprise • Knowledge of the nature of the criminal enterprise's activities.
§460.20(1)(b)	<ul style="list-style-type: none"> • Acquiring or maintaining any interest in or control of an enterprise 	<ul style="list-style-type: none"> • Intention to acquire or maintain an interest
	<ul style="list-style-type: none"> • By participating in a pattern of criminal activity 	<ul style="list-style-type: none"> • Intention to participate in or advance the affairs of the criminal enterprise • Mental element of predicate criminal act (if any)
	<ul style="list-style-type: none"> • Employed by or associated with a criminal enterprise 	<ul style="list-style-type: none"> • Knowledge of existence of criminal enterprise • Knowledge of the nature of the criminal enterprise's activities.
§460.20(1)(c)	<ul style="list-style-type: none"> • Participating in a pattern of criminal activity 	<ul style="list-style-type: none"> • Intention to participate in or advance the affairs of the criminal enterprise • Mental element of predicate criminal act (if any)
	<ul style="list-style-type: none"> • Investing any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise 	<ul style="list-style-type: none"> • Knowledge of the investment
	<ul style="list-style-type: none"> • Employed by or associated with a criminal enterprise 	<ul style="list-style-type: none"> • Knowledge of existence of criminal enterprise • Knowledge of the nature of the criminal enterprise's activities.

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.

¹²⁶⁴ Cf *ibid.*, at 807–813.

The subsection establishes a complex, 'cumbersome',¹²⁶⁵ 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.'¹²⁶⁶ 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.'¹²⁶⁷

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.¹²⁶⁸ 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.¹²⁶⁹ 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):

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:¹²⁷⁰

- (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

¹²⁶⁵ Ibid, at 823.

¹²⁶⁶ §460.00 *Penal Law* (NY).

¹²⁶⁷ Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act', at 811.

¹²⁶⁸ §460.10(1)(a) *Penal Law* (NY).

¹²⁶⁹ §460.10(1)(b) *Penal Law* (NY).

¹²⁷⁰ Cf Kessler, 'And a Little Child Shall Lead Them: New York's Organised Crime Control Act', at 812–813.

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.'¹²⁷¹ Moreover, the mental element, the intention to participate, ensures that the pattern of racketeering activity and the criminal enterprise are distinct.¹²⁷² This requirement also differs from federal *RICO*, where the enterprise and the pattern of racketeering activity may in some cases be identical or overlap.¹²⁷³

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.¹²⁷⁴

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 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

¹²⁷¹ Ibid, at 810.

¹²⁷² Gerber, "A RICO you can't refuse": New York's Organised Crime Control Act', at 991.

¹²⁷³ See Section 23.1.5. above.

¹²⁷⁴ Levi & Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, 6.

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 to organised crime.¹²⁷⁵

To exercise close control over the use of the *Organised Crime Control Act* provisions, 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.’¹²⁷⁶

23.5 California: Street Terrorism Enforcement and Prevention Act

23.5.1 Background and purpose

In 1988, the *California Street Terrorism and Prevention Act*,¹²⁷⁷ 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.¹²⁷⁸ §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 that the State Government take swift and drastic action against the seemingly escalating situation.¹²⁷⁹

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.¹²⁸⁰ 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.’¹²⁸¹ However, the Californian Act has served as a model for organised crime legislation in some jurisdictions outside the United States such as New Zealand¹²⁸² and Canada.¹²⁸³

¹²⁷⁵ See further Section 23.1.6 above.

¹²⁷⁶ §200.65 *Criminal Procedure Law* (NY). Similar requirements exist in some jurisdictions in relation to conspiracy charges, see further Section 2.3 above.

¹²⁷⁷ §186.20 *Penal Code* (CA).

¹²⁷⁸ 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.

¹²⁷⁹ See further, Beth Bjerregaard, ‘Antigang Legislation and Its Potential Impact’ (2003) 14(2) *Criminal Justice Policy Review* 171 at 174–176.

¹²⁸⁰ Some authors, however, consider organised crime and criminal street gangs as the same; see, for example, Truman ‘The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs’, at 683.

¹²⁸¹ §186.21 *Penal Code* (CA).

¹²⁸² See Section 5.1 above.

¹²⁸³ See Chapter 4 above

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*.¹²⁸⁴ 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 the *STEP Act*.¹²⁸⁵

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 48 below).

Figure 48 ‘Criminal street gang’, §186.22(f) *Penal Code* (CA).

Terminology	Criminal street gang
Elements	
Structure	<ul style="list-style-type: none"> 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	<ul style="list-style-type: none"> 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	<ul style="list-style-type: none"> [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* (1991) the California Court of Appeal held that this term ‘refers to a person’s relationship to an organisation that is not accidental or artificial’.¹²⁸⁶

¹²⁸⁴ 18 USC §1962(c). See further Section 23.1.5 above.

¹²⁸⁵ *People v Green*, 227 Cal App 3d 692, 702 (1991).

¹²⁸⁶ *Ibid.*

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. This significantly narrows the application of the *STEP Act* and helped it survive numerous constitutional challenges.¹²⁸⁷

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 narco trafficking, 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.¹²⁸⁸ 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 motor vehicle theft, 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*.

¹²⁸⁷ Moon, 'Outlawing the Outlaws', at 497. See further Section 23.5.5 below.

¹²⁸⁸ See Section 23.1.3 above.

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'.¹²⁸⁹ 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).'¹²⁹⁰

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 49 below). The threshold of this offence is considerably higher than similar offences in those jurisdictions that have adopted laws based on the Californian model.¹²⁹¹

Figure 49 Participating in a criminal street gang', §186.22(a) *Penal Code* (CA)¹²⁹²

Physical elements	Mental elements
<ul style="list-style-type: none"> Active participation 	
<ul style="list-style-type: none"> Criminal street gang, §186.22(f) Members of the gang engage in or have engaged in a pattern of criminal gang activity 	<ul style="list-style-type: none"> Knowledge
<ul style="list-style-type: none"> Promoting, furthering, or assisting in any felonious criminal conduct by member of the gang 	<ul style="list-style-type: none"> 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* 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.¹²⁹³

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

¹²⁸⁹ Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence', at 272.

¹²⁹⁰ Alexander Molina, 'California's Anti-Gang Street Terrorism Enforcement and Prevention Act' (1993) 22 *Southwestern University Law Review* 457 at 467, emphasis added.

¹²⁹¹ See, for example, New Zealand, Section 5.1 above.

¹²⁹² Cf Molina, 'California's Anti-Gang Street Terrorism Enforcement and Prevention Act', at 461; Truman 'The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs', at 709.

¹²⁹³ *People v Green* 227 Cal App 3d 692 (1991).

