Mafias & Motorbikes: New Ways to Fight Organised Crime

I understand that the Churchill Trust may publish this report, either in hardcopy or on the internet or both, and consent to such publication.

I indemnify the Churchill Trust against any loss, cost or damages it may suffer arising out of any claim or proceedings made against the Trust in respect of or arising out of the publication of any report submitted to the Trust and which the Trust places on a website for access over the internet.

I also warrant that my final report is original and does not infringe the copyright of any person, or contain anything which is, or the incorporation of which into this final report is, actionable for defamation, a breach of any privacy law or obligation, breach of confidence, contempt of court, passing-off or contravention of any other private right or of any law.

Signature: Andreas Schloenhardt   Date: July 30, 2012.
# Table of Contents

1  Executive Summary ............................................................................................................ 3
   1.1  Author/Fellow .............................................................................................................. 3
   1.2  Project Title and Outline............................................................................................ 3
   1.3  Highlights of the Fellowship ...................................................................................... 3
   1.4  Observations and Conclusions .................................................................................. 3
   1.5  Dissemination and Implementation ........................................................................... 4

2  Fellowship Programme .................................................................................................. 5
   Washington, DC, November 14–19, 2011 ........................................................................ 5
   Frankfurt, Germany, July 4–6, 2012 .............................................................................. 5
   Vienna, Austria, July 6–18, 2012 ................................................................................... 5
   Paris, France, July 19–26; 2012 ...................................................................................... 5

3  Introduction ...................................................................................................................... 6

4  International Perspectives ............................................................................................... 7
   4.1  Definition of Organised Criminal Group .................................................................... 8
      4.1.1  Structured group of three or more persons .............................................................. 9
      4.1.2  Existence for some period of time ....................................................................... 10
      4.1.3  Aim to commit serious crime ............................................................................. 10
      4.1.4  Financial or material benefit ............................................................................. 11
   4.2  Organised Crime Offence, Article 5(1)(a) .................................................................. 13
      4.2.1  Developments ...................................................................................................... 13
      4.2.2  Current concept .................................................................................................... 14
      4.2.3  Article 5(1)(a)(i): the conspiracy model ............................................................... 15
      4.2.4  Article 5(1)(a)(ii): the participation model .......................................................... 20
      4.2.5  Extensions: Article 5(1)(b) ................................................................................ 23
      4.2.6  Observations and Experiences ............................................................................ 23

5  France ................................................................................................................................ 25
   5.1  Background and Developments .................................................................................. 25
      5.1.1  Domestic influences ............................................................................................ 25
      5.1.2  European developments ..................................................................................... 27
   5.2  Definition of Organised Criminal Group ................................................................. 30
   5.3  Criminal Offences ..................................................................................................... 31
      5.3.1  Participation in a criminal association ................................................................. 31
      5.3.2  Unexplained wealth ............................................................................................ 32
      5.3.3  Penalties ............................................................................................................. 33
      5.3.4  Renunciation/collaboration with authorities ....................................................... 33
      5.3.5  Liability of legal persons (corporations) ............................................................... 34
   5.4  Other Provisions ........................................................................................................ 34
   5.5  Observations and Critique ......................................................................................... 35

6  United Kingdom ............................................................................................................... 37
   6.1  Background and Context ............................................................................................ 37
   6.2  Conspiracy ................................................................................................................ 37
      6.2.1  Current law ......................................................................................................... 37
      6.2.2  Reform proposals ............................................................................................... 39
   6.3  Enforcement Agencies ............................................................................................... 40
      6.3.1  Serious and Organised Crime Agency – SOCA (2005–2013) ............................... 41
      6.3.2  National Crime Authority (2013–) ................................................................... 43

7  Lessons for Australia ........................................................................................................ 45
1 Executive Summary

1.1 Author/Fellow

Professor Andreas Schloenhardt
PhD (Adel), Director of International Relations
The University of Queensland TC Beirne School of Law, Brisbane Qld 4072
a.schoenhardt@law.uq.edu.au; 07 3365 6191

1.2 Project Title and Outline

*Mafias & Motorbikes: New Ways to Fight Organised Crime*

This project uses a comparative analysis to examine the application and effectiveness of anti-organised crime laws in international law, in the United Kingdom and France. It builds on current research examining whether laws aimed at prohibiting criminal organisations and criminalising involvement in such groups are effective in targeting the complete spectrum of criminal organisations. This examination is based on open-source information, systematic consultation with international organisations and law enforcement agencies in Australia, the United Kingdom, United States, France, and Austria, and draws on experiences with existing organised crime offences in these countries. This project develops a range of observations which reflect on policy change and law reform designed to combat criminal organisations more effectively.

1.3 Highlights of the Fellowship

- Presentation to the American Society of Criminology conference, Washington DC;
- Meetings with senior representatives of UK’s Serious and Organized Crime Agency (SOCA), now National Crime Agency;
- Collaboration with the Treaty and Organized Crime Division, United Nations Office on Drugs and Crime, Vienna, Austria;
- Consultation with the University of Vienna, Faculty of Law, Institute of Criminal Law & Criminology;
- Meetings with senior prosecutors and other representatives of the Ministère de la Justice, Paris, France

1.4 Observations and Conclusions

A study of legislation and law enforcement approaches to organised crime in international law, France, and the United Kingdom reveals that, to this date, no jurisdiction has been able to develop a comprehensive and effective framework to prevent and suppress organised crime effectively. While several different approaches and legislative models can be identified, each system has faced fierce criticism by practitioners and scholars alike and little evidence has been found to show that any of the systems explored in this report has made a lasting impact and achieved stated policy goals.

While efforts to combat in Australia are only in their infancy, countries such as France, the United Kingdom, and the United States have a longer history of anti-organised crime legislation and law enforcement measures, which should inform the Australian debate. While no single model is flawless, Australia is in a position to avoid some of the mistakes made elsewhere and, in the medium and long term, develop a consistent, comprehensive, and durable framework to restrict the level and activities of organised
crime and, insofar as possible, reduce its impact on the Australian community. It is hoped, that this report and the outcomes of this Churchill Fellowship make a genuine and novel contribution to these efforts.

1.5 Dissemination and Implementation

The findings of this research will be integrated in a series of presentations and scholarly publications on different aspects associated with the topic of organised crime. Research findings and policy recommendations have been and continue to be shared with and presented to relevant stakeholders, including government, policy makers, international organisations, law enforcement agencies, and scholars. Furthermore, the experiences and insight gained through this research – and throughout the fellowship – will inform the teaching of students and practitioners in this field and in the wider discipline. The connections made and friendships established throughout the twelve months of the fellowship form a foundation for further research and exchange of ideas on this topic in many years to come.
2 Fellowship Programme

Washington, DC, November 14–19, 2011

- Participation in and presentation to the annual meeting of the American Society of Criminology:
- Presentation: ‘Ten Years after Palermo; No Victory in the War on Organized Crime’;
- Meetings with researchers from TRANSCRIME, Milan, Italy;
- Meetings with senior representatives from US Department of State, Drug Enforcement Agency, Federal Bureau of Investigations, Department of Justice/National Institute of Justice.


- Meetings with investigators and senior administrative staff of the Serious and Organised Crime Agency (SOCA), London;
- Meetings with investigators of the Home Office, UK Border Agency, Immigration Service (HMIS), London;
- Meetings with investigators of the Home Office, UK Border Agency, Enforcement and Crime Section, London;

Frankfurt, Germany, July 4–6, 2012

- Meetings with representatives of the organised crime division, German Federal Police (Bundeskriminalamt), Wiesbaden

Vienna, Austria, July 6–18, 2012

- Collaboration and consultation with Organized Crime and Illicit Trafficking Branch, Division of Treaty Affairs, and Anti-Human Trafficking and Migrant Smuggling Unit, United Nations Office on Drugs and Crime (UNODC);
- Meetings with the University of Vienna, Faculty of Law, Institute of Criminal Law & Criminology;
- Presentation to the University of Vienna summer program, Strobl.

Paris, France, July 19–26; 2012

- Meetings with investigators and senior administrative staff of the Office central pour la répression du banditisme (OCRB), Division de logistique opérationnelle, Direction Central de la Police Judiciaire (DCPJ), Paris
- Meetings with members of the Unité de coordination et de recherché anti-mafia (UCRAM), Paris.
3 Introduction

The Australian Crime Commission has estimated the cost of organised crime to Australians to be between $10 - $15b per year – in addition to the harms and losses caused to individuals and the broader community. The significance and seriousness of this issue is reflected in the rapid legislative developments in most Australian jurisdictions (State/Territory and federal) in recent years; in investigations, prosecutions and judicial proceedings that have followed the introduction of laws against criminal organisations; and in the great number of media features, public fora and political debates centred around the topic.

