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ORGANISED CRIME

Combating an Elusive Transnational Threat

A thesis
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Abstract

Since the end of the Cold War; wide spread political, economic, social and technological changes have enabled organised criminal groups to develop transnational activities. Encouraged by the United States, the world has conceived transnational organised crime as a 'new' and serious security threat. The international community has acknowledged the inherent incapability of national strategies, alone, to combat transnational organised crime. Therefore, concerted efforts have been taken to develop a global and uniformed response.

Efforts to combat transnational organised crime have been underpinned by a perceived necessity to protect national borders. This reaction is based on traditional, inaccurate, conceptions of organised crime, which focuses on structured, ethnically defined 'outsider' groups as a serious threat to security and the very fabric of society. This concept of organised crime is overly simplistic and fails to grasp the complexity of modern organised crime and its interaction with legal and illegal markets. Organise crime is a multifaceted phenomenon, characterised by loose networks of criminals, who are primarily motivated by profit and operate based on particular 'opportunities'.

Strategies to combat organised crime have been preoccupied with traditional, repressive, criminal justice measures; at the expense of developing a comprehensive understanding of the root problems that allow illicit markets and organised crime to flourish, in communities and society in general. It is essential that the international community, through the United Nations, realistically assess the effectiveness of its current approach, to aid the development of comprehensive strategies for the future.

New Zealand has taken promising steps to combat transnational organised crime. Although in its infancy, NZ has developed a comprehensive strategy which not only utilises traditional criminal justice tools, but also seeks to engage with communities to develop effective prevention measures.

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Abbreviations

AML/CFT	Anti-money laundering and countering financing of terrorism
ARA	Assets Recovery Agency
COTP	Conference to the Parties
CPRA	Criminal Proceeds (Recovery) Act
CPU	Crime Prevention Unit
DHS	Department of Homeland Security
DOJ	Department of Justice
EU	European Union
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
MLA	Mutual Legal Assistance
MOJ	Ministry of Justice
NCB	National Central Bureau
NIC	National Intelligence Centre
NZ	New Zealand
OCP	Organised Crime Project
OCRS	Organized Crime and Racketeering Section
OCS	Organised Crime Strategy
OECD	Organisation for Economic Co-operation and Development
OFCANZ Palermo Convention	Organised and Financial Crime Agency New Zealand United Nations Convention against Transnational organised crime
PCA	Proceeds of Crime Act
RICO	Racketeer Influenced and Corrupt Organizations Act
SFO	Serious Fraud Office
SOCA	Serious Organised Crime Agency
TNOC	Transnational Organised Crime
UK	United Kingdom
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
US	United States

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Bach v. Bear, Stearns and Co. 178 F.3d 930 (7th Cir. 1999)

H.J. Inc. v. Northwestern Bell Telephone Co. 492 U.S. 229 (1989)

Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 644 (7th Cir. 1995)

Sedima, S.P.R.L v. Imex Co. 473 (US) 479 (1985)

United States v. Rogers 89 F.3d 1326 (7th Cir. 1996)

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Crimes Act 1961

Criminal Proceeds (Recovery) Act 2009

Extradition Act 1999

Mutual Assistance in Criminal Matters Act 1992

Proceeds of Crime Act 1991

Sentencing Act 2002

United Kingdom

Customs and Excise Management Act 1979

Criminal Justice Act 1993

Criminal Law Act 1977

Drug Trafficking Act 1994

Misuse of Drugs Act 1971

Proceeds of Crime Act 2002

Serious Organised Crime and Police Act 2005

United States

Omnibus Crime Control and Safe Streets Act of 1968

Racketeer Influenced and Corrupt Organizations Act enacted as Title IX of the
Organized Crime Control Act of 1970

Chapter One

Introduction

Background

Organised crime is a notoriously difficult concept to define and measure.¹ Michael Levi likens it to a psychiatrist's Rorschach blot, "*its attraction as well as its weakness is that anyone can read almost anything into it.*"² The lack of precise definition has not impeded world leaders, and officials, from making confident statements regarding the scale of the problem, which is invariably described as 'growing'.³ Transnational organised crime (TNOc) has, increasingly, been perceived as a serious security threat by the international community.⁴ TNOc has become, and will continue to be, a defining security theme of the twenty-first century.⁵ Since the end of the Cold War; wide spread political, economic, social and technological changes have enabled organised criminal groups to develop transnational activities. Crime is no longer bound by the constraints of national borders.⁶

Organised criminal groups cross borders to exploit lucrative, foreign, illicit markets. In addition, they take advantage of national borders, as a defence mechanism; exploiting weak legal systems to evade law enforcement.⁷ Criminal groups have proved adept at crossing borders to suit their purposes. Governments, by contrast, have been hindered by national borders and notions

¹ Levi M and Maguire M, "Reducing and Preventing Organised Crime: an Evidence Based Approach" (2004) 41Crime Law and Social Change at 397.

² Levi M, *The Organisation of Serious Crimes* in Maguire M, Morgan R and Reiner, R Oxford Handbook of Criminology (3rd ed, 2002) at 887.

³ Ibid

⁴ Kendall R, *Responding to Transnational Crime* in Williams, P and Vlassis, D (eds.), *Combating Transnational Crime: Concepts, Activities and Responses* (2001) at 269.

⁵ Galeotti M, *Global Crime today: the Changing face of Organised Crime* (2006) at 1.

⁶ Di Gennaro G, *Strengthening the International Legal System in order to Combat Transnational Crime*, in Williams, P and Vlassis, D (eds.), *Combating Transnational Crime: Concepts, Activities and Responses* (2001) at 259.

⁷ Goodson R, and Williams P, *Strengthening Cooperation against Transnational Crime: A New Security Imperative* in Williams, P and Vlassis, D (eds.), *Combating Transnational Crime: Concepts, Activities and Responses* (2001) at 321

of sovereignty, in their efforts to combat TNOC.⁸ Because national strategies are inherently inadequate to respond to criminal activity that crosses multiple borders, involving multiple jurisdictions⁹, the international community has sought to build closer cooperation and a uniformed response, to combat TNOC. The United Nations Convention against Transnational Organised Crime (2000) is, to date, the pinnacle of these efforts. It represents years of intense negotiation between States and has resulted in a near universally accepted convention.

Research questions

What measures have the international community (and specifically New Zealand) deemed necessary to combat transnational organised crime and how effective have these measures been?

Understanding the nature, characteristics and activities of transnational organised crime is an essential first step towards answering this question. Accordingly, chapter two is concerned with developing an accurate conception of transnational organised crime and a working definition for the purpose of this thesis. This chapter will sift through the overly simplistic traditional conceptions of organised crime. The chapter will contrast traditional conceptions with the far more complex reality, illustrating their inability to encompass the multifaceted nature of modern organised crime. Finally, this chapter will outline measures that are needed to comprehensively respond to TNOC; ranging from traditional criminal justice tools, to non-traditional measures, such as, community engagement.

Chapter three will focus on how States have sought to cooperate on transnational criminal issues. This chapter will outline important legal instruments, which States have utilised to foster cooperation, and describe the growing trend toward developing multilateral treaties to deal with transnational

⁸ Ibid

⁹ Ibid

crime. A key aspect of this chapter concerns discussion and analysis of important international conventions, in particular the United Nations Convention against Transnational Organised Crime. As the preeminent international legal tool to fight TNOC; it is important to understand what conception of TNOC underpins it and what measures it obliges States to take. This chapter will illustrate that the convention is based on aspects of traditional conceptions of TNOC. In particular, the convention propagates a perception of TNOC as an alien criminal conspiracy, threatening, otherwise morally sound, citizens and institutions.¹⁰ The measures it advocates are heavily focused on traditional criminal justice, primarily focusing on criminalising ‘outsiders’. In addition, it provides little in the way of mechanisms for measuring the success of the convention. While representing an important step towards international cooperation; the convention essentially represents a redoubling of traditional measures to combat organised crime, without adequate knowledge of its potential or effectiveness.¹¹

A key purpose of this thesis is to analyse New Zealand’s efforts to combat TNOC and provide recommendations for the future. New Zealand is in its infancy in regards to developing measures to combat TNOC. For this reason chapter four contains two case studies, the United States and United Kingdom, to provide a more detailed understanding of how these countries have responded to organised crime. The US is often viewed as an experienced benchmark when it comes to dealing with organised crime. However, as the case study will illustrate, the US has retained outdated and inaccurate conceptions of organised crime, which have impeded their ability to effectively understand and respond to the problem.

NZ has been able to gain insights from experiences in the UK and has adopted a number of the measures which the UK deemed necessary to effectively combat organised crime. For instance, the Organised and Financial Crime

¹⁰ Woodiwiss M, *Transnational Organised Crime: The Global reach of an American concept* in Edwards A, and Gill P *Transnational Organised Crime: Perspectives on Global Security* (2003) at 1-25 and Edwards A, *Transnational organised Crime* in Sheptycki J and Wardak A (eds.), *Transnational and Comparative Criminology* (2005) at 213

¹¹ Ibid

Agency New Zealand, in many ways, mirrors the UK's Serious Organised Crime Agency.¹² Both agencies have been created to centralise law enforcement responses to organised crime and are tasked with developing an intelligence led approach. Moreover, New Zealand has recently introduced two pieces of important legislation; the Criminal Proceeds (Recovery) Act 2009 and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. The UK case study will discuss the effectiveness of the UK equivalent, the Proceeds of Crime Act 2002.

The UK approach also contains an important contrast to NZ. Rather than criminalise membership, or participation, in an organised criminal group, the UK takes a sector based approach. Within its legal system the UK targets particular activities, associated with organised crime, rather than confront organised crime in all its aspects.¹³ New Zealand on the other hand has criminalised participation in an organised criminal group under s 98A of the Crimes Act 1961. The case study will discuss how this aspect of the UK approach is some what confused, and contradictory to the aims of its own strategy.

Based on the discussion and analysis of international measures to combat TNOC, the two case studies, and New Zealand's response; chapter six will outline ways forward for the international community and for New Zealand specifically. This chapter will emphasise the need for a future focus on non-traditional measures to combat TNOC and the development of effective mechanisms to assess the impact of TNOC and the effectiveness of measures taken to combat it.

¹² Edwards, A and Levi, M. *Supra* n. 1 at 381. See also, Chapter 4 and 5 of this thesis, which discuss the Serious Organised Crime Agency (UK) and the Organised and Financial Crime Agency New Zealand, respectively.

¹³ Home Office, *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime*, March 2004, at 12. See also Cabinet Office and Home Office, *Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime*, July 2009 at 12-13.

Chapter Two

Conceptions of organised crime

Introduction

Finding a consensus on what constitutes transnational crime or organised crime has been notoriously difficult to achieve. Angela Leong, writing on this subject, concludes that perhaps there is no need for an exact definition, because organised crime and its transnational variation are a constantly changing phenomenon requiring “*different approaches... adopted at different times in different societies*”.¹⁴ However, James Finckenauer argues that definition is of great importance; because *how* the problem of organised crime is defined is significant in determining how laws are framed, how investigations and prosecutions are conducted, how research studies are done, and, increasingly, how mutual legal assistance across national borders is or is not rendered.¹⁵

It is a presumption for the purpose of this thesis, that in order to have any meaningful analyses and discussion on measures to effectively combat TNOC, it is important to know what is in need of being ‘combated’. The construction of transnational organised crime is crucial in deciding what measures should be taken to confront it.¹⁶ The purpose of this chapter is to develop an accurate conception and definition of transnational organised crime (TNOC), how it operates, what activities are associated with it, and what can be done to confront it.

¹⁴ Leong, V M A. *The Disruption of International organised Crime: An Analysis of Legal and Non-Legal Structures*. (2008) at 25.

¹⁵ Finckenauer J, *Problems of Definition: What is Organised Crime?* Trends in Organized Crime/Vol. 8, No. 3, Spring (2005) at 68.

¹⁶ Adam E and P Gill, *The politics of ‘transnational organized crime’: discourse, reflexivity and the narration of ‘threat’* British Journal of Politics and International Relations, Vol. 4, No. 2, (June 2002) at 259.

2.1 *Transnational Crime*

Transnational crime is a term initially coined to identify certain criminal activities that transcended international borders and, which transgressed the laws of several states.¹⁷ The term seems to have originated in the 1975 report of the *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, in Geneva.¹⁸ In this report a number of categories of transnational crime are identified; such as organised crime, corruption and offences involving works of art and other cultural property.¹⁹ Interest in transnational crime, amongst scholars and policy makers, did not intensify until the 1990s, during a time of significant political and economic development, as the Soviet Union dramatically collapsed.²⁰ The comparatively stable and predictable Cold War system gave way to uncertainty, and transnational crime was perceived as a developing new threat. The eventual breakup of the Soviet Union combined with significant technological developments, and an increasingly integrated globalised world, heightened concerns amongst the international community regarding the potential for cross-border criminal activity that could threaten State security.²¹

Classification debate

Initially, little consensus was found on what constitutes transnational crime and how it should be defined. Due to the conflicting views, efforts were made, during the 1994 *Fourth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems*, to create a more precise conception. This early attempt to assess the prevalence of transnational crime was fraught with difficulties.²² The survey results showed that two States were unable to respond because no distinction was made, in their criminal justice system,

¹⁷ Mueller G, *Transnational Crime: Definitions and Concepts* in Williams P and Vlassis D (eds), *Combating Transnational Crime: Concepts, Activities and Responses* (2001) at 13.

¹⁸ Ibid and in Reichel P (ed), *Handbook of Transnational Crime and Justice* (2005) at 5.

¹⁹ *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (1975).

²⁰ Reichel P (ed), *Handbook of Transnational Crime and Justice* (2005) at 3

²¹ Ibid.

²² Mueller G, *supra* n. 17 at 14

between national or transnational crime and almost all countries, of the 193 responding, encountered some form of classification problems.²³ However, for the purpose of the survey transnational crime was defined as; '*Offences whose inception, prevention and/or direct or indirect effects involved more than one country*'.²⁴

Transnational crime is a term that has become widely used by criminologists, policy makers, law enforcement officials and the wider public.²⁵ It has gradually come to mean, broadly speaking, "*criminal activities extending into and violating the laws of several countries*".²⁶ Critics of this conception have noted that the term 'transnational crime' can be confused with 'international crime', arguing that any distinction is a blurred one.²⁷ International crime is generally conceived as those crimes prohibited by international laws, norms, treaties and customs.²⁸ Philip Reichel and other contributors in the *Handbook of Transnational Crime and Justice* faced this difficulty in determining whether to use 'transnational' or 'international' crime in the title. They settled on using 'transnational', reasoning that international crimes are those recognised, as such, by international law and include acts that threaten world order and security, for example, crimes against humanity or war crimes.²⁹ Whereas, transnational crime is specifically concerned with acts criminalised by more than one State and which affect the interests of more than one state, but not necessarily the security of States and the world order.³⁰

However, some suggest that transnational crime *does* affect the security of States, particularly in developing nations. For instance, Antonio Maria Costa, executive director of the United Nations Office on Drugs and Crime (UNODC), declared in a recent press release that "*organised crime poses a*

²³ *Ninth United Nations Congress on the Prevention of Crime and Treatment of Offenders*, A.CONF. 169/15/Add, (April 1995) page 5, paragraph 13.

²⁴ *Ibid* at page 4, paragraph 9

²⁵ Reichel P, *supra* n. 20 at 5.

²⁶ Mueller G, *supra* n. 17 at 61.

²⁷ Reichel P, *supra* n. 20 at 6.

²⁸ *Ibid*

²⁹ Mueller G, *supra* n. 17 at xiv.

³⁰ *Ibid* at 6.

threat to the security of cities, States, and even entire regions".³¹ Furthermore, it has been argued that many 'transnational crimes' have achieved the status of 'international crimes' by way of international treaties and conventions.³² They also argue that, just like recognised international crimes such as genocide and war crimes, many other crimes, of transnational character, should be included under the jurisdiction of the Permanent International Criminal Court.³³

The United Nations, in 1994, tried to clarify the concept of transnational crime by establishing 18 categories of transnational crime.³⁴ A more succinct categorisation of the principal transnational criminal activities has been formulated by Reuter and Petrie³⁵ as shown below;

1. Smuggling- commodities, drugs, protected species
2. Contraband (goods subject to tariffs or quotas)- stolen cars, tobacco products
3. Services- immigrants, prostitution, indentured servitude, money laundering and fraud.

More recent, internationally agreed upon, definitions of transnational crime have continued to emphasise; as its distinguishing characteristic, the notion that it involves cross border criminal activity, violating the laws of more than one country. The United Nations Convention against Transnational Organised Crime (2000) (Palermo Convention)³⁶ states, in Article 3(2), that an offence will be transnational if:

- (a) It is committed in more than one State;

³¹ United Nations Office of Drugs and Crime, Media Advisory Press Release, (9, April 2009) *Crime Commission Meets to Confront "Global Crime Wave"* Retrieved from <<http://www.unodc.org/unodc/en/press/releases/2009-09.04.html>> 20 April 2009.

³² Mueller G, supra n. 17 at 21.

³³ Ibid, and in Scholenhardt A, 'Transnational Organised Crime and the international Criminal Court: Developments and Debates' (2005) 24(1) University of Queensland Law Journals at 93.

³⁴ *Ninth United Nations Congress on the Prevention of Crime and Treatment of Offenders*, A.CONF. 169/15/Add, page 9. 1, 4 April 1995. The list includes; money laundering, terrorist activities, theft of art and cultural objects, theft on intellectual property, illicit trafficking in arms, aircraft hijacking, sea piracy, land hijacking, insurance fraud, computer crime, environmental crime, trafficking in persons, trade in human body parts, illicit drug trafficking, fraudulent bankruptcy, infiltration of legal business, corruption and bribery of public officials, corruption and bribery of party officials and elected representatives and a 19th category of 'other offences committed by organised criminal groups'.

³⁵ Reuter, P and Petrie C (Eds.) *Transnational Organised crime: Summary of a Workshop* Washington DC: National Research Council, Committee on Law and Justice (1999) referenced in Reichel P (ed), *Handbook of Transnational Crime and Justice* (2005) at 19.

³⁶ The United Nations Convention against Transnational Organised Crime is often referred to as the 'Palermo Convention because it was first opened for signature by member States in Palermo, Italy 12-15 December 2000.

- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one state; or
- (d) It is committed in one State but has substantial effects in another State.³⁷

This convention re-emphasises that a transnational crime is one where some element of the crime will occur in, or affect, more than one State.

Meaning for the Purpose of this Thesis

The concept of transnational crime, used for the purpose of this thesis, will follow the simple notion that; it is a crime that involves cross border criminal activity, which violates the laws of more than one State. The definition from the Palermo Convention clarifies this as including the commission, preparation, planning, direction or effects of the crime occurring in more than one State. This definition of transnational crime covers a lot of criminal activity ranging from smuggling of illicit drugs to electronic crime, it is almost impossible to create a catch all list due to its evolving nature. This paper distinguishes ‘international crimes’ from transnational criminal activities on the basis that the former are egregious crimes prohibited by international law, including treaties and custom, whereas transnational crimes are those acts occurring in, or affecting, more than one State, and which are criminalised by the domestic laws of more than one State.³⁸

2.2. *Organised Crime*

Organised crime and its transnational variation have been around since national governments began to form and the existence of international trade began to grow. Piracy, cross-border brigandage, smuggling, fraud and trading in stolen goods are ancient occupations, which have increased in significance as nation States took prominence in the world system.³⁹ However, organised crime did

³⁷ United Nations Convention against Transnational Organised Crime (2000) Article 3(2).

³⁸ This conception of transnational crime is also used in; Reuter, P and Petrie C (Eds.) *Transnational Organised crime: Summary of a Workshop* Washington DC: National Research Council, Committee on Law and Justice (1999) and Reichel P (ed), *Handbook of Transnational Crime and Justice* (2005).

³⁹ Woodiwiss M, supra n. 10 at 13.

not become the subject of academic and professional study until the 1920's,⁴⁰ but since then it has steadily grown in prominence. Early academic studies conceptualised organised crime literally, as 'systematic criminal activity' and not necessarily associated with specific criminal groups.⁴¹ More recently, however, notorious organised criminal groups such as the 'the mafia' or 'triads' are often perceived as synonymous with 'organised crime'.

Despite the increased focus on organised crime in recent years, particularly transnational organised crime, a consensus on definition has proved particularly difficult to achieve. During negotiations for the Palermo convention the subject of definition was vigorously debated, with a clear tension between those who wished to create a broad definition, to encapsulate many criminal groups, and those who wished to formulate a narrower definition. Those opting for a narrow definition wished to avoid an overreaching of powers, which may occur, if the definition encapsulated less organised, and less harmful criminals.⁴² Eventually a consensus was achieved.⁴³ However, while not down-playing this remarkable feat, in practise the term still causes much confusion and debate.⁴⁴ What exactly constitutes 'organised crime' varies significantly among scholars and amongst the domestic laws of many States, with some States refusing to include a statutory definition of organised crime in their domestic legal system.⁴⁵

2.2.1. Traditional concepts of organised crime

Traditional concepts of organised crime have been heavily influenced by perceptions of, and reactions to, organised crime in the United States. Concerns in the US regarding organised crime can be traced back to the 1800s but began

⁴⁰ Ibid.

⁴¹ Ibid at 14.

⁴² Levi M, supra n. 2 at 882.

⁴³ See section 2.2.2, of this thesis, at page 28 for discussion on the Palermo Convention definition of organised crime.

⁴⁴ Levi M and Maguire M, supra n. 1 at 399.

⁴⁵ See Chapter 4, of this paper, case study on the United Kingdom.

to increase with earnest in the early 1950s.⁴⁶ Perceptions of organised crime were that of an ‘alien conspiracy’, a view attributing organised criminal activity with foreign or immigrant criminal groups.⁴⁷ No other group was singled out more for vilification than the ‘mafia’. Italian-American groups have attracted public and government attention for organised crime since the late 1800s during a large immigration wave from Italy.⁴⁸ This unsubstantiated suspicion leads to what is termed the ‘ethnicity trap’ where organised crime is explained in terms of its ethnicity rather than the conduct of the criminal activity itself.⁴⁹

The concept of organised crime as an Italian conspiracy, dominating organised crime in the US, was endorsed by a Senate investigating committee in 1950 and 1951. The mafia was depicted, and sensationalised, as a “*coherent, centralised international conspiracy of evil*”.⁵⁰ The committee’s third interim report asserted that America’s organised crime problem was of a Sicilian origin and that a ‘*nation wide syndicate, known as the mafia*’, dominated organised criminal activity.⁵¹ The mafia was viewed as a; structured, highly organised, well disciplined and overtly dangerous criminal group, which undermined the very security of the United States. This ‘moral panic’, as Michael Woodiwiss and Dick Hobbs describe it,⁵² was neatly illustrated in Robert Kennedy’s book called *The Enemy Within*, where he declares “*If we do not on a national scale*

⁴⁶ Woodiwiss M, supra n. 10 and Hobbs, D and Woodiwiss M, ‘Organized Evil and the Atlantic Alliance: Moral Panics and the Rhetoric’ (2009) 49 *British Journal of Criminology of Organized Crime Policing in America and Britain*.

⁴⁷ Ibid.

⁴⁸ Albanese J, *North American Organised Crime* in Mark Galeotti(ed) *Global Crime today: the Changing face of Organised Crime* (2006) at 11.

⁴⁹ Ibid. Ethnicity and organised crime is discussed in more detail under section 2.2.1, of this thesis, at page 18.

⁵⁰ Woodiwiss M, supra n. 10 at 15.

⁵¹ Hobbs, D and Woodiwiss M, ‘Organized Evil and the Atlantic Alliance: Moral Panics and the Rhetoric’ (2009) 49 *British Journal of Criminology of Organized Crime Policing in America and Britain* at 111 and in Fijnaut C and Letizia P, ‘Organised Crime and its control Strategies’ (2006) 14(3) *European Journal of Crime, Criminal Law and Criminal Justice* at 309.

⁵² Hobbs, D and Woodiwiss M, ‘Organized Evil and the Atlantic Alliance: Moral Panics and the Rhetoric’ (2009) 49 *British Journal of Criminology of Organized Crime Policing in America and Britain* at 106.

*attack organized criminals with weapons and techniques as effective as their own, they will destroy us”.*⁵³

By the end of the 1960s organised crime was understood, with little dispute, to be controlled by nationwide, hierarchical, centrally organised and rationally designed criminal organisations.⁵⁴ President Johnson’s Crime Commission defined organised crime in 1967 as:

...a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation... Its actions are not impulsive but rather the result of intricate conspiracies carried out over many years and aimed at gaining control over whole fields of activity in order to amass huge profits...⁵⁵

Often there was little or no evidence, supporting the claims of the alleged extensive mafia power and often the evidence was to the contrary. FBI investigations revealed, undoubtedly, the existence of some twenty-plus Italian-American crime syndicates who exhibited well organised hierarchical characteristics, and a willingness to engage in violence and intimidation to protect illegal business.⁵⁶ However, these same investigations also revealed that the ‘mafia’ groups could not direct, nor control, criminal activity in New York, let alone nationally.⁵⁷

Spread of the US inspired concept of organised crime

A significant factor in the spread of the US concept of organised crime was ‘America’s war on drugs’.⁵⁸ The prevalence of drug trafficking as an activity associated with organised crime, resulted in illicit drugs being identified as the most profitable and perhaps most damaging organised criminal activity.

⁵³ Kennedy R, *The Enemy Within* 1960. Referenced in Woodiwiss M, *Transnational Organised Crime: The Global reach of an American concept* in Edwards A, and Gill P *Transnational Organised Crime: Perspectives on Global Security* (2003) at 16.

⁵⁴ Leong, V M A. *The Disruption of International organised Crime: An Analysis of Legal and Non-Legal Structures*. (2008) at 9.

⁵⁵ President’s Commission on Law Enforcement and the Administration of Justice (1967) at 187, referenced in Woodiwiss M, *Transnational Organised Crime: The Global reach of an American concept* in Edwards A, and Gill P *Transnational Organised Crime: Perspectives on Global Security* (2003) at 16.

⁵⁶ Woodiwiss M, *supra* n. 10 at 16.

⁵⁷ *Ibid.*

⁵⁸ Carpenter T, *Bad Neighbour Policy: Washington’s futile war on Drugs in Latin America* (2003) and Geary W R, “The legislative recreation of RICO: Reinforcing the “myth” of organized crime” *Crime, Law & Social Change* 38: 311–356, (2002) at 325

Subsequently, to meet this perceived threat, the United States implemented a 'war on drugs'. This now infamous 'war' was announced by President Nixon in 1971.⁵⁹ This was partly to fulfil Nixon's election promises, of restoring law and order, but also was required because narcotics were considered "a modern curse of American youth".⁶⁰ The perception, by this time, acknowledged the mafia was no longer alone as the dominant force in organised crime. Organised criminal groups had emerged amongst Asian, Latin American and other ethnic groups to become major players in organised criminal activity. Despite adding more groups to the mix the premise remained the same; focus on an alien conspiracy, which threatens to destabilise otherwise morally sound American institutions.⁶¹

It was through this 'war on drugs' that the US began to spread its concept of organised crime to other parts of the world. In an effort to destroy the supply of drugs the US needed to enlist 'drug producing nations' to co-operate in the 'war'. They achieved this by putting pressure on nations considered to be drug producers to co-operate on US terms, particularly in the case of its hemispheric neighbours.⁶² This evolved into a major international supply-side 'offensive', which has become an integral part of US policy.⁶³ The war on drugs eventually evolved into an international war on drugs, with the world following the US's lead.⁶⁴

During a 1994 Washington conference, of high level American law enforcement officials, organised crime was described as a risk to the very fabric of democratic society and believed to be affecting critical national

⁵⁹ Ibid

⁶⁰ Carpenter T, *Bad Neighbour Policy: Washington's futile war on Drugs in Latin America* (2003) at 18.

⁶¹ Woodiwiss M, *Transnational Organised Crime: The Global reach of an American concept* in Edwards A, and Gill P *Transnational Organised Crime: Perspectives on Global Security* (2003) at 16. and Geary W R, "The legislative recreation of RICO: Reinforcing the "myth" of organized crime" *Crime, Law & Social Change* 38: 311–356, (2002) at 325

⁶² Carpenter T, *supra* n. 60 at 18.