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*.¹²⁹⁴

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 of 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.¹²⁹⁵ 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'.¹²⁹⁶

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 50 Soliciting or recruiting for a criminal street gang', §186.26(a) *Penal Code* (CA)

Physical elements		Mental elements
<ul style="list-style-type: none"> Soliciting or recruiting another Criminal street gang, §186.22(f) 	Intention either: <ul style="list-style-type: none"> 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.

¹²⁹⁴ Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence', at 286, emphases added.

¹²⁹⁵ Lizabeth de Vries, 'Guilt by Association' (2002) 37 *University of San Francisco Law Review* 191 at 199–200.

¹²⁹⁶ *People v Castenada*, 3 Pd 3d 278, 283–284 (2000).

Figure 51 Threats and coercion to participate a criminal street gang', §186.26(b) *Penal Code (CA)*

Physical elements		Mental elements
<ul style="list-style-type: none"> Threatening another person with physical violence Twice or more within a 30-day period 		<ul style="list-style-type: none"> Intention to coerce, induce, or solicit any person to actively participate in a criminal street gang.
<ul style="list-style-type: none"> Criminal street gang, §186.22(f) 		
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 52 Gang conspiracy, §182.5 *Penal Code* (CA)¹²⁹⁷

Physical elements	Mental elements
<ul style="list-style-type: none"> Active participation 	
<ul style="list-style-type: none"> Criminal street gang, §186.22(f) Members of the gang engage in or have engaged in a pattern of criminal gang activity 	<ul style="list-style-type: none"> Knowledge
<ul style="list-style-type: none"> Promoting, furthering, or assisting in, or benefiting from any felonious criminal conduct by member of the gang 	<ul style="list-style-type: none"> 'Wilful'

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.¹²⁹⁸

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.¹²⁹⁹ 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.'¹³⁰⁰

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 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.¹³⁰¹

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 California 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,

¹²⁹⁷ Cf de Vries, 'Guilt by Association', at 210–211.

¹²⁹⁸ Ibid, at 214.

¹²⁹⁹ Ibid, at 211.

¹³⁰⁰ Ibid, at 213.

¹³⁰¹ See further, Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence', at 286-289.

[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.¹³⁰²

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.'¹³⁰³

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, over twenty 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,¹³⁰⁴ for example, Arkansas,¹³⁰⁵ Florida,¹³⁰⁶ Georgia,¹³⁰⁷ Illinois,¹³⁰⁸ Indiana,¹³⁰⁹ Iowa,¹³¹⁰ Louisiana,¹³¹¹ Minnesota,¹³¹² Missouri,¹³¹³ Nevada,¹³¹⁴ Oklahoma,¹³¹⁵ and South Dakota.¹³¹⁶

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.¹³¹⁷ 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,¹³¹⁸ and the legislation and its equivalents in other States have thus far survived all challenges before the courts.¹³¹⁹

¹³⁰² Ibid, at 273.

¹³⁰³ Bjerregaard, 'Antigang Legislation and Its Potential Impact', at 174.

¹³⁰⁴ See further, Truman 'The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs', at 710-712.

¹³⁰⁵ Ark Code Ann §5-75-104.

¹³⁰⁶ FLA STAT ANN §874.03.

¹³⁰⁷ GA CODE ANN §16-15-3.

¹³⁰⁸ 740 ILL COMP STAT ANN 147/10.

¹³⁰⁹ IND CODE ANN §35-45-9-1.

¹³¹⁰ IOWA CODE ANN §723A.1.

¹³¹¹ LA REV STAT ANN §15:1404.

¹³¹² MINN STA ANN §609.229.

¹³¹³ MO REV STAT §578.421.

¹³¹⁴ NEV REV STAT §193.168.

¹³¹⁵ OKLA STAT ANN, tit 21, §856D-F.

¹³¹⁶ DC Codified Laws §22-10-14.

¹³¹⁷ Molina, 'California's Anti-Gang Street Terrorism Enforcement and Prevention Act', at 457, 458.

¹³¹⁸ Carol Martinez, 'The Street Terrorism Enforcement and Prevention Act' (1997) 28 *Pacific Law Journal* 711 at 713; Astvasadoorian, 'California's Two-prong Attack against Gang Crime and Violence', at 276, 282-286; Molina, 'California's Anti-Gang Street Terrorism Enforcement and Prevention Act', at 471-476; Bjerregaard, 'Antigang Legislation and Its Potential Impact', at 178.

¹³¹⁹ *People v Green*, 227 Cal App 3d 692 (1991); *People v Gamez* 235 Cal App 3d 957 (1991); *In re Alberto R*, 1 Cal Rptr 2d 348 (Ct App, 1991); cf *Jackson v State*, 634 NE 3d 532 (Ind Ct App, 1994), *Helton v State*, 624 NE 2d 499 (Ind Ct App, 1993), *State v*

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.¹³²⁰ Specifically, membership in a criminal gang alone is not a criminal offence under §186.22.¹³²¹ The legislation also does not criminalise mere association with criminals, which has constitutional protection.¹³²² 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.¹³²³ ‘[T]he conduct that *STEP* seeks to outlaw is presently criminal in itself.’¹³²⁴ ‘Because the *STEP Act* does not regulate speech or association, but conduct – and then only criminal conduct – it is not overly broad.’¹³²⁵

¹³²⁰ *Walker*, 506 NW 2d 430 (Iowa, 1993).
¹³²⁰ Molina, ‘California’s Anti-Gang Street Terrorism Enforcement and Prevention Act’, at 465–466; Martinez, ‘The Street Terrorism Enforcement and Prevention Act’, at 713; Astvasadoorian, ‘California’s Two-prong Attack against Gang Crime and Violence’, at 275, 278–282; Truman ‘The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs’, at 717; de Vries, ‘Guilt by Association’, at 202–204.
¹³²¹ Cf *Scales v US*, 367 US 203, 224–225 (1961).
¹³²² *NAACO v Claiborne Hardware Co*, 458 US 886, 908 (1992). See also Astvasadoorian, ‘California’s Two-prong Attack against Gang Crime and Violence’, at 280.
¹³²³ *People v Gamez*, 235 Cal App 3d 957, 971–972 (1991); *People v Green*, 227 Cal App 3d 692, 700 (1991).
¹³²⁴ Astvasadoorian, ‘California’s Two-prong Attack against Gang Crime and Violence’, at 299, emphasis added.
¹³²⁵ Truman ‘The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs’, at 714 (emphasis added), with reference to *People v Gamez*, 235 Cal App 3d 957 (1991).