The research and consultation involved in this Churchill fellowship aims to bring the problems associated with criminal organisations, and the laws designed to address them, to greater public attention and to encourage policy makers to re-think existing measures and adopt new frameworks to confront these problems more effectively. This project seeks to develop elements of new policies and law reform to deal with the incrimination of organised crime and to contribute to ongoing policy development and legislative reform proposals in Australia and elsewhere.

This project uses a comparative analysis to examine the development and application of anti-organised crime laws in international law, the United Kingdom (UK), and France. It builds on current research examining whether laws aimed at prohibiting criminal organisations and criminalising involvement in such groups are effective in targeting the complete spectrum of criminal organisations. This examination is based on open-source information, systematic consultation with international organisations and law enforcement agencies in Australia, the UK, United States (US), France, and Austria, and draws on experiences with existing organised crime offences in these countries. This research has benefited greatly from the experience and insight of many experts and officials working in this field who shared their knowledge and ideas so willingly and openly.

This project enhances contemporary knowledge on criminal organisations and the understanding of the laws pertaining to organised crime in Australia, which, in turn, improves the ability to develop effective countermeasures that address organised crime. Analysis of experiences in overseas jurisdictions will inform law and policy recommendations for policy makers, law enforcement agencies, and other stakeholders across Australia and abroad.
4 International Perspectives

The Convention against Transnational Organised Crime was approved by the United Nations (UN) General Assembly on November 15, 2000, and was made available for governments to sign at a conference in Palermo, Italy, on December 12-15, 2000, hence the name Palermo Convention. The Convention entered into force on September 29, 2003.

The Convention is supplemented by three protocols: the Protocol against the Smuggling of Migrants by Land, Air, and Sea, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition. 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.

The Organised Crime Convention has been described as ‘one of the most important developments in international criminal law’ and 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.

The 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 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.

The Organised Crime 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 offences: participation
in an organised criminal group (Article 5), money laundering (Article 6), corruption (Article 8), and obstruction of justice (Article 23). The Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto 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.¹⁰

The following sections explore the definition of organised criminal group in Article 2(a) of the Convention, followed by an analysis of the participation offence in Article 5.

4.1 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.¹¹

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 1 below.

Figure 1 ‘Organised criminal group’, Article 2(a) Convention against Transnational Organised Crime

<table>
<thead>
<tr>
<th>Terminology</th>
<th>Organised Criminal Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structure</td>
<td>• Structured group, Article 2(c); • Three or more persons; • Existing for a period of time and acting in concert.</td>
</tr>
<tr>
<td>Activities</td>
<td>• [no element]</td>
</tr>
<tr>
<td>Objectives</td>
<td>• Aim of committing serious crimes (Article 2(b)) or Convention offences (Articles 5, 6, 8, 23); • In order to obtain a financial or material benefit.</td>
</tr>
</tbody>
</table>

The following paragraphs explore the individual elements of this definition in more detail.¹²

---


¹¹ For more on the development and history of this definition see David McClean, Transnational Organized Crime (2007) 38–40.

¹² See also David McClean, Transnational Organized Crime (2007) 41–42; Andreas
4.1.1 Structured group of three or more persons

The definition in Article 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.\(^{13}\)

Only ‘structured groups’ of three or more persons can be the subject of the measures under the *Organised Crime Convention*. The term ‘structured group’ is further defined in Article 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.\(^{14}\) Acts committed by individuals or less than three persons,\(^{15}\) or acts done by three persons not ‘acting in concert’ also fall outside the scope of the Convention.\(^{16}\) Signatories to the Convention are, however, free to raise or lower the number of members required by this definition.\(^{17}\)

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 Article 2(a), (c) is wide enough to encompass a great variety of structural models. This is also confirmed in the *Interpretative Notes* which — contrary to Article 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.’\(^{18}\) 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.\(^{19}\)


\(^{15}\) 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’.

\(^{16}\) David McClean, *Transnational Organized Crime* (2007) 41, suggests that it is not necessary that ‘all members must join the activity’ but ‘that this must be a group activity, not merely the simultaneous acts of some of its members each acting on his or her own account.’


\(^{19}\) *Legislative Guides*, 14.
4.1.2 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. 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.

4.1.3 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 (Articles 5, 6, 8, 23), such as corruption and money laundering; or (2) to commit one or more serious crimes.

Under Article 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. 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. 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.’ 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 Organised Crime Convention. It is ultimately left to individual States Parties to decide which offences to bring within the ambit of the Convention and which ones to leave out, thus making discrepancies between countries unavoidable. David Freedman notes that:


Ultimately, countries themselves define the activities that fall within the rubric of serious crime, given that the definition is linked to punishment rather than a list of predicate offences specifically enumerated. However, since offences and their punishment vary from country to country, the four-year threshold has the potential to raise doubt about which offences should be prosecuted as organised criminal activity.25

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.26 ‘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,’27 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’,28 a point also supported by Militello.29

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’.30

4.1.4 Financial or material benefit

The definition under Article 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 Interpretative Notes establish that ‘other material benefit’ may also include non-material gratification such as sexual services.31 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’.32

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


26 Cf Legislative Guides, 14.


31 Interpretative Notes, para 3.

32 Legislative Guides, 13 (with reference to the Interpretative Notes).
environmental or politically motivated offences’ seem unwarranted. Indeed, the Legislative Guides note that the definition is intended to exclude groups with purely political or social motives:

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

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.

In summary, the definition of organised criminal group under the Organised Crime 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 Article 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’. Alexandra Orlova and James Moore have described the definition as ‘a conceptually weak compromise definition that is, at once, overly broad and under inclusive.’ 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.

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.

Others, however, have argued that the definition of organised crime in the Organised Crime Convention is only a secondary issue ‘as the Convention was not designed to tell the Signatories what organised crime was.’

---

33 Alexandra Orlova & James Moore, ““Umbrellas” or “Building Blocks”?: Defining International Terrorism and Transnational Organised Crime in International Law’ (2005) 27(2) Houston Journal of International Law 267 at 283
34 Legislative Guides, 13.
40 Keith Morrell, Director, United Nations, Criminal Law and Treaty Division, Department of Foreign Affairs and International Trade, Canada (23 Oct 2003) cited in Alexandra Orlova &
4.2 Organised Crime Offence, Article 5(1)(a)

4.2.1 Developments

The criminalisation of participation in an organised crime group is generally seen as one of the most important elements of the Organised Crime Convention and was one of the main motivators for early suggestions to develop an international treaty in this field. Ancillary discussions contained no specific concept for a criminal offence and it was recognised early on that it would be difficult to find consensus on this point.\(^{41}\)

The original draft of the Convention presented at the first session of the Ad Hoc Committee in January 1999 included a basic model to serves as basis for discussion and seeking to build a bridge between civil and common law systems:\(^{42}\)

**Article 3 Participation in a criminal organisation**

1. Each State Party shall undertake in accordance with the fundamental principles of its domestic legal system, to make punishable one or both of the following types of conduct:

   (a) Conduct by any person consisting of an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of a crime or offences that are punishable by imprisonment or other deprivation of liberty of at least [ ] years; or

   (b) Conduct by any person who participates in a criminal organisation, where such participation is intentional and is either with the aim of furthering the general criminal activity or criminal purpose of the group or made in the knowledge of the intention of the group to commit offences.

2. Nothing contained in this article shall affect the principle that the description of offences to which it refers and of legal defences thereto is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in conformity with that law.\(^{43}\)

Although this draft was created for discussion purposes only, it already included two separate criminalisation models that survive in the final version of the Organised Crime Convention: one model attaches criminal liability to an agreement to commit criminal offences (draft Article 3(1)(a)); the other one creates liability for participation in a criminal organisation (draft Article 3(1)(b)). These two approaches are reflective of common and civil law influences respectively and the draft (as well as the final Convention) enable to criminalise ‘one or both’ models.