⁶³ Ibid at 22

⁶⁴ The United Nations has been the platform for the creations of three influential international conventions relating to drugs. The Single Convention on Narcotic Drugs (1961), the Convention on Psychotropic Substances (1971), United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). The latter has a particular focus on organised criminal groups involved in the drug trade. (See 1988 Convention's preamble).

security interests.⁶⁵ Organised criminal groups were considered to be forging world wide alliances to achieve their goals.⁶⁶ Shortly after this conference the United Nations held the World Ministerial Conference on Organised Transnational Crime in Naples, where the message and analysis was a near replica of the Washington conference, illustrating how the US concept of organised crime was being adopted into a global setting. The former United Nations Secretary-General, Boutros Boutros-Ghali, painted a grim picture to attending delegates:

Organised crime has ... become a world phenomenon. In Europe, in Asia, in Africa and in America, the forces of darkness are at work and no society is spared.⁶⁷

Godfather Delusion: The 'Mafia Model' of organised crime

The traditional view of organised crime has long conceived that large, structured, hierarchical, ethnically based, criminal groups dominate and control the majority of organised criminal activity. These groups are perceived as having; defined leaders, a clear chain of command, and continuity beyond the life, or participation, of any individual member of the group.⁶⁸ A small number of powerful groups, comparable to multi-national corporations, are alleged to dominate certain activities of organised crime or, in some cases, certain regions. They are thought to have achieved a quasi-superpower status operating with a significant amount of sophistication and an equal amount of ruthlessness.⁶⁹

The Mafia was the original 'culprit' of organised crime, but, gradually more ethnically defined groups have been included. CarrieLyn Donigan Guymon

⁶⁵ Woodiwiss M, *Transnational Organised Crime: The Global reach of an American concept* in Edwards A, and Gill P *Transnational Organised Crime: Perspectives on Global Security* (2003) at 13. Key note speakers at the conference included FBI director Louis Freeh and CIA director R. James Woolsey.

⁶⁶ Ibid

⁶⁷ United Nations World Ministerial Conference on Organised Transnational Crime, Naples (1994). Referenced in Woodiwiss M, *Transnational Organised Crime: The Global reach of an American concept* in Edwards A, and Gill P *Transnational Organised Crime: Perspectives on Global Security* (2003) at 21.

⁶⁸ Finckenauer J, *Problems of Definition: What is Organised Crime?* Trends in Organized Crime/Vol. 8, No. 3, Spring (2005) at 66.

⁶⁹ Guymon C, 'International Legal Mechanisms for Combating Transnational Organized Crime: The need for a Multilateral Convention' (2000) 18, Berkley Journal of International Law, at 53.

identifies five major ‘international criminal organisations’ as; the ‘Russian mafia’, the Italian mafia families, Colombian cartels, the Chinese Triads and the Japanese Yakuza.⁷⁰ These groups are viewed as the preeminent criminal corporations, dominating transnational organised criminal activity. They are perceived to have developed sophisticated regional and world-wide operations, involving thousands of people and billions of dollars worth of business.⁷¹

Guymon declare that;

...leaders of the largest international criminal organizations have formalized their collaborative relationships so that they rival strategic arrangements of legitimate heads of state or multinational corporations.⁷²

In Guymon’s view these groups began to form alliances and hold ‘world summits’ going back as far as the end of WWII.⁷³ Guymon sites meetings in 1990 (apparently timed to co-inside with the Dublin EC summit) between international (Italian) mafia groups and Russian ‘mafia’ leaders, operating outside the Soviet Union.⁷⁴ Furthermore, in 1992, Guymon believes the Sicilian mafia had achieved a secret agreement with the Russians in Prague.

The purpose was alleged to be:

...to protect their new illicit trade throughout Central Europe, establish a global network for the drug trade and marketing of nuclear components, and create a lethal squad of killers' made of ex-KGB agents.⁷⁵

Guymon concludes that just as the Group of Eight industrialised nations meet frequently, to discuss international cooperation, so too the five major criminal organisations meet, in order to discuss their own global operations.⁷⁶ Guymon cites supporting evidence as:

French intelligence reports revealed that a 1994 gathering in Burgundy of Russian, Chinese, Japanese, Italian, and Colombian “businessmen” was really a summit of “representatives of the world's leading organized crime syndicates” in an effort “to discuss carving up western Europe for drugs, prostitution, smuggling and extortion rackets.”⁷⁷

⁷⁰ Ibid at 56.

⁷¹ Roy G and Williams P, ‘Strengthening Co-operation against Transnational Crime’ (1998) 40(3) *Survival* at 67.

⁷² Guymon C, *supra* n. 69 at 66 and 67.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid

⁷⁷ Ibid at 66-69.

The intelligence reports indicate up to 12 organised criminal groups met in Beaune in 1994, including groups from Russia, Italy, China and Colombia.⁷⁸ However, there is no evidence to suggest this correlates to a grand coalition of criminals, seeking to dominate the worlds criminal activity. It is extremely unlikely that the various criminals can speak for all Russian, Chinese, Italian or Colombian crime.⁷⁹

Guymon is not alone in her views. For example, Claire Sterling described the mafia as a ‘multinational heroin cartel’ and estimated they were the twentieth richest ‘nation’ in the world.⁸⁰ Sterling popularised the notion of a ‘Pax Mafiosa’; the idea that major criminal organisations were working together, with an intent to dominate illegal activity around the globe.⁸¹ Her claims were regarded highly enough to prompt an invitation to attend the (above mentioned) Washington DC conference of high-level American law enforcement and intelligence community personnel, in September 1994.⁸² An ominous conclusion of the conference was that organised crime provided a far bigger threat than anything the world faced during the cold war. Furthermore, worldwide alliances were being forged in every criminal pursuit, and organised crime was the world’s fastest growing ‘business’, with profits estimated at \$1 trillion.⁸³

Criticism of traditional conceptions

More recently, the traditional model of organised crime has begun to attract criticism from scholars, as an over simplification of organised crime. Michael Levi firstly points out that; even if accurate anywhere, one cannot assume this model will apply everywhere else in the world. If this model of organised crime can be applied accurately in parts of Italy, or America, in a particular

⁷⁸ Williams P, *Cooperation among Criminal Organizations* in Berdal M and Serran M(eds), *Transnational Organized Crime & International Security: Business as Usual?* (2002) at 77.

⁷⁹ Ibid.

⁸⁰ Hobbs, D and Woodiwiss M, ‘Organized Evil and the Atlantic Alliance: Moral Panics and the Rhetoric’ (2009) 49 *British Journal of Criminology of Organized Crime Policing in America and Britain* at 116.

⁸¹ Williams P, *Cooperation among Criminal Organizations* in Berdal M and Serran M(eds), *Transnational Organized Crime & International Security: Business as Usual?* (2002) at 67

⁸² Ibid.

⁸³ Ibid.

historical period, that does not mean it is safe to assume it would apply in other parts of the world with completely different conditions.⁸⁴

Moreover, in Italy, the ‘home’ of the mafia, even though powerful mafia fraternities do exist, they have not acquired a monopoly on any sector of organised crime nationally, let alone internationally.⁸⁵ For instance, in the transnational heroin trade, Cosa Nostra families initially played a large role, particularly in routes from Asia to the US via Sicily; however, they never achieved total market domination. Today a multitude of groups, ranging from Mexican, Chinese and Colombian nationality, amongst others, participate in this market.⁸⁶ In the case of the Italian Cosa Nostra, its power is not unchallenged even in its own geographical headquarters, where its main ‘stronghold’ exists. Cosa Nostra families are often in a minority position, with their local competitors, and are thus unable to assert control over the local underworld let alone globally.⁸⁷

Critics of the ‘mafia model’, or ‘global pluralist’ theory of organised crime as Woodiwiss describes it, do not dispute that criminal groups exist all over the world; as there is ample evidence showing this to be the case.⁸⁸ The main criticism towards the mafia model is that it over simplifies the problem of organised crime. The mafia type groups, while exhibiting a degree of power, only participate in illegal markets, they rarely if ever control them. Illegal markets such as illicit drugs are not characterised by monopolisation but rather fragmentation and competition.⁸⁹ Michael Levi states:

...there is a tendency in media, political and even policing debates to conflate the risk of, or the opportunities for, organized crime domination with the current levels of organized crime activity. It would be surprising if many crime groups had any serious wish to ‘dominate’ any particular country, let alone the world, and even among those

⁸⁴ Levi M, supra n. 2 at 881.

⁸⁵ Ibid also see Galeotti M(ed), *Global Crime Today: The Changing face of Organised Crime* (2006) at 22 and Fijnaut C and Paoli L(eds) *Organised Crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond* (2005) at 275.

⁸⁶ Fijnaut C and Paoli L(eds) *Organised Crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond* (2005) at 275.

⁸⁷ Ibid.

⁸⁸ Woodiwiss M, supra n. 10 at 23.

⁸⁹ Ibid

with such lofty ambitions, this aim would arouse competition from rivals and would motivate law enforcement and governments to deal more vigorously with the threat.⁹⁰

Woodiwiss also notes that if organised crime was really dominated by a small number of ‘super criminal’ organisations, it would be relatively simple to deal with them. Eliminate the leadership of these groups and that would be the end of the organised crime problem.⁹¹ This concept has been popular amongst law enforcement officials around the world and is referred to as ‘dismantling’, where the leadership of a particular group is arrested, in the hope that this will cripple the group, leaving them without direction, and therefore, unable to continue any significant criminal activity.⁹² However, experiences in the US have shown that this approach does not work; disposing of crime ‘bosses’ such as Al Capone, Lucky Luciano, Tony Salerno and John Gotti has not put an end to the reality of organised crime in the US.⁹³

As academic researchers have begun to examine the traditional conception of organised crime, they have found it to be too simplistic and have begun to sift through the overly homogenised imagery of this perceived threat.⁹⁴ Rather than conceiving organised crime in rigid terms of stable criminal structures with powerful ‘bosses’ at the helm, researchers have observed mostly *“improvisation, fluid networks and ad hoc coalitions, opportunistic and very flexible individual entrepreneurs, criminal omnivores and organisational chaos”*⁹⁵

⁹⁰ Levi M and Maguire M, “Reducing and Preventing Organised Crime: an Evidence Based Approach” (2004) 41 Crime Law and Social Change at 399.

⁹¹ Woodiwiss M, Supra n. 10 at 23.

⁹² Klerks P, *The network paradigm applied to criminal organisations: Theoretical nitpicking or a relevant doctrine for investigators? Recent developments in the Netherlands* in A Edwards and P Gill (eds) *Transnational Organised Crime: Perspectives on Global Security* 2003 at 102.

⁹³ Ibid and Woodiwiss M, Supra n. 10.

⁹⁴ Edwards A and Gill P, ‘The politics of ‘transnational organised crime’: discourse, reflexivity and the narration of ‘threat’ (2002) 4(2) British Journal of Politics and International Relations at 247.

⁹⁵ Klerks P, Supra n. 92 at 99.

Outsider Threat – Ethnicity and Organised Crime

The traditional view of organised crime has also created an ‘outsider’ conspiracy responsible for and central to most organised criminal activity. In popular media, law enforcement circles and in policy announcements, organised crime is often described in terms of ethnicity with reference to such groups such as; the Italian mafia, Colombian drug barons, Albanian traffickers and so on. Following the US inspired thinking regarding causes, dynamics and appropriate policy responses to organised crime, the United Nation’s Convention against Transnational Organised Crime was launched, in December 2000.⁹⁶ With over 100 countries involved there was a remarkable degree of consensus on the existence and character of transnational organised crime. Central to this consensus is a belief in the ethnic basis to organised crime and a desire for States to protect their borders from ‘outsiders’.⁹⁷

The link between ethnicity and organised crime has raised much debate, both in regards to its accuracy, and its usefulness, as a model for constructing a conception of organised crime. Those who support research into the link between ethnicity and organised crime, such as Frank Bovenkerk, believe there are good theoretical grounds for assuming that such a link exists in reality. Political and geographical factors make such a linkage possible and under certain conditions some minorities run a heightened risk of being involved in organised crime, because illegal organisations can sometimes thrive within the seclusion of ethnic minority communities.⁹⁸ Law enforcement officials and agencies are also quick to describe organised criminal groups in terms of their ethnicity.⁹⁹ The New Zealand police, for example, state that:

Identifying organised crime by ethnicity or activity remain useful aids for Police when dealing with the day-to-day activities of overt organised groups.¹⁰⁰

⁹⁶ Edwards A, *Transnational organised Crime* in Sheptycki J and Wardak A(eds), *Transnational and Comparative Criminology* (2005) at 213.

⁹⁷ Ibid. Also see Chapter 3, of this thesis, for discussion on the United Nations Convention against Transnational Organise Crime..

⁹⁸ Bovenkerk F, *Organized Crime and Ethnic Minorities: Is There a Link?* In Williams P and Vlassis D (eds) *Combating Transnational Crime: Concepts, Activities and Responses* (2001) at 124.

⁹⁹ See for example: Serious Organised Crime Agency, *The United Kingdom Threat Assessment of Serious Organised Crime* (2008/09) at 38.

¹⁰⁰ New Zealand: Criminal Investigation Branch (9 Aprils 2006), retrieved from, <http://www.police.govt.nz/service/cib/organised_crime.html> on April 20, 2009.

Countering the ethnic based conception of organised crime, is the conclusions of studies, completed in 1995 in the Netherlands, by the 'Fijnaut group' (later confirmed by the Dutch Ministry of Justice Research Centre) which noted that the supposed homogeneity of criminal groups were a thing of the past. Rather, opportunism, ad hoc coalitions and relationships based on friendship, now much more than before, form the basis for criminal projects.¹⁰¹ Karim Murji notes that there is no reason to assume ethnic minorities will not be involved in organised crime. What must be stressed, however, is that the appearance of ethnic differentiation, in organised crime, is not the same as proving ethnicity is key to the particular operation of organised crime.¹⁰² Suggesting that organised crime is dependent on the ethnicity, or even cultural values, of its members would imply that criminal groups of different ethnicity operate in significantly different ways.¹⁰³ For ethnicity to be a useful tool, in understanding organised crime, then there must be something compellingly unique about, for instance, Chinese crime compared, to say, Russian crime.

Jay Albanese, despite writing in a book broken down into ethnically defined chapters, is sharply critical of the 'ethnicity approach' describing organised crime.

This narrow view leads to unwarranted stereotypes of ethnic groups, ignores the fact that organised crime is committed by groups of many different ethnicities, and that the public demand for illicit goods and services drives most organised crime activity regardless of time and place... Thus ethnicity does not help explain the presence or absence of organised crime.¹⁰⁴

This is not to suggest that ethnicity has no role in organised crime. Ethnicity clearly provides a key resource for the organisation of serious crimes in unfamiliar environments; where trust is vital and familial or broader kinship networks provide protection against policing and intelligence operations.¹⁰⁵ Moreover, advantages that common ethnicity provide, such as common

¹⁰¹ Klerks P, supra n. 92 at 101.

¹⁰² Muraji K, 'Hierarchies, Markets and Networks: Ethnicity/ Race and Drugs Distribution' (2007) 37(4) *Journal of Drug Issues* at 784.

¹⁰³ Geary W R, "The legislative recreation of RICO: Reinforcing the "myth" of organized crime" (2002) *Crime, Law & Social Change* 38: 311–356 at 329

¹⁰⁴ Albanese J, *North American Organised Crime* in Mark Galeotti (eds.) *Global Crime today: the Changing face of Organised Crime* (2006) at 11.

¹⁰⁵ Edwards A, supra n. 96 at 220.

language or contacts amongst communities, can enable groups to organise efficiently. However, the problem with viewing organised crime as an ‘outsider threat’, characterised solely by specific ethnic groups threatening the otherwise stable institutions of a State, is that it assumes it is a necessary feature and ignores issues and factors such as the demand for illicit goods in societies and the reality of network relationships between criminals of different ethnicities.

Adam Edwards describes this short fall as follows:

A problem...with the external threat narrative in official discourse on transnational organised crime is that it reifies ethnicity, mistaking this as a necessary organising feature of serious crime... it is but one, contingent, determinant of organised criminality. This is not to suggest that criminal organisations cannot employ ethnicity as a resource in the trafficking of illicit goods and services, but even here such organisations are unlikely to control the entire operation from production through to distribution to end consumers.¹⁰⁶

Focusing on ethnicity obscures the importance of other kinds of actors, such as intermediary facilitators or ‘criminal contract brokers’ as well as other episodic associations.¹⁰⁷ Moreover, the ‘ethnicity trap’ which shifts blame for organised crime onto ethnic minorities or migrants has, in some countries, provoked, or further stirred, significant persecution of these minority populations.¹⁰⁸

Where once an organised criminal group might be based on a single ethnic group, there is now little reason to assume this is an exclusive approach. Instead organised crime is becoming increasingly inclusive; people and groups with the right skills, contacts, resources or territory, may be accepted into the network as long as they can prove usefulness, or an ability to operate within the dominant culture.¹⁰⁹

¹⁰⁶ Ibid.

¹⁰⁷ Ibid at 220 and Klerks P, supra n. 92 at 108.

¹⁰⁸ Edwards, A supra n. 96 at 221. Edwards points to the example of Western Europe, where the association of ethnic minorities with organised crime has resulted in civil unrest and vigilante assaults. Edwards suggests these attacks are often further fuelled by ‘vindictive media coverage’.

¹⁰⁹ Galeotti M(ed), *Global Crime Today: The Changing face of Organised Crime* (2006) at 3.

2.2.2 *Organised Crime today – The Complicated Reality*

Network Paradigm

Recent analyses of the trends and composition of criminal groups has led to an awareness that organised crime is increasingly operating through fluid network structures, rather than the traditionally conceived more-formal hierarchies.¹¹⁰ The over homogenised and simplistic view of a small number of large organised, ethnically defined, criminal groups dominating transnational criminal activity has been found unsuitable to reflect modern day transnational organised crime. While structured, hierarchical criminal groups, with clear leaders and chain of command do exist, they are considered the exception rather than the norm.¹¹¹

What are networks?

Phil Williams describes networks, in a paper titled *Networks, Markets and Hierarchies*, as:¹¹²

A network can be understood simply as a series of nodes that, in one way or another, are connected together. The nodes can be individuals, organisations, firms or even computers, but the critical point is that there are significant linkages among them.

Networks vary in size, may be local or global, domestic or transnational and their structure may range from centrally directed to highly decentralised.¹¹³ A certain network may be specifically focused on one goal or operating towards many goals; and its membership may be exclusive or broadly encompassing.¹¹⁴ The network concept can be an elusive one, due to the great variability in their make up and structure. On a practical level, when applied to organised crime, this variability can make criminal networks very difficult to combat.¹¹⁵

¹¹⁰ Edwards A and Levi M, supra n. 1 at 364. See also Williams P, *Transnational Criminal Networks* in Arquilla J and Ronfeldt D (eds.), *Networks and Netwars: The Future of Terror, Crime, and Militancy* (2001) at page 62 and; Betti S, 'New prospects for inter-state cooperation in criminal matters: The Palermo Convention' *International Criminal Law Review* (2003) 3: 151–167 at 155.

¹¹¹ Finckenauer J, *Problems of Definition: What is Organised Crime?* Trends in Organized Crime/Vol. 8, No. 3, Spring (2005) at 65.

¹¹² Williams P, *Networks, Markets and Hierarchies* in Williams P and Vlassis D (eds.), *Combating Transnational Crime: Concepts, Activities and Responses* (2001) at 57.

¹¹³ *Ibid* at 74.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid*

Traditionally conceived ‘conspiracies’ and ‘mega hierarchies’; identified by law enforcement officials in the past, have been revealed as “*constructions that cannot stand up to close scrutiny*”.¹¹⁶ After examining the dossiers of over a hundred organised crime cases and investigations between 1995 and 1998 research groups from the Netherlands determined that what seemed like large, super-criminal organisations, were in fact strings of interlinked smaller groups. These groups did not have a central leader, rather they co-ordinated their activities along episodic lines. They formed ad hoc relationships, based on opportunity, or bonds of close friendship, and these relationships were not necessarily maintained for long periods.¹¹⁷ A joint report from the European Commission and Europol also supports the view that organised criminal groups are rarely hierarchical, more often they show an opportunistic character. The groups are often seen to be entrepreneurial, flexible and established for specific short operations, or activities, and are able to respond quickly to changing markets.¹¹⁸

Edwards and Levi, when explaining how criminals organise and operate within the ‘network’ paradigm, note there are a number ways the term ‘network’ is used. They opt for the following meaning, as research completed for the United Kingdom Home Office¹¹⁹ best supports it.

As a way of describing the structure and/or everyday workings of the market as a whole, in the sense that the market can be regarded as a complex social network (singular noun), within which different participants have to network (verb) (to carefully seek out and interact with traffickers who may be like or unlike themselves. In other words, through networking, traffickers [and other offenders] construct the market.¹²⁰

¹¹⁶ Klerks P, supra n. 92 at 101.

¹¹⁷ Ibid at 100, also see Edwards A, supra n 96 at 216, Galeotti M(ed), *Global Crime Today: The Changing face of Organised Crime* (2006), Serious Organised Crime Agency, *The United Kingdom Threat Assessment of Serious Organised Crime* (2008/09) at 38 and Williams P, *Organizing Transnational Crime: Networks, Markets and Hierarchies* in Williams P and Vlassis (eds) *Combating Transnational Crime: Concepts, Activities and Responses* (2001) at 73.

¹¹⁸ Commission Staff Working Paper, Joint report from Commission Services and Europol, *Towards a European Strategy to prevent Organised Crime*, SEC(2001) 433 Commission of the European Communities at p 8. Retrieved from: <http://ec.europa.eu/justice_home/news/information_dossiers/forum_crimen/documents/sec_2001_433_en.pdf> May 25th 2009.

¹¹⁹ Dorn N, Levi M and King L, ‘Literature Review on Upper Level Drug Trafficking’. Home Office RDS OLR 22/05 (2005). Online at:

<<http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr2205.pdf>>

¹²⁰ Supra n. 98 at 364.

This perception of networking explains how, by networking, criminals construct the illicit market they are operating in.

Networking: A superior model for 'organised crime'

The traditional conception of organised crime is not only oversimplified, it also severely underestimates the challenge posed by organised crime. A national or even global organised crime 'conspiracy' run by a small number of large, rigid, strictly hierarchical criminal groups who maintain a long association, would be relatively easy targets vulnerable to 'dismantling'.¹²¹ The reality is much more complicated. Loose, less formal network structures make criminal groups highly resilient to dismantling tactics focused on taking out leadership.¹²² Networks of criminals are able to adapt more easily to law enforcement 'interruptions' than rigid hierarchical groups, who rely heavily on established leadership. When someone, who was assumed vitally important, is arrested they are either replaced or the loss is adjusted to quickly. Often after a short time frame the original operational potential is able to be rebuilt.¹²³

Transnational criminal networks have, as one of their core strengths, great ability to get around physical barriers and across legal or geographical boundaries.¹²⁴ Networks have been described as the perfect means of conducting business, both legal and illegal, in a globalised world.¹²⁵

...there is a natural congruence between transnational or cross-border activities and networks structures, irrespective of whether the networks operate exclusively in the legitimate sector or in supplying illicit...goods and services. In this connection, the capacity of individual criminals or groups in one country to extend their network through linkages with their counterparts in other countries gives organized crime and drug trafficking a transnational character that makes it difficult to combat.¹²⁶

¹²¹ Williams P, supra n. 112 at 72.

¹²² Ibid at 73. See also Klerks P, supra n. 92 at 102 and Galeotti M(ed), *Global Crime Today: The Changing face of Organised Crime* (2006) at 3. Galeotti notes that human traffickers and drug traffickers often operate in very loose networks allowing them flexibility to operate across national borders and lowering the risk on an entire group being caught by law enforcement.

¹²³ Ibid.

¹²⁴ Williams P, supra n. 112 at 74.

¹²⁵ Ibid

¹²⁶ Ibid

Emphasising that the majority of organised crime is network based does not suggest that it is undirected.¹²⁷ Rather, it highlights that traditional concepts of organised crime have overlooked important features evident in criminal networks, such as ‘criminal contact brokers’.¹²⁸ Organised criminal activity is enabled predominately through the episodic co-operation of criminal actors, who may offer a wide range of skills or resources. Therefore, successful criminal activity is facilitated by intermediaries, or ‘criminal contact brokers’, who supply criminal entrepreneurs for the purpose of accomplishing particular ‘jobs’.¹²⁹ These intermediaries, in putting people and skills together, have proved central to the success of criminal operations.¹³⁰ Various law enforcement officials have had success in disrupting organised criminal operations by targeting the small number of ‘brokers’ who brought together suppliers, financiers, skilled traffickers and street distributors.¹³¹ The traditional focus on crime ‘bosses’ and leadership, has obscured the vital service that intermediaries play in enabling criminals to organise for particular operations.

Contemporary law enforcement agencies have also begun to re-assess the traditional views of organised crime, acknowledging the importance of networks.¹³² The 2008/09 United Kingdom Threat Assessment of Organised Crime compiled by the UK Serious Organised Crime Agency acknowledges that while some criminals may belong to “*established groups with clear hierarchies and defined roles*” a wide range of other structures exist where criminals “*are part of looser criminal networks and collaborate as necessary to carry out particular criminal ventures. Such contacts are reinforced by links of kinship, ethnicity, or long association*”.¹³³ The 2008/09 New Zealand

¹²⁷ Ibid

¹²⁸ Klerks P, supra n. 92 and Galeotti M(ed), *Global Crime Today: The Changing face of Organised Crime* (2006) at 216.

¹²⁹ Ibid

¹³⁰ Klerks P supra n. 92 at 107-108 also see Levi M, supra n. 2 at 905 and the United Nations Office on Drugs and Crime, *World Drug Report* (2007) at 169.

¹³¹ Ibid. The UN World Drug Report (at p169) notes the Australian police have recorded successes in combating illicit drugs by targeting the relatively small number of brokers who bring suppliers, financiers, skilled traffickers and street distributors together. These brokers are considered a weak link in the organised criminals networks. See also Klerks P supra n. 92 at 110-111, outlining the experience of Police in the Netherlands.

¹³² Ibid

¹³³ *The United Kingdom Threat Assessment of Serious Organised Crime* (2008/09) at 5.

Organised Crime Strategy has described organised crime in New Zealand as being “characterised by loose networks between groups and individuals”.¹³⁴

Illegal Markets – Enterprise crime

It is widely agreed that the primary motivation of organised crime, whether local or transnational, is the pursuit of profit.¹³⁵ Organised criminal activity is facilitated by criminal networks that organise, supply and traffic illicit goods and services.¹³⁶ While the core of the activity is directed at the supply of illegal goods and services, successful criminal groups may also be involved extensively in legitimate business, allowing the groups to launder money and appear respectable.¹³⁷ This fact has led a number of criminologists to refer to organised crime as ‘enterprise crime’.¹³⁸

Organised criminals satisfy a demand for illegal goods and services within illegal markets. An illegal market is a place or principle within which there is an exchange of goods and services. The production, selling and consumption of these goods and services are either forbidden or strictly regulated by the majority of States and/or by international law.¹³⁹ In some respects illegal markets are governed by normal economic forces for instance, there are buyers and sellers, importers and distributors. Pino Arlacchi’s analysis of illegal markets concludes that they are composed of numerous small and medium sized, semi-independent firms supplying goods and services to final consumers.¹⁴⁰ The composition of illegal markets reflects the network paradigm, where there are numerous groups, ranging in size, who construct the

¹³⁴New Zealand Ministry of Justice: Crime Prevention Unit *Organised Crime Strategy* (2008/09) available at: <<http://www.justice.govt.nz/cpu/organised-crime/strategy.html>>

¹³⁵ Ibid

¹³⁶ Williams, P supra n. 112 at 73

¹³⁷ Levi M, supra n. 2 at 894 and Arlacchi P, *The Dynamics of Illegal Markets* in Williams P and Vlassis D (eds), *Combating Transnational Crime: Concepts, Activities and Responses* (2001) at 8.