PART 4

CONCLUSION

24 Observations

Organised crime is not a new phenomenon and is not restricted to any one part of the world. It 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 provide. 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, 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 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 Gross Domestic Product (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 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 are generally attributed to 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 illegal activities. '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.'¹³²⁶ It is now widely accepted 'that previous efforts against

¹³²⁶ Moon, 'Outlawing the Outlaws', at 459.

organised crime have failed because the focus has been on individual prosecutions rather than on organisational foundations.¹³²⁷

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.¹³²⁸ 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. 'From the perspective of crime prevention', notes Estelle Baker,

logic suggests that an approach aimed at the level of the organisation is likely to produce greater crime reduction dividends than one which requires dissipated law enforcement efforts across a spectrum of individual end behaviour offences.¹³²⁹

The offences explored in this study 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.¹³³⁰

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.'¹³³¹

Minor variations aside, four main types of organised crime offences can be identified.¹³³² These include:

5. 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;¹³³³
6. 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);¹³³⁴

¹³²⁷ Goldsmith, 'RICO and Enterprise Criminality', at 775.

¹³²⁸ Cf Wise, 'RICO and its Analogues', at 304 citing James Jacobs

¹³²⁹ Baker, 'The legal regulation of transnational organised crime', at 187.

¹³³⁰ See further Section 2.1 above.

¹³³¹ Adamoli et al, *Organised Crime around the World*, 136.

¹³³² Cf the distinction of three models in Moon, 'Outlawing the Outlaws', at 494; and in Militello, 'Participation in an Organised Criminal Group as International Offence', at 105–109.

¹³³³ See Sections 3.3.1, 2.1.3, 11.2, 12.2, 22.2.2, and Chapter 13 above.

¹³³⁴ 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.

7. 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;¹³³⁵
8. The labelling/registration model of Hong Kong, Singapore, Malaysia, Japan, New South Wales, and South Australia;¹³³⁶

Jurisdictions, such as Indonesia, Cambodia, Thailand, Lao PDR, Vietnam, and some Pacific Islands do not, or not yet, have these offences.¹³³⁷ 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.¹³³⁸ The conspiracy model can be found predominantly in those jurisdictions 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 conspiracy 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.¹³³⁹

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.¹³⁴⁰ 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.¹³⁴¹ Mere knowledge or recklessness as to the existence of the agreement does not suffice to establish liability for conspiracy.¹³⁴²

Given these practical 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.¹³⁴³ Among those Signatories that have chosen

¹³³⁵ See Sections 23.1, 23.3, 23.4, and 15.2 above,

¹³³⁶ See Sections 8.3.2, 11.32., 12.3, 20.2.1, 6.2.2, and 6.4 above.

¹³³⁷ See Chapters 14, 16, 17, 18, 19, and 22.3 above.

¹³³⁸ See further Section 2.1.3, 8.2, 11, 12.2, 13, 15.2, and 22.2.2 above.

¹³³⁹ See further Section 2.1.3 above, with reference to Adamoli et al, *Organised Crime around the World*, 132, and relevant case law

¹³⁴⁰ See further Section 2.1.3 with reference to Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', at 78; Hill, *The Japanese Mafia*, 148–149.

¹³⁴¹ Cf Meagher, *Organised Crime*, 64.

¹³⁴² *R v Alexander* (2005) 206 CCC (3d) 233; *R v Roche* (2004) 192 CCC (3d) 557.

¹³⁴³ See further Section 3.3.1 above.

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.¹³⁴⁴ 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.

To overcome some of the limitations of conspiracy, Singapore amended its criminal law following the adoption 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) of the Convention and, in fact, much wider than any organised crime offence anywhere else in the Asia Pacific region.¹³⁴⁵ Similar observations can be made about the conspiracy provisions in Malaysia and Brunei which are based on the Singapore model.¹³⁴⁶

24.2.2 The participation model

Historically, offences proscribing the participation in a criminal organisation (also referred to as 'associative offences'¹³⁴⁷) 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.'¹³⁴⁸ 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 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,¹³⁴⁹ but there are subtle, yet important, differences in how these elements are expressed.

'Participation' is the preferred term used in most jurisdictions, such as international law, Canada, New Zealand, New South Wales (Australia), Taiwan, the Pacific Islands, and California.¹³⁵⁰ 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.¹³⁵¹

¹³⁴⁴ McClean, *Transnational Organized Crime*, 60.

¹³⁴⁵ See further Section 11.1.3 above.

¹³⁴⁶ See further Section 12.2 and Chapter 13 above.

¹³⁴⁷ Verbruggen, 'On Containing Organised Crime Using "Container Offences"', at 117.

¹³⁴⁸ Wise, 'RICO and its Analogues', at 312.

¹³⁴⁹ See Figure 54 below.

¹³⁵⁰ 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.

¹³⁵¹ See further Section 5.2.2 above.

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'.¹³⁵² In contrast, in New Zealand participation extends to passive participation and participation by mere presence,¹³⁵³ though it has been suggested to limit the offence to 'active' participation to ensure that the legislation is construed strictly.¹³⁵⁴ It remains debatable which is the preferred approach: A 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.¹³⁵⁵

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 prospective members of criminal organisations.¹³⁵⁶ Accordingly, randomly and more 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.¹³⁵⁷ 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.¹³⁵⁸

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.¹³⁵⁹ Furthermore, the standard required to prove the existence of a criminal organisation is "beyond reasonable doubt". This is in sharp contrast to the registration and labelling model discussed in Section 24.2.4.

¹³⁵² *People v Castenada* 3 Pd.3d 278 at 283–284

¹³⁵³ *R v Mitford* [2005] 1 NZLR 753 at para 59.

¹³⁵⁴ Mullins, 'Broader Liability for Gang Accomplices', 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.

¹³⁵⁵ See further Section 5.2.2 above.

¹³⁵⁶ 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).

¹³⁵⁷ See further Section 10.3.3 above.

¹³⁵⁸ 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.

¹³⁵⁹ *Ciarniello v R* [2006] BCSC 1671 at para 67 per W F Ehrcke J.

Figure 54 Common elements of 'participation in a criminal organisation' offence

	Physical elements	Mental elements
1	<ul style="list-style-type: none"> participation 	<ul style="list-style-type: none"> intention (to participate): Canada, California, China recklessness: NZ, NSW, Cook Islands, PIF
2	<ul style="list-style-type: none"> criminal organisation 	<ul style="list-style-type: none"> 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 54 above). In international law, Canada, and California, the participation has to be intentional or with knowledge about the nature of the participation.¹³⁶⁰ China further requires proof that an accused has the intention that the participation contributes to the occurrence of specific criminal acts.¹³⁶¹ These jurisdictions limit liability to deliberate, purposeful contributions to criminal organisations and exclude those persons who may make unwitting contributions.¹³⁶²

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 consequences.¹³⁶³ 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.'¹³⁶⁴ 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.¹³⁶⁵ 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.

¹³⁶⁰ 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).

¹³⁶¹ Article 294[1] *Criminal Law* (China).

¹³⁶² See further Section 3.3.2 above.

¹³⁶³ 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).

¹³⁶⁴ NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Michael Daley, Moroubra) 1537.

¹³⁶⁵ 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).

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.