A new, more advanced text for this Article was proposed by the United Kingdom during the first session of the Ad Hoc Committee\(^{44}\) and was further discussed at the second session in March 1999:

\[^{44}\] UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Proposals and contributions received from Governments on the draft United Nations*
1. Each State Party shall establish as criminal offences the following conduct:
   (a) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group; and
   (b) 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 any 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;
      (ii) Conduct by a person who intentionally, and with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes active part in:
         a. Activities of an organized criminal group referred to in article 2 bis of this Convention;
         b. Other activities of the group in the knowledge that the person’s participation will contribute to the achievement of the above-described criminal aim.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.45

The offences set out in Article 3(1)(b)(i) and (ii) of this draft are the basis of the offences contained in Article 5(1)(a) of the final version of the Convention. Changes to the British proposal have been relatively minor and the final text was largely settled during the seventh session of the Ad Hoc Committee in January 2000.46

4.2.2 Current concept

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

[a]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’, Article 3(1).\(^{47}\) According to this definition, the application of the offences under Article 5 is limited to ‘transnational organised crime’, i.e. to offences that occur across international borders, art 3(2).\(^{48}\) 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 Organised Crime 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’).

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, while the participation offence under (ii) may be more palatable for continental, civil law countries (some of which do not permit simple criminalisation of an agreement).\(^{49}\) Several States Parties have opted to legislate both models.

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

Liability for the offence in Article 5(1)(a)(i) of the Organised Crime Convention is based on an agreement to commit serious crime. The design of this offence is, for the most part, identical with the conspiracy offence found in most common law jurisdictions (though the Convention does not use the term conspiracy).

**Conspiracy at common law**

In many jurisdictions, especially those following common law traditions, the doctrine of conspiracy is one tool to create liability for people involved in criminal organisations, especially for persons ‘who plan and organise crimes but take no part in their actual commissions’.\(^{50}\) 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.\(^{53}\)

---


\(^{49}\) See, for example, Article 115 *Penal Code* (Italy).


\(^{53}\) 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*
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’, it creates liability even if no preparation of the contemplated offence has begun. 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.

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.

Elements or Article 5(1)(a)(i)

Article 5(1)(a)(i) of the Organised Crime Convention combines elements of conspiracy (the agreement to commit a crime) with the additional requirement of a purpose of obtaining a financial or other benefit.

In essence, liability under Article 5(1)(a)(i) arises when two or more persons deliberately enter into an agreement to commit a serious crime for the purpose of obtaining some material benefit. There is no requirement to demonstrate that the accused came close (‘proximate’) to the completion of the substantive (serious) offence.

Liability centres predominantly on the agreement to commit a serious offence as defined in Article 2 of the Convention. The agreement must be made between at least two people. An agreement with oneself is not possible. Common law suggests that 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.

The agreement between the conspirators imports an intention that the unlawful act or purpose of the agreement be done.60 ‘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’.61

The requirement that the purpose of the agreement is directed at obtaining financial or material benefits is one noticeable difference to traditional common law concepts of conspiracy. This requirement eliminates from Article 5(1)(a)(i) those conspiracies that are aimed at committing non-profitable crimes. Material benefits may also include non-financial advantages such as sexual gratification.62 This additional requirement is, however, largely semantic and ‘little is added to the basic understanding of conspiracy’.63

At common law, 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.64 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.65 At common law,66 in Canada,67 New Zealand,68 Queensland,69 Victoria,70 and Western Australia,71 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.72 Justices McPherson and Thomas, for instance, remarked that:

60 R v Rogerson (1992) 174 CLR 268; R v O’Brien (1954) 110 C.C.C. 1
62 See also Legislative Guides, 24.
64 Donald Stuart, Canadian Criminal Law (5th ed, 2007) 705.
66 ‘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.
67 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.
69 Sections 541, 542 Criminal Code (Qld)
70 Section 321(1), (2) Crimes Act 1958 (Vic).
71 Poulters’ Case (1611) 77 ER 813. Colvin & McKechnie, Criminal Law in Queensland and Western Australia (5th ed, 2008) para 19.22.
72 ‘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; Koufis v R [1941] SCR 481 at 488.
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.\(^73\)

The Convention accommodates those jurisdictions that under their domestic law require proof of an overt act in furtherance of the agreement.\(^74\) The experience of those countries that have adopted the “conspiracy model” set out in Article 5(1)(a)(i) of the Organised Crime Convention 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’\(^75\) and because ‘the authorities generally do not learn of the conspiracy until it has been transacted, wholly or partly.’\(^76\)

A point of procedural significance can be found in Article 5(2), which facilitates the proof of the mental elements.\(^77\) The purpose and intention required under Article 5(1)(a)(i) may be inferred from objective factual circumstances, thus lowering the threshold of the burden of proof placed on the prosecution.

**Observations**

Article 5(1)(a)(i), the first of the two types of organised crime offences in the Organised Crime 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.

One of the practical advantages of conspiracy – and thus of Article 5(1)(a)(i) – is that it allows merging of the prosecution of several charges against multiple persons,\(^78\) 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.\(^79\) ‘The conspiracy prosecution’, remarks Clay Powell, ‘has the great advantage of combining all the isolated acts to put together the full picture.’\(^80\) 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’.\(^81\)

---


\(^77\) See also Article 3(3) *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*.


At common law, conspiracy 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.  

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

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. 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.

Many countries that have adopted the offence set out in Article 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

---

87 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.
agreement or the involvement in an organised criminal group, while 33 States indicated that no additional element was required. 89

A third problem with this offence stems from the fact that senior members of criminal organisations 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, Levi and Smith note that ‘[c]onspiracy contemplates an agreement to engage in conduct which relates to one or a series of closely related crimes, it does not contemplate the activities of a multi-faceted criminal enterprise.’ 90

Finally, conspiracy charges often fail because the law is so overly complex, involve a great number of defendants, are very resource-intensive, and because some jurisdictions have created procedural obstacles (such as approval by Attorneys-General) to limit the use of conspiracy charges. 91

Although Article 5(1)(a)(i) does not resolve these issues, the drafters of the Convention against Transnational Organised Crime included the conspiracy model, mindful 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, 92 which can be found in the alternative offence under Article 5(1)(a)(ii).

4.2.4 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 of countries such as France and Italy. 93 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’).

Liability under Article 5(1)(a)(ii) requires that an accused ‘takes active part in’ certain activities of an organised criminal group (as defined in Article 2(a)). The participation has to be ‘active’ in the sense that it makes an actual contribution to the group’s activities and is not completely unrelated to them. The accused’s participation may be (a) in the group’s criminal activities or also (b) in other, non-criminal activities if the accused knows that his/her contribution will contribute to achieving a criminal aim.\(^{94}\) 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.\(^{95}\)

Liability under Article 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.\(^{96}\) This, according to Gerhard Kemp,

\[\text{requires convincing proof that the accused intended to join the association for the purpose of supporting the group’s criminal conduct. Furthermore, this principle requires proof that the accused had sufficient knowledge of the association’s past, present and continuing criminal activity and that he or she joined the organisation in support or sustenance of that activity.}^{97}\]


\(^{95}\) David McClean, Transnational Organized Crime (2007) 64.

\(^{96}\) See further, Legislative Guides, 24.

This, in turn, 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. States Parties 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, Article 34(3).  

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

The key feature of the offence under Article 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’.

The application of Article 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 4 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.

Figure 4  Extension of criminal liability under art 5(1)(a)(ii) Convention against Transnational Organised Crime

---

Figure 4 illustrates that Article 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.

4.2.5 Extensions: Article 5(1)(b)

Liability for involvement in criminal organisations is further extended by Article 5(1)(b) to include intentionally ‘organising, directing, aiding, facilitating or counselling the commission of serious crime involving an organised criminal group’.

This Article criminalises secondary liability for persons who provide advice or assistance to serious crimes committed by organised criminal group. The purpose of the Article is to extend liability beyond persons who participate directly in the (criminal) activities of criminal organisations (as captured by Article 5(a)(ii)). ‘Aiding, facilitating or counselling’ covers secondary parties and accomplices who are not themselves principal offenders.100

‘Organising’ and ‘directing’, on the other hand, are extensions not commonly found (and defined) in national laws prior to the development of the Organised Crime Convention. To that end, Article 5(1)(b) ‘is intended to ensure the liability of leaders of criminal organisations who give the orders but do not engage in the commission of the actual crimes themselves’.101 What is not clear from Article 5(1)(b) is whether liability for organising and directing requires proof that a serious crime has been committed by an organised crime group or whether this provision also captures serious crimes that have only been planned and perhaps prepared, but have not yet been executed.