¹³⁸ Levi M, supra n. 2. See also Levi M and Maguire M, supra n. 1, Williams P, supra n. 112 at 76 and Edwards A, Gill P, ‘Crime as Enterprise? The case of Transnational Organised Crime’ (2002) 37 *Crime Law and Social Change*.

¹³⁹ Arlacchi P, *The Dynamics of Illegal Markets* in Williams P and Vlassis D (eds), *Combating Transnational Crime: Concepts, Activities and Responses* (2001) at 7.

¹⁴⁰ Ibid

market. Illegal markets are not typically dominated by large monopolies or oligopolies.

While illegal markets exhibit some similarities to legal ones, Arlacchi notes the dynamics of criminal markets significantly differ from those that drive legal markets. For instance, criminal groups can resort to violence and intimidation against competitors to increase market share or establish local monopolies.¹⁴¹ Organised criminal groups also have to factor in law enforcement and, therefore, spend vast amounts on avoiding or corrupting law enforcement and other public officials.¹⁴² One activity essential to avoiding law enforcement is money laundering, criminals must hide or disguise the illegal source of their, sometimes obvious, wealth.¹⁴³ These extra costs are passed on to consumers resulting in higher prices for the final products or service.

Criminal groups often begin transnational operations because they are attracted to particular markets, in host countries, where there is significant demand for the products and services they supply.¹⁴⁴ Illicit markets, whether domestic or transnational, tend to be composed of a variety of actors with criminal organisations, of various sizes and structures, playing a large but not always exclusive role.¹⁴⁵

Characteristics of organised crime – narrow or broad approach?

Attempting to create a ‘catch all list’ of crimes associated with organised crime, or a set of defining characteristics of organised criminal groups, is difficult and not entirely useful. Defining or explaining organised crime through a list of crimes does not help to decisively clarify what ‘organised crime’ is. As Finckenauer asserts;

¹⁴¹ Ibid at 8

¹⁴² Ibid also see Velkova, E and Georgievski, V. “Fighting Transborder Organized Crime in Southeast Europe through Fighting Corruption in Customs Agencies” Southeast European and Black Sea Studies (2004) Vol. 4, No. 2 280-293

¹⁴³ See section 2.4 p 38, of this thesis, for discussion on organised crime and money laundering.

¹⁴⁴ Williams P, supra n. 112 at 69.

¹⁴⁵ Ibid

This "thing," this phenomenon known as organized crime, cannot be defined by crimes alone. Any definition must address and account for the elusive modifying term organized.¹⁴⁶

Early work completed by Michael Maltz proposed that four characteristics were essential to be identified as 'organised crime'; violence, corruption, continuity and variety in types of crimes engaged in.¹⁴⁷ However, there are serious questions regarding the wisdom of trying to pin down an exclusive set of characteristics to define organised crime. Not only does organised crime vary in different periods of history and in different locations, but the crimes committed are continually evolving, and expanding, as factors such as technology and demand change.

Both the United Nation's and European Union have struggled with the concept of organised crime, while drawing up conventions designed to combat it. EU States negotiated for a long time to find a common concept of organised crime.

The careful deliberations were deemed necessary to avoid a definition that was:

- a. too expansive, thus running the risk of including criminal groups that approach organised crime without in fact belonging to it,
- b. too narrow, therefore running the risk of adopting only a partial approach to the phenomenon by not including criminal organisations that, nevertheless, have all the characteristics of organised crime (such as groups using legal fronts to launder money from their criminal activities).¹⁴⁸

In 2001 a joint report from Europol and the European Commission established a list of characteristics associated with organised crime.¹⁴⁹ A minimum of 6 must be present with 4 of the list mandatory.

Mandatory criteria

1. Collaboration among more than two people
2. Extending over a prolonged or indefinite period (referring to stability and (potential) durability)
3. Suspected of committing serious criminal offences, punishable by imprisonment for at least four years or a more serious penalty
4. The central goal of profit and/or power

¹⁴⁶ Finckenauer J, *Problems of Definition: What is Organised Crime?* Trends in Organized Crime/Vol. 8, No. 3, Spring (2005) at 65

¹⁴⁷ Levi M, supra n. 2 at 880.

¹⁴⁸ European Parliament : Committee on Freedoms and Rights, Justice and Home Affairs , *Fight against Organised Crime*, 15 October 2005, from <http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/291_en.htm> Retrieved 12 May 2009.

¹⁴⁹ Commission of the European Communities, Joint Report from Commission Services and EUROPOL, *Towards a European strategy to prevent organised crime*, Brussels, SEC (2001) 433 (13.03.2001)

- Optional criteria
5. Specialised division of labour among participants
 6. Exercising measures of discipline and control
 7. Employing violence or other means of intimidation
 8. Employing commercial or business-like structures
 9. Participating in money-laundering
 10. Operational across national borders
 11. Exerting influence over legitimate social institutions (polity, government, justice, economy)

Similarly, the problematic concept of organised crime was highlighted during negotiations for the Palermo Convention. Debate over how to best define organised crime was vigorous, time consuming and one of the most significantly contested parts of the Convention.¹⁵⁰ The resulting definition to be used is, therefore, very broad.

Article 2. Use of Terms

For the purposes of this Convention:

- (a) "Organized criminal group" shall mean 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;
- (b) "Serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;
- (c) "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure;¹⁵¹

The definition is somewhat vague and slightly confusing. For instance; firstly an organised criminal group is to be a structured group, however, 'structured group' is given a very loose meaning that seems to stray far away from the ordinary meaning of 'structured'. The official interpretative notes indicate that Article 2 should be interpreted broadly, outlining that 'structured group' should be given an all encompassing meaning;¹⁵²

...so as to include both groups with hierarchical or other elaborate structure and non-hierarchical groups where the roles of the members of the group need not be formally defined.

¹⁵⁰ This is evident throughout the notes of the *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Organized Crime and the Protocols thereto*, United Nations, New York, 2006, online at

<http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf>

¹⁵¹ United Nations Convention against Transnational Organised Crime (2000)

¹⁵² United Nations General Assembly, *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto A/55/383/Add.1* (3 November 2000) at paragraph 4.

As States negotiated for the definition there was a clear tension between those who wanted a wide definition, to avoid the risk of any major criminal being overlooked, and others who want to avoid an overreach of powers, which may result in too much focus on groups who are only a small or modest threat.¹⁵³

Both the EU and UN efforts to define organised crime illustrate the typically contradictory approach taken by many governments and international organisations, when addressing organised crime. On the one hand they will emphasise the growing threat of organised crime, on the other they adopt very broad, all encompassing, legal definitions of organised crime, which do not include strict criteria in terms of numbers or group structure.¹⁵⁴ Levi and Maguire believe this broad definitional approach has achieved a wide spread consensus in Europe and, generally, amongst the wide spread signatories of the Palermo Convention. This consensus can be summarised as follows;

- two or more people are involved in continuing significant illegal activities, irrespective of national boundaries;
- such a group is capable of defending its members, enterprises or profits and to this end, may use violence, coercion or corruption; and
- Criminal proceeds have been generated by a grouping which has both core and peripheral members.¹⁵⁵

This broad concept has been adopted in New Zealand with very few minor differences.¹⁵⁶

2.3 Working definition for the purpose of this thesis

For the purpose of this thesis transnational organised crime will be defined as transnational criminal activity carried out by organised criminal groups and will contain these elements;

¹⁵³ Levi M, supra n. 2 and Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Organized Crime and the Protocols thereto, United Nations, New York, 2006, online at <http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf>

¹⁵⁴ Fijnaut, C and Paoli, L. "Organised Crime and Its Control Policies", European Journal of Crime, Criminal Law and Criminal Justice (2006) Vol.13 307-327 at 312

¹⁵⁵ Levi M and Maguire M, supra n. 1 at 399

¹⁵⁶ Chapter 5, of this paper, discusses New Zealand's conception and definition of organised crime in more detail.

- (a) Transnational crime involves cross border criminal activity, violating the laws of more than one State, and occurring in or affecting more than one State. For this paper, criminal activity will be considered cross border criminal activity; even if the offence was carried out in one State but a substantial part of its preparation, planning, direction or control took place in another State.¹⁵⁷
- (b) This thesis will employ a broad definition of ‘organised crime’ as used by many governments and international organisations. Organised crime will be understood to mean; the commission of a serious offence involving a group (of 3 or more people), who formed with a common purpose of obtaining financial or other material benefit.¹⁵⁸ The group may have continuity, or permanent membership or they may have formed for the commission of a single serious offence.

The rationale behind a broad definition is to ensure it covers both larger organised criminal groups as well as those smaller networking groups who account for much organised criminal activity, particularly in New Zealand.¹⁵⁹ It is not just large mafia type groups who are committing serious transnational crime, this chapter has shown the importance of smaller loose networks and thus a broad definition reflects the need to encompass the wide variety of organised groups committing serious organised crime.

2.4 Activities associated with Transnational Organised Crime

Organised criminal activity, including criminal activity carried out across borders, encompasses many diverse crimes. It is difficult to determine the exact extent of organised criminal activity world wide due to the secretive nature of its activities. Some estimates have speculated that organised criminal activity is

¹⁵⁷ United Nations Convention against Transnational Organised Crime (2000), Article(3)(2)(c).

¹⁵⁸ A serious offence is understood to mean one punishable by a sentence of 4 or more year’s imprisonment. See United Nations Convention against Transnational Organised Crime (2000) Article(2)(b) and Crimes Act 1961 ss98A(2)(a).

¹⁵⁹ See Chapter five, of this paper, for discussion on the nature of organised crime in New Zealand.

worth as much as US \$2 Trillion.¹⁶⁰ Likewise, it is fruitless to try and list all of the crimes that organised criminal groups carry out across borders. The list is vast, varies between regions and always continues to evolve and grow. However, this section will describe some of the most prevalent criminal activities, associated with organised crime.

Illicit Drugs

Illicit drugs provide criminal groups with an extremely profitable business due to large consumer demand around the world. The UN estimates 208 million people world wide are drug users¹⁶¹ and 28 million of those people are considered problem drugs users. Cannabis is the most commonly used illicit drug with 165.6 million user's world wide. Amphetamine use is estimated having around 24.7 million users in 2008. Other prevalent drugs include Cocaine (16 million users), Opiates (16.5 million users, of which heroin accounts for 12 million) and Ecstasy (around 9 million users).¹⁶² This worldwide demand encourages a global drug trade that is estimated annually at US \$320 billion.¹⁶³

Drug production, in some categories of drugs, is dominated by a relatively few countries. For instance in 2007 Afghanistan accounted for 92% of the world's opium production and Colombia, Bolivia and Peru dominate coca cultivation for supply to the world.¹⁶⁴ The majority of demand for drugs comes from developed nations particularly in the US and Europe.¹⁶⁵ The demand for drugs produced in foreign States creates the transnational nature of the illicit drug trade. Drugs must cross borders to get from producing countries to those

¹⁶⁰ New Zealand Ministry of Justice. *Organised Crime Strategy*. (March 2008- June 2009). Online at < <http://justice.govt.nz/policy-and-consultation/crime/documents/organised-crime/Organised-Crime-Strategy-document.pdf>>.

¹⁶¹ United Nations Office on Drugs and Crime, World Drug Report, 2008, online at <http://www.unodc.org/documents/wdr/WDR_2008/WDR_2008_eng_web.pdf>. Drugs users are defined as persons who have used illicit drugs at least once in the last 12 months.

¹⁶² Ibid.

¹⁶³ United Nations Office on Drugs and Crime, World Drug Report, 2007, online at <http://www.unodc.org/pdf/research/wdr07/WDR_Readership_survey.pdf> at p 170.

¹⁶⁴ Supra n. 161 at 11, 13.

¹⁶⁵ Ibid.

countries with high demand for the final products, and often they will travel through multiple jurisdictions before reaching their final destination.

Organised crime and the illicit drug trade

Using a broad definition of organised crime, such as in the Palermo Convention, much of transnational drug trafficking would be classified as organised criminal activity. However, the degree of organisation, sophistication and extent of their operations obviously varies, to a great extent.¹⁶⁶ Drug trafficking includes both large scale, continuing, operations as well as small time operations; carried out by criminals, acting based on a particular ‘opportunity’, who wouldn’t consider themselves ‘career criminals’. *The World Drug Report* (2007) also states that most known organised criminal groups are involved in drug trafficking but, rarely limit their criminal activity to just drugs.¹⁶⁷

Drug trafficking in New Zealand

The illicit drug market in New Zealand, reflecting world trends, is considered very profitable attracting local gangs as well as overseas based groups who wish to exploit the NZ market, particularly the amphetamine market.¹⁶⁸

Human Trafficking

Human trafficking is defined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, that supplements the Palermo Convention Crime:

Article 3. Use of terms

For the purposes of this Protocol:

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or

¹⁶⁶ Supra n. 163.

¹⁶⁷ Ibid

¹⁶⁸ Supra n. 160. See Chapter five, of this paper, for more discussion on the drug trade in New Zealand.

services, slavery or practices similar to slavery, servitude or the removal of organs,¹⁶⁹

This crime has been met with strong condemnation and revulsion around the world, former UN General Secretary Kofi Annan described trafficking in persons as;

...one of the most egregious violations of human rights that the United Nations now confronts... facilitated by practices that discriminate against women and driven by cruel indifference to human suffering on the part of those who exploit the services that the victims are forced to provide.¹⁷⁰

Human trafficking is big business with the global trade estimated at around \$US32 Billion.¹⁷¹ Estimates on the scope of human trafficking vary widely, the International Labour Organisation estimates 12.3 million people are in forced labour, bonded labour, forced child labour and sexual servitude at any given time. Other estimates range from 4 million-27 million.¹⁷² The US government estimates that 800,000 people are trafficked across national borders every year.¹⁷³ Approximately 80 percent of trafficking victims are women and girls and up to 50 percent are minors (under 18 years of age).¹⁷⁴ Sexual exploitation is the most common form of enslavement (79%) followed by forced labour (18%).¹⁷⁵

Transnational Organised Crime and Human Trafficking

Human trafficking is often national or regional and carried out by people of the same nationality as the victims. However, there is still a significant transnational trade in human beings. Europe for instance, is the destination for victims of the widest range of origins and Asian victims are the most likely to

¹⁶⁹ United Nations Convention against Transnational Organised Crime (2000) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime article 3.

¹⁷⁰ Ibid at foreword.

¹⁷¹ Supra n. 163.

¹⁷² Turner, J and Kelly, L. "Trade Secrets: Intersections between Diasporas and Crime Groups in the Constitution of the Human Trafficking Chain", *British Journal of Criminology* (2009) vol. 49, 184. Some consider 27 million to be a conservative estimate.

¹⁷³ United States Department of State, *Trafficking in Persons Report* (2008) at 7. Online at <<http://www.state.gov/g/tip/rls/tiprpt/2008/>>.

¹⁷⁴ Ibid.

¹⁷⁵ United Nations Global report in Human Trafficking (2009) (the report notes these figures may represent bias because sexual exploitation is often a more visible form of human trafficking). <http://www.unodc.org/documents/Global_Report_on_TIP.pdf>.

be trafficked to the widest range of destinations.¹⁷⁶ There is a well established nexus between organised crime and human trafficking. Trafficking in persons is very profitable and criminal groups involved in the trade range from small to large. Furthermore, those groups involved in human trafficking, usually do not limit themselves exclusively to this criminal activity, often involving themselves in a range of other illegal activities.¹⁷⁷

Human Trafficking in New Zealand

The specific offence of trafficking was made illegal in NZ in 2002.¹⁷⁸ Section 98D of the Crimes Act 1961 outlines the offence and penalty for trafficking in people by means of coercion and deception. Thus far no offences of human trafficking have been investigated, prosecuted or resulted in a conviction in NZ.¹⁷⁹ The *US Department of State Trafficking in Persons Report* (2008) lists NZ as a tier one country; deemed to be fully complying with minimum standards to eliminate human trafficking.¹⁸⁰ The report also states that NZ is a destination country for women from Malaysia, Hong Kong, the People's Republic of China and other countries in Asia, trafficked for the purpose of commercial sexual exploitation.¹⁸¹ However, both the United Nations report and the US State Report conclude that, estimations of trafficking in New Zealand are modest.¹⁸²

Immigration Offences/Migrant smuggling

The key difference between smuggled migrants and victims of human trafficking, relates to consent. Smuggled migrants usually consent to the process whereas trafficking victims provide no consent, or their consent is rendered meaningless by the actions of the traffickers.¹⁸³ Furthermore, migrant smuggling always involves crossing borders; trafficking victims may be

¹⁷⁶ Ibid at 7.

¹⁷⁷ Supra n. 172.

¹⁷⁸ Supra n. 175 at 179.

¹⁷⁹ Ibid.

¹⁸⁰ Supra n. 173 at 193.

¹⁸¹ Ibid.

¹⁸² Supra n. 175 at 179 and supra n. 173 at 193.

¹⁸³ United Nations Tool Kit to Combat Trafficking in Persons, online at <http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_1-2.pdf>.

trafficked internally in their own country. The relationship between smuggler and migrant involves a commercial transaction, which will usually finish after the border crossing operation. Human traffickers and their victims often have an ongoing relationship of abuse and exploitation motivated by the generation of profits for the trafficker.¹⁸⁴ It should be noted, however, that often smuggled migrants become victims of human trafficking. Moreover, traffickers may act dually as smugglers, using the same routes for both sets of operations.¹⁸⁵

Migrant smuggling/Immigration Offences in New Zealand

The main types of immigration offences, as identified by immigration New Zealand, are visa applications supported by fraudulent documentation, document forgery and people smuggling.¹⁸⁶ Organised criminal groups have displayed a high level of creativity in producing and obtaining identity documents to facilitate the entry of immigrants into the country. The primary motivation for organised criminals, participating in this activity, is profit.¹⁸⁷

Arms Smuggling

The illegal arms trade is believed to be worth around \$US1 Billion annually.¹⁸⁸ It is estimated that over 600 million small arms and light weapons are in circulation world wide; contributing to around 300,000 deaths annually, of which, 100,000 occur in conflict zones and 200,000 outside of conflict zones.¹⁸⁹ The wide spread existence of arms and the sheer volume creates an enormous challenge to states trying to curb the illicit trade in arms. Kofi Annan described the arms trade as a;

...complex and multifaceted challenge to international peace and security, social and economic development, human security, public health and human rights, among others.¹⁹⁰

The UN has adopted a Protocol against arms trafficking.¹⁹¹ The purpose of the Protocol is to promote, facilitate and strengthen cooperation among States

¹⁸⁴ Ibid at 5.

¹⁸⁵ Ibid at 4.

¹⁸⁶ Supra n. 160.

¹⁸⁷ Ibid.

¹⁸⁸ Supra n. 163.

¹⁸⁹ United Nations Firearms Protocol: Curbing the Illicit Spread of Weapons, UNODC News Letter (April 2005) online at <<http://www.unodc.org/newsletter/en/200504/page005.html>>.

¹⁹⁰ Ibid.

Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.¹⁹² Organised criminal groups are known to be involved in illegal arms trafficking, for instance, in the UK criminal groups notably from Albania, Lithuania, Bulgaria and Croatia have brought weapons or sent weapons into the UK. These weapons may be for private use or for use by criminals.¹⁹³

Arms Trafficking in New Zealand

Little is known about arms trafficking in New Zealand, a fact admitted by the Ministry of Justice despite their concern that NZ organised criminal groups are becoming involved in this offence.¹⁹⁴

Corruption

Corruption is a widespread problem, particularly in countries with weak State institutions and weak implementation of the law. There are close connections between transnational organised crime and corruption; often the success of cross-border criminal operations depends on the corruption of customs or migration officials.¹⁹⁵ The United Nations recognised the link between TNOC and corruption of public officials in the Palermo Convention. Article 8 of this convention requires State Parties to criminalise corruption. In addition to this in UN resolution 55/61 of 4 December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of other conventions was needed. Corruption was described in particularly strong language by the Secretary-General in 2003;

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human

¹⁹¹ United Nations Convention against Transnational Organised Crime (2000) Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime.

¹⁹² Ibid in Article 2.

¹⁹³ Serious Organised Crime Agency, *The United Kingdom threat Assessment of Serious Organised Crime*, 2008/09 at 21.

¹⁹⁴ Supra n. 160.

¹⁹⁵ Velkova, E and Georgievski, V. "Fighting Transborder Organized Crime in Southeast Europe through Fighting Corruption in Customs Agencies". (Southeast European and Black Sea Studies (2004) Vol. 4, No. 2 280-293.

rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish.¹⁹⁶

United Nations General Assembly resolution 58/4 of 2003 adopted the United Nations Convention against Corruption; its main aims are preventing and criminalising corruption, international co-operation and asset recovery.¹⁹⁷

Corruption in New Zealand

New Zealand is generally considered to have very low levels of domestic corruption, ranking first in the world (alongside Finland and Iceland), of 163 countries, as being perceived to have the least levels of corruption, according to the 2006 Corruption Perception Index.¹⁹⁸

Money Laundering¹⁹⁹

Money laundering is vital in facilitating organised criminal activity. As profit is the primary motivation for most criminal activities, criminals must find a way to disguise their ill-gotten gains. The United Nations Office on Drugs and Crime defines money laundering as:

...the method by which criminals disguise the illegal origins of their wealth and protect their asset bases, so as to avoid suspicion of law enforcement and to prevent leaving a trail of incriminating evidence.²⁰⁰

Levi describes money laundering simply as; “...*the cleansing of funds so that they can be used in a way indistinguishable from legitimate money.*”²⁰¹

Effective money laundering enables criminals to remove any possibility of their criminal activities being traced back to them. This makes it more difficult to prosecute criminals and confiscate their proceeds. Laundering money also enables criminals to enjoy the benefits of their crimes including investing their

¹⁹⁶ The Secretary-General, *Statement On The Adoption By The General Assembly Of The United Nations Convention Against Corruption*, New York 31 October 2003. Online at <<http://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html>>.

¹⁹⁷ United Nations Convention against Corruption, *Convention Highlights*, online at <<http://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html>>.

¹⁹⁸ Supra n. 160.

¹⁹⁹ Chapter 3 will discuss the international conventions relating to money laundering in more details. Chapter 4 includes a discussion on anti-money laundering measures in the UK and Chapter 5 includes a discussion on New Zealand’s anti-money laundering measures.

²⁰⁰ United Nations Office on Drugs and Crime, *Introduction to Money Laundering*. Online at: <<http://www.unodc.org/unodc/en/money-laundering/introduction.html>>.

²⁰¹ Levi M, supra n. 2 at 894.

profits for future criminal activity.²⁰² The New Zealand Ministry of Justice identifies three stages to a money laundering operation²⁰³:

1. Placement: placing cash proceeds from crime into the financial system. For example, depositing the cash proceeds in a bank.
2. Layering: splitting the criminal funds into various deposit accounts to hide their origin.
3. Integration: withdrawing the layered funds and bringing them back together in one account or multiple accounts so that they appear legitimate.

There are also many different methods used to launder money, ranging from the sophisticated to the very basic. The most common examples include²⁰⁴:

- "Smurfing" (or structuring): depositing cash at various institutions in amounts less than the amount that must be reported to government, and subsequently transferring them to a central account.
- Currency smuggling: moving funds across borders to disguise their source and ownership by mail, courier or body packing (often to countries with strict bank secrecy laws).
- Exchanging transactions: buying foreign currency that can be transferred to offshore banks.
- Purchasing assets with bulk cash: purchasing cars, boats and real estate in someone else's name then selling them and depositing the funds.
- Gambling: buying gambling chips and after placing a few bets, redeeming the chips for a casino cheque.

Money laundering empowers both organised criminals and corrupt officials. Just as criminals must disguise their illegal gains so too corrupted officials must disguise bribes and other kick-backs.²⁰⁵ Estimates of money laundered globally range from 2-5% of global GDP; this represents between \$US800 billion-\$2 trillion. Despite the huge variation in the estimates, even the lower figure highlights the enormity of the challenge facing the international community to confront money laundering.²⁰⁶

²⁰² Ministry of Justice, *The nature of money laundering*, September 25, 2009. Online at <<http://www.justice.govt.nz/policy-and-consultation/crime/anti-money-laundering-and-countering-the-financing-of-terrorism/chapter-1>>.

²⁰³ Ibid.

²⁰⁴ Ministry of Justice, *Methods of money laundering*, September 25, 2009. Online at <<http://www.justice.govt.nz/policy-and-consultation/crime/anti-money-laundering-and-countering-the-financing-of-terrorism/chapter-2>>.

²⁰⁵ UNODC, *Introduction to money laundering*, online at <<http://www.unodc.org/unodc/en/money-laundering/introduction.html>>.

²⁰⁶ UNODC, *Money-laundering and Globalization*, online at <<http://www.unodc.org/unodc/en/money-laundering/globalization.html>>.

Wildlife and Fisheries Offences

Wildlife smuggling is a global and highly profitable business estimated at \$US 6-8 Billion annually.²⁰⁷ New Zealand's unique wildlife, flora and fauna make it particularly susceptible to this illegal trade. Kea, kaka, tuatara and frogs are just some of the native New Zealand wildlife involved in international smuggling operations. High rewards and a relatively low risk of detection and punishment have made the illegal wildlife trade attractive to organised criminals.²⁰⁸ Apart from robbing New Zealand of its native species organised, groups importing illegal wildlife into NZ run a considerable risk of introducing pests and disease, which could affect primary industries in the country.²⁰⁹

Of particular concern in New Zealand is Paua smuggling, a significant area organised criminal groups have found to be lucrative. An investigation into a large Paua poaching operation in 2008 resulted in the arrest of 65 people in New Zealand.²¹⁰ Organised criminal poaching and distribution impacts significantly on the commercial sector and the NZ police believe that Paua poaching is often used to fund other criminal activities such as the supply of illicit drugs.²¹¹

Terrorism

This paper mentions terrorism in order to distinguish it from transnational organised crime but acknowledge, at times, they are linked. Since 9/11 terrorism has received top priority on the international agenda and its links with organised crime have become apparent. The General Assembly resolution 55/25 of 15 November 2000, that adopts the Palermo Convention, notes “...with deep concern” a growing link between transnational organised crime

²⁰⁷Ministry of Agriculture and Forestry, *Multi-agency effort to catch wildlife criminals*, (30 April 2008).
<<http://www.biosecurity.govt.nz/publications/biosecurity-magazine/issue-74/multiagency>>. Accessed 5 May 2009.

²⁰⁸Supra n. 160.

²⁰⁹Ibid.

²¹⁰Gangs and Organised Crime Bill, No.10 – 2 (2009) at p 6.

²¹¹Ibid.

and terrorist crimes.²¹² Like organised crime, terrorism has been a notoriously difficult concept to define.²¹³ It is not in the scope of this section to attempt a definition of terrorism. Rather, this section seeks to outline particular features that distinguish TNOC from terrorism.

Typically organised criminal groups have been considered non-ideological, in the sense that they do not have a political agenda of their own, nor do they espouse any particular political ideology of their own.²¹⁴ However, it is feasible for criminal organisations to wish to nullify governments, or particular members of government. The method used to achieve this may involve actions such as corruption, kidnapping or violence; the latter making them, at least in the eyes of the media or public, indistinguishable from a terrorist group.²¹⁵ This has been evident amongst drug trafficking groups who have engaged in violence and extortion against judges, prosecutors, elected officials and law enforcement agents. The aim of these actions is the disruption of legitimate government to divert attention from drug operations. The existence of this kind of activity during the 1980's led to the coining of the term narco-terrorism.²¹⁶ Terrorism and organised crime can, at times, exhibit such similar characteristics that any distinguishing features become blurred. This is particularly true when organised criminal groups use violence to achieve their goals or co-operate with terrorists. For instance terrorist groups are known to work with organised criminal groups, or run their own operations, in order to fund their on-going ideological struggle.²¹⁷

Despite this blurring of characteristics, and perhaps an overlapping in activities, the key distinguishing feature remains; organised criminal groups are primarily motivated by profit, while terrorist groups are primarily motivated by a particular ideology or struggle. While terrorism and organised crime may at

²¹² United Nations Convention against Transnational Organised Crime (2000).