Figure 55 Aggravations to the participation offence¹³⁶⁶

Offences	California	Canada	China	Macau	NSW	Taiwan
Directing/leading	-	×	×	×	-	×
Recruiting	×	-	-	-	-	-
Coercion, 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.¹³⁶⁷ 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.¹³⁶⁸ 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*.¹³⁶⁹

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,¹³⁷⁰ 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.¹³⁷¹ Providing financial assistance to

¹³⁶⁶ Cf 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) 9.

¹³⁶⁷ 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] *Organised 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'.

¹³⁶⁸ See further Section 4.3.3 above.

¹³⁶⁹ See further Section 3.3.3 above.

¹³⁷⁰ See also art 288(2) *Penal Code* (Macau)

¹³⁷¹ Article 294 *Criminal Law 1997* (China); art 2(1) *Organised Crime Law 1997* (Macau).

criminal groups is a separate offence in Taiwan and Macau.¹³⁷² 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 supplied to criminal organisations.¹³⁷³ Canada also has a special provision for criminal organisations involved in certain drug offences, and a general offence for committing any criminal offence on behalf of a criminal group.¹³⁷⁴ 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'.¹³⁷⁵ Macau criminalises extortion and collecting protection money for a criminal association.¹³⁷⁶

These special offences that complement the participation offence serve two equally important purposes: 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 selections of aggravations, which in some cases appear to be somewhat unrelated to organised crime. 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 these 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-conspirators. 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,

¹³⁷² Article 6 *Organised Crime Control Act 1996* (Taiwan); art 2(2) *Organised Crime Law 1997* (Macau).

¹³⁷³ §186.28(a) *Penal Code* (CA); s 244.2(3) *Criminal Code* (Canada); art 288(2) *Penal Code* (Macau).

¹³⁷⁴ Section 5(3)(a) *Controlled Drugs and Substances Act 1996* (Canada); s 467.12 *Criminal Code* (Canada). See further Section 4.3.2 above.

¹³⁷⁵ Section 93T(2), (3), (4) *Crimes Act 1900* (NSW); see further Section 6.2.1 above.

¹³⁷⁶ Article 3 *Organised Crime Law 1997* (Macau).

not status. Under *RICO*, notes Gerard Lynch, '[o]rganised crime is as organised crime does.'¹³⁷⁷

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.

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 predicate offences considered to be 'symptomatic of organised criminal activity.'¹³⁷⁸ 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.¹³⁷⁹ 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.¹³⁸⁰

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.¹³⁸¹ The disadvantage associated with this approach 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 over-encompassing 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 Philippine model, at least two predicate offences have to be committed within a ten-year period.¹³⁸² The New York Code limits this to five years.¹³⁸³ 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.

¹³⁷⁷ Lynch, 'RICO: The Crime of Being a Criminal, Part I & II', at 688.

¹³⁷⁸ Blakesley, 'The Criminal Justice System Facing the Challenge of Organized Crime', at 89. See further Section 23.1.3 above.

¹³⁷⁹ §460.10(1)(a) *Penal Law* (NY). See further Section 23.4.3 above.

¹³⁸⁰ See further Section 15.2.1 above.

¹³⁸¹ See further Section 23.1.3 above.

¹³⁸² Section 4(d) *RICO Bill* (Philippines).

¹³⁸³ §460.10(4) *Penal Code* (NY)

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 racketeering 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).

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.¹³⁸⁴

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.'¹³⁸⁵ 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 obtuse to try to transpose them into other legal systems.¹³⁸⁶

While no other country may have adopted the exact provisions set by *RICO*, the statute 'had a major influence on legislative changes beyond the borders of the US, even though most countries used it merely as a model from which to extract concepts around which domestic legislation could then be shaped.'¹³⁸⁷

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 elsewhere. 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:

¹³⁸⁴ See further Sections 15.2.2, 23.1.2, and 23.4.3

¹³⁸⁵ Wise, 'RICO and its Analogues', at 303.

¹³⁸⁶ *Ibid*, at 306, 308.

¹³⁸⁷ Gastrow, 'The Origin of the Convention', at 22.

The drafters 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 conspiratorial agreement. It allows the prosecution to reach all members of the group in one trial, to expose the full scope of the organisation [...].¹³⁸⁸

Further research is necessary to explore in more detail how *RICO* could be adopted in common law and civil law systems.

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. This fourth model, in short, 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 — and now also under consideration in Australia's Northern Territory¹³⁸⁹ — is one of positive prohibition which involves the labelling of certain groups as criminal or illegal.

¹³⁸⁸ Wise, 'RICO and its Analogues', at 311 [emphases added, references removed].

¹³⁸⁹ *Serious Crime Control Bill 2009* (NT).

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.¹³⁹⁰ Organisations that are not registered or ineligible for registration are deemed to be unlawful.¹³⁹¹ Hong Kong and Singapore also make special provisions for triad societies and other groups using triad insignia or rituals.¹³⁹² Each jurisdiction has set up administrative units, which are often large bureaucracies, to process registrations.¹³⁹³ In some places, the registrars are employed or appointed by law enforcement or other security agencies.¹³⁹⁴

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.¹³⁹⁵

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 prohibit that person from engaging in certain activities or from associating with other members.¹³⁹⁶

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.¹³⁹⁷ This labelling approach shares similarities

¹³⁹⁰ 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.

¹³⁹¹ Section 18 *Societies Ordinance 1997* (Hong Kong); s 14(1) *Societies Act 1967* (Singapore); s 41(1) *Societies Act 1966* (Malaysia).

¹³⁹² Section 18(3) *Societies Ordinance 1997* (Hong Kong); s 23 *Societies Act 1967* (Singapore)

¹³⁹³ Section 8(1)-(4) *Societies Ordinance 1997* (Hong Kong); ss 3, 4(1) *Societies Act 1967* (Singapore)

¹³⁹⁴ Section 8(1)-(4) *Societies Ordinance 1997* (Hong Kong).

¹³⁹⁵ See further Sections 6.2.2, 6.4.1, and 20.2.1 above.

¹³⁹⁶ 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.

¹³⁹⁷ 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).

with laws dealing with terrorist organisations in that they create lists of prescribed organisations and criminalise support of or other associations with them.¹³⁹⁸

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 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.¹³⁹⁹ Alternatively, other groups may simply resurface under a different name, thus circumventing the legislation altogether.

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 56 below provides an overview of the main offences in relevant jurisdictions. These offences share many similarities with the aggravated offences under the participation model.¹⁴⁰⁰

¹³⁹⁸ See, for example, Division 102 *Criminal Code* (Cth).

¹³⁹⁹ See further Section 20.2.3 above.

¹⁴⁰⁰ See Figure 55 above.