4.2.6 Observations and Experiences

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

A further extension can be found in Article 5(1)(b) which requires States 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.102 This provision, notes Donigan Guymon ‘takes a significant step in recognising that that those chiefly

101 Legislative Guides, 25; David McClean, Transnational Organized Crime (2007) 64.
responsible for organised crime are often not the perpetrators alone, but the other links in the hierarchical chain of command.\textsuperscript{103} Moreover, Article 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.\textsuperscript{104}

The extensions of criminal liability created by the Convention are significant and not without controversy. One of the weaknesses of the international system is that the \textit{Organised Crime Convention} leaves responsibility for the adoption and design of measures against organised criminal groups to States 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 \textit{Organised Crime 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.\textsuperscript{105} 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.’\textsuperscript{106}

\begin{itemize}
\end{itemize}
5 France

The French Penal Code contains offences relating to the participation in criminal organisations that are reflective of the civil law approach to this problem and also represents the common approach developed by the European Union.

5.1 Background and Developments

5.1.1 Domestic influences

The ‘archetype’ of offences relating to participation in a criminal organisation was originally set out in Articles 265–268 of the Penal Code of France of 1810 which first established offences for the association de malfeiteurs (or ‘association of wrongdoers’) and categorised them as ‘crimes against the public peace’. The offence of participating in an association of this kind was originally designed to criminalise the operation of gangs that formed in the aftermath of the French Revolution.107 ‘Throughout most of the nineteenth century’, notes Edward Wise, ‘the crime was held to require a fairly large, permanent, hierarchically organised group, composed of members with a criminal past.’108

In 1893, changes were made to the offence in order to suppress anarchist movements.109 Article 265 was amended to read:

Every association formed, regardless of its duration or the number of its members, every agreement (entente) made for the purpose of preparing or committing crimes against persons or property, constitutes a crime against the public peace.110

For the next eighty years the Article was left unaltered; only minor changes occurred in 1981.111

In the 1980s, the notion of organised crime gang (bande organisée) was introduced into French criminal law. The 1992 reform of the Penal Code, which entered into force on March 1, 1994, dropped some of the requirements of the offence relating to the size and duration of the association, added some aggravating circumstances, and increased the penalty for the offence.112 The distinction between organisations planning to

---


commit offences against persons and those planning offences against property was also abolished at that time. In 1992, the French Parliament set up a commission of inquiry headed by Mr François d’Aubert to assess the threat posed by organised crime, specifically the Mafia, and evaluate the legislative and enforcement responses in France. The Commission’s Rapport de la commission d’enquête sur les moyens de lutter contre les tentatives de penetration de la mafia en France was presented in late January 1993, setting out several recommendations to strengthen France’s administrative and judicial response to organised crime. In this report, the Commission proposed, inter alia, the creation of a new criminal offence of membership in a criminal organisation, based on similar legislation in Italy and the United States. Throughout the 1990s and into 2000 and 2001, Mr d’Aubert became one of the chief advocates and the ‘most consistent champion’ for the introduction of this offence. His recommendation, however, did not lead to any legislative change and a Parliamentary inquiry relating to financial crime and money laundering conducted in 1999 rejected his proposal.

Around the same time, beginning in 2000, the French Parliament discussed a bill to amend money laundering laws which, in 2001, was adopted as part of the Loi relative aux nouvelles régulations économique (NRE Act). During the debates of the NRE bill, the idea of criminalising membership in a criminal organisation resurfaced, but initially lacked sufficient support. At the insistence of Mr d’Aubert, however, a political compromise was reached and a new criminal offence relating to membership in a criminal organisation was added to the French Penal Code.

The discussions and passing of the NRE Act coincided with the launch of the Convention against Transnational Organised Crime in Palermo, Italy, in December 2000. France signed the Organised Crime Convention on December 12, 2000 and ratified it on October 29, 2002 after unanimous votes in the Senate (on February 21, 2002) and
the National Assembly (on July 24, 2002). During discussions about the necessary legislative reforms following the ratification of the Convention, there was some division about compliance of existing French law with the criminalisation provisions of Article 5 of the Organised Crime Convention. The prevailing view was that the existing criminal association offence in Article 450-1 sufficiently addressed the international law requirements. Others advanced the view that it would be desirable and perhaps necessary to introduce an offence specifically for participation in a criminal organisation. At that time, however, no such change was made, leading one commentator to note that:

The French are very reluctant to criminalise membership of a criminal organisation, although concern of appearing to lag behind international standards may eventually lead policy-makers to recommend it [in future] legislative debates. The operational agencies still do not take much interest in the criminalisation aimed at the structure of groups, whereas little use is made of the existing offences which suffice to designate actions committed by a group. The ratification of the Organised Crime Convention also resulted in legislative changes affecting criminal procedure, which were enacted in 2004 by adding a new Chapter IV to the Code of Criminal Procedure entitled, ‘Procedure applicable to organised crime and delinquence’ (De la procedure applicable à la délinquance et à la criminalité organise).

5.1.2 European developments

The current offences relating to participation in a criminal organisation in France are also influenced by developments in the European Union. In the late 1990s, the European Union started to develop a framework for greater harmonisation of anti-organised crime laws. In 1998, a Joint Action on making it a criminal offence to participate in a criminal organisation in Member States of the European Union (98/733/JHA) was issued. This document is widely considered to provide ‘the first internationally agreed upon definition of organised crime’. The Joint Action also provided a codification of the offence of ‘participation in a criminal organisation’, though an Action Plan for the prevention and control of organised crime issued in 2000 shifted the focus away from this offence, instead calling on Member States to criminalise certain types of conduct usually associated with organised crime.

---


122 Act No 204 of 2004 (9 March 2004); see further Carole Girault, ‘L’élargissement des formes de preparation et de participation, Raport National: France’ (2207) 78 (3-4; cd-rom annexe) International Review of Penal Law, 117, 118.


The 1998 Joint Action was substituted in 2008 to update the European framework and better integrate the requirements of the Organised Crime Convention, which most European Union Member States have ratified. The Framework Decision on the Fight against Organised Crime (2008/841/JHA) is now the principal legal instrument in the EU providing a definition of organised crime and setting out the requirements for offences criminalising the participation in a criminal organisation.\textsuperscript{125}

**Definition of criminal organisation**

Article 1 of the Framework Decision defines the term ‘criminal organisation’ to mean

a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or material benefit.

The term ‘structured association’ is further defined in Article 1 as

an association that is not randomly formed for the immediate commission of an offence, nor does it need to have a formally defined roles for its members, continuity of its membership, or a developed structure.

These definitions follow very closely their counterparts in the Organised Crime Convention, which uses the terms ‘organised criminal group’ and ‘structured group’.\textsuperscript{126}

Given the similarity between the EU Framework Decision and the Organised Crime Convention, it is not surprising that the European definitions relating to criminal organisations have faced the same criticism as their UN counterparts. In particular, the same concerns over the breadth, vagueness, and application of the definitions in the Convention have also been expressed in relation to the 2008 European Framework Decision and the 1998 Joint Action, which it substituted but not fundamentally changed.\textsuperscript{127} Francesco Calderoni notes that:

The Framework Decision (2008/841/JHA) definition, as it appears, is so vague as to deprive the notion of structured association of a large part of its selective potential. [...] From a criminological point of view, the definition covers an extremely broad span of phenomena and does not address the distinctive features of organized crime.\textsuperscript{128}

He goes on to say that:


The structured association is defined in a negative way. This does not distinguish it from the mere cooperation in a crime by multiple offenders [...]. [...] The definition of “structure association” is thus a nebulous oxymoron challenging legal certainty.129

Participation offence

The offence of participation in a criminal organisation in the 2008 European Framework Decision is also not fundamentally different to the offence in Article 5 of the Organised Crime Convention. Importantly, like its predecessor, the 1998 Joint Action, and the Convention, the EU Framework Decision also offers two alternative models based on the common law’s conspiracy approach and the participation model which stems from civil law traditions:130

Article 2 Offences relating to participation in a criminal organisation

Each Member State shall take the necessary measure to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences:

(a) Conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in questions, actively take part in the organisation’s criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation’s criminal activities; or

(b) Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity.

The first alternative under Article 2(a) reflects the participation offence under the Organised Crime Convention and, unlike the Convention, specifically states that ‘active participation’ also includes conduct such as ‘the provision of information or material means, the recruitment of new members and all forms of financing of its activities’. Calderoni notes that ‘[t]hese behaviours describe the typical activities of leaders of the groups and other “external” contributors. They are criminalised because of their essential support role to the criminal activities of the organisation.’131

A further difference is that Article 2 of the EU Framework Decision does not use the ‘uncertain and unclear’ distinction of the Organised Crime Convention between ‘criminal activities’ and ‘other activities’.