²¹³ Organised Crime and Terrorism legal and factual perspectives.

²¹⁴ Finckenauer J, *Problems of Definition: What is Organised Crime?* Trends in Organized Crime/Vol. 8, No. 3, Spring (2005) at 65.

²¹⁵ Ibid.

²¹⁶ Mylonakia, E. "The manipulation of organised crime by terrorists: Legal and Factual Perspectives". *International Criminal Law Review*(2002) Vol. 2: 213-235 at 227.

²¹⁷ Ibid at 228.

times display similar characteristics, it is understood, for the purpose of this thesis, that their fundamentally different motivations mean they must be distinguished. Because of the fundamental differences in motivation, strategies to combat terrorism and TNOC will differ substantially. A strategy aimed at addressing issues that have fostered the creation of terrorist groups will be, obviously, different from a strategy aimed at preventing organised crime. For instance, a strategy to prevent drug trafficking offences needs to address those factors that give rise to demand for drugs. This has no particular relevance to a strategy to prevent the conditions which foster terrorism. It is for this reason that terrorism is not included in the definition of ‘organised crime’ in the Palermo Convention, and also why there are a host of specific conventions and resolutions aimed directly and solely at terrorism.²¹⁸

2.5 *Combating organised crime*

Organised crime is perceived as a major contributor to serious crime, and the extent of its negative impact is often measured by the amount of ‘harm’ it causes to society. Therefore, measures to combat organised crime are based on a desire to reduce the amount of harm it inflicts on society. Organised criminal activities affect a wide range of interests including; individuals, households, businesses as well as other organisations and institutions.²¹⁹ Other less documented criminal activities such as wildlife smuggling also cause significant harm to the environment.²²⁰

Often the most documented measurement of harm, caused to society, relates to the economic costs of organised criminal activities. For instance, in the UK

²¹⁸ For example, International Convention for the Suppression of Terrorist Bombings (1997), International Convention for the Suppression of the Financing of Terrorism (1999), International Convention for the Suppression of Acts of Nuclear Terrorism (2005). See online at <<http://www.un.org/terrorism/instruments.shtml>> for a comprehensive list and details of these conventions.

²¹⁹ Tusikov N, *Developing Harm Analysis to Rank Organized Crime Networks: The Canadian Method* (All Academic Research: International Studies Association Conference, February 15-18, 2009) at 3.
<http://www.allacademic.com/meta/p_mla_apa_research_citation/3/1/3/1/1/pages313114/p313114-3.php>.

²²⁰ Ibid at 3.

preliminary research conducted by the Home Office, regarding the economic cost of organised crime, estimated it to be as much as £40 billion a year. The report outlined particular costs associated with a number of categories of crime. For instance; the abuse of Class A drugs is (conservatively) estimated at £13 billion a year, indirect tax fraud estimated at £7 billion annually and organised immigration crime estimated to be at least £3 billion.²²¹ In Australia organised crime is, conservatively, estimated to have cost the country \$10AUS Billion.²²² Illicit drug use is perhaps the most prevalent and serious crime that causes enormous harm to societies around the world.²²³ Criminal groups are well known to be involved in producing and supplying drugs to consumers.²²⁴ For instance, in New Zealand, 75% of drugs labs have been attributed to known organised criminal groups.²²⁵ Moreover, it is estimated that in 2005/06 illicit drug use cost New Zealand \$1.31 Billion in social costs.²²⁶

2.5.1 Traditional measures

The traditional concept of TNOC has emphasised an external, ethnically based, threat, which requires increased crime control based primarily on repressive criminal justice measures.²²⁷ Strategies to combat organised crime have typically focused on targeting and immobilising specific criminals or criminal groups; utilising traditional criminal justice measures to achieve these goals.²²⁸ Traditional, repressive, measures to combat organised crime have not been effective, on their own, to effectively investigate, prosecute and prevent organised crime.²²⁹ They do not sufficiently address factors that encourage participation in organised crime, nor the issues that give rise to the creation and development of illegal markets. Woodiwiss has described traditional criminal justice measures, to combat organised crime, as akin to;

²²¹ Ibid at 8-9.

²²² Australian Crime Commission, *Organised Crime in Australia*, 2009, at 5. Online at <http://www.crimecommission.gov.au/publications/oca/_files/2009/2009_oca_complete.pdf>.

²²³ Supra n. 161 and Supra n. 163.

²²⁴ Ibid and Supra n. 222.

²²⁵ Gangs and Organised Crime Bill, No.10 – 2 (2009), explanatory note at 6.

²²⁶ Ibid.

²²⁷ Edwards A, supra n. 96 and Levi M, supra n. 2 at 896 and 897.

²²⁸ Woodiwiss M, supra n. 10 at 24.

²²⁹ Levi M, supra n. 2 at 897.

...the construction of a twenty-first century criminal justice equivalent of those labyrinthian traps for rats built by 1930s psychologists to learn whether and how quickly the rats can escape from them.²³⁰

The development of additional, non-traditional, measures is needed to complement traditional measures. This is vital in developing a sound framework for combating organised crime.

Traditional Legal response

By conceiving organised crime as an external threat authorities limit themselves to a certain strategy of control while, by default, negating other possible strategies.²³¹ Shifting blame from organised crime on to, often ethnically defined, ‘others’ instigates a repressive, criminal based, control strategy focused on enforcing, punishing, containing, disturbing and dismantling these outsider groups.²³² Based on this conception, law makers have sought to create legislation aimed at specific offences associated with these criminal groups.²³³ In addition to this approach, increasingly, many countries have begun to criminalise membership or participation in an organised criminal group.²³⁴

Law enforcement

Law enforcement has generally been mired in traditional concepts of organised crime, failing to accurately understand that which they are attempting to target. There has been a tendency amongst law enforcement agencies to treat centralised hierarchical criminal groups as synonymous with organised crime, while disregarding networks as ‘disorganised’ crime when, in fact, networks are a highly sophisticated and adaptable organisational form.²³⁵ In addition, most criminal intelligence has been directed at traditional conceptions of

²³⁰ Woodiwiss M, supra n. 10 at 25.

²³¹ Edwards A, supra n. 96 at 214.

²³² Ibid.

²³³ Leong A, supra n. 14 at 81 and Levi M supra n. 2 at 896

²³⁴ Ibid. See also Chapter 4 of this thesis; outlining the UK approach to target specific offences associated with organised crime with criminalising participation in an organised criminal group. Chapter 5 discusses NZ’s approach to also criminalise participation in an organised criminal group.

²³⁵ Williams P, supra n. 112 at 73.

organised crime, attempting to work out the pyramid structure of certain criminal groups, so as to capture and imprison ‘crime bosses’.²³⁶ Because of this false conception, police intelligence has failed to develop an accurate picture of organised criminal activity and therefore have often failed to keep up with changes in how groups operate, developments in illicit markets, and often failed to map out future trends.²³⁷

Traditional law enforcement, exhibiting a preoccupation with key criminal actors and getting them ‘behind bars’, failed to recognise the importance of targeting criminal finances to achieve this purpose.²³⁸ Legislation targeting criminal finances has, until recently, been considered ancillary to the main crime being targeted.²³⁹ Financial investigations were never an integral part of criminal investigations until the 21st century.²⁴⁰

2.5.2 *Comprehensive approach*

Levi and Maguire outline the two, basic, core elements that are needed to effectively prevent or reduce organised crime.²⁴¹

1. the prevention or reduction of particular forms of serious crime (a focus on harmful *acts*); and
2. a reduction in the growth and development of organized criminal groups or formations, and in their involvement in the commission of those serious offences (a focus on harmful *actors*).

Levi and Maguire acknowledge the need to prioritise and focus on harmful acts (serious crime), but also acknowledge that organised groups, often, have the greatest ability to cause vast amounts of harm. This view is supported by Chris Eades, who states:

Those most successful in the commission of crimes tend to be the best organised, they garner the most profit and they cause the most harm; they are thus most deserving of dedicated and concerted law enforcement attention.²⁴²

²³⁶ Leong A, *supra* n. 14 at 77.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.* See Chapter 4, of this thesis for discussions on US and UK. And chapter 5 for discussion on NZ.

²⁴⁰ *Ibid.*

²⁴¹ Levi M and Maguire M, *supra* n. 1.

²⁴² Eades C, *Serious Organised Crime: A New Approach*, The Centre for Crime and Justice Studies (may 2006) at 1.

<www.crimeandjustice.org.uk/opus239/serious-organised-crime.doc>.

It is also clear that traditional measures to combat organised crime are not sufficient on their own. An understanding of the context and development of certain crime events and illegal markets is needed. Understanding the factors that generate increased opportunities for crime will, in turn, help build recognition of the social and community issues that give rise to certain criminal markets.²⁴³ This is essential in building comprehensive strategies to combat organised criminal groups, who exist to provide illicit goods and services to these markets.

*Participation Offence*²⁴⁴

To both effectively target and prevent organised crime, participation in a criminal group should be inherently risky.²⁴⁵ Criminalising participation in a criminal group is a necessary first step and necessary addition to targeting those criminal activities associated with organised crime. Criminal groups have proved adept at responding to legislative and law enforcement measures aimed at disrupting criminal activity.²⁴⁶ A successful prosecution under a ‘sectorial’ approach²⁴⁷ often requires that proof that the individuals are involved in the commission of the offence.²⁴⁸ Organisers and facilitators of criminal groups will often refrain from carrying out substantive offences, therefore, under a sectorial approach, there is very little risk associated with their role.²⁴⁹ Moreover, traditional conspiracy legislation fails to take into account the

²⁴³ Edwards A, supra n. 96 at 216.

²⁴⁴ Chapter 3 will discuss the United Nations Convention against Transnational Organised Crime (2000) which obliges Member States to criminalise membership or participation in an organised criminal group. Chapter 4 will outline the US approach to criminalising participation, and discuss how erroneous perceptions of organised crime have undermined US efforts. Chapter 4 also discusses how the UK has resisted criminalising membership or participation in an organised criminal group. Chapter 5 will discuss New Zealand’s approach to criminalising participation in a criminal group.

²⁴⁵ See UK case study in Chapter 4. The strategy of the UK is to make participating in organised crime inherently risky. However, the UK takes a sectorial approach to combating organised crime, primarily targeting specific activities associated with organised crime and neglecting to criminalise participation in organised criminal groups.

²⁴⁶ Klerks P, supra n. 92 at 102.

²⁴⁷ Sectorial approach, in this context, refers to solely targeting specific offences or activities associated with organised crime. See Chapter 4 case study on the UK in this thesis.

²⁴⁸ Levi, M and Smith, A “*A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*”, Home Office Online Report 17/02 at 16. Online at <<http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr1702.pdf>>.

²⁴⁹ Ibid.

activities of a multifaceted criminal group.²⁵⁰ Ensuring that criminal groups are targeted, effectively, requires the development of an accurate conception of organised crime. A broad statutory definition of ‘criminal organisation’ is preferred because it can encompass the wide variety of criminal groups and networks that operate in illegal markets.²⁵¹

Targeting criminal finances²⁵²

Profit is the primary motivator for criminals and, therefore, any effective strategy to combat organised crime must include measures that target money laundering and allow for the seizure and forfeiture of criminal assets, to ensure that criminals cannot hide or profit from their illegal gains.²⁵³ Targeting these areas also helps to effectively investigate and prosecute criminals, by tracking and linking obvious signs of wealth (without an obvious, legal, source of income) to illegal activity. Ensuring that criminals will not profit from illegal activity can also act as a deterrent, if criminals realise they won’t profit from their illicit activity.²⁵⁴ Criminals often seek to infiltrate the legitimate economy to hide their illicit gains. Consequently, engaging the private sector and creating regulatory policies and suspicious activity reporting, for financial institutions, is necessary to construct an effective framework for targeting criminal finances.²⁵⁵ Increasingly States are adopting legislation to ensure private sector cooperation.²⁵⁶

Intelligence led approach²⁵⁷

Organised crime prevention and reduction strategies require an effective intelligence led approach.²⁵⁸ Policy makers and law enforcement agencies that

²⁵⁰ Ibid. Also refer to UK case study under Chapter 4 of this thesis.

²⁵¹ United Nations General-Assembly, *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* A/55/383/Add.1 at paragraph 4.

²⁵² Chapter 3 will discuss international efforts to achieve uniformed standards targeting money laundering and criminal proceeds in the United Nations Convention against Transnational Organised Crime. Chapter 4 and discuss the UK and NZ approaches respectively.

²⁵³ Supra n. 203.

²⁵⁴ Leong A, supra n. 14 at 198.

²⁵⁵ Levi, M supra n. 2 at 898 also see chapter 4 for UK, and chapter 5 for NZ’s, reforms relating to proceeds of crime and anti-money laundering legislation.

²⁵⁶ See chapters 4 and 5.

²⁵⁷ See chapters 4 and 5 for discussion and analysis of the US, UK and NZ approach to intelligence regarding organised crime disruption, prevention and reduction.

base decisions and reactions, relating to organised crime, on accurate crime pattern analysis, will better understand organised crime trends and the groups operating in certain illicit markets.²⁵⁹ Furthermore, the development of sound intelligence is vital to predict future trends and patterns in organised criminal activities. Understanding future trends will ensure law enforcement keeps up with the evolving and fluid nature of criminal networks, and ensure they can implement prevention measures, rather than relying on reactionary measures.²⁶⁰

Law enforcement agencies are increasingly adopting a more intelligence led approach, illustrated by the creation of agencies with the specific purpose of targeting and reducing organised crime.²⁶¹ These agencies rely on an intelligence led approach to inform their responses to organised crime.²⁶²

Effective international cooperation²⁶³

The transnational nature of organised crime requires that States implement effective measures to facilitate cooperation in the investigation, prosecution and prevention of organised crime.²⁶⁴ Creating a central authority to deal with mutual assistance requests is essential to achieving effective cooperation.²⁶⁵ Moreover, States need to implement the provisions of multilateral treaties relating to organised crime, such as the Palermo Convention. This will help to achieve at least minimum standards, which all States will be expected to adhere

²⁵⁸ Leong A, supra n. 14 at 114.

²⁵⁹ Ibid.

²⁶⁰ Ibid at 77.

²⁶¹ Ibid at 114 and 115.

²⁶² See chapter 4 for analysis of the US and UK law enforcement efforts, particularly of interest is the UK's willingness to achieve flexible intelligence led policing compared with the US who have remained rooted in traditional thinking towards organised crime. Chapter 5 discusses New Zealand's efforts to mimic the UK's approach and develop a central agency tasked with an intelligence led approach to combat organised crime.

²⁶³ See chapter 3 for discussion and analysis regarding the international community's effort to achieve a cooperation and a uniformed approach to combating organised crime.

²⁶⁴ Chapter 3 will discuss the international communities effort to facilitate cooperation on criminal matters.

²⁶⁵ United Nations General-Assembly A/59/565, "*A more secure world: Our shared responsibility*", Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, at 50. Online at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/gaA.59.565_En.pdf>. Also see section 3.3.2 of chapter 3 of this thesis.

to. Wide spread adherence to international conventions will also aid the development of a uniformed approach to combating TNOc.²⁶⁶

*Non-traditional prevention measures*²⁶⁷

Traditional approaches have tended to focus only on who is involved (in organised crime) rather than understanding why they are involved.²⁶⁸ Conceptualisation of, and research into, the diverse social contexts of organised crime and the factors that drive it is in a very infant stage.²⁶⁹

...but ethnographic research into the differential associations that enable or preclude the formation and reproduction of criminal co-operatives has identified important avenues for comparative research.²⁷⁰

A large range of diverse factors, such as shifts in local housing, poverty, drug use and labour markets, have been implicated in the development and sustainability of criminal networks.²⁷¹ Traditional situational crime prevention and repressive measures have neglected other important crime reduction and suppression areas, such as community action.²⁷² Governments need to engage with their communities at a ‘grass roots level’ to understand why demand for particular illegal goods and service exists, why criminal networks develop and what attracts people to participate in organised crime. However, as this thesis will illustrate, currently there has been a failure to achieve meaningful prevention measures, outside of the traditional criminal justice approach.

Assessing the impact of transnational organised crime

Law enforcement has traditionally measured disruption based on factors such as; quantity of arrests made, warrants executed, quantity of illicit goods seized

²⁶⁶ Ibid at 51.

²⁶⁷ Chapter 3 highlights the failure of the international community to address non-traditional measures, such as community based crime suppression. Chapter 5 will touch on NZ’s strategy which includes a number of non-traditional measures to combat organised crime.

²⁶⁸ Edwards A, supra n. 96 at 221.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Levi M, supra n. 2 at 897.

and reduction in the number of criminal groups.²⁷³ However, these factors only measure the disruption process, not the actual impact of these measures on organised crime and serious criminal activity.²⁷⁴

It cannot be assumed that any of these particular measures represent more than temporary setbacks for criminal networks, and it does not in the least demonstrate a reduction in the level of harm to society.²⁷⁵ Furthermore, they provide very little basis for future policy changes and learning.²⁷⁶ For instance, countries may have as an objective the reduction of overall harm caused by serious crime on society.²⁷⁷ However, as Levi remarks;²⁷⁸

...the impact of anti-organised crime measures on outcomes remains insufficiently analysed, since there are little reliable data on the 'before' or 'after' of (a) levels, or (b) organization of drugs and people trafficking...etc.

Levi illustrates that the lack of reliable data, relating to the impact of anti-organised crime measures, extends to all sectors of illegal activities associated with organised crime. Therefore, to guide future policies and strategies to combat TNOG, the international community and individual States, need to realistically assess the extent of transnational organised crime. They must also develop measures to accurately assess the impact of current policies and responses on organised crime and serious crime in general.

²⁷³ Levi M, supra n. 2 at 902, supra n. 160 at page 7 and Edwards A and Gill P, *After transnational organised crime? The politics of public safety*, in Edwards A and Gill P (eds.), *Transnational Organised Crime: Perspectives on Global Security* (2003) at 277.

²⁷⁴ Supra n. 160 at 7.

²⁷⁵ Edwards A and Gill P, *After transnational organised crime? The politics of public safety*, in Edwards A and Gill P (eds.), *Transnational Organised Crime: Perspectives on Global Security* (2003) at 277.

²⁷⁶ Ibid.

²⁷⁷ As is the approach in the United Kingdom. See case study in chapter 4 of this thesis.

²⁷⁸ Levi M, supra n. 2 at 902.

Chapter Three

International efforts to combat transnational organised crime

3.1. *Complex transnational challenge*

TNOC inevitably leads to unique challenges; the involvement of more than one State complicates the investigation, successful prosecution and prevention in criminal cases. Any effective solution or strategy to combat TNOC must be sought beyond national borders, involving close cooperation amongst the States involved or affected.²⁷⁹ Cooperation must be achieved on a wide range of issues often requiring States to harmonise key provisions of legislation. In practise achieving the necessary level of cooperation amongst States has proved a problematic issue. Clive Hartfield illustrates the difficulty of responding to TNOC:²⁸⁰

It is a global problem to which any potential or aspirational global solution suffers from the political reality of different national priorities and perspectives within the diplomatic arena, and different agency priorities and powers within the nationally-structured, multiple jurisdictional arena. Organized crime is a common menace without a common criminal code.

The first obstacle, which often hinders the successful investigation or prosecution of transnational cases, is the issue of sovereignty. Protecting sovereignty is a primary concern for national governments, often resulting in hesitancy when it comes to co-operating with other States.²⁸¹ The second prevalent obstacle is difficulty in harmonising different legal systems, cultures and customs. This is a significant issue even when cooperation is agreed on and

²⁷⁹ Dandurand, Y, Colombo, G and Passas, N. "Measures and mechanisms to strengthen international Cooperation among prosecution services", *Crime Law Soc Change* (2007) 47:261–289 at 261 see also Richardson Song, L. "Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem". *Berkeley Journal of International Law: University of California* (2007) Vol. 26, no. No. 1 at 80.

²⁸⁰ Hartfield, C. "The organization of 'organized crime policing' and its international context". *Criminology and Criminal Justice* (2008) Vol. 8 at 484.

²⁸¹ Stefano, B "New prospects for inter-state co-operation in criminal matters: The Palermo Convention.". *International Criminal Law Review*(2003) Vol. 3: 151-167. at 155.

assistance granted.²⁸² Domestic prosecution of transnational cases requires evidence, obtained in a foreign country, be presented in a form admissible in the prosecuting countries courts. This can often be difficult, expensive and time consuming to achieve.²⁸³

3.2 Instruments facilitating international cooperation

International instruments, also referred to as treaties, are the corner stone of international law and international criminal justice.²⁸⁴ They are formally signed and ratified agreements, made between two or more States or other international entities.²⁸⁵ Typically international treaties fall into two categories; either bi-lateral or multi-lateral.²⁸⁶ Traditionally, States have sought to form bi-lateral agreements with key partners to achieve cooperation on specific matters.²⁸⁷ However, as the world becomes more integrated and the scope of transnational crime continues to spread around the globe it is apparent that bi-lateral agreements are not sufficient, on their own, to deal with the challenges of organised crime. TNOC often occurs in or affects more than just two jurisdictions. Moreover, negotiating bi-lateral agreements with a large number of States is not only difficult and time consuming, but the substance of the treaties may vary from State to State resulting in lack of international coherence in responding to TNOC.

The complexities of the legislative and procedural framework, within and across jurisdictions, require the international community to take an integrated and uniformed approach, with effective enforcement mechanisms. Such an

²⁸² Ibid.

²⁸³ Richardson Song, L. "Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem". Berkeley Journal of International Law: University of California (2007) Vol. 26, no.1 at 80.

²⁸⁴ Reichel P, supra n. 20 at 255.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid at 256.

approach must be espoused as widely as possible.²⁸⁸ The international communities realisation of this need is reflected in recent multi-lateral initiatives such as the United Nations Convention against Transnational Organised Crime (Palermo Convention), which has achieved wide spread signatories.

3.2.1 Bi-lateral Agreements

The traditional international instruments for cooperation between States were bilateral agreements, they are treaties negotiated and signed between two States. The advantage of bilateral agreements is that they can be tailored and adapted to the specific interests and context of the States involved, which is particularly useful when differences in legal systems must be overcome.²⁸⁹ Furthermore, they have the advantage of being expanded, amended and terminated relatively easily.²⁹⁰ However, concluding bilateral treaties has a number of potential downsides. It can be very time consuming to negotiate separate bi-lateral agreements with many States and this process is often very resource-intensive, which is a particular disadvantage for smaller or under-developed States who cannot afford an extensive international negotiating program.²⁹¹ More powerful States will often favour bilateral agreements over solely multilateral treaties simply because it is a better way for them to get what they want.²⁹²

3.2.2 Multilateral agreements

Multilateral agreements have several signatories ranging from smaller groupings to extensive multilateral treaties, involving the wide spread

²⁸⁸United Nations Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto 2004 at xvii , online at <www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf>.

²⁸⁹ Ibid.

²⁹⁰ Reichel P, supra n. 20 at 256.

²⁹¹ Ibid.

²⁹² Hartfield C, supra n. 280 at 490 The United States is a case and point, for instance they have negotiated an assistance bi-lateral agreement with the Cayman Islands that is one-sided in favour of the US.

participation of States from around the world.²⁹³ Multilateral agreements are often more difficult to draft than bilateral agreements due to the greater number of participants with varying agendas and needs. Negotiations are often drawn out over long periods, as States seek to achieve a consensus that suits all parties involved.²⁹⁴ Furthermore, multilateral agreements are more difficult to amend and terminate, the implementation of some agreements will require establishing a permanent infrastructure (e.g. secretariat), which subsequently requires the investment of further resources.²⁹⁵ Multilateral agreements also suffer the perceived weakness of only achieving the lowest common denominator of consensus as States must exhibit as much flexibility as possible and provide compromises to ensure they achieve wide spread consensus.²⁹⁶ The more States involved the more difficult it becomes to achieve consensus, often leading to conventions that have watered down provisions in an effort to make the convention palatable to the diverse parties involved.

Despite the problems in negotiating multilateral agreements, and the potential for ambiguous or weakened provisions, there are a number of advantages to a multilateral convention. Multilateral agreements provide a framework and degree of stability to international cooperation.²⁹⁷ A multilateral treaty has the potential to achieve a truly wide spread international consensus, particularly when formulated through an organisation with wide spread membership, such as the UN. Multilateral treaties have the advantage of documenting and reinforcing international norms.²⁹⁸ The parties involved are clearly signalling their resolve to establish lasting rules and institutions, based on mutual solidarity and shared responsibility.²⁹⁹ This is of vital importance when attempting to create an international system to combat TNOC.

²⁹³ In the context of organised crime the United Nation's Convention against Transnational Organised Crime (2000) is the most important international multi-lateral treaty, and will be discussed in detail, later in this chapter.

²⁹⁴ Example of UN treaties United Nations Convention against Transnational Organised Crime began negotiation in 1994 but was not completed until 2000.

²⁹⁵ Reichel P, supra n. 20 at 256.

²⁹⁶ Hartfield C, supra n. 280 at 490.

²⁹⁷ Reichel P, supra n. 20 at 256.

²⁹⁸ Hartfield C, supra n. 280 at 490.

²⁹⁹ Reichel P, supra n. 20 at 256.

There must be wide spread international resolve to confront TNOC and to ensure there are common, at least minimum, standards by which States are expected to adhere. On a practical level, signing up to a multilateral agreement relieves the burden on States from having to enter into numerous bilateral agreements, each of which may require different procedures³⁰⁰ and where the substance of the agreement may differ depending with whom it is signed. Finally, in the criminal justice sphere and particularly important in the context of TNOC, by extending the geographical scope of those signing up to a treaty there is a reduction in the possibility that offenders can evade justice, or hide proceeds of crime, by operating from or escaping to States that are not parties to such agreements.³⁰¹

3.2.3 Domestic Law

States may also make allowance for international cooperation, in the absence of formal treaties, within their domestic legal frameworks. The United Nations expressly encourages States to make provision for cooperation on criminal matters within their domestic law.³⁰² For instance, New Zealand has relatively few bi-lateral treaties relating to extradition or mutual legal assistance, instead provides such assistance based on domestic legislation.³⁰³

3.3 Criminal justice across borders

Extradition and mutual legal assistance are essential to facilitating cooperation amongst states to combat TNOC. Extradition ensures that criminals cannot evade justice simply by crossing borders and mutual legal assistance ensures that criminals cannot evade prosecution and confiscation of proceeds when

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² For instance, United Nations Convention against Transnational Organised Crime (2000) article 34(3). See also United Nations Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto 2004, at page 7. Online at <www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf>.

³⁰³ See Chapter 5, of this thesis at section 5.6, which discusses New Zealand's domestic law relating to extradition and the provision of mutual legal assistance.

evidence or proceeds of crime are located in another country.³⁰⁴ Cooperation amongst police and other law enforcement officials is also of vital importance but is usually achieved outside of treaty level on a more informal basis. This section will introduce and outline these key tools, describing the way they are used by states and the common problems associated with them.

3.3.1 Extradition

What is extradition?

The United Nations Office on Drugs and Crime (UNODC) defines extradition as:

...the formal process by which one jurisdiction asks another for the enforced return of a person who is in the requested jurisdiction and who is accused or convicted of one or more criminal offences against the law of the requesting jurisdiction. The return is sought so that the person will face trial in the requesting jurisdiction or punishment for such an offence or offences.³⁰⁵

For a long period there were few examples of any provisions or treaties relating to extradition. Instead extradition was largely a matter of either courtesy or subservience, in the rare cases where it existed at all.³⁰⁶ These days the legal bases for extradition may be through bilateral agreements, multilateral treaties/conventions or through ad hoc agreements. Reciprocity or comity may also be a legal basis for extradition usually when supported by domestic legislation.³⁰⁷ Furthermore, newly emerging international criminal tribunals exercising treaty-based criminal jurisdiction means that extradition may be possible through these non-states bodies.³⁰⁸

³⁰⁴ Australian Government, Attorney-General's. *Department Extradition and mutual assistance* on line at <http://www.ag.gov.au/www/agd/agd.nsf/Page/Extradition_and_mutual_assistance>. The Australian extradition and mutual assistance review, shares this view describing extradition and mutual assistance as two key tools to combating transnational organised crime.