Figure 56 Unlawful/declared organisations; criminal offences

Offences	Hong Kong	Singapore	Malaysia	Japan	NSW	South Australia
Directing/leading	×	×	-	-	-	-
Recruiting	×	×	-	-	×	-
Coercion, extortion	-	-	-	×	-	-
Promoting	-	×	-	-	-	-
Providing/collecting funds	×		×	-	-	-
Membership	×	×	×	-	-	-
Claiming to be a member	×	-	-	-	-	-
Providing premises	×	×	-	-	-	-
Visiting gang premises	-	-	-	-	-	×
Associating with other members	-	-	-	-	×	×
Firearms possession	-	-	-	-	-	×

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 are offences in Hong Kong and Malaysia.¹⁴⁰¹

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'.¹⁴⁰² 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.¹⁴⁰³ Wise notes 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.¹⁴⁰⁴

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.¹⁴⁰⁵ While Japan's law has thus avoided criticism

¹⁴⁰¹ Section 43 *Societies Act 1966* (Malaysia).

¹⁴⁰² Section 35 *Serious and Organised Crime (Control) Act 2008* (SA); s 26 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

¹⁴⁰³ See further Section 24.5 below.

¹⁴⁰⁴ Wise, 'RICO and its Analogues', at 321.

¹⁴⁰⁵ See further Section 20.2.1 above.

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’.¹⁴⁰⁶

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.¹⁴⁰⁷ 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.¹⁴⁰⁸

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).¹⁴⁰⁹

In California and Canada, these indicia include symbols and other insignia used by organised criminal groups.¹⁴¹⁰ 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’.¹⁴¹¹ 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.¹⁴¹²

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.¹⁴¹³

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.

¹⁴⁰⁶ Saeki, ‘Japan: The Criminal Justice System Facing the Challenge of Organised Crime’, at 419.

¹⁴⁰⁷ See further Section 7.2 above.

¹⁴⁰⁸ See further Section 21.2.1 above.

¹⁴⁰⁹ See further Sections 4.2.1, 6.3.2, and 8.3.1 above.

¹⁴¹⁰ §186.22(f) *Penal Code* (CA); s 467.11(1), (3) *Criminal Code* (Canada).

¹⁴¹¹ Section 28(2) *Societies Ordinance* (Hong Kong); see also s 2 *Organised and Serious Crime Ordinance 1994* (Hong Kong).

¹⁴¹² Proposed s 545A(2) *Criminal Code* (Qld).

¹⁴¹³ Levitz & Prior, ‘Criminal Organization Legislation: Canada’s Response’, at 381.

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 makes it 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.¹⁴¹⁴ 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.¹⁴¹⁵

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.¹⁴¹⁶ 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, 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.¹⁴¹⁷

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.¹⁴¹⁸ 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.¹⁴¹⁹ Taiwan's *Organised Crime Control Act 1996* also provides a number of accessorial penalties such as prohibiting offenders from registering for public office.

¹⁴¹⁴ See further Section 4.5 above.

¹⁴¹⁵ Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minister for Justice)).

¹⁴¹⁶ Article 3[1] *Organised Crime Control Act 1996* (Taiwan).

¹⁴¹⁷ 18 USC §1963(a)(1)–(3).

¹⁴¹⁸ See also art 33 *Organised Crime Law 1997* (Macau).

¹⁴¹⁹ Section 27(6) *Crimes (Criminal Organisations Control) Act 2009* (NSW); see further Section 6.2.2 above.

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).¹⁴²⁰ Under US federal *RICO*, the Attorney-General may also instigate these proceedings.¹⁴²¹ 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,¹⁴²² while others see the use of civil remedies as indicative of a failure of the criminal justice system.¹⁴²³

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. Specifically, all jurisdictions require proof of one or more elements relating to the structure, management, size, and continuity of the organisation.¹⁴²⁴ Further, a separate element of the definitions relate to the purpose of the organisation.¹⁴²⁵ There are only very few definitions that involve proof of activities by the organisation.¹⁴²⁶ It is worthy to note that no jurisdiction specifically uses or defines the term ‘organised crime’.

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.’¹⁴²⁷ 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.¹⁴²⁸

¹⁴²⁰ 18 USC §1964; *Law to Prevent Unjust Acts by Organised Crime Group Members* (Japan).

¹⁴²¹ 18 USC §1964(a); see further Section 23.1.6 above.

¹⁴²² Cf Newman, ‘RICO and the Russian Mafia’, at 245.

¹⁴²³ Wise, ‘RICO and its Analogues’, at 309.

¹⁴²⁴ See Section 24.3.1 below.

¹⁴²⁵ See Section 24.3.2 below.

¹⁴²⁶ See Section 24.3.3 below.

¹⁴²⁷ *Travaux Préparatoires*, para 4. See further Section 3.2 above.

¹⁴²⁸ 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.

In New South Wales, there is no requirement whatsoever of any formal structure of the criminal group.¹⁴²⁹ 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.¹⁴³⁰ 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'.¹⁴³¹ Under art 2 *Organised Crime Control Act 1996* (Taiwan) the criminal group also needs to maintain some hierarchical structure or other internal management system.¹⁴³²

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'.¹⁴³³ There is no single model of transnational organised crime, 'there is no prototypical crime cartel'.¹⁴³⁴ 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.¹⁴³⁵

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.

¹⁴²⁹ See further Section 6.2.1 above.

¹⁴³⁰ See further Section 20.2.1 above.

¹⁴³¹ China, Supreme People's Court, *Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature* (2000), in Keith & Lin, *New Crime in China*, 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 Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime', at 181–182. See further Section 7.3.1 above.

¹⁴³² 'Taiwan: Introduction to the "Organized Crime Control Act"', at 1021. See further Section 10.3.1 above.

¹⁴³³ Louise Shelley, 'Transnational Organized Crime' (1995) 48(2) *Journal of International Affairs* 463 at 464.

¹⁴³⁴ *Ibid.*, at 464.

¹⁴³⁵ See also Fiorentini & Peltzman, 'Introduction', at 6; Mittie Southerland & Gary Potter, 'Applying Organization Theory to Organized Crime' (1993) 9(3) *Journal for Contemporary Criminal Justice* 251 at 251.

Size

Most jurisdictions further require a minimum number of three persons to constitute a criminal organisation.¹⁴³⁶ In Hong Kong, the minimum number is as low as two persons.¹⁴³⁷ Macau and South Australia have no minimum 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.¹⁴³⁸ 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.¹⁴³⁹

Continuity

A further characteristic of organised crime is the ongoing, sustained basis of criminal organisations and their operations. ‘The notion of “organisation”’, notes Estelle Baker, ‘conjures up a sense of stability over time and of coherence of membership, both in terms of being criteria by which those who belong can be distinguished from those who do not and some kind of longevity.’¹⁴⁴⁰ 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.¹⁴⁴¹ Accordingly, the definition of organised crime group in the *Palermo Convention* requires that the group ‘exists for a period of time’.¹⁴⁴² 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 exclude 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,¹⁴⁴³ 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.

¹⁴³⁶ 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 Organized Crime Model Provisions* (PIF); s 109A(2) *Crimes Act 1969* (Cook Islands); art 2 *Organized Crime Control Act 1996* (Taiwan).