The penalty for offences under Article 2 is set by Article 3 of the 2008 Framework Decision to ‘a maximum term of imprisonment of at least between two and five years’.132

Article 2 does not require that the person participating in the criminal organisation completes or attempts any (other) criminal offence. If, however, an offence has been committed, the penalty may be aggravated: Article 3(2).

Article 5 of the 2008 Framework Decision extends liability for offences under Article 2 to legal persons.

5.2 Definition of Organised Criminal Group

Current French law sets out offences relating to participation in a criminal organisation in Title V of Book IV of the Penal Code – Felonies and Misdemeanours against the Nation, the State and the Public Peace.

Article 450-1 contains a definition of criminal association:

[1] A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years’ imprisonment.133

This definition overlaps substantially with that of ‘organised criminal group’ (bande organisée) in Article 132-71 of the Penal Code (France) which is discussed separately in Section 5.4 below. Article 132-71 creates an aggravating factor, resulting in a higher penalty, for offences committed by criminal organisations.

Article 450-1, by contrast, captures situations where the execution of a criminal offence is envisaged by the group but has not yet commenced.134 In a decision dating June 21, 2006 the French Chambre Criminelle [the criminal law branch of France’s Cour de Cassation (Court of Appeal of the Supreme Court)] also reaffirmed that the offence of ‘association de malfaiteurs can be made out even if no material element of a substantive criminal offence has commenced (or has been attempted).135 But rather than consider Article 450-1 as a secondary offence, the Chambre Criminelle has repeatedly held that it is a separate provision, independent of the preparation or commission of criminal offences by members of the organisation.136

The definition of criminal association in Article 450-1[1] only applies to serious offences. Its application is limited to groups that contemplate criminal offences which attract a penalty of at least five years imprisonment. Groups contemplating less serious offences are thus beyond the scope of this definition.137

There is no minimum number of participants and no requirement that the organisation plans to commit more than one offence.138

133 ‘Tout groupement formé ou entente établie en vue de la préparation, caractérisée par un ou plusieurs faits materials, d’un ou plusieurs crimes d’un pu plusieurs délits punis d’au moins cinq ans d’emprisonment.’

134 Pascal Lemoine, ‘Le délit d’association de malfaiteurs et la circonstance de bande organisée’ [2007] 2 Revue pénitentiaire et de droit pénal 277 at 278.

135 Cass. Crim. 21 June 2006, pourvoi no. 05-87.693.


The definition in Article 450-1 has been criticised for not containing an element relating to the duration or ‘existence for some time’ of the organisation, and French legal scholars have noted that the definition is capable of capturing organisations that intend to commit no more than a single criminal offence.\(^{139}\)

There is also no specification of a purpose of the organisation which, as Carole Girault notes, is explained by the lack of any proper definition of organised crime itself.\(^{140}\)

Also absent from the definition in Article 450-1 is any requirement concerning the structure of the criminal organisation. The application of the definition, and the offences that flow from it, is thus not dependent on the existence of any form of hierarchy between the members of the group or any Mafia or cartel-like structure of the criminal organisation.\(^{141}\)

### 5.3 Criminal Offences

The offences relating to ‘participation in a criminal organisation’ are set out in Article 450-1[2] and [3] of the Penal Code (France). Articles 450-2 to 450-5 add a number clarifications and extensions to this offence.

#### 5.3.1 Participation in a criminal association

Paragraphs [2] and [3] of Article 450-1 set out two separate criminal offences relating to the definition of criminal association under paragraph [1].

\[^{1}\] A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years’ imprisonment.

\[^{2}\] Where the offences contemplated are felonies or misdemeanours punished by ten years’ imprisonment, the participation in a criminal association is punished by ten years’ imprisonment and a fine of €150,000.

\[^{3}\] Where the offences contemplated are misdemeanours punished by at least five years’ imprisonment, the participation in a criminal association is punished by five years’ imprisonment and a fine of €75,000.

Both paragraphs criminalise the participation in a criminal association. The term ‘participation’ is not further defined in this Article and is open to judicial interpretation. Participation is the only element of these offences, in addition to the requirement of a criminal association. The difference between the two variations of the participation offence lies in the penalty. A higher penalty of ten years imprisonment and a fine of €150,000 applies if the criminal offences intended, planned, or otherwise envisaged by the group are punishable by ten years imprisonment. If the criminal group


\[^{141}\] Pascal Lemoine, ‘Le délit d’association de malfiteurs et la circonstance de bande organisée’ [2007] 2 Revue pénitentiaire et de droit pénal 277 at 279.
contemplates offences punishable by five years or more, the penalty for participants in that group is reduced accordingly. Criminal associations planning or preparing criminal offences that do not attract a minimum penalty of five years do not meet the threshold of this paragraph; accordingly participation in such groups is not an offence under Article 450-1.

If the criminal offences envisaged by criminal group do actually materialise, a person may be held liable under Article 450-1 and simultaneously for the offence in which he or she engaged or that were executed by other participants.142

Separately from Article 450-1, the French Penal Code also recognises a number of aggravating circumstances if a specific offence is committed in connection with a criminal organisation or by several people acting together as offenders or accomplices, see, for example Article 311-4.143

5.3.2 Unexplained wealth

Article 450-2-1 of the Penal Code (France) contains a separate offence which seeks to criminalise persons benefitting from the activities of criminal organisations. Specifically, this provision creates criminal liability for unexplained wealth:

The inability by a person to justify an income corresponding to his way of life, while being habitually in contact with persons engaged in activities set out under article 450-1, is punished by five years' imprisonment and a fine of €75,000.

Liability under this Article rests primarily on the ‘habitual contact’ between the accused and persons participating in a criminal organisation as defined in Article 450-1. An accused under Article 450–2–1 need not him/herself be a participant or member of the criminal organisation or its activities; the provision is specifically designed for persons who stand back and obtain material benefits from the commission of criminal offences by others. The offence does not require a particular type or level of income by the accused, it merely alludes to an equation between income and ‘way of life’.

Article 450–2–1 places a burden on the accused to explain (i.e. ‘justify’) the sources of his/her income. Persons unable to validate the sources of their income may be liable for a penalty of up to five years imprisonment and a fine of €75,000.

This offence pursues the goal of depriving organisers, financiers, and others associated with organised crime of their proceeds, but raises a number of concerns about its practical application and possible infringements of civil liberties. The offence essentially attaches liability to an inability, a failure to do something. An accused under Article 450-2-1 does not have to engage in any positive conduct; liability arises merely for the inability to produce records or other documents which validate the source of income. At best, the offence creates a requirement for persons to keep record of their financial transactions; at worst, it creates criminal liability for persons who are no good at filing, accounting, and record keeping.


5.3.3 Penalties

Article 450-3 of the Penal Code (France) enables the imposition of additional penalties:

- Natural persons convicted of the offence referred to under articles 450-1 also incur the following additional penalties:
  - 1° forfeiture of civic, civil and family rights, pursuant to the conditions set out under article 131-26
  - 2° prohibition to hold public office or to undertake a social or professional activity in the course of which or on the occasion of the performance of which the offence was committed pursuant to the conditions set out under article 131-27;
  - 3° area banishment pursuant to the conditions under article 131-31.

The other additional penalties incurred for the felonies or misdemeanours that the group or conspiracy was designed to commit may also be pronounced against such persons. These penalties may be imposed in addition to imprisonment or fines ordered under Article 450-1. These additional penalties have the potential to severely restrict the liberties and rights of individuals as they include, for instance, forfeiture of the right to vote, to stand in elections, to hold judicial or public office. It also offers an avenue to bar individuals from accessing certain areas or premises. This can serve as a tool to deter persons convicted for participating in a criminal organisation from meeting with other members of the group, attend their gatherings, or visit their club houses.

A further provision relating to penalties is set out in Article 450-5 of the Penal Code (France):

- Natural and legal persons convicted of the offences set out under the second paragraph of article 450-1 and article 450-2-1 also incur the additional penalty of confiscation of all or part of their assets, whatever their nature, movable or immovable, severally or jointly owned.

This article provides for the confiscation of proceeds of crime and ensures that persons convicted for participating in a criminal organisation lose any financial or other material benefit they may have incurred from their criminal activities.

5.3.4 Renunciation/collaboration with authorities

Article 450-2 of the Penal Code (France) allows for special concessions to be made for persons who renounce their membership in a criminal organisation and collaborate with law enforcement agencies:

Any person who has participated in the group or the conspiracy defined by article 450-1 is exempted from punishment if, before any prosecution is instituted, he discloses the existence of the group or conspiracy to the competent authorities and enables the other participants to be identified.