³⁰⁵ United Nations Office on Drugs and Crime Report *Informal Expert Working Group on Effective Extradition Casework Practice* (2004) para 7page 5.

³⁰⁶ Reichel P, supra n. 20 at 259.

³⁰⁷ Supra n. 305 at para 8.

³⁰⁸ Ibid.

Background

During the 1800s bilateral extradition treaties began to emerge, particularly among the commonwealth States who.³⁰⁹ The first multilateral agreements were not formed until much later. The first multilateral convention regarding extradition was the 1933 Organisation of American States Convention on Extradition.³¹⁰ Since then a number of conventions have been created, typically forming around regional groupings, for instance the Arab Extradition Agreement in 1952, the European Convention of Extradition in 1957 and the 1966 Commonwealth scheme for the rendition of fugitives.³¹¹ More recently, the European Union has created multilateral treaties relating to extradition, such as; the 1995 Convention on simplified extradition within the European Union, and the 1996 European Union Convention on the substantive requirements for extradition within the EU.³¹² Provisions relating to extradition are also included in a number of multilateral conventions that deal with specific types of crime such as; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the United Nations Convention against Corruption (2003) and the Palermo Convention.³¹³

Impediments to extradition and grounds for refusal

Despite the vast body of bilateral and multilateral agreements relating to extradition, or perhaps because of this fact, extradition can often be a cumbersome process where significant obstacles still exist to creating a predictable streamlined version of extradition.³¹⁴ The United Nations Office on Drugs and Crime Informal Expert Working Group on Effective Extradition Casework Practice (UNODC report) found a number of factors that impede effective extradition practises.³¹⁵ Apart from weak/outdated extradition treaties

³⁰⁹ Reichel P, supra n. 20 at 259.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid.

³¹³ Dandurand, Y, Colombo, G and Passas, N. "Measures and mechanisms to strengthen international Cooperation among prosecution services", *Crime Law Soc Change* (2007) 47:261–289: at 263.

³¹⁴ Ibid.

³¹⁵ Some common impediments include; absence of double criminality, non-extradition of nationals, non extradition in the case of political offences, non-extradition for human rights

and laws the report also found that countries tend to have widely differing preconditions for extradition.³¹⁶ These refusals may be based on legitimate rationale and moral responsibility, for instance a responsibility to respect fundamental human rights. However, often refusal occurs due to lack of awareness of national/international extradition law and practise, or of alternatives to refusal that may exist.³¹⁷

These, often, inconsistent conditions create delays and confusion in cases of TNO. The UNODC report found that the complexity, length, cost and uncertainty regarding extradition process or procedures is a significant obstacle to swift extradition casework.³¹⁸ The system needs to be consistent and predictable to be effective.

Simplifying the extradition process

In an attempt to streamline the process the UN has set about formulating international standards and norms for extradition and the offences they cover. In 1990 the UN Model Treaty on Extradition was adopted by the UN General Assembly resolution 45/116 and amended in 1997 by resolution 52/88.³¹⁹ Some of the minimum standards set out in the model treaty include an obligation to extradite any persons, subject to the provisions of the treaty, to the requesting State for prosecution or for the imposition or enforcement of a sentence in respect of such an offence.³²⁰ The model treaty also outlines what constitutes an extraditable offence,³²¹ grounds for refusing a request³²² and practical matters such as the correct procedure for channels of communication and required documents.³²³ In addition to model treaties, specific conventions

reasons. United Nations Office on Drugs and Crime Report: Informal Expert Working Group on Effective Extradition Casework Practice (2004) p 6 and 7. See also Reichel P supra n. 20 at 260.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ United Nations Office on Drugs and Crime Report: Informal Expert Working Group on Effective Extradition Casework Practice (2004) at 6.

³¹⁹ Ibid at 9.

³²⁰ United Nations Model Treaty on Extradition (1990) article 1.

³²¹ Ibid Article 2.

³²² Ibid Article 3 and 4.

³²³ Ibid Article 5.

such as the Palermo Convention and the United Nation Convention against Corruption address extradition issues, based on experiences of member States, and have recommended measures to simplify evidentiary requirements and keep the burden of proof at a minimum in extradition proceedings.³²⁴

While streamlining the treaty system regarding extradition is important to a functioning international system, it is the domestic law of requested States that ultimately governs the extradition process.³²⁵ According to the UNODC report:

The sheer size and scope of the resulting domestic variations in substantive and procedural extradition law create the most serious ongoing obstacles to just, quick and predictable extradition.³²⁶

The differing conditions States have for allowing/refusing extradition; the often burdensome evidentiary requirements of requested States, that are not familiar or well understood by requesting States; and inflexible prosecution practices; all contribute to impede efficient extradition.³²⁷

The UN has recognised that an effective treaty system will only be as strong as the domestic laws used to implement the treaty. Therefore the United Nations Model Law on Extradition (2004) was created by the UNODC to compliment the UN Model Treaty on Extradition. The UNODC has constructed model laws for both civil law and common law countries.³²⁸ The UN model law includes provisions seeking to standardise definitions relating to extradition and outlines the legal bases for extradition.³²⁹ The model law outlines the substantive conditions for extradition³³⁰ and provides a list of legitimate grounds for refusing extradition, with the hope of providing consistency and accepted norms.³³¹ The model law also contains provisions relating to documentary

³²⁴ Dandurand, Y, Colombo, G and Passas, N supra n. 313 at 263.

³²⁵ Ibid at 263 and supra n. 318 at 6 para 10.

³²⁶ Ibid.

³²⁷ Supra n. 318 at 6 and 7.

³²⁸ As well as a model for Islamic Countries, which applies specifically to illicit traffic in narcotic drugs, psychotropic substances and precursors. See online at <<http://www.unodc.org/unodc/en/legal-tools/Model.html>>.

³²⁹ United Nations Model Treaty on Extradition (2004) ss 1 and 2.

³³⁰ Ibid at s 3.

³³¹ Ibid at ss 4-15.

requirements³³², transit proceedings³³³ and provisions relating to costs for extradition.³³⁴

3.3.2 Mutual legal assistance

What is mutual legal assistance?

Mutual legal assistance (MLA) describes the process by which States provide formal assistance to one another; commonly in criminal investigations prosecutions and to recover proceeds of crime.³³⁵ The purpose of MLA is to encourage a foreign State to assist in the requesting States judicial process. This may involve, when located in the requested States territory; securing the testimony of possible victims, witnesses or expert witnesses; taking other forms of evidence; or by checking judicial or other official records.³³⁶ The Attorney-Generals Office of Australia provides the following examples of common instances of MLA:³³⁷

- a person is accused of fraud and money laundering offences and the person's bank account records are sought from financial institutions in a foreign country to assist with the investigation and possible prosecution of the person and/or to recover the money/proceeds of crime, or
- a key witness to a crime resides in a foreign country and a witness statement is sought from that person to assist with the criminal investigation and possible prosecution of an accused person.

Background

Often MLA is provided and administered under specific bilateral treaties which will enable States to tailor each treaty to specific legal system and law enforcement needs.³³⁸ Usually the primary motivation for signing a bilateral treaty regarding MLA is to facilitate obtaining foreign evidence in a form admissible in domestic courts.³³⁹ In the case of TNOc however, just as with extradition, on their own MLA bilateral treaties have limited effectiveness. Noting the difficulty in attempting to sign bilateral treaties with multiple States,

³³² Ibid at ss 16-32.

³³³ Ibid at ss 37-40.

³³⁴ Ibid at s 41.

³³⁵ Supra n. 304.

³³⁶ Reichel P, supra n. 20 at 264.

³³⁷ Supra n. 304.

³³⁸ Richardson Song, L. "Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem". Berkeley Journal of International Law (2007) Vol. 26, no. 1 at 81.

³³⁹ Ibid at 82.

a number of multilateral treaties have been drafted, aimed at creating international or at least regional norms and common practises.

Two of the most influential multilateral agreements created are; the Council of Europe Convention on Mutual Assistance in Criminal Matters 1959 and an instrument applied within the Commonwealth called the Commonwealth Scheme for Mutual Assistance in Criminal Matters (known as the Harare Scheme).³⁴⁰ The Council of Europe Convention focuses primarily on assistance in judicial matters; in 2000 the European Union created its own Mutual Assistance Convention to supplement the 1959 Convention.³⁴¹ The Harare Scheme does not create binding international obligations but rather provides useful recommendations on a wide range of issues including; indentifying and locating persons, examining witnesses, obtaining evidence and facilitating the personal appearance of witnesses.³⁴² Furthermore several multilateral agreements have been drafted that deal with specific offences and provide extensive provisions on the subject of MLA.³⁴³ These multilateral agreements include the Palermo Convention and the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) which are relevant in the context of TNOC.³⁴⁴

Procedural issues relating to requests for MLA

One significant problem, creating an obstacle to effective MLA cooperation, is the considerable variation in procedural laws amongst different States.³⁴⁵ For example, when responding to a request for evidence, the requested State may provide the evidence in a form or manner which is unacceptable under the procedural law of the requesting State, or alternatively sometimes the requesting State will require special procedures that are not even recognised

³⁴⁰ Reichel P, supra n. 20 at 264.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid. These conventions are discussed in more details in section 3.5 of this thesis.

³⁴⁵ Dandurand Y, Colombo G and Passas N, supra n. 313 at 268.

under the law of the requested State.³⁴⁶ A United Nations expert group,³⁴⁷ considering this matter, strongly urged States to ensure the greatest possible flexibility in their domestic law and practice, to enable broad and speedy assistance. Furthermore, they noted, it was particularly important to have the capacity to render the assistance in the manner sought by the requesting State.³⁴⁸

When responding to a request it is imperative that consideration is given, as much as possible, to the requesting States procedural requirements. Section 10(1) of the UN Model Law on Mutual Assistance in Criminal Matters (2007) provides that; requests for assistance shall be executed in accordance with any procedures specified in the request, unless such execution would be contrary to the fundamental principles of the law of the requested State. Furthermore s 10(2) provides that s (10)(1) shall apply even if the requested procedures are not used in the requested State, or not available in relation to the type of assistance sought domestically.

Central Authorities

In order to streamline the process of MLA many modern MLA agreements will provide for the creation of a ‘central authority’ to handle incoming MLA requests.³⁴⁹ Usually the Ministry of Justice, or national equivalent, will act as the designated central authority for MLA requests.³⁵⁰ In the US the Department of International Affairs acts as the designated central authority³⁵¹, in New Zealand it is the Attorney-General.³⁵² A central authority helps to facilitate the taking of requests by avoiding courts and diplomatic channels, thus significantly reducing the time required to secure assistance.³⁵³ The creation of a central authority provides States with a nominated body capable and ready to

³⁴⁶ Ibid.

³⁴⁷ United Nations Informal Expert Working Group on Mutual Legal Assistance Case Work Best Practise, Vienna 3-7 December 2001 at p 7.

³⁴⁸ Ibid.

³⁴⁹ Richardson Song, L. Supra n. 338 at 82.

³⁵⁰ Reichel P supra n. 20 at 267.

³⁵¹ Richardson Song, L. Supra n. 338 at 81.

³⁵² Mutual Assistance in Criminal Matters Acts 1992 ss 8 and 25.

³⁵³ Richardson Song, L. Supra n. 338 at 81.

coordinate its own requests for assistance and also stands ready to respond swiftly to incoming requests from foreign States.³⁵⁴ This is vital if States wish to be successful in combating TNOc. Every country needs a centralised body coordinating MLA requests to ensure that delays in assistance are kept to a minimum and to ensure that evidence from witnesses and documentary evidence are produced in a form acceptable for use in the requesting States courts.

The Palermo Convention makes it mandatory to set up a central authority to deal with MLA. The authority is expected to have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution.³⁵⁵ The purpose of the authority as outlined in the convention is to; “...ensure the speedy and proper execution or transmission of the requests received”.³⁵⁶

3.4 Law Enforcement Cooperation

The growth in cases of TNOc and terrorism has resulted in a need for law enforcement agencies to modernise and increase their capability to investigate criminal activity taking place across borders.³⁵⁷ The agencies tasked with investigating instances of TNOc vary from country to country but typically include police, customs agencies and increasingly specific intelligence lead agencies created to tackle organised crime.³⁵⁸

The diversity in national policing structures creates a significant obstacle to transnational police cooperation.³⁵⁹ Even within member States of the European Union; divergent legal systems, different law enforcement strategies

³⁵⁴ Dandurand Y, Colombo G and Passas N, supra n. 313 at 268.

³⁵⁵ United Nations Convention against Transnational Organised Crime (2000) Article 18(13).

³⁵⁶ Ibid.

³⁵⁷ Bantekas I and Nash S, *International Criminal Law 3rd Edition* (2007) at 407.

³⁵⁸ For instance, in the United Kingdom and New Zealand specific agencies (SOCA and OFCANZ) have been created to combat organised crime. They work closely with Police and other agencies such as Customs to achieve their goals. See Chapter 4 case study on the UK (discussing SOCA) and chapter 5 on NZ (discussing OFCANZ).

³⁵⁹ Dandurand Y, Colombo G and Passas N, supra n. 313 at 279.

and the increasing diversity of transnational criminal activity combine to impede effective police cooperation.³⁶⁰ A typical example of these difficulties can be seen in the use of special investigative techniques. Proactive law enforcement strategies, and complex investigations, often require the use of special investigative techniques, such as, wire taps or undercover police operations.³⁶¹ When a case becomes transnational, requiring cooperation between States, laws regulating the use of these techniques can severely hamper the proficiency of the investigation.³⁶² This problem and many other difficulties have plagued police investigations, when the case has a transnational element. Therefore, law enforcement agencies have actively sought to implement and continually improve cooperation. Cooperation is usually structured on a relatively informal level utilising direct agency to agency contact, often facilitated by the service of Interpol.³⁶³

Interpol

Created in 1923, the International Criminal Police Organization (Interpol) is the world's largest international police agency with 187 members (as of 2009).³⁶⁴ Interpol seeks to facilitate cross-border police co-operation, support and assist all organisations, authorities and services whose mission is to prevent or combat international crime.³⁶⁵ Operating in four official languages (English, French, Spanish and Arabic), Interpol provides a secure police communications service, offers a range of operational databases for police and provides other operational police services.³⁶⁶ The Interpol communication system is one of its most important functions, assisting police to circulate crime-related information to one another.³⁶⁷ Its primary purpose is to facilitate cross-border police cooperation against TNOG including drug-trafficking,

³⁶⁰ Bantekas I and Nash S, supra n. 357.

³⁶¹ Dandurand Y, Colombo G and Passas N, supra n. 313 at 279-280.

³⁶² Ibid.

³⁶³ Bantekas I and Nash S, supra n. 357 at 408.

³⁶⁴ Interpol, *About Interpol*, (24 November 2009) online at <<http://www.interpol.int/Public/ICPO/default.asp>>.

³⁶⁵ Ibid.

³⁶⁶ Bantekas I and Nash S, supra n. 357 at 408.

³⁶⁷ Ibid.

human trafficking and internet-based child pornography.³⁶⁸ The aims of Interpol, as stated in the Interpol Constitution and Regulations, are:

- (1) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the 'Universal Declaration of Human Rights';
- (2) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.³⁶⁹

Interpol is not an operational agency in the same manner as a conventional domestic police force. Its four core functions are to provide a secure global police communication service, maintain and provide an operational database service and databases for police for the purpose of circulating critical crime related information, operational police support services and, finally, provide police training and development expertise.³⁷⁰

The two senior decision making bodies of Interpol are the General Assembly and the Executive Committee. The decisions of these two bodies are implemented by the General Secretariat which consists of several departments.³⁷¹ The General Secretariat alongside the Interpol National Central Bureau's (NCB) are responsible for co-ordinating with law enforcement agencies in each Member State to facilitate the everyday work of police co-operation.³⁷² NCBs are vital to the functioning of Interpol's police cooperation efforts. Each Member State has an NCB, usually located within a division of the national police agency or investigation service. The NCB serves as a contact point for all Interpol investigations.³⁷³

The General Secretariat seeks to support the NCBs in three ways; capacity building, police training and development of the 'I-24/7' secure communication system.³⁷⁴ The NCBs are responsible for sending requests for

³⁶⁸ Ibid and supra n. 364.

³⁶⁹ ICPO-INTERPOL Constitution and General Regulations (13 November 2009) <<http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/constitutionGenReg/constitution.asp>>.

³⁷⁰ Bantekas I and Nash S, supra n. 357 at 409 and supra n. 369.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ Interpol, *National Central Bureaus, Regional Activities: What is an NCB?*. Online at <<http://www.interpol.int/Public/Icpo/NCBs/default.asp>>.

³⁷⁴ Ibid.

assistance and receiving requests from other Member States.³⁷⁵ This includes receiving requests for information from other NCBs and replying to requests in turn. NCBs are also responsible for transmitting requests for international cooperation from domestic police and courts to foreign NCBs.³⁷⁶ Apart from this the other core tasks of the NCBs include:³⁷⁷

1. Collection of criminal intelligence related to international offences and offenders. This intelligence is then passed on directly to other NCBs as well as to Interpol's General Secretariat;
2. To ensure that police operations requested by other States NCBs are carried out proficiently;
3. Forming part of the national delegations which attend the annual meeting of the General Assembly.

3.5 United Nations Convention against Transnational organised Crime

Development of international conventions

The rise of TNOG as a perceived threat, in the eyes of world leaders, has led to the creation of several international multi-lateral conventions. These conventions are designed to promote cohesion and uniformity in the measures taken to combat TNOG. The UN has been the vessel for the creation of a number of conventions relating to TNOG, including; the Single Convention on Narcotic Drugs (1961), the Convention on Psychotropic Substances (1971), United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) The United Nations Convention against Transnational Organised Crime (Palermo Convention), the United Nations Convention against Corruption (2003)

Led by the United States, the conventions directed at illicit drugs and drug trafficking represent a desire, of the international community, to curb the

³⁷⁵ Bantekas I and Nash S, supra n. 357 at 410.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

production, transportation and supply of illegal drugs.³⁷⁸ An important purpose of the two earlier treaties is to codify internationally applicable control measures in order to ensure the availability of narcotic drugs and psychotropic substances for medical and scientific purposes, and to prevent their diversion into illicit channels.³⁷⁹ The purpose of the 1988 Convention is set out in article 2 where it states;

The purpose of this Convention is to promote co-operation among the parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension...³⁸⁰

It is intended that the three conventions, relating to illicit drugs, will be mutually supportive and complementary, creating a comprehensive international legal framework for the purpose of stemming the production and supply of illegal drugs.³⁸¹ The 1988 Convention also highlights the perceived growing links between organised crime and drug trafficking. It states in the preamble that State Parties are aware that the illicit traffic in drugs;

...generates large financial profits and wealth enabling transnational criminal organisations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all levels.

In recognition of the need for States to better co-operate in facing up to criminal groups involved in the illegal narcotic trade the 1988 convention includes specific articles on extradition (article 6), mutual legal assistance (article 7), money laundering (article 5), transfer of proceedings (article 8), as well as other forms of co-operation and training (article 9).

The conventions, relating to illicit drugs, represent awareness by the international community of the need for effective cooperation to combat organised crime and its associated activities. However, until the creation of the Palermo Convention, cooperation was limited; applying only to specific activities, such as, drug production and trafficking.

³⁷⁸ Woodiwiss M, supra n. 10 at 15.

³⁷⁹ United Nations Office on Drugs and Crime, *Drug-Related Treaties*, online at <<http://www.unodc.org/unodc/en/treaties/index.html>>.

³⁸⁰ Article 2(1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

³⁸¹ Supra n. 379.

3.5.1 *Universal convention to combat TNOC*

The United Nations Convention against Transnational Organised Crime (known as the Palermo Convention) opened for signature in Palermo, Italy, on the 12-15th December 2000 and came into force on 29 September 2003.³⁸² It is the product of efforts undertaken by the UN beginning in 1994, the year in which the World Ministerial Conference on Organised Transnational Crime (Naples Conference) produced a Political Declaration and a Plan of Action.³⁸³ These instruments plotted for the first time the creation of a uniform and legally-binding convention, with an aim to harmonise methodologies, structures and procedures needed to tackle TNOC in all its forms and manifestations.³⁸⁴

The Convention represents the international community's desire for a truly global approach to combat TNOC. One of its main purposes is to promote cooperation for the prevention of, and effective fight against, TNOC.³⁸⁵ It seeks to enlarge the number of States that take effective measures against TNOC and to forge and strengthen cross-border links between States. The convention wishes to respect the differences and specificities of diverse legal traditions and cultures, while at the same time promoting a common language, uniform minimum standards and helping to remove some of the existing barriers to effective transnational collaboration.³⁸⁶

The Palermo Convention has three supplementary protocols dealing with specific offences. The protocols were deemed necessary, in addition to the main convention, to effectively deal with the offences contained within them.

³⁸² United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and its Protocols: Conference of the Parties to the United Nations Convention against Transnational Organized Crime*, online at <<http://www.unodc.org/unodc/en/treaties/CTOC/index.html>>.

³⁸³ Betti, S *New prospects for inter-state co-operation in criminal matters: The Palermo Convention* (International Criminal Law Review (2003) Vol. 3: 151-167 at 151.

³⁸⁴ Ibid.

³⁸⁵ United Nations Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto 2004, at XVII online at <www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf>.

³⁸⁶ Ibid and at XVIII.

The three protocols address, respectively, offences relating to human trafficking, migrant smuggling and firearms.³⁸⁷

Structure

The Legislative Guide for the Implementation of the Palermo Convention summarises the main goals and achievements of the convention as follows:³⁸⁸

The Organized Crime Convention:

- (a) Defines and standardizes certain terms that are used with different meanings in various countries or circles;
- (b) Requires States to establish specific offences as crimes;
- (c) Requires the introduction of specific control measures, such as protection of victims and witnesses;
- (d) Provides for the forfeiture of the proceeds of crime;
- (e) Promotes international cooperation, for example through extradition, legal assistance and joint investigations;
- (f) Provides for training, research and information-sharing measures;
- (g) Encourages preventive policies and measures;
- (h) Contains technical provisions, such as for signature and ratification.

The legislative guide clarifies the terminology relating to States obligations under the convention. Some provisions are explicitly mandatory, other measures are strongly encouraged and some are entirely optional.³⁸⁹ The guide also acknowledges that the Palermo Convention was drafted for general purposes; thus the level of abstraction is high, and therefore, the text is not suitable to be adopted verbatim into domestic legislation. Rather, States are encouraged to adopt the spirit and meaning of the various articles, as they draft national legislation.³⁹⁰

It should be emphasized that the provisions of the Convention, and its Protocols, set only minimum standards, which States are expected to meet for the sake of conformity.³⁹¹ Provided that the minimum standards are met, State Parties are free to exceed those standards and, in several provisions, are

³⁸⁷ The protocols are officially named as; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.

³⁸⁸ *Supra* n 385 at 6.

³⁸⁹ *Ibid* at 7.

³⁹⁰ *Ibid*.

³⁹¹ *Ibid* at 11.

expressly encouraged to do so.³⁹² The Palermo Convention can be divided into four main thematic areas containing provisions dealing with; criminalisation, measures to enhance international cooperation, technical cooperation and implementation.³⁹³

Substantive Criminal Law

The Palermo Convention contains mandatory provisions requiring State Parties to establish a number of offences in their domestic legislation, if these do not already exist. Those States with relevant legislation already in place must ensure the provision of such laws conform to the convention's requirements and amend their legislation should that be necessary.³⁹⁴ Under the provisions of the Palermo Convention State Parties are expected to adopt, into their domestic legal framework, measures that include:

- criminalising participation in an organised criminal group,³⁹⁵
- criminalising and taking measures against the laundering of proceeds of crime,³⁹⁶
- criminalising and taking measures against corruption,³⁹⁷
- criminalising and taking measures against obstruction of justice³⁹⁸

A general consensus was found during the negotiations for the Palermo Convention that the activities covered by these offences are vital to the success of the vast majority of criminal operations, and to the ability of offenders to operate efficiently.³⁹⁹ They also enable groups to generate substantial profits and to protect themselves, as well as their illicit gains, from law enforcement authorities. It is therefore necessary to criminalise and focus on these offences,

³⁹² See for example Article 34(3) and Ibid.

³⁹³ Dimitri Vlassis, *United Nations Convention against Transnational Organized Crime* in Berdal M R and Serrano M, *Transnational organized crime and international security: business as usual?*(2002) at 90.

³⁹⁴ Supra n. 385 at 17.

³⁹⁵ United Nations Convention against Transnational Organised Crime (2000) article 5.

³⁹⁶ Ibid at article 6 and 7.

³⁹⁷ Ibid article 8 and 9. Criminalising corruption is addressed as a separate topic, in section 3.6, so as to include discussion on the United Nations Convention against Corruption (2003).

³⁹⁸ Ibid at article 23-25.

³⁹⁹ Supra n. 385 at 17.

as part of a coordinated global effort to combat organised criminal groups and their associated activities.⁴⁰⁰

Criminalising participation in an organised criminal group

Article 5 of the Palermo Convention requires State Parties to adopt legislation, and other measures⁴⁰¹ that may be necessary, to establish as criminal offences, distinct from offences involving the attempt or completion of criminal activity, either or both of the following offences⁴⁰²:

- (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 organized criminal group;
- (ii) Conduct by a person who, 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 an active part in:
 - a. Criminal activities of the organized criminal group;
 - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

As outlined in chapter two,⁴⁰³ the Palermo Convention employs a broad notion of what constitutes an organised criminal group. This ensures that both structured criminal groups and looser networks of criminals are included in the scope of this convention.

The two criminalisation options, outlined in article (5)(a)(1)(i) and (ii), reflect the two common methods States have used to criminalise the act of participation in a criminal group. Typically Common Law countries have used the offence of ‘conspiracy’, while Civil Law countries tend to use offences that proscribe an involvement in a criminal group. Alternatively some States have opted to use a combination of both approaches.⁴⁰⁴ To ensure that these approaches are used in harmony in the global effort to combat TNOC, both methods are considered equivalent under the convention. States have the

⁴⁰⁰ Ibid.

⁴⁰¹ United Nations General-Assembly, Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto A/55/383/Add.1 at paragraph 9. The interpretive notes emphasise that ‘other measures’ are additional to legislative measures and presuppose the existence of a law.

⁴⁰² United Nations Convention against Transnational Organised Crime (2000) at article 5(1)(a).

⁴⁰³ Section 2.2.2.

⁴⁰⁴ Supra n. 385 at 21.

discretion to choose to criminalise one or the other, or both offences. Article 5(1)(a)(i) reflects the ‘conspiracy’ approach and 5(1)(a)(ii) the approach favoured by civil law countries who have sought to criminalise participation in a criminal group.⁴⁰⁵

Including both methods allows for effective action against organised criminal groups, without forcing States to introduce a legal concept (conspiracy or criminal association) that was foreign to their domestic law prior to ratifying the convention. However, it would be useful for States signing up to the convention to be familiar with both concepts, in addition to treating them as equivalent, to facilitate in answering requests for legal assistance in cases of TNOC.

Article 5(1)(b) also deals with persons who organise, assist or in some way facilitate serious organised criminal groups. The provision requires that States establish as an offence, when committed intentionally:

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

This article stresses the need to criminalise those who organise serious criminal activity, but, who may not necessarily participate in the commission of the offence. Article (5)(1)(b) also reflects the need to target intermediaries and facilitators who are often instrumental in bringing together criminals and resources needed for the successful commission of serious crimes. This is particularly true in the network model of organised crime, where looser connections of criminals need intermediaries, those people with the ‘right’ contacts, so they can gather the necessary skill sets for a particular ‘job’.⁴⁰⁶

Criminalising and taking measures against the laundering of proceeds of crime

Successful organised criminal operations, aimed primarily at generating large amounts of money, need to find a way to store and use the money without its

⁴⁰⁵ Ibid.