¹⁴³⁷ Section 2 *Organised and Serious Crime Ordinance 1994* (Hong Kong).

¹⁴³⁸ See further Section 20.2.1 above.

¹⁴³⁹ See further Sections 4.1.1 and 5.1 above.

¹⁴⁴⁰ Baker, ‘The legal regulation of transnational organised crime’, at 188.

¹⁴⁴¹ See further Bassiouni, ‘Organized Crime and Terrorist Criminal Activities’, at 11; McClean, *Transnational Organized Crime*, 41; Hill, *The Japanese Mafia*, 149.

¹⁴⁴² Article 2(a) *Convention against Transnational Organized Crime*; see further Section 3.2 above.

¹⁴⁴³ See further Section 24.3.4 below.

24.3.2 Purpose of the organisation

The purpose of criminal organisations connects the organisation to criminal activity and thus 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.¹⁴⁴⁴

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'.¹⁴⁴⁵

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 illicit 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.¹⁴⁴⁶ In New South Wales and in the Pacific Islands the sought profits also have to derive from certain serious or indictable offences.¹⁴⁴⁷

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 caught doing so, and charged with mischief over \$5000. They admit having done the same thing on eight prior occasions.¹⁴⁴⁸

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'.¹⁴⁴⁹

¹⁴⁴⁴ Cf 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) 7, 8.

¹⁴⁴⁵ See further Section 3.2.4 above.

¹⁴⁴⁶ See further Section 9.3.1 above.

¹⁴⁴⁷ See further Sections 6.2.1, 22.3.3 and 22.3.4 above.

¹⁴⁴⁸ *R v Lindsay* (2004) 182 CCC (3d) 301 at para 47.

¹⁴⁴⁹ *Ibid.*

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 *Travaux Préparatoires* note that this may also include non-material gratification such as sexual services¹⁴⁵⁰ ‘to ensure that organisations [engaged in] trafficking in human beings or child pornography for sexual and not monetary reasons are not excluded’.¹⁴⁵¹ 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.¹⁴⁵² In *R v Leclerc*, for instance, it was held that providing a criminal organisation with an increased presence on a particular territory (i.e. turf in the illicit drug market) can be a benefit.¹⁴⁵³

Other specific purposes

The meaning of criminal organisation is extended in a number of jurisdictions to capture those groups that engage in violent crimes that serve no 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.¹⁴⁵⁴ 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.¹⁴⁵⁵

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.¹⁴⁵⁶

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’.¹⁴⁵⁷ Article 26 *Penal Law 1997* (China) also ‘does not require

¹⁴⁵⁰ *Travaux Préparatoires*, para 3.

¹⁴⁵¹ *Legislative Guides*, 13 (with reference to the *Travaux Préparatoires*).

¹⁴⁵² *R v Lindsay* (2004) 182 C.C.C. (3d) 301 at para 58 per Fuerst J.

¹⁴⁵³ *R v Leclerc* [2001] JQ No 426 (Court of Québec – Criminal and Penal Division); see Section 4.2.3 above.

¹⁴⁵⁴ Sections 98A(2)(c), (d), 312A(a) *Crimes Act 1961* (NZ); s 93S(1) *Crimes Act 1900* (NSW).

¹⁴⁵⁵ See further Section 6.2.1 above.

¹⁴⁵⁶ Schedule 1 *Organised and Serious Crime Ordinance* (Hong Kong); see further Section 8.2.1 above.

¹⁴⁵⁷ See further Section 6.4.1 above.

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.¹⁴⁵⁸

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 the facilitation of serious offences can be one of several purposes of the organisation.¹⁴⁵⁹ Judicial decisions in Canada also reject 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.'¹⁴⁶⁰ 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.¹⁴⁶¹ Because the criminal purpose in Canada and Taiwan does not have to be the sole objective of 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.¹⁴⁶²

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.¹⁴⁶³

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 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,

¹⁴⁵⁸ Lewis, 'China's Implementation of the United Nations Convention against Transnational Organized Crime', at 180.

¹⁴⁵⁹ See Section 4.2.2 above.

¹⁴⁶⁰ *R v Lindsay* (2004) 182 CCC (3d) 301.

¹⁴⁶¹ See further Section 10.3.1 above.

¹⁴⁶² Robertson (ed), *Adams on Criminal Law*, 252.

¹⁴⁶³ *Legislative Guides*, 13.

serious bodily or psychological harm to any person (or risk thereof), or serious loss of liberty of any person.¹⁴⁶⁴ 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.¹⁴⁶⁵ 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 groups may engage 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.¹⁴⁶⁶

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*.¹⁴⁶⁷

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 committed by corporations. In line with this objective, the term ‘enterprise’ includes ‘any individual, partnership, corporation, association or other legal entity, [...]’.¹⁴⁶⁸ Both legitimate and illegitimate businesses can be the subject of *RICO* enforcement.¹⁴⁶⁹

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 control the activities of the group.¹⁴⁷⁰ 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.

¹⁴⁶⁴ See further Section 8.2.1 above.

¹⁴⁶⁵ See further Section 7.3.1 above.

¹⁴⁶⁶ McClean, *Transnational Organized Crime*, 31.

¹⁴⁶⁷ *People v Green* 227 Cal App 3d 692 at 702. See further Section 23.1.5 above.

¹⁴⁶⁸ 18 USC §1961(4).

¹⁴⁶⁹ See further, Allison et al, ‘Racketeer Influenced and Corrupt Organisations’, at 1115–1117.

¹⁴⁷⁰ 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.

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. Furthermore, New York and federal laws require that the organisation has a record of engaging in criminal racketeering activities in the past.

24.3.5 Observations

Among the countries of the Asia Pacific region there is little 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 explore the great diversity of groups that exist in the region.

In many jurisdictions, the organised crime laws are local responses to local problems. Definitions of criminal organisations are tailored accordingly to suit a particular phenomenon 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 as 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 more clandestine activities.¹⁴⁷¹

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.¹⁴⁷²

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

¹⁴⁷¹ See further Section 4.5 above.

¹⁴⁷² See Section 3.2 above.

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*.