This Article exempts persons from criminal liability for participation in a criminal organisation under Article 450-1 under two circumstances. First, the person needs to disclose the existence of the criminal organisation to law enforcement agencies, thus enabling other participants to be identified. Second, this avenue to avoid punishment is only open before a prosecution is instituted.

Article 450-2 is an important tool to gain the cooperation of individual members of criminal organisations and creates a strong incentive for them to renounce their involvement in the criminal organisation. It should be noted, however, that the immunity

---

See Article 131-26 Penal Code (France).
which Article 450-2 can offer only extends to the participation offence in Article 450-1; it
does not offer blanket immunity to other criminal offences the person may have
committed.

5.3.5 Liability of legal persons (corporations)

Article 450-4 of the Penal Code (France) extends liability for the offence of participating in a
criminal association under Article 450-1 to corporations:

Legal persons may incur criminal liability pursuant to the conditions set out under article 121-
2 for the offence provided for under article 450-1.

The penalties incurred by legal persons are:

1) a fine, in the manner prescribed to under Article 131-38;

2) the penalties referred to under article 131-39.

The prohibition referred to under (2) of article 131-39 applies to the activities in the course of
which or on the occasion of the performance of which the offence was committed.

As mentioned earlier, Article 450-5 allows for the confiscation of assets and proceeds of crime, including those acquired by corporations:

Natural and legal persons convicted of the offences set out under the second paragraph of
article 450-1 and article 450-2-1 also incur the additional penalty of confiscation of all or part of
their assets, whatever their nature, movable or immovable, severally or jointly owned.

5.4 Other Provisions

In addition to the provisions relating to participation in a criminal organisation under
Article 450–1, French criminal law contains a separate provision relating to criminal
organisations in Article 132–71 of the Penal Code. By way of comparison, the
participation provisions, as discussed above, are aimed at criminal conduct envisaged
by the group in the future while Article 132–71 sets out an aggravating circumstance
that can be applied after a criminal offence has been committed by an organised crime
group (referred to as ‘bande organisée’).145

Under Article 132-71 of the Penal Code (France)

[a]n organised crime gang within the meaning the meaning of this law is any group formed or
association established with a view to the preparation marked by one or more material fact of
one or several offences.

This provision makes the commission of certain crimes by an organised group an
aggravating circumstance which incurs a higher penalty. When the article was
introduced in 1981, the aggravation was limited to certain types of crime,146 but the
reform of the Penal Code in 1994 extended its application to all offences.147 Unlike

International Review of Penal Law 341, 347.


147 Thierry Godefoy, ‘The Control of Organised Crime in France: A Fuzzy Concept but a Handy
Reference’, in Cyrille Fijnaut & Letizia Paoli (eds), Organised Crime in Europe: Concepts,
Patterns and Control Policies in the European Union and Beyond (Springer, 2004) 763 at
Article 450–1, the aggravation in Article 132–71 applies to all offences not just to those attracting a minimum penalty of five years imprisonment.148

5.5 Observations and Critique

The association de malfeiteurs offence in the French Penal Code is frequently referred to as the archetype of organised crime offences and as the ‘classic’ model of the participation in a criminal organisation offence. During its long history spanning over two hundred years, the French offence has seen considerable changes which transformed the provision from an offence to outlaw revolutionary gangs to one that aims to combat criminal organisations in their contemporary forms.

The current organised crime offences set out in Article 450 of the Penal Code (France) are very loyal to the requirements under the Organised Crime Convention and the 2008 European Framework Decision. Indeed, there are only very minor differences between French law and international law. The similarity to the Organised Crime Convention has also created the same concerns over the French participation offence, with many critics arguing the current laws are too broad, too vague, and create guilt by association. Unsurprisingly, the scholarly analysis of the French law points to exactly the same issues that have been identified in relation to Article 5 of the Organised Crime Convention.

As with its international counterparts, particular concerns have been expressed about the extension of criminal liability created by Article 450-1 of the Penal Code (France). Carole Girault, for instance, argues that:

> The legitimacy of the war on terror and on organised crime has served the legislator as a pretext to introduce rule that depart fundamentally from the principles and standards ordinary laws.149

In comparison to the conspiracy model, which is set out as an alternative in the Organised Crime Convention and used more widely in common law countries, one of the criticism levelled at the French offences is that they are unable to create collective criminal responsibility for a criminal organisations as they remain loyal to the basic principle of the criminal law which requires responsibility (and guilt) to be determined individually.150 Girault notes that:

> The requirement of a minimum of materialisation (detection of concealed weapons, hoods, gloves, plans or photographs taken by members of the group) is what distinguishes the offence of participation in an association de malfeiteurs from the anglo-saxon concept of conspiracy which allows intervention even more upstream […].151

---

In summary, the analysis of the French offence of participation in a criminal organisation confirms the concerns raised in connection with the *Organised Crime Convention* rather than offering fresh, alternative perspectives. Accordingly, any calls to implement this participation model more widely, including in countries such as Australia, will simply lead to a duplication of well known problems, unless significant amendments are made.
6 United Kingdom

6.1 Background and Context

In the United Kingdom, no particular offences pertaining to participation in a criminal organisation exist. Instead, the concept of conspiracy, which has its origin in common law is used to criminalise agreements between individuals to commit criminal offences. The application of conspiracy, and its advantages and disadvantages, are discussed in earlier parts of this report; specific issues that have been discussed in the British context are explored in Section 6.2.

It is noteworthy that there is also no definition of organised crime in English law. Some sources seem to suggest that such a definition is unnecessary, with one commentator noting that ‘organised crime will be recognisable when encountered, in the same way that something that looks, walks, quacks, and generally behaves like a duck is recognisable as such’.152 Others have noted that scholars and government agencies alike have been unable to agree on a definition of organised crime, partly because the manifestations of organised crime and criminal organisations in the United Kingdom are too diverse and manifold to be captured by a single legal definition.153

Over the past ten years, the British Government has undertaken a number of reviews of existing anti-organised crime arrangements in the United Kingdom and explored a range of legislative, organisational, and enforcement options to combat organised crime more effectively. The existing laws and law enforcement arrangements are, by and large, the product of various reviews conducted in the early 2000s which led to the development of a policy paper entitled One Step Ahead: A 21st Century Strategy to Defeat Organised Crime which was presented to Parliament by the then Home Secretary, Mr David Blunkett, in March 2004.154 The following sections explore the background, findings, and critique of these reviews and the policy paper in further detail.

6.2 Conspiracy

6.2.1 Current law

Along with many other common law countries, including Australia, in England and Wales the offence of conspiracy is, to this day, the principal avenue to charge persons involved in the organisation and management of criminal organisations. While the UK presently does not criminalise participation and/or membership in a criminal organisation, the conspiracy laws sufficiently comply with obligations stemming from the UK’s ratification of the Convention against Transnational Organised Crime and the European Framework Decision on the Fight against Organised Crime discussed earlier.155

---

155 See Sections 4.2.3 and 5.1.2 above.
The disadvantages of the conspiracy model have been discussed in earlier parts of the report. A report commissioned by the UK Home Office in 2002, entitled *A Comparative Analysis of Organised Crime Conspiracy Legislation and Practice and Their Relevance to England and Wales*, further criticised conspiracy because

1. […] it does not contemplate the activities of a multi-faceted criminal enterprise [...].
2. Each defendant in a single conspiracy indictment has to be shown to be party to the same agreement. Proof of the agreement and its terms is usually indirect. It is thus often difficult to distinguish related or sub-conspiracies.
3. Agreement, in the sense of meeting of two more minds, does not accord with the common experience and how people actually associate in criminal endeavour.
4. Strict rules of evidence dislocate and obscure the presentation to the court of a full or clear picture.\(^{156}\)

The UK Government’s 2004 anti-organised crime policy paper also explored the application of conspiracy provisions and noted that:

Organised crime investigations rarely affect individuals who are not involved in one way or other in the crime. If the conspirators themselves or those who aid them are not willing to talk, the burden of proof is entirely on the investigators to find the necessary evidence.

This obviously means prosecutions will rely heavily on catching criminals red-handed, or the use of highly intrusive and expensive surveillance techniques. […]

The sophistication and breadth of much organised crime activity mean it is often surrounded by a wider circle of people with some knowledge of the group’s activities. There are often professional facilitators, particularly those involved in money laundering and fraud (including excise fraud) cases or where illegitimate business is mixed with legitimate business.