⁴⁰⁶ Klerks P, supra n. 92 at 101.

illegal source being traceable. This requires a method of making ‘dirty’ money ‘clean’, a process that is commonly referred to as ‘money laundering’.⁴⁰⁷ Money laundering involves transforming the profits of a crime (or crimes) into money that has the appearance of coming from a legitimate source, and makes the criminal origin of the money difficult to trace.⁴⁰⁸ The assets criminals accumulate from TNOC activity can be used to finance future criminal operations, reward past crimes and provide an incentive to participate in future crimes.⁴⁰⁹ An effective global effort to combat TNOC needs to have strong harmonised measures to deal with money laundering and to ensure criminals cannot profit from their ill-gotten gains.

The Palermo Convention reflects the need for an effective international solution to the problem of money laundering.⁴¹⁰ Thus the convention includes provisions dealing with criminalisation of money laundering and provisions outlining measures that States must take to ensure they will effectively confront money laundering. Furthermore, the convention includes provisions directed at seizing and confiscating the proceeds of crime, with the aim of ensuring that crime does not pay.

Criminalisation aspects

Article 6 requires States to criminalise the conversion or transfer of proceeds of crime⁴¹¹ and the concealment or disguising of the nature, source, location, disposition, movement or ownership of proceeds of crime.⁴¹² Furthermore, but subject to the basic principles of each States domestic law, States must also criminalise the acquisition, possession or use of proceeds of crime⁴¹³ and the participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with Article 6.⁴¹⁴ To satisfactorily meet the requirements set out under this article States must seek to apply the offences

⁴⁰⁷ Levi M and Maguire M, supra n.1 at 401.

⁴⁰⁸ Ibid.

⁴⁰⁹ Supra n. 385.

⁴¹⁰ Ibid 39.

⁴¹¹ Article 6(1)(a)(i).

⁴¹² Article 6(1)(a)(ii).

⁴¹³ Article 6(1)(b)(i).

⁴¹⁴ Article 6(1)(b)(ii).

listed above to the widest range of criminal conduct.⁴¹⁵ For instance, where a State party requires legislation setting out a list of specific predicate offences, such a list must include a comprehensive range of offences that are associated with organised criminal groups.⁴¹⁶

Additional measures

Placing illicit funds into the legitimate financial system is a vital part of the money laundering process. Once achieved, tracing the assets gained from illicit activity becomes much harder or even impossible. Stopping organised criminal groups from taking this first step and developing the capacity to track the movement of assets is crucial and requires significant international cooperation and harmonisation.⁴¹⁷ Article 7 of the Palermo Convention outlines a number of additional measures that States are expected to take to effectively deal with money laundering problems. This article emphasises an expectation that all State Parties will take strong domestic measures to deter money laundering.

Notably Article 7 contains two major mandatory requirements. Firstly, States are expected to establish a comprehensive domestic regulatory and supervisory regime for banks, non-bank financial institutions and where appropriate other bodies susceptible to money laundering.⁴¹⁸ Secondly, they must ensure that the domestic agencies tasked with combating money-laundering have the ability to cooperate, and exchange information, at the national and international levels. This includes seriously considering the establishment of a specialist financial unit to serve as national centre to aid in the collection, analysis and dissemination of information regarding potential money laundering.⁴¹⁹ The aim of these two requirements is to prevent the introduction of illicit funds into the legitimate financial system and furthermore to ensure the necessary

⁴¹⁵ Article 6 (2)(a)-(c).

⁴¹⁶ Article 6(2)(b).

⁴¹⁷ Supra n. 385 at 41. Article 7(4) stresses the need for State parties to “*develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering*”.

⁴¹⁸ Article 7(1)(a).

⁴¹⁹ Article 7(1)(b).

mechanisms and procedures are in place to detect and trace transactions or funds that may be of a criminal nature.⁴²⁰

Targeting criminal proceeds: Making sure crime doesn't pay

In addition to the money laundering provisions, the Palermo Convention provides a number of provisions aimed at; identifying, freezing, confiscating and seizing illegally gained proceeds and property.⁴²¹ There has been difficulty in harmonising the international system in this area because significant variations exist in the methods and approaches employed by different legal systems.⁴²² Some countries employ a property-based system, others a value-based system, and a number opt to combine the two. The first method allows for the confiscation of property found to be proceeds or instrumentalities used for the commission of crime. The second method allows the determination of the value of proceeds and instrumentalities of crime and the confiscation of an equivalent value.⁴²³ The Palermo Convention attempts to achieve some integration and promote a global approach by devoting three articles (articles 12-14) to this issue.⁴²⁴

Article 12

Article 12 requires States to adopt measures, to the greatest extent possible within their legal systems, which may be necessary to enable the confiscation of proceeds of crime derived from offences covered by the convention or property that corresponds to the value of the proceeds.⁴²⁵ Furthermore States must also adopt measures that enable the confiscation of property, equipment or other instrumentalities used in, or destined for use in offences, covered by the convention.⁴²⁶ The legislative guide supplementing the Palermo

⁴²⁰ Article 2 also contains a 'strong suggestion' that States consider implementing measures to detect and monitor the movement of cash (and other negotiable instruments) across their borders. However this is to be balanced against the need to ensure legitimate business is not impeded.

⁴²¹ The terms associated with money laundering and confiscation are found in article 2 of the United Nations Convention against Transnational Organised Crime (2000).

⁴²² *Supra* n. 385 at 141.

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

⁴²⁵ Article 12(1)(a).

⁴²⁶ Article 12(1)(b).

Convention indicates that the phrase, “*to the greatest extent possible within their domestic legal systems*”, is intended to reflect the variations in the way that different legal systems carry out their obligations under this convention.⁴²⁷ While acknowledging the diverse methods States choose, to deal with these obligations, it is expected they will comply with the intent and ‘essence’ of the provisions of the article.⁴²⁸

Article 12(6) also requires that State Parties empower their national courts or relevant authorities to order bank, financial or commercial records be made available or be seized.⁴²⁹ Furthermore, this article expressly forbids the use of ‘bank secrecy’ as a reason for States failing to fulfil this provision. This provision reflects the importance of financial institutions in the money laundering process and also how vital cooperation between them and the authorities is in tracing criminal’s illegal gains.

Article 13

Article 13 deals with procedures relating to international cooperation for the purposes of confiscation, reflecting the need to address the transnational nature of organised crime, where criminals often seek to hide illegal proceeds overseas. The article requires that State parties; receiving a request from another State party, regarding confiscation matters, must take steps to identify, trace, and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 12(1), situated in the territory of the requested State Party, for the purpose of eventual confiscation.⁴³⁰ Article 13(3) outlines practical matters relating to the form in which requests are to take and the substance contained within them. For instance, Article 13(3)(a) details that a request should include a description of the property to be confiscated and a summary of the facts the requesting State party is relying on, to make such an

⁴²⁷ Supra n. 385 at 142.

⁴²⁸ Ibid.

⁴²⁹ This provision (Article 12(6)) applies for the purposes of Articles 12 and 13 of the United Nations Convention against Transnational Organised Crime (2000).

⁴³⁰ Article 13(1) and (2).

order. This article also outlines the manner in which requests should be drafted, submitted and executed by the State parties involved.⁴³¹

Article 14

Article 14 focuses on the disposal of confiscated crime proceeds. Paragraph 2 provides that requested State parties, when determining how to dispose of confiscated proceeds, shall give priority to the requesting State party. There is a desire that the confiscated assets should be returned to the requesting State so compensation may be given to the victims of the crime or to return the property or proceeds of crime to their legitimate owners. However, Article 14(3) also encourages States to consider concluding an agreement whereby proceeds may be contributed to the United Nations to fund technical assistance activities under the Palermo Convention, or an arrangement to share the proceeds with other States parties that have assisted in their confiscation.⁴³²

Obstruction of Justice

Article 23 of the Palermo Convention obliges State Parties to create two criminal offences relating to the obstruction of justice. Firstly, States must establish as a criminal offence; the use of physical force, threats, intimidation, or the giving of undue advantage to induce false testimony, or to interfere in the giving of testimony, or the production of evidence in a proceeding relating to offences established under the convention.⁴³³ Secondly, States are required to criminalise interference with the exercise of duties by justice or law enforcement officials.⁴³⁴

The aim of the first offence is to deter efforts to influence potential witnesses. Thus the article addresses both coercive measures (threats, physical force) and corruptive measures (bribes).⁴³⁵ The second offence only includes coercive measures because, as public officials, justice and law enforcement officials are

⁴³¹ Supra n. 385 at 143.

⁴³² Ibid.

⁴³³ Article 23(a).

⁴³⁴ Article 23(b).

⁴³⁵ Supra n. 385 at 92.

included under article 8 relating to corruption.⁴³⁶ In addition to criminalising efforts to obstruct justice, article 24 requires that States take appropriate measures to ensure the protection of witnesses.

Promoting International Cooperation

The Palermo Convention seeks to promote cooperation, amongst State Parties, primarily by provisions relating to extradition, mutual legal assistance and law-enforcement cooperation.⁴³⁷

Extradition

Article 16 of the Palermo Convention relates to extradition. The main obligations for State Parties under this article are to ensure that the following offences are deemed extraditable offences in any extradition treaties signed between States⁴³⁸;

- Offences established in accordance with articles 5, 6, 8 and 23 of the convention, that are transnational in nature and involve an organised criminal group.
- The article may also apply to other serious crime not covered by this article; when the offence is transnational in nature and involves an organised criminal group⁴³⁹
- Offences established in accordance with Articles 5, 6, 8 and 23; that involve an organised criminal group, or serious crime that involves an organised criminal group, where the person who is to be extradited is located in the territory of the requested State.

State Parties employing a general statutory extradition scheme must ensure that the offences described above are included as extraditable offences under such a scheme.

⁴³⁶ Ibid.

⁴³⁷ Vlassis D, Supra n. 393 at 91.

⁴³⁸ Supra n. 385 197.

⁴³⁹ Article 16(2).

The principle of dual criminality applies regarding extradition under this article. This requirement should be automatically fulfilled, amongst Parties to the Palermo Convention, in respect to offences established under articles 6, 8 and 23. However, in respect of offences under article 5 or to serious crime, where States are not required to criminalise the same conduct, there is no obligation to extradite, unless the dual criminality requirement is fulfilled.⁴⁴⁰ Apart from the obligations outlined above, most of the particulars of extradition are essentially left to national legislation, or treaties, that currently exist or that are to be concluded between States.⁴⁴¹ Article 16 does outline some expectations, even if they are not all considered mandatory. For instance, article 16(10) obliges State Parties, which deny an extradition request solely because the person in question is a national of that country, to submit the case for domestic prosecution. The States involved must cooperate with one another to ensure the efficiency of such a prosecution. Other notable obligations or expectations for State Parties include; not refusing a request solely because it includes fiscal matters,⁴⁴² endeavouring to expedite extradition proceedings and simplifying evidentiary requirements.⁴⁴³

Furthermore, States should consult with a requesting party before refusing a request, therefore, enabling the requesting party to present further information or views on the matter.⁴⁴⁴ States who require a treaty basis for extradition may use the Palermo Convention as that basis, when receiving a request from another State with whom they have no prior treaty.⁴⁴⁵ Finally article 16(17) encourages States to conclude further bilateral or multilateral agreements, to enhance the effectiveness of extradition.

⁴⁴⁰ Supra n. 385.

⁴⁴¹ Dimitri V, supra n. 393 91.

⁴⁴² Article 16(15).

⁴⁴³ Article 16(8).

⁴⁴⁴ Article 16(16).

⁴⁴⁵ Article 16(4).

Mutual Legal Assistance

The Palermo Convention contains detailed provisions relating to mutual legal assistance, prompting some to label it as a ‘treaty within a treaty’.⁴⁴⁶ Article 18 seeks to promote extensive and effective mutual assistance between States, as can be seen in the first paragraph, where States are explicitly obliged to provide one another ‘*the widest measure of legal assistance*’ in investigations, prosecutions and judicial proceedings relating to offences provided under article 3 of the Palermo Convention.⁴⁴⁷ Article 18(2) also provides that MLA shall be provided to the fullest extent possible in relation to offences where a legal person may be held liable.

If a countries current Mutual Assistance laws and treaties are not broad enough, to meet the requirements of article 18(1) or (2), then they may need to amend their legislation.⁴⁴⁸ Article 3 requires that the offences be transnational and involve an organised criminal group. Article 18 sets a low evidentiary standard for achieving this purpose. For instance, the mere fact that victims, witnesses, proceeds, instrumentalities or evidence of offences under the Convention are located in another State shall constitute in itself sufficient prima facie grounds that the offence is transnational.⁴⁴⁹

Article 18(3) provides that mutual legal assistance may be requested for any of the following reasons:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

⁴⁴⁶ Dimitri V, supra n. 393 91.

⁴⁴⁷ Article 18(1).

⁴⁴⁸ Supra n. 385 at 221.

⁴⁴⁹ Ibid.

Furthermore, Article 18 requires that States designate a central authority to handle and make requests⁴⁵⁰ and also outlines in detail practical and procedural aspects for making a request to ensure the process is streamlined and expedient.⁴⁵¹ Article 18(8) and (22) explicitly forbid States from denying requests solely on the basis of bank secrecy or requests they consider involve fiscal matters.

Article 18 of the Palermo Convention also seeks to introduce some innovative provisions, although not mandatory, in order to facilitate the hearing of witness or expert evidence. For instance Article 18(18) provides that where ever possible and when it is not desirable for a witness or expert to travel to the requesting State, then the first State party may at the request of the other State permit the hearing to take place via video conference. Article 18(24) encourages States to fulfil requests promptly and take into account, where possible, any deadlines suggested by the requesting State. However Article 18(25) allows States to postpone responding to a request when such a request may interfere with an ongoing investigation, prosecution or judicial proceeding.

Law enforcement cooperation

Article 19 provides a some what token mention of the possibility of joint investigations. Under this article State Parties are encouraged to consider concluding bilateral, or multilateral, arrangements in relations to investigations, prosecutions or judicial proceedings in one or more States. If no such agreement exists then States are required to consider making agreements on a case by case basis. There is a clear tension in this article between the desire of States to protect their sovereignty and the knowledge that comprehensive cooperation is needed to conduct effective transnational investigations.

Article 27 contains a mandatory provision that States must strive to cooperate closely with one another to improve the effectiveness of law enforcement action against offences covered by the Palermo Convention. This provision is

⁴⁵⁰ Article 18(13).

⁴⁵¹ For example Article 18(14) and (15).

tempered by the acknowledgment that States are required only to cooperate when consistent with their respective domestic legal and administrative systems. This has the effect of allowing States to refuse cooperation, or provide conditions, when they believe providing such cooperation would not be consistent with their domestic requirements.⁴⁵² However, the legislative guide accompanying the Palermo Convention makes it clear that apart from this general limitation State Parties must strive to

... strengthen the channels of communication among their respective law enforcement authorities; undertake specific forms of cooperation in order to obtain information about persons, the movements of proceeds and instrumentalities of crime provide to each other items or quantities of substances for purposes of analysis or other investigative purposes; promote exchanges of personnel including the posting of liaison officers; exchange information on a variety of means and methods used by organized criminal groups; and conduct other cooperation for purposes of facilitating early identification of offences.⁴⁵³

Article 23 also contains some completely optional provisions providing for the possibility that States enter into bilateral or multilateral agreements on direct cooperation between law enforcement agencies or alternatively use the Palermo Convention as the basis for such mutual law enforcement cooperation.⁴⁵⁴ Finally, Article 23 asks meekly that States endeavour to cooperate with one another on the issue of TNOC committed via the use of modern technology.⁴⁵⁵

Prevention

Article 31 of the Palermo Convention encourages States to develop national projects, best practices and policies aimed at aiding in the prevention of organised crime activity and to dissuade people from joining criminal groups. Furthermore, the article encourages States to raise public awareness regarding organised crime. Organised criminal activities such as money laundering will often bring major criminals into direct contact with legitimate financial and banking markets, and with professionals such as accountants and lawyers, who

⁴⁵² Supra n. 385at 235.

⁴⁵³ Ibid at 235. Also article 27(1)(a)-(f).

⁴⁵⁴ Article 23(2).

⁴⁵⁵ Article 23(3).

may or may not know they are facilitating crime.⁴⁵⁶ Therefore increasing public awareness of organised crime will decrease the possibility that members of the public or legitimate institutions unwittingly become facilitators of serious organised crime.

State Parties ratifying the Palermo Convention must commit themselves as much as possible to prevent organised crime by, for example, strengthening relationships between law enforcement agencies, prosecutors, relevant private entities including industry and also to promote codes of conduct for relevant professionals such as lawyers and accountants.⁴⁵⁷ The article also encourages States to take measures preventing organised criminal groups from manipulating bidding procedures for private contracts, public subsidies and licences for commercial activity.⁴⁵⁸ The convention provides only weakly worded suggestions for non-traditional preventive measures and contains no mandatory provisions. This reflects the fact that the Palermo Convention is primarily focused on traditional repressive measures to combat organised crime, rather than community based, or other non-traditional, crime prevention measures.

3.6 Confronting Corruption

Close connections exist between corruption and TNOC. Organised crime is often facilitated by corruption and the successes of TNOC operations are deeply dependent on corruption among customs and migration officials.⁴⁵⁹ The World Bank has estimated that up to \$US1 Trillion is paid in bribes each year around the world, and with strong links existing between corruption and TNOC it can be assumed a great portion of that is linked to facilitating organised

⁴⁵⁶ Levi M and Maguire M, *supra* n. 1 at 400 and 401.

⁴⁵⁷ De Ruyver B, Vermeulen G and Vander Beken Tom (eds.), *Strategies of the EU and US in combating Transnational Organised Crime* (2002) at 206.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Supra* n. 385 at 80 and Velkova, E and Georgievski, V. *Fighting Transborder Organized Crime in Southeast Europe through Fighting Corruption in Customs Agencies*. (Southeast European and Black Sea Studies (2004) Vol. 4, No. 2: 280-293 at 281.

criminal activity.⁴⁶⁰ Therefore strong measures to combat corruption in its various forms are a necessary aid in the overall fight against TNOc.

Corruption not only facilitates crime by aiding illegal markets such as illegal immigration, human trafficking and arms trafficking, but it can also have the further effect of undermining the stability of governments as the public lose confidence in their leader's ability to govern justly especially when corruption extends to high levels of public office.⁴⁶¹ Moreover, corruption can jeopardise inter-State relations and act as a discouragement to foreign investment therefore hampering the economic and social advancement of countries who suffer from endemic corruption.⁴⁶² This section will discuss the measures outlined firstly; in the United Nations Convention against Transnational Organised Crime and secondly; in the United Nations Convention against Corruption.

3.6.1 The United Nations Convention against Transnational Organised Crime

Article 8 of the Palermo Convention requires States to make corruption a criminal offence. Primarily this consists of criminalising the act of bribing public officials (active corruption) and criminalising the acceptance of such bribes by public officials (passive corruption).⁴⁶³ States are also required to consider adopting legislative measures to make the conduct mentioned above a domestic offence even when it involves foreign officials.⁴⁶⁴ Furthermore States should also adopt measures to establish as a criminal offence participation or acting as an accomplice to the offences outlined above.

⁴⁶⁰ Misunderstanding Corruption at 8.

⁴⁶¹ Supra n. 385 at 79 and United Nations Legislative Guides for the Implementation of the United Nations Convention against Corruption 2006, at iv, online at <http://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/06-53440_Ebook.pdf>.

⁴⁶² Supra n. 385 at 79.

⁴⁶³ Article 81(a) and (b) and supra n. 385 at 81.

⁴⁶⁴ Article 8(2).

Article 9 outlines further mandatory measures that States should take against corruption. These include adopting legislative or other relevant measures to promote integrity of public officials; prevent, detect and punish corruption of public officials; and to ensure effective action by officials.⁴⁶⁵ Finally, each State Party is required to provide anti-corruption officials with sufficient independence so as to deter the application of undue influence on their actions;⁴⁶⁶ in other words to shield anti-corruption officials from being corrupted.

3.6.2 United Nations Convention against Corruption

In January 2001 the United Nations General-Assembly Resolution 55/61 determined that a Convention independent of the Palermo Convention was required to effectively meet the challenges posed by corruption in its various forms.⁴⁶⁷ Work was then undertaken to create a comprehensive convention dealing specifically with corruption resulting in the 2003 General Assembly Resolution 58/4 adopting the United Nations Convention against Corruption (Corruption Convention). The perception created by Kofi Annan, in the convention's foreword, is that it will provide States with an effective legal framework, which used in tandem with the Palermo Convention, will enhance the international community's ability to deal with TNOC.

The Corruption Convention is structured into chapters dealing with prevention, criminalisation, international cooperation and asset recovery. It also contains provisions relating to law enforcement and jurisdiction.⁴⁶⁸

⁴⁶⁵ Article 9(1).

⁴⁶⁶ Article 9(2).

⁴⁶⁷ United Nations General-Assembly, A/RES/55/6, Resolution adopted by the General Assembly 55/61. An effective international legal instrument against corruption. Retrieved from <http://www.unodc.org/pdf/crime/a_res_55/res5561e.pdf> on 5/09/2009.

⁴⁶⁸ United Nations Legislative Guides for the Implementation of the United Nations Convention against Corruption 2006, at 2 and 3, online at <http://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/06-53440_Ebook.pdf>.

Criminalisation

Many of the substantive criminalisation parts of the Corruption Convention are identical to those in the Palermo Convention. For instance Article 15 of the Corruption Convention uses identical language to Article 8(1) of the Palermo Convention. However there are number of important differences⁴⁶⁹ notably; Article 16 requires State Parties to make domestic criminalisation of bribery of a foreign official mandatory, where it was optional under the Palermo Convention. Furthermore, the Corruption Convention employs a broader definition of ‘public official’ than the Palermo Convention expanding the scope of who can be held accountable for corrupt activities.⁴⁷⁰

The Corruption Convention also includes mandatory provisions requiring States implement specific criminal offences relating to; the embezzlement, misappropriation, diversion, by a public official, of any funds or things of value entrusted to them⁴⁷¹; laundering proceeds of crime⁴⁷²; and obstruction of justice⁴⁷³. Article 27 contains a mandatory requirement that States criminalise participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with the Convention.⁴⁷⁴

The Corruption Convention also includes a number of optional criminalisation provisions, that States are encouraged to consider implementing,⁴⁷⁵ including provisions relating to corruption in the private sector.

Prevention

The Corruption Convention contains a number provisions aimed at fostering an environment that minimises opportunities for corruption and seeks to encourage integrity and transparency; promote strong and legitimate normative guidance and integrate the efforts of the public sector, the private sector and

⁴⁶⁹ Ibid at 76.

⁴⁷⁰ See Article 2(a) and supra n. 468 at 76.

⁴⁷¹ United Nations Convention against Corruption (2003) article 17.

⁴⁷² Ibid at article 23.

⁴⁷³ Ibid at article 25.

⁴⁷⁴ Supra n. 468 at 114.

⁴⁷⁵ Articles 16, 18, 19, 20, 21, 22 and 24.

civil society together.⁴⁷⁶ The convention devotes an entire chapter to prevention measures; article 5 firstly outlines the aims of prevention and the means to attaining them.⁴⁷⁷ The remainder of the articles in the chapter illustrate how those general principles can be applied in accordance with the fundamental legal principles of the State Parties.⁴⁷⁸

3.7 Implementation and monitoring mechanisms for the United Nations Convention against Transnational Organised Crime

Article 32 of the Palermo Convention provides for the creation of a Conference of the Parties to the United Nations Convention against Transnational Organised Crime (COTP). Its purpose is to improve the capacity of State Parties to combat TNOC and to promote and review the implementation of this Convention.⁴⁷⁹ Among the roles outlined for this supervisory body are; mobilising voluntary donations for funding, facilitating the exchange of information among State Parties on patterns and trends in TNOC and on successful practices in combating it. The COTP also has the important role of periodically reviewing the implementation of the convention.⁴⁸⁰ Since its formation the COTP has undertaken four regular review sessions in 2004, 2005, 2006 and, most recently, in 2008.⁴⁸¹

The COTP monitors the implementation of the Palermo Convention and its protocols by delivering questionnaires and checklists to States Parties in order to canvas the level and scope of implementation and to determine any problems States may have encountered in implementing the conventions provisions. The information returned by States is then consolidated into a report (Implementation Report) that outlines the level of implementation, problems

⁴⁷⁶ Supra n. 468 at 15. and Chapter II of the United Nations Convention against Corruption.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Article 32(1).

⁴⁸⁰ Article 32(3)(a)-(e).

⁴⁸¹ United Nations Office on Drugs and Crime, *Conference of the Parties to the United Nations Convention against Transnational Organized Crime and its Protocols: Regular sessions of the conference parties*, online at <<http://www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP.html>>. Retrieved 1 October 2009.

encountered and recommendations for the future. The 2008 Implementation Report⁴⁸² is divided into two cycles based on the feedback of States to the checklist and questionnaires. The first cycle contains a consolidated report relating to criminalisation requirements, international cooperation requirements, difficulties reported and technical assistance needs.⁴⁸³ The second cycle contains a report relating to measures to combat money laundering, the investigation of TNOC, measures related to the protection of witnesses and victims and finally measures to prevent TNOC.⁴⁸⁴ Of the 140 States that have signed up to the Palermo Convention, 107 responded with answers to the checklist and questionnaire.⁴⁸⁵

Criminalisation

Almost all responding States have fulfilled their obligations (under article 5) to criminalise participation in an organised criminal group.⁴⁸⁶ Most have criminalised the laundering of proceeds of crime (under article 6) and furthermore almost all States indicated that all the offences covered by the Convention were under their domestic law predicate offences to money-laundering;⁴⁸⁷ likewise most States reported that their domestic legislation allowed for confiscation and seizure required under article 12.⁴⁸⁸ All reporting

⁴⁸² The report builds on the information provided by States from the first three sessions.

⁴⁸³ Conference of the Parties to the United Nations Convention against Transnational Organized Crime (CTOC/COP/2005/2/Rev.2), *Implementation of the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the first reporting cycle, Report of the Secretariat*, 2008, online at <<http://www.unodc.org/documents/treaties/COP2008/CTOC%20COP%202005%202%20Rev2%20Final%20E.pdf>>.

⁴⁸⁴ Conference of the Parties to the United Nations Convention against Transnational Organized Crime (CTOC/COP/2006/2/Rev.1), *Implementation of the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the second reporting cycle, Report of the Secretariat*, 2008, online at <<http://www.unodc.org/documents/treaties/COP2008/CTOC%20COP%202006%202%20Rev1%20Final%20E.pdf>>.

⁴⁸⁵ Status of States Responses to Questionnaire/Checklist, online at <http://www.unodc.org/documents/treaties/UNTOC/1._STATUS_of_responses_to_the_questionnaires_Update19_Jan_10.pdf>.

⁴⁸⁶ Exceptions being Ecuador, Iceland and Thailand; Ireland and Myanmar: Although they also reported that new legislation in line with the Convention was under consideration, at 4.

⁴⁸⁷ With the exception of Angola, Azerbaijan, Jamaica, Morocco and Togo.

⁴⁸⁸ Ibid page 13 New Zealand was one of only two States that reported that their legislation did not enable the confiscation of property, equipment or other instrumentalities used in or destined for use in offences.

States, with the exception of three, reported that their domestic legislation criminalised active and passive bribery of public officials (in accordance with article 8) as well as acting as an accomplice in bribery offences.⁴⁸⁹ Finally most States reported that obstruction of justice was at least to some extent criminalised under their domestic legislation.⁴⁹⁰

Measures to combat money laundering

The vast majority of reporting States have fulfilled their obligations, under the article 7, to institute a domestic regulatory and supervisory regime for the deterrence and detection of all forms of money-laundering.⁴⁹¹ The report indicates that compliance amongst States under the Convention to establish a comprehensive regime against money-laundering is quite advanced. The report illustrates that most of the minimum measures required are in place and the level of awareness and knowledge on the area is steadily growing.⁴⁹² The report suggests that this high standard is due to many States having obligations under a number of conventions, notably the Palermo Convention and relevant instruments against terrorist financing.⁴⁹³

Extradition and Mutual Legal Assistance

Only two reporting States, Honduras and Myanmar, reported extensive restrictions relating to the provision of extradition.⁴⁹⁴ Most States made extradition conditional on the principle of dual criminality and 50 States further indicated they would not extradite their own nationals due to constitutional or other reasons.⁴⁹⁵ However, all of those States who refuse to extradite their own nationals, except Honduras, indicated they were able to establish jurisdiction over offences committed by their national abroad, in accordance with article 16(10), and could therefore, submit the case to their own relevant authorities

⁴⁸⁹ Ibid at 7 the exceptions are Azerbaijan, El Salvador and Kazakhstan.