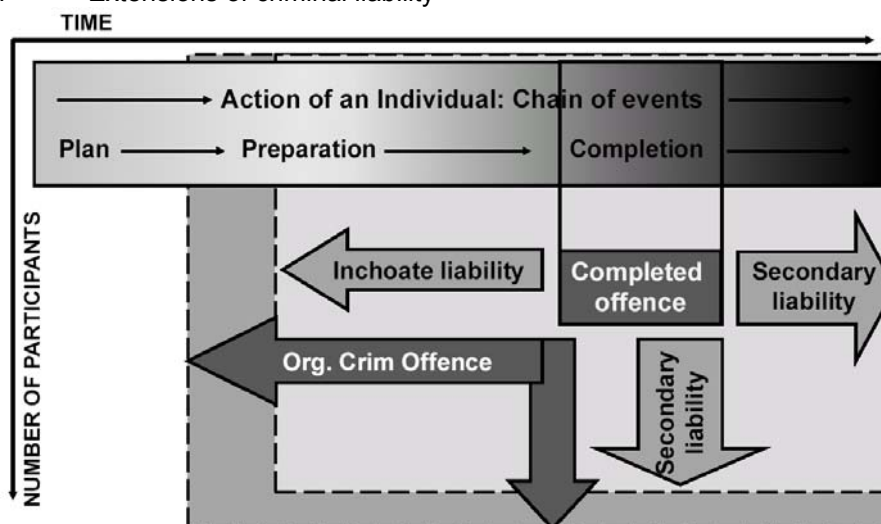
24.4 Limits of Liability

The provisions explored in this study arose out of the frustration over the established limitations of criminal liability. Baker notes:

The criminal law copes badly when harm amounting to a criminal act takes place as a result of the collective actions or omissions of a group of individuals or of an organisation, especially where the blame for their occurrence is widely diffused among a body of actors.¹⁴⁷³

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 parameters of traditional concepts of criminal liability. Accordingly, the organised crime offences are designed to extend criminal responsibility beyond the usual boundaries.

Figure 57 Extensions of criminal liability



This extension is also the principal point of contention. Edward Wise finds 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

¹⁴⁷³ Baker, 'The legal regulation of transnational organised crime', at 185.

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.¹⁴⁷⁴

Regardless of the model adopted, the common feature of all 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 a criminal offence. Figure 57 above illustrates once more how the organised crime offences extend the spectrum of criminal liability in two ways:¹⁴⁷⁵

- First, they 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, they 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. These offences, notes Frank Verbruggen,

break with the classical theory that states should not intervene in human relations with a blunt instrument like criminal law unless damage has been done to a specific “legally proscribed interest”, “a common good” like property, sexual integrity or life and limb. [...] The *Convention [against Transnational Organised Crime]* confirms unambiguously that those classical theories no longer apply. [...] Instead, criminal law becomes a tool to prevent the damage from ever happening, by making endangerment the threshold for intervention and sanctioning.¹⁴⁷⁶

Organised crime and inchoate liability: the time line

Organised crime offences extend liability beyond the scope of inchoate offences. They enable the criminalisation of acts that occur at a point in time when liability for attempt would not yet arise. They also remove 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).¹⁴⁷⁷ 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.

¹⁴⁷⁴ Wise, ‘RICO and its Analogues’, at 321.

¹⁴⁷⁵ See also Figure 6 above.

¹⁴⁷⁶ Verbruggen, ‘On Containing Organised Crime Using “Container Offences”’, at 130 [emphasis added].

¹⁴⁷⁷ See further Section 2.1.1 above.

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 [...]’.¹⁴⁷⁸ 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.¹⁴⁷⁹ 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 is 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.

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.¹⁴⁸⁰ 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 Political 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.¹⁴⁸¹ 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.¹⁴⁸² The same points have been made in Canada,¹⁴⁸³ New Zealand,¹⁴⁸⁴ Australia,¹⁴⁸⁵ and the United States.¹⁴⁸⁶

The wide scope of many offences explored in this study has been criticised for overbreadth; 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

¹⁴⁷⁸ Robertson (ed), *Adams on Criminal Law*, 210.

¹⁴⁷⁹ See further Section 2.1.2 above.

¹⁴⁸⁰ See further Section 2.3 above.

¹⁴⁸¹ ‘Taiwan: Introduction to the “Organized Crime Control Act”’, at 1028.

¹⁴⁸² See further, Hill, *The Japanese Mafia*, 169.

¹⁴⁸³ See further Section 4.5 above.

¹⁴⁸⁴ See further Section 5.2.2 above.

¹⁴⁸⁵ See further Sections 6.3.3 and 6.4.4 above.

¹⁴⁸⁶ See further Section 23.1.8 above.

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. '[I]t is a basic requirement of the rule of law that criminal law should be sufficiently clear for individuals to be able to discriminate between those acts that will infringe the norms that it lays down and those which will not', remarks Baker.¹⁴⁸⁷

It is interesting to note that despite these widespread concerns, no constitutional or other judicial challenge of these laws has been successful. 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, double jeopardy, violation of the freedom of association, 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.¹⁴⁸⁸ In Japan, where notorious crime groups have launched legal challenges against the *Anti-Boryokudan Law*, the courts have consistently upheld the statutory provisions.¹⁴⁸⁹ 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*.¹⁴⁹⁰

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 with 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.¹⁴⁹¹ New Zealand, New South Wales (Australia), Taiwan, and the Pacific Islands also

¹⁴⁸⁷ Baker, 'The legal regulation of transnational organised crime', at 189 with reference to Andrew Asworth.

¹⁴⁸⁸ See further Section 23.5.6 above.

¹⁴⁸⁹ Hill, 'The Changing Face of the Yakuza', at 103; Hill, *The Japanese Mafia*, 202–204.

¹⁴⁹⁰ See further Section 4.5 above.

¹⁴⁹¹ Section 467.11(1)(3) *Criminal Code* (Canada); see further Section 4.3.1 above.

require proof of participation without further defining the term.¹⁴⁹² 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.¹⁴⁹³ The *Palermo Convention* contains a slightly more restrictive offence of ‘active participation in (criminal) activities’.¹⁴⁹⁴

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 end. Moreover, nothing in the laws suggests that it is not possible to charge a person with attempted participation in a criminal group, 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.¹⁴⁹⁵

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 which are unable to hold directors, financiers and the like criminally responsible.

¹⁴⁹² See further Sections 5.2.2, 6.2.1, 10.3.3, 22.3.3, and 22.3.4 above.

¹⁴⁹³ Section 35 *Serious and Organised Crime (Control) Act 2008* (SA).

¹⁴⁹⁴ Article 5(1)(a)(ii) *Convention against Transnational Organised Crime*; see further Section 3.3.2 above.

¹⁴⁹⁵ Mullins, ‘Broader Liability for Gang Accomplices’, at 852.

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.¹⁴⁹⁶ 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 accused'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.¹⁴⁹⁷ Canada also has an aggravation for certain drug offences committed by criminal organisations,¹⁴⁹⁸ and New South Wales connects assaults and property damage to criminal groups in this way.¹⁴⁹⁹

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 associated with organised crime and may deter some persons from committing offences on behalf of a criminal group. Michael Moon, also supportive of this approach, notes that

the fundamental prerequisite of an enterprise crime prosecution is the commission of certain, clearly specified predicate acts, each of which carries its own mental and act requirements. [These offences] do not allow for a conviction based on an individual's thought or character alone. The proposed legislation does not punish merely because one has a criminal character: it punishes because one has a criminal character and has committed crimes.¹⁵⁰⁰

24.5 Implementation and Enforcement

The offences discussed in this study have no more than symbolic meaning unless they are properly implemented and consistently enforced. 'The answer lies in increasing policing and prosecutorial resources, not new offences',¹⁵⁰¹ 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.