There is seldom likely to be enough evidence to charge these individuals on the fringes. Nor is there any incentive on them to share with the police information on criminal activity.\(^{157}\)

The Home Office emphasised however that ‘prosecution will remain central to the successful disruption and dismantling of organised crime groups, and hence to long term harm reduction’.\(^{158}\) To that end, the policy paper notes:

The Government has been engaged in an extensive consultation with law enforcement and prosecuting agencies to identify the key barriers to the prosecution of organised crime groups. As a result, it has found a number of areas where the current legal framework appears not to be fit for purpose in combating organised crime and has developed a series of proposals for enhanced powers to be targeted on those who cause most harm. […]

There is a strong view within the criminal justice community that we may need to consider changes to the criminal law in order to address modern sophisticated criminality more effectively. It is commonly believed that the existing conspiracy legislation may not always reach the real ‘Godfather’ figures, does not provide a practical means of addressing more peripheral involvement in serious crime and does not allow sentencing courts to assess the real seriousness of individual offences by taking into account the wider pattern of the accused’s criminal activities.

In contrast to the participation in a criminal organisation provisions, conspiracy does not criminalise participation that is ‘not directly linked to some predicate offence within the


activities of the crime organisation. […] Participating “in the organisation’s other activities” knowing that such action “will contribute to the achievement of the organisation’s criminal activities” would require new legislation’, notes Christopher Harding.159

6.2.2 Reform proposals

Although the concerns and frustrations over the use of conspiracy laws against criminal organisation are well documented, and widely shared by investigators and prosecutors alike, there have been few practical steps or in-depth discussions in the UK about substituting or complementing existing laws with the type of organised crime offence found in France and other parts of continental Europe as well as Canada and New Zealand or with the style of RICO (Racketeer Influenced and Corrupt Organizations) laws found in US federal and state jurisdictions.

Among the few scholars who have explored the possibility of introducing a participation-style offence into English criminal law is Christopher Harding. He argues that:

Such an offence would almost inevitably require definition of key elements of organisation and participation, the latter extending beyond the existing provisions of criminal liability for inchoate or secondary participation in relation to any predicate offences committed within the scope of the organisation’s activities. […] It would much of the time constitute criminalisation of conduct which would normally be lawful, were it not done with the intention of supporting a criminal organisation. Acts of organisational management or direction, investing money or exercising some discretion as an official or political actor may not be legally objectionable as such. The criminalising element would reside in the knowledge and intention to carry out such action in order to promote or protect the interests of a criminal organisation. […] It is unlikely that membership in itself of a criminal organisation could feasibly be the basis of criminal liability, since that is not a position which either practically or morally would provide a satisfactory ground for liability. […] The crucial, distinctive elements of such criminal liability would therefore appear to comprise: knowledge of the organisation an its criminal character, action of a certain kind intended to support the organisation, and a link between that action and the organisation’s operation or objectives. […] [The] focal point would be support of the organisation rather than any specific predicate offence.160

While, to this day, no specific attempts have been undertaken to introduce offences to criminalise participation in an organised criminal group, the British Government has not fundamentally rejected such suggestions and continues to monitor developments in this field. In 2004, the Home Office noted that:

A number of specific changes have been suggested, including creating a membership offence of belonging to an organised crime group, a new offence of trading in proscribed goods, changing the link between conspiracy and specific predicate offences, relaxing the ‘mens rea’ requirements for liability as a secondary party, and ways of admitting evidence of wider criminality to inform sentence.

The Home Office is considering in detail the law of conspiracy and secondary participation in order to assess the potential that these and other changes may have in enhancing the prospects of investigators and prosecutors in tackling modern organised crime, as well as


the scope for making better use of existing provisions. [...] We are particularly interested in the area of secondary participation, where a defendant may be aware he or she is engaging in organized crime, but can argue they are unaware of the precise nature of the criminality.\textsuperscript{161}

In examining the applicability of such laws to the UK, the British Government along with other experts suggest that the organised crime landscape in the UK is fundamentally different to that of the United States or Italy and that, as a result, the introduction of such laws is neither warranted nor suitable.\textsuperscript{162} For example, in Michael Levi & Alaster Smith note that:

One can think of no 20th century UK parallels to the levels of corrupt control over city life and aspects of commercial services that have been witnessed in the US. In particular, though there have been instances of entrenched local cultures of corruption in England and Wales, there have been non yet revealed that include large tranches of police as well as elected officials, and no systematically corrupt union domination or pension fund abuses or toxic waste dumping to which RICO legislation has proved such a potent remedy.\textsuperscript{163}

Further concerns have also been expressed about the evidential burden required in criminal trials in the UK which is relatively higher to that permissible under RICO and Italian-style anti-mafia laws.\textsuperscript{164}

6.3 Enforcement Agencies

The investigation of organised crime was traditionally vested in the 43 police areas across England and Wales as well as national agencies such as HM Customs and Excise (HMCE) and HM Immigration Service (HMIS). The absence of a national police force in the United Kingdom has long been seen as a major obstacle in combatting organised crime, though prior to 2004 only modest steps were undertaken to centralise and consolidate anti-organised crime enforcement and intelligence sharing. For example, in 1964, nine Regional Crime Squads were established to target offenders operating across police regions. In 1993, the squads were merged into six regions covering all of England and Wales. At the national level, the early 1990s also saw the formation of the Organised and International Crime Division in the Home Office and the transition of the National Drugs Intelligence Unit into the National Criminal Intelligence Service. The Home Office also set up an Organised Crime Strategy Group (OCSG) to enhance communication and ‘partnership working’ between agencies and for the development of inter-agency strategies to fight discrete aspects of organised crime in the UK.\textsuperscript{165}


\textsuperscript{163} Michael Levi & Alaster Smith, \textit{A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales} (2002) 16 [emphasis added].


A review of the organisational structure for tackling organised crime conducted by the British Government in the early 2000s ‘found that the UK’s law enforcement agencies are effective and well respected amongst their international peers’ but also noted that ‘the dividing line between institutional responsibilities remains unclear in several areas, putting a high premium on good relations between agencies.’\textsuperscript{166} It was specifically noted that:

Coupled with what appears to be duplication in some areas, the current fragmented effort against organised crime can make co-ordination difficult and lead to a lack of critical mass in some less traditional but important skill areas. This has proved a particular problem in tackling financial crime.\textsuperscript{167}

Other authors have also criticised the lack of a uniform response to organised crime across the UK and the ‘lack of any real understanding about the harm caused by organised crime and the need to “build on [the] existing intelligence effort to develop a comprehensive understanding of the scale of the problem.”’\textsuperscript{168}

6.3.1 Serious and Organised Crime Agency – SOCA (2005–2013)

On February 9, 2004, the Home Secretary announced the creation of the Serious and Organised Crime Agency (SOCA) as a nationwide, specialist organised crime agency ‘to bring a new clarity of approach, with enhanced capabilities and skills’.\textsuperscript{169} SOCA, which came into operation on April 3, 2006, merged the former National Crime Squad (NCS) and National Criminal Intelligence Service (NCIS), together with some divisions of the HM Immigration Service, HM Customs and Excise, and the MI5 Security Service. Staff from these agencies were morphed into or seconded to SOCA and additional personnel was recruited from the wider intelligence community.\textsuperscript{170} Special prosecutors, answerable to the Attorney-General, work alongside SOCA’s staff.\textsuperscript{171} In Scotland and Northern Ireland, SOCA co-exists and works alongside the Scottish Drug Enforcement Agency and the Police Service of Northern Ireland.\textsuperscript{172}

The stated functions of SOCA are to:

(a) prevent and detect serious organised crime and other offences, and

\textsuperscript{172} Clive Harfield, ‘SOCA – A Paradigm in British Policing’ (2006) 46 \textit{British Journal of Criminology} 743 at 748.
(b) contribute to the reduction of such crime in other ways and to the mitigation of its consequences.¹⁷³

Unlike traditional police agencies, SOCA is equipped with intelligence gathering and law enforcement powers.¹⁷⁴ The emphasis of SOCA appears to be on the disruption of organised crime especially through intelligence gathering and intelligence support for other law enforcement agencies, rather than on detection and prosecution and, to that end, SOCA personnel and Home Office Ministers have stressed that ‘SOCA is not a police agency’.¹⁷⁵ With its focus on intelligence, SOCA takes a more strategic approach to organised crime and acquires knowledge that goes beyond individual perpetrators, individual offences, and individual criminal organisations. The creation of SOCA, notes Michael Levi, ‘reflects growing awareness by politicians and administrators that these historic demarcations are untenable in the light of flexible multi-crime offending patterns by at least some serious criminals.’¹⁷⁶

SOCA also serves as a central agency to liaise with foreign counterparts, especially within the European Union, and INTERPOL in international efforts to combat organised crime through cross-border law enforcement cooperation.¹⁷⁷

In 2007, the Serious Crimes Act 2007 (UK) was enacted to enable courts to impose control orders on persons suspected of being involved in serious crime (so-called Serious Crime Prevention Orders). It also created an offence for encouraging and assisting serious crime, and created new proceeds of crime and asset recovery regimes under the control of SOCA. The Serious Crime Prevention Orders serve as a tool to restrict the activities of individuals involved in serious crime and may also be imposed on corporations in order to restrict their activities, especially financial and property dealings. Under the Act a person is involved in serious crime of he or she has committed a serious offence such as drug offences, trafficking in persons offences, arms trafficking, prostitution, robbery, money laundering et cetera, if he or she facilitate the commission of such an offence, or conducted him/herself in manner that was likely to facilitate the commission of a serious offence.