⁴⁹⁰ Ibid at 8.

⁴⁹¹ Supra n. 484 at 4.

⁴⁹² Ibid at 27.

⁴⁹³ Ibid.

⁴⁹⁴ Supra n. 483 at 16.

⁴⁹⁵ Ibid at 17 and 19.

for the purpose of prosecution.⁴⁹⁶ 47 responding States also indicated that extradition was subject to evidentiary requirements. These requirements were often considered burdensome particularly when civil law countries seek assistance from common law countries; States are therefore encouraged to further simplify their evidentiary requirements.⁴⁹⁷

In regards to Article 18 on mutual legal assistance; all but 11 States responded that they would be able to implement the provisions of Article 18(9)-(29). Those 11 States who were not able to fulfil their obligations under this article must take appropriate measures to do so, as the convention is mandatory on this point.⁴⁹⁸ The vast majority of States indicated they have domestic legislation allowing for the provision of mutual assistance and all but one indicated they were parties to bilateral and multilateral treaties on mutual legal assistance. Furthermore, many also indicated that reciprocity or comity was a basis on which mutual legal assistance could be granted.⁴⁹⁹ Most States responded that they were able to provide all the types of assistances outlined in article 18(3), although it should be noted again that this list is a minimum standard. In addition many States also indicated they were in a position to allow evidence to be heard via video conference (a less traditional method outlined in Article 18(8)) in circumstances where the requested person could not be present in the requesting State.⁵⁰⁰

In relation to Article 18(15), which outlines the minimum information requirements to be included in a request for assistance, most States reported that minimum information requirements included the identification of the authority requesting assistance, the type and nature of the assistance requested, the description and legal classification of the relevant facts, as well as the purpose of the assistance sought in conjunction with the subject and nature of the proceedings in the requesting State to which the request related. Some States also referred to confidentiality assurances and time limits for the

⁴⁹⁶ Ibid at 19.

⁴⁹⁷ Ibid at 21.

⁴⁹⁸ Ibid at 22.

⁴⁹⁹ Ibid at 21.

⁵⁰⁰ Ibid at 22.

provision of assistance.⁵⁰¹ Moreover, many States emphasised that the requirement for any additional information to be included in a MLA request was dependent on the type of assistance sought.⁵⁰² Most responding States have also fulfilled their obligation to exclude bank secrecy as a ground for refusing a request for MLA.⁵⁰³

Law enforcement cooperation

In accordance with article 27 virtually all States responded that channels of cross-border communication, coordination and cooperation were available to and routinely used by their law enforcement agencies. Many also indicated that cooperation between law enforcement authorities was formalised through bilateral or regional agreements, providing for the exchange of information on offences, offenders and proceeds of crime.⁵⁰⁴

The report indicates that many national law enforcement authorities take advantage of services offered by INTERPOL, and its national central bureaux, to exchange information and cooperate with foreign authorities beyond bilateral and regional networks. In particular, many of the respondents highlighted INTERPOLs 'I-24/7' system of police communications as a mode for sharing information on offenders and transnational criminality.⁵⁰⁵ Moreover, the report indicates that many responding States have entered into agreements to allow the use of joint investigative teams to address cases of TNOC. This may be provided for through bilateral and multilateral treaties or on a case-by-case basis.⁵⁰⁶ However, the extent of such agreements varied amongst States, with some having only concluded agreements with neighbouring countries and other States not allowing for the possibility of ad hoc joint investigation teams where a treaty did not exist.⁵⁰⁷

⁵⁰¹ Ibid at 23.

⁵⁰² Ibid.

⁵⁰³ Ibid.

⁵⁰⁴ Supra n. 482 at 18.

⁵⁰⁵ Ibid at 18.

⁵⁰⁶ Ibid at 16.

⁵⁰⁷ Ibid.

Chapter Four

Case studies

4.1 United States of America

As outlined in Chapter 2 the United State's historical perception of, and reactions to, organised crime has immensely impacted on responses to organised crime around the world. This case study will show that the US perception of organised crime has changed little from the traditional, outsider conspiracy, inspired perception. The mafia inspired perception has been the premise for the creation of The Racketeer Influenced and Corrupt Organizations Act, the main legislative tool used to combat organised crime. This erroneous conception of organised crime has led to confusion in the US Courts and created the impetus for an intense, but ultimately misguided, response by US law enforcement, in their efforts to combat organised crime both domestically and trans-nationally.

4.1.1 Failure to adopt a modern conception of organised crime

The traditional view of organised crime, which was propagated by the US, has attracted criticism for its failure to reflect the reality of modern organised crime and transnational organised crime.⁵⁰⁸ However, the US perception toward organised crime has changed very little and continues to regard organised crime as an outsider conspiracy consisting, predominantly, of large structured mafia style organised groups. William Geary laments the lack of substantial change in the US position since the original mafia model was conceived, in the 1950s, in his paper *"The legislative recreation of RICO: Reinforcing the "myth" of Organized crime"*:⁵⁰⁹

⁵⁰⁸ See chapter 2, of this thesis, at section 2.2.

⁵⁰⁹ Geary W R, "The legislative recreation of RICO: Reinforcing the "myth" of Organized crime". *Crime, Law & Social Change* (2002) Vol. 38: 311–356.

Rhetorically, even though the government's view of organized crime has backed away from an orthodox Mafia view, remnants of the past remain. Recent hearings reflect the government's emphasis on sub-cultural traits and the Mafia as a standard.⁵¹⁰

In substance very little has changed. The US government pays some lip service to recent findings, regarding organised crime, but has taken no meaningful steps to implement any change in its policies or strategy to combat organised crime.

A recent congressional research paper, discussing organised crime trends in the United States, illustrates Geary's claim. The section on definition firstly acknowledges that; modern organised criminal groups do not tend to exhibit the characteristics of traditional organised criminal groups, such as the Italian Mafia.⁵¹¹ However, the paper continue to propagate a list of essential characteristics, relating to organised crime groups, that are based on traditional conceptions. They are perceived as highly structured, having a restricted membership and continuity beyond the life time of individual members.⁵¹² These perceived characteristics may be true in some cases but they certainly are not an accurate representative of all modern organised criminal groups. More of this confusion can be seen in the main legal tools used to combat organised crime.

4.1.2 Legal Tools to Combat Organised Crime in the US

The leading⁵¹³ US statutory definition of organised crime is found in the Omnibus Crime Control and Safe Streets Act of 1968 (Crime Control Act).⁵¹⁴

The unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.

This definition comes from a time in history, when the Mafia was thought to dominate practically all organised crime activity, therefore, it is clearly not

⁵¹⁰ Ibid at 325.

⁵¹¹ Finklea K M, *Organized Crime in the United States: Trends and Issues for Congress*, Congressional research Service (May 15 2009) at 2.

⁵¹² Ibid at 2 and 3.

⁵¹³ Ibid at 3.

⁵¹⁴ P.L. 90-351; 82 STAT. 197. Part F – Definitions (b).

suitable to encompass modern, more loosely organised, episodic criminal activity. However, the Crime Control Act is not the preeminent legal tool used to fight organised crime. The Racketeer Influenced and Corrupt Organizations Act (RICO) created within the Organized Crime Control Act of 1970 (P.L. 91-452) is the dominant statutory tool, used, to combat organised crime. RICO does not explicitly define organised crime but rather describes it in terms of illegal enterprises, involved in a pattern of racketeering activity.⁵¹⁵

4.1.3 RICO

The Racketeer Influenced and Corrupt Organizations Act,⁵¹⁶ better known simply as RICO, is considered the most important piece of organised crime legislation created in the US.⁵¹⁷ Since being enacted in 1970 it has become one of the most dominant tools, used to combat and prosecute organised criminal groups in the US.⁵¹⁸ RICO was designed to have a broad application that extends beyond organised crime. Congress directed that RICO should, “*be liberally construed to effectuate its remedial purposes*”.⁵¹⁹ In addition the Supreme Court has held that the application of RICO is not limited to organised crime but may also be applied to legitimate businesses.⁵²⁰ However, the primary purpose, Congress intended for RICO, was to implement a piece of legislation effective in combating organised crime.⁵²¹ During the first decade of its existence, RICO lay relatively dormant and was little used. However the 1980s-1990s saw a massive increase in the use of RICO, for both public and private litigants.⁵²²

⁵¹⁵ See 18 USC 1961, Part 1, Chapter 96 Racketeer Influenced and Corrupt Organizations Act.

⁵¹⁶ Enacted as Title IX of the Organized Crime Control Act of 1970.

⁵¹⁷ Finklea K M, supra n. 511 at 6.

⁵¹⁸ Ibid.

⁵¹⁹ Jones A, Satory J and Mace T. “Racketeer Influenced and Corrupt Organizations”, American Criminal Law Review (2002) Vol. 39: 977 at 978-979.

⁵²⁰ See *Sedima, S.P.R.L v. Imex Co.* 473 (US) 479 (1985).

⁵²¹ Jones A, Satory J and Mace T supra n. 519 at 978 and Finklea K M, supra n. 511 at 6 and *Sedima, S.P.R.L v. Imex Co* 473 (US) 494 (1985).

⁵²² Geary W R, supra n. 509, at 325. This upsurge coincided with the emergence of the US ‘war on drugs’ and also the perceived rise in other ethnically defined organised crime threats such as Asian and Latino groups.

Offences under RICO

Section 1962 of RICO outlines those activities that are to be considered unlawful under the Act, including conspiracy to commit or participate in such activities:

- i) Prohibiting any person⁵²³ from using income derived from a pattern of racketeering activity or from the collection of an unlawful debt to acquire an interest in an enterprise affecting interstate or foreign commerce;⁵²⁴
- ii) Prohibiting any person, through a pattern of racketeering activity or through collection of unlawful debt, acquiring or maintaining an interest in or control of any enterprise which affects interstate or foreign commerce;⁵²⁵
- iii) Prohibiting any person from conducting or participating in the conduct of the affairs of an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity or collection of unlawful debt;⁵²⁶
- iv) Section 1962(d) also prohibits any person from conspiring to violate any of the subsections outlined in the section.

Penalties prescribed by RICO

Section 1963 on criminal penalties states that; whoever violates the provisions under section 1962 can face fines or, imprisonment not exceeding 20 years.⁵²⁷ Furthermore, this section provides that any interest, property, or proceeds the person has acquired, or maintained, in violation of section 1962 will be forfeited.⁵²⁸ Congress amended RICO in 1985, and again in 1986, to enhance the government's ability to seize assets obtained through racketeering activity. These amendments provided the government with additional powers to seek

⁵²³ Section 1961(3) defines "person" as to include any individual or entity capable of holding a legal or beneficial interest in property.

⁵²⁴ Section 1962(a) and see Jones A, Satory J and Mace T supra n. 519 at 980.

⁵²⁵ Section 1962(b).

⁵²⁶ Section 1962(c).

⁵²⁷ Or for life when the violation is based on an offence for which the maximum penalty includes life imprisonment.

⁵²⁸ Section 1963(a)(1), (2), (3), Section 1963(b) and (c).

pre-indictment restraining orders.⁵²⁹ Section 1963(d) of RICO contains a feature which allows the court, prior to any conviction, to enter a restraining order, injunction, or other action, to ensure the availability of the property for forfeiture. In addition to criminal liability under section 1963 the government may bring a civil action to obtain equitable relief and recover damages against the offender under section 1964.⁵³⁰ Furthermore, private parties injured in their property or business by reason of a violation under section 1962 may also bring a civil action.⁵³¹ They are entitled to recover threefold the damages they may have sustained and the cost of the law suit including attorney fees.⁵³²

Criminal enterprise and racketeering activity

RICO itself, although enacted to combat organised crime, does not contain any definition of organised crime. It focuses instead on individuals or enterprises, involved in a pattern of racketeering activity. RICO provides for the prosecution of anyone who participates or conspires to participate in a criminal ‘enterprise’⁵³³ through a ‘pattern of racketeering activity.’⁵³⁴ These two terms were intended to provide guidance as to what an organised criminal group *is* and what such a group *does*.⁵³⁵ It must be recalled that when RICO was created, in 1970, organised crime was viewed in the traditional sense.⁵³⁶ Thus RICO was originally intended to provide an effective tool to combat highly structured, mafia type, criminal groups.⁵³⁷

Racketeering activity within RICO consists of “*no more and no less than commission of a predicate act.*”⁵³⁸ The predicate acts are outlined in section

⁵²⁹ Jones A, Satory J and Mace T supra n. 519 at 1016.

⁵³⁰ Ibid.

⁵³¹ Section 1964(c).

⁵³² Ibid.

⁵³³ Section 1961(4) defines ‘enterprise’ as “... any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity”.

⁵³⁴ Finklea K M, supra n. 511 at 6.

⁵³⁵ Geary W R, supra n. 509 at 318.

⁵³⁶ Ibid at 320. W. R Geary refers to it as “an almost religious following of the traditional, Mafia view”.

⁵³⁷ See Congress discussions further on in this chapter.

⁵³⁸ *Sedima, S.P.R.L v. Imex Co* 473 (US) 495 (1985).

1961(1) of RICO. Section 1961(5) defines a ‘pattern of racketeering activity’ as requiring at least two acts of racketeering activity within a ten year period.⁵³⁹ Initially this seems like a very broad definition of ‘pattern’, however, it is clear in a 1969 Senate Report that the intention of RICO is not to target ‘sporadic activity’.⁵⁴⁰ In fact the sponsor of the Senate bill, Senator McClellan, stated that the term pattern in itself requires “*the showing of a relationship*” and thus proof of two acts of racketeering without more would not be sufficient to establish a ‘pattern’.⁵⁴¹ Congress was more specific when it sought to define ‘pattern’ in a later provision of the same bill.⁵⁴²

"[Criminal] conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

It is this reading of ‘pattern’, one that incorporates many elements of the traditional view of organised crime, which the Supreme Court in *Sedima, S.P.R.L v. Imex Co* follows. Another leading Supreme Court case *H.J. Inc. v. Northwestern Bell Telephone Co.*⁵⁴³ Confirms, and further clarifies, this interpretation of a pattern of racketeering activity. Brennan J stated that:

To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity.⁵⁴⁴

He went on to say:

A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long term criminal conduct.⁵⁴⁵

The case also went on to discuss whether RICO racketeering activity should include only activities that have a clear connection to ‘organised crime’. In

⁵³⁹ Racketeering activity is defined in Section 1961(1) and includes (for example) acts or threats involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, dealing in a controlled substance or listed chemical.

⁵⁴⁰ As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) quoted in *Sedima, S.P.R.L v. Imex Co* 473 (US) 497 (1985).

⁵⁴¹ *Sedima, S.P.R.L v. Imex Co* 473 (US) 497 (1985).

⁵⁴² *Ibid*

⁵⁴³ 492 U.S. 229 (1989)

⁵⁴⁴ *Ibid* at 240.

⁵⁴⁵ *Ibid* at 242.

making reference to organised crime the court seems to be viewing it in the traditional sense, as outlined in Omnibus Crime Control and Safe Streets Act of 1968.⁵⁴⁶ The court held it would be counterproductive, and a misrepresentation of congressional intent, to adopt a narrow construction of the statute's 'pattern element', if it required proof of an organised crime connection.⁵⁴⁷

Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.⁵⁴⁸

The Court felt that Congress had drafted RICO broadly to:

...encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators, operating in many different ways.⁵⁴⁹

Although there is no exact consensus amongst the US Court circuits, many leading cases interpret RICO's pattern of racketeering activity to require at a minimum:

- Proof of a relationship between the predicate acts and;
- Continuity of those acts over an extended period of time

These two requirements have been referred to as the 'continuity plus relationship test' now widely applied by the US court circuits albeit with some varying conclusions.⁵⁵⁰ In *H.J. Inc. v. Northwestern Bell Telephone Co*, where the test was first formulated, it was held that continuity may be sufficiently established where the defendant is operating as part of a long-term association that exists for criminal purposes.⁵⁵¹ However, it has been argued that Congress did not intend RICO to be limited, in its scope, to only criminal groups or associations, but rather it should be more widely applied to even target individuals working alone.⁵⁵²

Likewise, 'enterprise' has also been broadly interpreted by the Courts. Section 1961(4) of RICO defines an 'enterprise' as;

⁵⁴⁶ Ibid at 245 and 248.

⁵⁴⁷ Ibid at 249.

⁵⁴⁸ Ibid at 248.

⁵⁴⁹ Ibid.

⁵⁵⁰ Jones A, Satory J and Mace T supra n. 519 at 984 and 985.

⁵⁵¹ Ibid at 243.

⁵⁵² Ibid at 244.

...any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

The US Court circuits are yet to come to a uniformed definition of ‘enterprise’, although one common element they generally require is some form of organisational structure. However, a wide array of groups; large and small, highly structured and loosely structured, have been deemed to fit the definition of ‘enterprise’ under the RICO statute.

For instance, the decision of *United States v. Turkette*⁵⁵³ deemed an ‘enterprise’ to include legitimate and illegitimate, as well as, formal and informal organisations.⁵⁵⁴ The case of *Bach v. Bear, Stearns and Co.*⁵⁵⁵ sought to clarify, and narrow, the definition by stating that an enterprise must “*be an organisation with a structure and goals separate from the predicate acts themselves*”.⁵⁵⁶ A RICO enterprise has also been held to mean:

...an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.⁵⁵⁷

When applied to a criminal group this would seem applicable to organised criminal groups in the traditional sense. However, the case of *United States v. Rogers*⁵⁵⁸ held that:

...the continuity of an informal enterprise and the differentiation among roles can provide the requisite 'structure' to prove the elements of 'enterprise'.⁵⁵⁹

In an even more liberal interpretation of RICO the case of *United States v. Swiderski*⁵⁶⁰ held that a “*shifting definition of enterprise*” was “*necessary in view of the fluid nature of criminal associations*”. This is an apparent acknowledgement that a strict interpretation of RICO would result in many criminal associations passing below the threshold of ‘organisation’.

In light of the original intent of RICO, it is simply fortuitous that the interpretation of RICO, by some Courts, has allowed it to be used against

⁵⁵³ 452 U.S. (1981).

⁵⁵⁴ Ibid at 576 and 587.

⁵⁵⁵ 178 F.3d 930 (7th Cir. 1999).

⁵⁵⁶ Ibid at 930 and 931.

⁵⁵⁷ *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995).

⁵⁵⁸ 89 F.3d 1326 (7th Cir. 1996).

⁵⁵⁹ Ibid at 1337.

⁵⁶⁰ 593 F.2d1246, 1249(D.C. Cir. 1978). Referenced in Jones A, Satory J and Mace T supra n. 519 at 988.

various forms of organised criminal groups. Some courts have encompassed the very structured, to more loosely organised groups. However, many prosecutors have found it difficult to use RICO against ‘street gangs’, some of whom exhibit all the characteristics of a transnational organised criminal group under other definitions, such as the UN definition found in the Palermo Convention.⁵⁶¹ In the same paragraph of a Congressional Research Service Report, titled *Emerging Transnational Gang Threats*, the author describes how RICO has been instrumental in hampering, and dismantling organised criminal enterprises, but, very ineffective in combating organised street gangs, some of whom have established bases in a number of South American countries.⁵⁶² Because these ‘gangs’ do not fit neatly into the traditional view of organised crime prosecutors find it difficult to develop a RICO case against them.⁵⁶³

Debate concerning RICO’s application

The broad interpretation given to RICO in some US Court circuits has attracted criticism from many of RICO’s original sponsors. In 1985 Congress held hearings to debate some potential major changes to RICO, with the primary issue being ‘how is RICO being used’.⁵⁶⁴ Chair of the Senate Judiciary Committee Strom Thurmond began the proceedings by stating that:

Regrettably, the improvements contained in the 1970 Organized Crime Control Act have seemingly proven insufficient to stem the rising tide of organized crime activities.⁵⁶⁵

The rhetoric employed by Thurmond and others goes on to mirror that of 1969, when RICO was first being considered. At that time RICO was considered necessary to provide an effective tool to combat (mafia type) organised crime. The 1985 hearing focused on a perceived insufficiency of RICO due to, amongst other factors, organised crime adapting and apparently becoming *more organised* than current legislation and law enforcement. Compounding the problem, it now involved new types of organised crime such as

⁵⁶¹ Franco C, “The MS-13 and 18th Street Gangs: Emerging Transnational Gang Threats?” CRS Report for Congress (January 30 2008) at 5-7.

⁵⁶² *Ibid.*

⁵⁶³ *Ibid.*

⁵⁶⁴ Geary W R, *supra* n. 509 at 326 and 327.

⁵⁶⁵ Quoted in Geary W R, *supra* n. 509 at 327.

‘oriental’.⁵⁶⁶ The irony is that, in 1969, it was argued a new law was needed to effectively combat organised crime (the result being RICO) while on the 1985 occasion Thurmond is now arguing for limitations on RICO to better focus on ‘organised crime’.⁵⁶⁷

Another to testify, in 1985, was Roman Hruska one of those who founded RICO.⁵⁶⁸ It was his belief:

. . . that in the past several years we have seen a distortion and an unintended application of RICO provisions in ways that have produced harmful results... it was not my intention that the civil sanctions contained in Title IX serve as a vehicle to engage in the type and extent of use to which many efforts are directed. My bills, and their successors, were directed at organized crime. They were not intended to be a vehicle to charge legitimate businessmen with organized crime activities.⁵⁶⁹

What ‘legitimate’ businessmen might be in danger of being targeted by RICO, he does not clarify. Furthermore, he contends that the courts have used RICO to target criminals far outside its original intent.⁵⁷⁰ He makes this contention due to his distorted perception of what ‘organised crime’ is:

It is an elaborate hierarchy – a body of persons organized and classified according to rank, capacity, and authority. It operates as an invisible form of government; dictatorial, tyrannical, oppressive. Edicts of the rulers, even the slightest order, are carried out dutifully, scrupulously, and mercilessly by the lesser members. Disloyalty, disobedience, and even inefficiency in performance mean summary imposition of sanctions without benefit of hearing or trial. Punishment runs the gamut of beatings, torture, deprivation of property, and often capital punishment in gangland style. . . It is contemptuous of the rules of conduct and even of standards of human decency which our Nation has evolved through the ages through our democratic, constitutional structure. It exploits and despoils our institutions wantonly – institutions which have been developed through the generations of our Nation to form a civilization worthy of human aspiration.⁵⁷¹

It is this perception that compels Hruska, and those with a like-mind, to contend that legislation designed to combat organised crime should not be used against ‘legitimate businessmen’ or other such people, even when they have committed serious offences, because they do not fit into this mythical category of organised crime. This mind-set also allows well organised ‘street gangs’ to fall outside the scope of legislation, aimed at combating ‘organised crime’,

⁵⁶⁶ Ibid at 327 and 328.

⁵⁶⁷ Ibid.

⁵⁶⁸ Ibid .

⁵⁶⁹ Ibid at 331.

⁵⁷⁰ Ibid at 333. Assistant Attorney General, Stephen Trott pointed out, of all RICO criminal prosecutions, only 7% involved what he described as ‘traditional organised crime’.

⁵⁷¹ Ibid.

despite the clear harm they are inflicting on society. Dwight Smith claims this approach is reflective of a “*preoccupation with people (who) called organized crime rather than events (what) called organized crime*”.⁵⁷² Therefore, those trying to reinforce their belief of organised crime as ethnically defined outsiders, involved in a highly structured criminal conspiracy, seek to limit legislation (in this case RICO) to cover only certain types of people and activities, with the purpose of excluding individuals, or groups, who do not fit into the traditional ideology of organised crime.⁵⁷³

The distorted perceptions of organised crime, in the US, are further highlighted by the fact that during the 1985 hearings, even those who argued for retaining a broad interpretation of RICO, did not necessarily do so on the grounds that they believed it can be useful to better combat modern organised crime. Neither did the opposing sides seriously consider, or even debate, including a modern definition of organised crime in RICO's provisions.⁵⁷⁴ In fact there was very little debate, or recognition that perhaps the underlying problems with RICO stems from the erroneous preconceptions of what organised crime is, amongst those in Congress.

Continued Confusion in the United States

Since RICO's inception, voting on amendments have, generally, always been close. Subsequently little has been done by the legislature to address the controversial provisions of RICO.⁵⁷⁵ Thus, the leading US statutory tool to combat organised crime remains without a clear definition of what it is meant to combat. Furthermore, in the best case scenario, current understanding of ‘enterprise’ and ‘a pattern of racketeering’, within RICO, provide an unclear perception of organised crime, at worse these terms simply reinforce a false conception based on traditional views, that border on a myth. Because of this lack of definition and accurate perception of organised crime, the US courts

⁵⁷² Quoted in Geary W R, *supra* n. 509 at 354.

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid* at 351.

continue to interpret RICO broadly, with significantly varying conclusions in regards to what constitutes ‘enterprise’ and ‘a pattern of racketeering activity’. The result is a muddled conception of what organised crime is and how it should be approached.

Efforts to combat organised crime in the US will continue to be confused, lacking a clear focus or direction, as long as organised crime remains undefined in leading legislation. Furthermore, compounding the problem, those in decision making positions continue to adhere to a traditional view of organised crime that fails to encapsulate modern realities. Until these views are seriously challenged, it will be impossible to achieve an accurate concept of organised crime, for the purpose of guiding strategies and legal tools, to combat it.

4.1.4 Law Enforcement

The same perceptions regarding organised crime, found amongst US law makers and policy drivers, are also found at the law enforcement level. Those primarily responsible for enforcing laws to combat organised crime have, naturally, adopted the traditional concept of organised crime as the central focus in their strategy to combat organised crime.

Together, the US Department of Justice (DOJ) and the US Department of Homeland Security (DHS) lead and coordinate a number of agencies, in investigating organised crime and transnational crime.⁵⁷⁶ The Organized Crime and Racketeering Section (OCRS) is responsible for coordinating DOJ programs, to combat organised crime.⁵⁷⁷ The principal enforcement efforts are currently directed against a number of ethnically defined ‘outsider groups’, including “*traditional groups*” such as Italian La Cosa Nostra families; emerging groups from Asia and Europe, such as Chinese Triads, the Sicilian

⁵⁷⁶ Wagley J R, *Transnational Organized Crime: Principal Threats and US Responses*, CRS Report for Congress (March 20 2006) at 9.

⁵⁷⁷ United States Department of Justice, *Organized Crime and Racketeering Section*, Criminal Division. Online at <<http://www.justice.gov/criminal/links/ocrs.html>>. Retrieved October 29 2009.

Mafia, and Russian organized crime.⁵⁷⁸ The OCRS provides prosecutors to the Crime Strike Force Units of the U.S. Attorneys' Offices, which supervise investigations and prosecutions of transnational organised criminal groups. The OCRS is also responsible for reviewing all proposed federal prosecutions under RICO, and furthermore, provides extensive advice to prosecutors about the use of the statute.⁵⁷⁹

FBI

The primary US agency, responsible for investigating and disrupting organised crime, is the Federal Bureau of Investigation (FBI).⁵⁸⁰ The FBI continues to conceive and view organised crime in a traditional sense. The FBI defines organised crime as⁵⁸¹:

...any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region, or the country as a whole.

Furthermore, because RICO does not define or refer explicitly to 'organised crime' in its provisions, the FBI must reflect RICO and employ a definition of 'enterprise' as a guide to what constitutes organised crime.

The FBI defines a criminal enterprise as a group of individuals with an identified hierarchy, or comparable structure, engaged in significant criminal activity. These organizations often engage in multiple criminal activities and have extensive supporting networks.⁵⁸²

This definition also employs terminology that mirrors the traditional concept of organised crime. Confusingly, it appears that the FBI tries to distinguish 'organised crime' from 'criminal enterprise'⁵⁸³ on the basis that RICO does not define organised crime but does provide a definition of 'enterprise'. However, when providing other characteristics and examples of organised criminal

⁵⁷⁸ Ibid.