¹⁴⁹⁶ See further Section 24.2.2 above.

¹⁴⁹⁷ See further Sections 4.4 and 23.5.3 above.

¹⁴⁹⁸ See further Section 4.4 above.

¹⁴⁹⁹ See further Section 6.2.1 above.

¹⁵⁰⁰ Moon, 'Outlawing the Outlaws', at 499.

¹⁵⁰¹ Roach, 'Panicking over Criminal Organizations: We Don't Need Another Offence', at 3.

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 agencies in the region have 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*.¹⁵⁰²

[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.¹⁵⁰³

[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.¹⁵⁰⁴

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

¹⁵⁰² See further Section 6.5.2 above.

¹⁵⁰³ 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).

¹⁵⁰⁴ ACC, *Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliamentary Joint Committee on the Australian Crime Commission (undated).

desirable?' asks Peter Hill.¹⁵⁰⁵ 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.¹⁵⁰⁶ 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, is the cost 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 highly conflicting. While the *Convention against Transnational Organised Crime* seeks 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 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.¹⁵⁰⁷ 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 its 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, France 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.

¹⁵⁰⁵ Hill, *The Japanese Mafia*, 174.

¹⁵⁰⁶ See further Sections 4.5 and 23.1.8 above.

¹⁵⁰⁷ Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity', at 1119.

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.'¹⁵⁰⁸ Bribery and corruption of government officials are widespread 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 asks:

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.¹⁵⁰⁹

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.¹⁵¹⁰ A separate United Nations *Convention against Corruption* has since been created.¹⁵¹¹ 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 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 on 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.

¹⁵⁰⁸ Ibid, at 1115-1116.

¹⁵⁰⁹ Hill, *The Japanese Mafia*, 147.

¹⁵¹⁰ Article 8 *Convention against Transnational Organised Crime*.

¹⁵¹¹ 2004 ILM 37.

25 The Way Ahead

In the so-called 'war on organised crime',¹⁵¹² 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'.¹⁵¹³ 'There are no votes in being soft on crime',¹⁵¹⁴ notes Donald Stuart. Many countries have legislated before they investigated. In jurisdictions such as Canada and New South Wales, the introduction of the laws was particularly rushed and reactionary.¹⁵¹⁵

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'.¹⁵¹⁶

In a note published on January 12, 1986 entitled 'Declaring war on Organised Crime', then US President Ronald Reagan wrote:

Our goal must be victory. [...] We're in this thing to win. There will be no negotiated settlements, no détente with the mob. It's war to the end where they're concerned. Our goal is simple: We mean to cripple their organisation, dry up their profits and put their members behind bars where they belong.¹⁵¹⁷

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 suspects 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.

¹⁵¹² Then US President Reagan, 'Declaring War on Organized Crime', 26.

¹⁵¹³ Stuart, 'Politically Expedient but Potentially Unjust Criminal Legislation against Gangs', at 246.

¹⁵¹⁴ Ibid, at 246.

¹⁵¹⁵ See further Section 4.1.1 above.

¹⁵¹⁶ See Sections 6.2.1 and 6.2.2 above.

¹⁵¹⁷ Reagan, 'Declaring War on Organized Crime', 26.

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. Frank Verbruggen comments that:

In established democracies, people with historic perspective remind us of comparable abuses during political or other witch-hunts in the past. In an international context, these kinds of offences have therefore always been treated with diffidence. The fact that this resistance has crumbled in recent years, mainly under the pressure from law enforcement asking for “tools” to fight organised crime and terrorism, is in itself one of the most remarkable trends now definitively sealed by the *Palermo Convention*.¹⁵¹⁸

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.¹⁵¹⁹

In short, the organised crime offences are considered by many as complete failures and as dangerous and unnecessary violations of civil rights. Instead, some see the solutions in swifter procedures, tougher enforcement, and better criminal intelligence. According to Kent 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.¹⁵²⁰

It is, however, too short-sighted 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’.¹⁵²¹ 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*.¹⁵²² The experiences in Canada and New Zealand have been similar.¹⁵²³

It may be premature to judge the effectiveness of the laws discussed in this study. Some legislative changes have only occurred very recently and only future research

¹⁵¹⁸ Verbruggen, ‘On Containing Organised Crime Using “Container Offences”’, at 117–118 [emphasis added].

¹⁵¹⁹ Koenig, ‘The Criminal Justice System Facing the Challenge of Organised Crime’, at 1377.

¹⁵²⁰ Roach, ‘Panicking over Criminal Organizations: We Don’t Need Another Offence’, at 3.

¹⁵²¹ 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.

¹⁵²² See further Section 23.1.8 above.

¹⁵²³ See further Sections 4.5 and 5.3 above.

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.¹⁵²⁴ 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. It 'marks a turning point in the commitment of the community of states to cooperate against transnational crime.'¹⁵²⁵ The *Palermo Convention*

focuses attention on the problem, legitimises stiffer domestic law enforcement measures, provides aspirational standards and expectations, facilitates smoother cooperation among states willing to make agreements by increasing harmonisation, and has great symbolic force. [The Convention] exerts a kind of "peer pressure" on countries around the world that have not yet developed effective modalities to combat organised crime.¹⁵²⁶

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 July 30, 2009, 147 countries of the 192 UN member states have ratified it, with further countries expected to follow.¹⁵²⁷

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.¹⁵²⁸

¹⁵²⁴ See Section 2.2 above.

¹⁵²⁵ Militello, 'Participation in an Organised Criminal Group as International Offence', at 97.

¹⁵²⁶ Donigan Guymon, 'International Legal Mechanisms for Combating Transnational Organised Crime', at 98.

¹⁵²⁷ UNODC, *United Nations Convention against Transnational Organized Crime* (status as on 26 Sep 2008). See further Section 3 above.

¹⁵²⁸ For alternative reform models see also 'Model Organised Crime Legislation:

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

The way ahead

A recent document 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 which they operate, based on assessments of profit, risk, and potential cost — that is, penalty or loss of profit.¹⁵²⁹

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. [...] It is time for the

¹⁵²⁹ Concentrating on the Enterprise’ by Moon, ‘Outlawing the Outlaws’, at 494–511.
Australia, Parliamentary Joint Committee on the ACC, *Inquiry into the future impact of serious and organised crime on Australian society*, paras 6.93, 6.101.

international community to hit back',¹⁵³⁰ 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 do 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',¹⁵³¹ 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 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.

¹⁵³⁰ Smith, 'An International Hit Job: Prosecuting Organised Crime Acts as Crimes against Humanity', at 1116, 1113.

¹⁵³¹ McClean, *Transnational Organized Crime*, 31.

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