Along with the creation of SOCA, the British Government also introduced new powers to collect evidence, including measures to compel individuals to give evidence, enhanced evidential use of intercept material, and several reforms to the way in which criminal trials involving organised crime are conducted.¹⁷⁸

¹⁷³ Sections 2(1), 3(1) Serious and Organised Crime Police Act 2005.
Concerns about the effectiveness of SOCA have been raised since the creation of the organisation in 2005. As early as 2006, Clive Harfield expressed reservations about the capacity of SOCA to effectively prevent and combat organised crime across the United Kingdom. He specifically noted:

Although it is envisaged that SOCA will have the capability and lawful authority to assist local police forces in the United Kingdom, it is doubtful that it will have the capacity if the threat of serious organised crime is as large as the Government asserts. SOCA may simply have no resources to spare beyond the contribution of certain specialist expertise to local policing operations. Its real contribution to local policing may only be indirect, with local communities benefiting vicariously from the reduced harm achieved by SOCA.\(^{179}\)

In conversations with SOCA investigators, particular reservations have been expressed about the enforcement of the Serious Crime Prevention Orders. While these orders have been issued against a number of individuals and appear to have disrupted their involvement in organised crime, SOCA investigators are concerned about the resources needed if prevention orders are issued against a large number of individuals. It appears that human and material resources are too limited to closely monitor the movements of individuals if more than a few dozen people are placed under prevention orders.

6.3.2 National Crime Authority (2013–)

In June 2010, the UK Home Secretary announced the creation of a new National Crime Agency (NCA) to substitute SOCA. On May 10, 2012 a Crime and Courts Bill was introduced into the House of Lords setting out the mandate and structure of the NCA. It is expected that the NCA will become operational in 2013.

From the limited information available, it appears that the NCA will largely subsume and expand the current mandate of SOCA and will also incorporate the Child Exploitation and Online Protection Centre, and some of the functions of the National Policing Improvement Agency which fit the NCA’s crime fighting remit. Preliminary information released by the Home Office in mid-2012 notes that:

The NCA will deliver a step change in tackling serious, organised and complex crime, building on the work of its predecessors, by:

- pulling together a single national intelligence picture on organised criminals and their activities
- having the authority to coordinate and task the national response, prioritising resources according to threat
- working with law enforcement partners to ensure that those who commit serious and organised crime are pursued and brought to justice, their groups and activities disrupted, and their criminal gains stripped away.\(^{180}\)

An announcement has been made that the NCA will comprise an Organised Crime Command which ‘will build on the best of SOCA’s current capacity, capability, powers and reach, to tackle organised crime groups, whether they operate locally, across the country or across international borders.’\(^{181}\)

---


Further information about the structure and futures activities of the NCA, and the way in which the agency's anti-organised crime operations may differ from that of SOCA, were unavailable at the time of writing.
7 Lessons for Australia

The analysis of the international, French, and English laws relating to organised crime reveals many common themes and issues that have equally shaped and plagued Australia’s attempts to criminalise involvement in organised crime groups. The study of legislative material, case law, academic literature, government reports, and extensive consultations with many experts in law enforcement, prosecution and judiciary, and other government sectors shows that criminal justice systems around the world face the same difficulties in trying to combat organised crime, irrespective of their domestic legal systems and traditions. From an Australian perspective it is, perhaps, comforting to know that countries with more established criminal laws and with more experience in fighting organised crime face the same challenges as Australian legislators who only very recently turned their attention to the criminalisation of organised crime.

It may thus not be surprising – but it is nevertheless disappointing – that the development of anti-organised crime laws in France, the United Kingdom, as well as in Australia, was motivated and heavily influenced by political considerations, rather than by a genuine desire to understand the organisation and operation of organised crime and by thorough, empirical research about the best and most effective ways to combat it. The flaws of and concerns over domestic and international anti-organised crime laws are well known and long-standing, but none of the countries discussed in this report has made a genuine attempt to systematically address these concerns and rectify these flaws. Instead, many laws are the result of policy-making ‘on the run’ and represent reactionary responses to public outcries over individual instances and manifestations of organised crime. It seems that politicians and legislators have been more concerned about the speed with which they respond to organised crime rather than about the quality of these responses.

The principal concern over anti-organised crime laws that have sprung up around the world relates to the significant extension these laws create to the established spectrum of criminal liability. The different models of laws explored in this report all share one main feature: that is to hold persons criminally liable even though they may only be loosely or more distantly associated with the commission of recognised offences. Indeed, criminal liability for most of the offences discussed here does not depend on the completion of an offence. Instead, these laws criminalise anticipatory, participatory or, as some may argue, rudimentary forms of involvement in criminal enterprises. This approach raises conceptual questions about the limits of criminal liability, i.e. about where criminal liability begins and, more importantly, where it ends. None of the laws explored in this report (and, for that matter, elsewhere in the available literature) can answer these questions with precision and certainty.

Further concerns remain over the effectiveness of the various anti-organised crime laws. When a range of new laws were introduced in several Australian States and Territories in 2008–2012, including South Australia, New South Wales, Queensland, and the Northern Territory, no empirical evidence was ever presented that these laws would actually work. To this date, there is no proof whatsoever that the outlawing of gangs or the criminalisation of participation in criminal organisation can effectively reduce organised crime, let alone eliminate it. Suggestions by Australian politicians that such laws would ‘smash the gangs straight away’ are not sustainable and not supported by research and knowledge. This report has shown that even in those countries with long established anti-organised crime measures there is little proof to show that these laws have reduced the presence and operations of criminal organisations in any way. In
contrast, many experts have suggested that these laws may have been counter-productive in that they push criminal organisations further underground and force them to become more sophisticated and, in some cases, more powerful and more influential.

These observations suggest that criminalisation may, at best, close some loopholes in a country’s efforts to combat organised crime, but that in and by itself the creation of new offence does not and cannot win the so-called ‘war on organised crime’ in the short or long term.

At a minimum, criminalisation must be accompanied by better enforcement, investigation, and prosecution which, in turn, requires additional financial and material resources as well as better training. At best, criminalisation and domestic enforcement measures should be accompanied by better cross-border cooperation, extradition, mutual legal assistance and the like to ensure that offenders cannot evade prosecutions simply by moving to another jurisdiction.

While enforcement measures have not been the primary focus of this report, it is interesting to note that in its efforts to combat organised crime, the British Government has looked to Australia for ideas and inspiration – perhaps more so than Australian governments have looked to the UK for answers. The reforms of organised crime policing in the UK, which started in 2005 with the creation of SOCA, mirror very closely similar developments in Australia in the early 1980s which led to the establishment of the National Crime Authority (NCA) as a national law enforcement agency equipped with special powers to investigate organised crime and operate across the boundaries of federal, state, and territory police forces. Renamed to the Australian Crime Commission (ACC) in 2002, this agency consists of permanent staff and personnel seconded from law enforcement agencies across Australia. Most of the ACC carry out intelligence function and, in that capacity, support other police agencies. Perhaps ironically, the UK plans to rename SOCA to National Crime Agency in 2013.

In conclusion, this report has not found magic solutions and quick fixes to combat organised crime in Australia. But this report highlights the experience of other jurisdictions in their attempt to fight this problem. It is hoped that this experience, the mistakes made and the lessons learned, help inform the current debate in Australia and assist Australian policy makers and legislators in their efforts to develop effective, fair, and durable solutions to prevent and suppress organised crime in Australia in the medium and long term.