⁵⁷⁹ Ibid.

⁵⁸⁰ Finklea K M, supra n. 511 at 8.

⁵⁸¹ Federal Bureau of Investigation, *Organized Crime Glossary*. Online at, <<http://www.fbi.gov/hq/cid/orgcrime/glossary.htm>>. Retrieved October 29 2009.

⁵⁸² Ibid.

⁵⁸³ Ibid

activities, it seems that both definitions are used as a guide to illustrate the FBI's perceived view of organised crime.⁵⁸⁴

Continuing with the traditional model of organised crime, the organised criminal threats identified by the FBI are strictly ethnically defined and the rhetoric employed by the FBI reflects the conspiracy view that evil outsider forces are seeking to corrupt, otherwise morally sound, American institutions, people and their communities.⁵⁸⁵

- ...organized crime includes:
- Russian mobsters who fled to the U.S. in the wake of the Soviet Union's collapse;
 - Groups from African countries like Nigeria that engage in drug trafficking and financial scams;
 - Chinese tongs, Japanese Boryokudan, and other Asian crime rings; and
 - Enterprises based in Eastern European nations like Hungary and Romania.
- All of these groups have a presence in the U.S. or are targeting our citizens from afar—using the Internet and other technologies of our global age.

The FBI identifies and divides the main perceived threats from organised criminal groups into three ethnically based groups.

- i) Italian crime 'syndicates' in particular La Cosa Nostra
- ii) Eurasian/middle eastern criminal groups
- iii) Asian and African criminal 'enterprises'

The branch of the FBI tasked with investigating organised crime, (The Transnational Criminal Enterprise Section in the Criminal Enterprise Branch of the Criminal Investigative Division), is subsequently divided into three divisions, focusing on the three 'categories' of groups outlined above.⁵⁸⁶

⁵⁸⁴ Ibid. See also, United States Department of Justice, *Remarks Prepared for Delivery by Attorney General Michael B. Mukasey on International Organized Crime at the Center for Strategic and International Studies*, Washington D.C. (April 23 2008). Online at: <<http://www.justice.gov/archive/ag/speeches/2008/ag-speech-080425.html>>. Retrieved November 2 2009,.Federal Bureau of Investigation, *Headline Archives – Move over Mafia: The new face of organized crime*. Online at: <http://www.fbi.gov/page2/feb09/organizedcrime_021309.html>, Federal Bureau of Investigation, *Organized Crime: About organized crime*. Online at <<http://www.fbi.gov/hq/cid/orgcrime/aboutocs.htm>> and Finklea K M supra n. 509 at 2, 8 and 9.

⁵⁸⁵ Finklea K M supra n. 509 at 2, 8 and 9.

⁵⁸⁶ Ibid at 8 and Federal Bureau of Investigation, *Organized Crime: About organized crime*. Online at <<http://www.fbi.gov/hq/cid/orgcrime/aboutocs.htm>>.

US efforts to combat TNOC have seen the placement of FBI agents in more than 50 countries. They are responsible for training foreign law enforcement personnel and in return the FBI receives foreign cooperation, for the purpose of gathering evidence relating to instances of TNOC, particularly drug crime.⁵⁸⁷ Moreover, the FBI is involved in a number of international ‘working groups’, such as; the ‘*Italian American Working Group*’, ‘*Eurasian Organized Crime Working Group*’ and the ‘*Central European Working Group*’.⁵⁸⁸ The purpose of these groups is to encourage closer working relationships with foreign counterparts. For instance, the Italian working group arrangement has provided for an exchange of agents between the FBI and the Italian National Police headquarters.⁵⁸⁹ Other initiatives have included setting up joint initiatives with other States. For instance in 2000 the FBI established a joint FBI/Hungarian National Police task force in Budapest to combat ‘Russian organised crime’. The purpose of the task force was to counter the perceived increasing threat of Russian organised crime.⁵⁹⁰

Mired in the ethnicity trap

The DOJ, DHS and the FBI specifically define the ‘greatest’ organised criminal (and by their nature transnational) threats as: Russian, Asian, Italian, Balkan, Middle Eastern and African crime, without stating, specifically, what is unique about these particular categories (other than their ethnicity). Nor do they provide convincing evidence to illustrate how they are a particularly ‘great threat’.⁵⁹¹ Transnational criminal groups are viewed as primarily responsible for modern day organised crime, overtly targeting US citizens from afar as well as bringing drugs into US cities and raising the level of violence in US communities.⁵⁹² Therefore law enforcement resources and personnel are

⁵⁸⁷ Transnational Organized Crime: Principal Threats and US Responses at 10.

⁵⁸⁸ Finklea K M supra n. 509 at 10.

⁵⁸⁹ Ibid.

⁵⁹⁰ Ibid.

⁵⁹¹ Ibid at 15. See also Federal Bureau of Investigation, *Organized Crime: About organized crime*. Online at <<http://www.fbi.gov/hq/cid/orgcrime/aboutocs.htm>>.

⁵⁹² Federal Bureau of Investigation, *Organized Crime: About organized crime*. Online at <<http://www.fbi.gov/hq/cid/orgcrime/aboutocs.htm>>. See also Federal Bureau of Investigation, *Headline Archives – Move over Mafia: The new face of organized crime*. Online at <http://www.fbi.gov/page2/feb09/organizedcrime_021309.html>.

focused on addressing these perceived threats. This approach illustrates clearly ‘the ethnicity trap’, where the blame for criminal problems is assigned to outsiders and enforcement measures are primarily directed at these ethnic groups. All the while authorities fail to recognise that ethnicity is but one contingent characteristic of organised crime.⁵⁹³

4.2 United Kingdom

Over the last decade the United Kingdom has undertaken a number of reforms, to update its response to organised criminal activity. These include the formation of a new organised crime agency, and reforming legislation relating to money laundering and the forfeiture of criminal finances. The UK legal system has resisted including a definition of organised crime. Subsequently participation in an organised criminal group has not been made illegal; rather, the UK relies on a ‘sectorial’ approach, targeting separate activities related to organised crime rather than organised crime as a ‘whole’. This case study, on the UK, will discuss and analyse the recent reforms, and highlight the ongoing debate over participation offences.

4.2.1 Perceptions of organised crime in the UK

Like most western countries the United Kingdom views transnational organised criminal activity as an ever increasing threat, which undermines legitimate institutions, and causes immense harm to society.⁵⁹⁴ In light of this perceived rising threat the UK began; to review, in the early 2000s, its ability to combat TNOC, and develop new approaches, to better attack modern criminal networks. In 2004 the Home Office released a White Paper titled: *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime* (Organised

⁵⁹³ Edwards A, supra n. 96 at 220.

⁵⁹⁴ See comments by William Hughes in Serious Organised Crime Agency, *The United Kingdom threat Assessment of Serious Organised Crime, 2008/09*. (foreword), comments by former Home Secretary Jacqui Smith in Serious Organised Crime Agency, Annual Plan, 2009/10, online at <http://www.soca.gov.uk/about-soca/library/doc_download/57-serious-organised-crime-agency-annual-plan-200910-.pdf> (foreword), and Foreword from David Blunkett in Home Office, “One Step Ahead: A 21st Century Strategy to Defeat Organised Crime”, March 2004, online at <<http://www.homeoffice.gov.uk/documents/cons-organised-crime-300704/organised-crime-3007042835.pdf?view=Binary>>. Retrieved 27 June 2009.

Crime White Paper). This Paper announced and outlined a number of potential new innovations, including; the creation of the Serious Organised Crime Agency (SOCA) and new powers against organised crime, such as, conspiracy/participation offences, and new powers to collect evidence.

The *Organised Crime White Paper* uses typical rhetoric, to describe the threat of organised crime, and reflects the tendency for countries to describe organised crime in terms akin to a serious national security threat:⁵⁹⁵

Organised crime reaches into every community, ruining lives, driving other crime and instilling fear. At its worst, it can blight our most vulnerable communities driving out innocent residents and legitimate businesses. It manifests itself most graphically in drug addiction, in sexual exploitation and in gun crime. Its influence corrupts government and law agencies in many states world-wide which desperately need good and honest government as a foundation for economic prosperity, order, security and political liberty.

How is Organised Crime perceived in the UK?

The Organised Crime White Paper asks the key question: What is organised crime? There is an assumption that it dominates much of the criminality that has the most harmful impact on the UK.⁵⁹⁶ Thus, it is firstly described in terms of its activities, covering a very broad range, from “*drugs and organised immigration crime, through evasion of VAT and excise duties, financial and business fraud to intellectual property theft or counterfeiting*”.⁵⁹⁷ Furthermore, many organised criminal groups are believed to be operating essentially as sophisticated businesses on a wide spectrum of ‘organisation’; with those most organised and sophisticated posing the biggest threat.⁵⁹⁸

UK authorities have sought to refine this conception of organised crime as they have learnt more about how criminals operate and how criminal networks form.⁵⁹⁹ In the 2006/07 *United Kingdom Threat Assessment of Serious*

⁵⁹⁵ Home Office, “One Step Ahead: A 21st Century Strategy to Defeat Organised Crime”, March 2004, at 1, online at <<http://www.homeoffice.gov.uk/documents/cons-organised-crime-300704/organised-crime-3007042835.pdf?view=Binary>>. Retrieved 27 June 2009.

⁵⁹⁶ *Ibid* at 7.

⁵⁹⁷ *Ibid*.

⁵⁹⁸ *Ibid*.

⁵⁹⁹ Cabinet Office: Strategy Unit and Home Office, “Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime”, July 2009, online at

Organised Crime (2006 Threat Assessment), published by SOCA, criminal structures are described as varied, generally consisting of a durable core of key individuals, and linked by factors such as family, friendship, a shared history of criminal activity or imprisonment together.⁶⁰⁰ The groups are thought to have a cluster of lower level subordinates, specialists and more transient members, in addition to a network of dispensable associates.⁶⁰¹ Other structures may involve loose networks, or ‘career criminals’, who come together for a specific criminal venture, then disperse once that is complete.⁶⁰² The 2006 Threat Assessment makes it clear that particular criminal activities will require different criminal structures. For instance, a successful armed robbery may require a group with clearly assigned roles and co-ordination in order to carry out a plan while other groups involved in drug illicit commodities may have a cellular structure performing specific functions.⁶⁰³

A 2009 paper released by the Home Office titled *Extending our Reach: A Comprehensive Approach to Tackling Serious Organised Crime* (2009 Strategy) introduces what is termed a ‘new strategy’.⁶⁰⁴ This paper would be more accurately described as building on the 2004 strategy, by implementing what SOCA and police have learned, from research and gathering intelligence, about organised crime over this time period.⁶⁰⁵ In this paper the nature of organised crime is described as involving some hierarchical tight knit groups, based around a durable core group of individuals, but predominantly, in the UK, it involves loose networks of criminals who come together for the duration of a particular criminal activity.⁶⁰⁶

<<http://www.homeoffice.gov.uk/documents/extending-our-reach/extending-our-reach-accessible2835.pdf?view=Binary>>. Retrieved 2 November 2009.

⁶⁰⁰ Serious Organised Crime Agency, *The United Kingdom threat Assessment of Serious Organised Crime*, 2006/07 at 53.

⁶⁰¹ Ibid at 54.

⁶⁰² Ibid.

⁶⁰³ Ibid.

⁶⁰⁴ Serious Organised Crime Agency, *The United Kingdom threat Assessment of Serious Organised Crime*, 2009/10, (Foreword). Online at <http://www.soca.gov.uk/about-soca/library/doc_download/54-the-united-kingdom-threat-assessment-of-organised-crime.pdf>. Accessed 2 November 2009.

⁶⁰⁵ Ibid at 7.

⁶⁰⁶ Ibid.

Ethnicity and Organised Crime in the UK

The role that ethnicity plays in organised crime is addressed in many of the annual UK Serious Organised Crime Threat Assessments and differs significantly from the stance held in the US. The latest UK Threat Assessment of Organised Crime (covering the period 2009/10) portrays ethnicity as but one factor that can reinforce collaboration amongst criminals, alongside other factors such as family ties, shared experiences (for example prison) or recommendation from trusted individuals.⁶⁰⁷ These Threat Assessments have been careful to avoid the ethnicity trap. While not ignoring that fact that ethnicity can have a role to play in facilitating organisation it is not treated as the only, or even the key, factor in why criminals become organised.⁶⁰⁸

4.2.2 Strategy to combat organised crime

Harm Reduction Approach

The UK strategy to combat organised crime aspires to a ‘harm reduction’ approach.⁶⁰⁹ The Home Office acknowledges that little work has been done world wide to measure the scale of organised crime and the harm it does. Nonetheless, a Harm Framework was developed in an attempt to help measure the scale of harm. The framework introduced a number of measures.⁶¹⁰

- First, the economic and social costs of organised crime, ranging from straightforward financial losses to health and crime harms.
- Secondly, the level of public concern about organised crime and the problems it causes. Some issues, like the availability of drugs, are of general concern. But we need to take account of local factors too, like the fear which organised crime can inflict on particular neighbourhoods.
- Thirdly, the size of the criminal market involved. This will help measure the profitability of criminal markets, which poses its own challenge to society and the rule of law.

Preliminary results, in 2004, indicated that all losses and harms caused by organised crime, in the UK, amounted to around £40 billion per year.⁶¹¹ In the 2009 strategy, defining and measuring harm, caused by organised crime,

⁶⁰⁷ Ibid at 1 para 2.

⁶⁰⁸ See discussion on ethnicity, in chapter 2 of this thesis, section 2.2.1.

⁶⁰⁹ Supra n. 595 at 8.

⁶¹⁰ Ibid.

⁶¹¹ Ibid.

continues to be problematic, despite the development of a more comprehensive Harm Framework.⁶¹² Rather than attempting a concise definition of harm the Harm Framework includes a basket of indicators;

...derived from various sources and of varying degrees of precision and proximity to the harms themselves, from which the most relevant can be selected and applied to each circumstance.⁶¹³

Determining what constitutes ‘the most relevant’ is an ongoing process of learning through practical experience. The basic principles guiding a harm reduction strategy to combat organised crime consist of:

- *Reducing profit opportunities.* This means reducing demand for the goods and services trafficked by criminal enterprises. It also means reducing the vulnerability of the public and private sector to attack by organised crime.
- *Disrupting the businesses and their markets.* We must make criminal enterprise unprofitable in the UK by disrupting and dismantling their businesses and the markets in which they operate. This means using all the regulatory and other powers at our disposal, including our tax powers, our financial recovery powers and our powers to bear down on money laundering.
- *Increasing the risk.* We must raise the personal risks for the criminals, particularly the leading figures, by prosecuting the key players involved in organised crime. And we must reform the criminal justice system to enable us to bring to bear the evidence which will lead to convictions for involvement in organised crime.⁶¹⁴

The willingness of the UK to review its conceptions of organised crime, and adjust definitions if needed, is in stark contrast with the US approach, where the prevailing perception of organised crime has changed little since the 1950s. The flexibility, demonstrated in the UK, is a reflection of a commitment to an intelligence led approach, in its efforts to combat TNOC.⁶¹⁵ Organised crime is not defined strictly by activity or degree of organisation, but responses to organised crime are guided by a combination of both. There is a focus on particular activities, and those groups who are better organised and considered to have more ability to cause harm. Various policing and legislative innovations have been developed in the UK to implement the strategy. However, the UK has resisted creating a statutory definition of organised crime, reflecting a preference to target individuals and particular criminal offences related to ‘organised crime’, rather than criminal groups as a whole.

⁶¹² Supra n. 604 at paragraph 11.

⁶¹³ Ibid.

⁶¹⁴ Supra n. 595 at 12.

⁶¹⁵ Ibid at 29.

4.2.3 *Serious Organised Crime Agency*

To better deal with organised crime in the UK, the government identified a need to reorganise UK agencies tasked with combating organised crime and create a “critical mass” particularly in “*the key areas of competence and focus our efforts on front-line intelligence and investigation*”.⁶¹⁶ Therefore, the UK government launched a review to determine whether the current organisational structures could effectively tackle the immediate challenges posed by organised crime.⁶¹⁷ The review found that UK “*law enforcement agencies are effective and well respected amongst their international peers...*” However, “*...the dividing line between institutional responsibilities remains unclear in several areas*”.⁶¹⁸

The government determined that better coordination and efficiency could be achieved by creating one agency, which combined the National Crime Squad, the National Criminal Intelligence Service, Her Majesty’s Customs and Excise investigation and intelligence work on serious drug trafficking and recovering related criminal assets, and the Immigration Service’s work on organised immigration crime.⁶¹⁹ The result of this merge was the creation of the Serious Organised Crime Agency (SOCA). The aspiration for SOCA is that it will;

...lead to greater consistency of approach; a critical mass in key skill areas, address current problems of duplication and co-ordination, limit bureaucracy, provide opportunities for economies of scale, and represent a ‘one stop shop’ for our international partners. In particular, it should address some of the key weaknesses in the generation, dissemination and use of intelligence material.⁶²⁰

Serious Organised Crime and Police Act 2005

SOCA was established under the Serious Organised Crime and Police Act 2005 (SOCPA). Section 2 of SOCPA provides for SOCA’s establishment, outlines its activities and states that SOCA’s functions shall be:

- (a) preventing and detecting serious organised crime, and
- (b) contributing to the reduction of such crime in other ways and to the mitigation of its consequences.

⁶¹⁶ Ibid at 21.

⁶¹⁷ Ibid.

⁶¹⁸ Ibid at 22.

⁶¹⁹ Ibid.

⁶²⁰ Ibid.

Section 5(3) makes clear that, despite reference to ‘*serious organised crime*’ in Section 2(1), SOCA may carry out activities in relation to other crime, if they are carried out for the purpose of any functions outlined in Section 2 or 3. ‘*Serious organised crime*’ is not defined within the Act, which in effect allows SOCA a lot of flexibility to determine what should be targeted, but could potentially cause a loss of focus. To guide SOCA, the broad definition of organised crime, originally formulated by the NCIS, continues to be used.

Those involved, normally working with others, in continuing serious criminal activities for substantial profit, whether based in the UK or elsewhere.⁶²¹

This very broad definition is capable of encapsulating a very wide range of groups.

4.2.4 Legal tools to combat organised crime

Despite the stated aims, in the 2004 Organised Crime White Paper, to target and increase the risk for those criminals involved in organised crime, there has been a reluctance to define organised crime.⁶²² This approach seemingly reflects a determination to tackle specific organised crime activities or sectors rather than “*impose a single template to tackle organised crime in all its aspects*”.⁶²³ Subsequently there is also no offence prescribed for participation in an organised criminal group. Rather individuals are charged, on an individual basis, for the commission of an offence, such as; offences under the Misuse of Drugs Act 1971, the Drug Trafficking Act 1994, the Criminal Justice Act 1993 or the Customs and Excise Management Act 1979.⁶²⁴ The UK manages to technically fulfil its mandatory obligations, under Article 5 of the Palermo Convention,⁶²⁵ through the common law conspiracy offence. Under section 1 of the Criminal Law Act 1977 when two or more people agree to commit an offence they may be charged with conspiracy to commit such an

⁶²¹ Supra n. 604 at 6.

⁶²² Supra n. 595 at 12.

⁶²³ Ibid at 12. See also in supra n. 604 at 12, which identifies those most prevalent organised criminal activities as; drug trafficking, human trafficking and people smuggling, firearms trafficking, fraud, counterfeiting and smuggling.

⁶²⁴ Leong A, supra n. 14 at 99.

⁶²⁵ Article 5 requires State Parties to criminalise participation in an organised criminal group.

offence. This also extends to conspiracy to commit offences outside of the UK.⁶²⁶

Proceeds of Crime Act 2002

A 2000 report from the Cabinet Office's Performance and Innovation Unit (PIU) titled "*Recovering the Proceeds of Crime*" provided the impetus for the creation of the Proceeds of Crime Act 2002 (PCA).⁶²⁷ The report was the culmination of a nine month investigation by the PIU focusing on:⁶²⁸

- The effectiveness of pursuing and removing criminal assets as part of the fight against crime, and particularly against serious and organised crime; and
- How to maximise the effective use of these techniques.

Angela Leong outlines the main proposals suggested by the report and later implemented in the PCA 2002:⁶²⁹

- (i) The creation of a new agency with lead responsibility for asset recovery and containing a 'Centre of Excellence' for financial investigation training.
- (ii) The consolidation of existing laws on confiscation and money laundering into a single piece of legislation
- (iii) The introduction of new civil recovery proceedings without the need for a criminal conviction
- (iv) The use of Inland Revenue functions by the new agency in relation to criminal gains
- (v) The development of gateways for the exchange of information between the new agency and the other authorities
- (vi) The assurance of sufficient trained staff in all the agencies involved in asset recovery so that the system can function efficiently

The Assets Recovery Agency (ARA) was the title given to the new agency created under the PCA 2002 (Part I). Its functions were set out in the 2001 Government's Asset Recovery Strategy and included disrupting criminal enterprises through the recovery of criminal asset as well as promoting the use of financial investigation as an integral part of criminal investigation.⁶³⁰ This

⁶²⁶ Criminal Law Act s 1A (1977).

⁶²⁷ Leong A, supra n. 14 at 137.

⁶²⁸ Cabinet office Performance and Innovation Unit Report, *Recovering the Proceeds of Crime* (June 2000) at 5. Online at <http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/strategy/downloads/su/criminal/crime.pdf>. Retrieved 16-12-2009.

⁶²⁹ Leong A, supra n. 14 at 138.

⁶³⁰ Leong A, supra n. 14 at 139.

agency has since been merged into SOCA, who now performs the functions of ARA, as part of the UK's overall strategy to combat organised crime.⁶³¹

Summary

The PCA 2002 makes provision for a confiscation regime⁶³² as well as civil recovery and forfeiture proceedings.⁶³³ It consolidates, updates, and reforms the criminal law in the United Kingdom with regard to money laundering⁶³⁴ and also sets out powers for use in criminal confiscation, civil recovery and money laundering investigations.⁶³⁵ The Act deals with the relationship between confiscation and insolvency proceedings⁶³⁶ and provides for co-operation in investigation and enforcement between the jurisdictions of the United Kingdom and with overseas authorities.⁶³⁷

Confiscation Regime

Section 6 of the PCA sets out the nature of confiscation orders and the circumstances under which they are to be made. A confiscation order is an order to a convicted defendant to pay a sum of money, representing the defendant's benefit from crime.⁶³⁸ It is mandatory for the Court to undertake a confiscation proceeding when both of the following conditions from the PCA 2002 is met. Firstly:

- (a) he is convicted of an offence or offences in proceedings before the Crown Court;
- (b) he is committed to the Crown Court for sentence in respect of an offence or offences under section 3, 4 or 6 of the Sentencing Act;
- (c) he is committed to the Crown Court in respect of an offence or offences under section 70 below (committal with a view to a confiscation order being considered).⁶³⁹

Secondly;

- (a) the prosecutor or the Director asks the court to proceed under this section, or
- (b) the court believes it is appropriate for it to do so

⁶³¹ The Serious Crime Act 2007 (Commencement No. 2 and Transitional and Transitory Provisions and Savings) Order 2008.

⁶³² Part 2, 3 and 4 Proceeds Crimes Act 2002.

⁶³³ Ibid Part 5.

⁶³⁴ Ibid Part 7.

⁶³⁵ Part 8.

⁶³⁶ Part 9.

⁶³⁷ Part 11.

⁶³⁸ Proceeds of Crime Act 2002 explanatory notes online at <http://www.opsi.gov.uk/ACTS/acts2002/en/ukpgaen_20020029_en_1>. Retrieved 22/12/2009.

⁶³⁹ Section 6(2) ('he' refers to the defendant, gender neutral language is lacking in this Act).

If these two conditions are met then the Court must determine if the defendant has a 'criminal lifestyle'.⁶⁴⁰ Furthermore, s 6 clarifies a defendant's benefit from either his 'general criminal conduct' or his 'particular criminal conduct'.⁶⁴¹

General criminal conduct means any criminal conduct of the defendant's, whenever the conduct occurred and whether or not it has ever formed the subject of any criminal prosecution. Particular criminal conduct means the offences of which the defendant has been convicted in the current proceedings, together with any taken into consideration by the court in passing sentence. So general criminal conduct includes particular criminal conduct.⁶⁴²

If the defendant is found to have a 'criminal lifestyle' then the court must determine if he has benefited from this conduct and, for this purpose, is permitted to make four statutory assumptions under section 10.⁶⁴³ Firstly, the Court can assume that any property transferred to the defendant at any time, after the relevant day, was obtained by him as a result of his general criminal conduct.⁶⁴⁴ Secondly, it is assumed that any property held by the defendant at any time after the date of conviction was obtained by him as a result of general criminal conduct.⁶⁴⁵ The third assumption is that any expenditure incurred by

⁶⁴⁰ Section 6(4)(a) Section 75 outlines the definition and test for determining a 'criminal lifestyle' and should be read in conjunction with section 6. Paragraph's 135-137 of the PCA 2002 explanatory notes set out and summarise the tests.

Para 135. The criminal lifestyle regime is based on the principle that an offender who gives reasonable grounds to believe that he is living off crime should be required to account for his assets, and should have them confiscated to the extent that he is unable to account for their lawful origin. The criminal lifestyle tests, therefore, are designed to identify offenders who may be regarded as normally living off crime. Under *section 75*, a person has a criminal lifestyle if he satisfies one or more of the tests set out in that section.

Para 136. The first test is that he is convicted of an offence specified in *Schedule 2* of the PCA 2002 (for instance Drug trafficking, money laundering, people trafficking, arms trafficking). The second test is that the defendant is convicted of an offence of any description, provided it was committed over a period of at least six months and he obtained not less than £5,000 from that offence and/or any others taken into consideration by the court on the same occasion. The third test is that the defendant is convicted of a combination of offences amounting to "a course of criminal activity".

Para 137. The third test is more complicated than the other two. The defendant satisfies it if he has (a) been convicted in the current proceedings of four or more offences of any description from which he has benefited, or (b) he has been convicted in the current proceedings of any one such offence and has other convictions for any such offences on at least two separate occasions in the last six years. In addition, the total benefit from the offences and/or any others taken into consideration by the court on the same occasion (or, in the case of (b), occasions) must be not less than £5,000.

⁶⁴¹ Proceeds of Crime Act 2002 s 6(4)(b) and (c).

⁶⁴² Explanatory notes for the Proceeds of Crime Act 2003 at paragraph 23. See also section 76.

⁶⁴³ Leong A, *supra* n.14 at 141.

⁶⁴⁴ Section 10(2).

⁶⁴⁵ *Ibid* at s 10(3).

the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct.⁶⁴⁶ The final assumption is, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he obtained it free of any other interests in it.⁶⁴⁷

Alternatively, if the Court has found that the defendant does not have a ‘criminal lifestyle’, the Court will decide whether they have benefited from their ‘particular criminal conduct’.⁶⁴⁸ Once the court has determined the amount of the defendants benefit they may proceed in determining the recoverable amount under Section 7 and make the confiscation order requiring the defendant to pay that amount.⁶⁴⁹ To ensure that a defendant cannot dispose of their assets before a conviction (or during proceedings) the Court may issue a restraint order under Section 41 to prohibit the defendant from dealing with any ‘realisable property’.

Civil Recovery and forfeiture proceedings

Following recommendations from the Home Office PIU report it was determined that it would be beneficial to have civil recovery powers available in the UK, similar to those available in the US under the RICO legislation.⁶⁵⁰ These powers do not rely on the conviction of an individual, but rather, allow for civil forfeiture on ‘irrefutable presumptions’ without a prior conviction.⁶⁵¹

Section 240 of the PCA states:

- (1) This Part has effect for the purposes of—
 - (a) enabling the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property which is, or represents, property obtained through unlawful conduct,
 - (b) enabling cash which is, or represents, property obtained through unlawful conduct, or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before a magistrates' court or (in Scotland) the sheriff.
- (2) The powers conferred by this Part are exercisable in relation to any property (including cash) whether or not any proceedings have been brought for an offence in connection with the property.

⁶⁴⁶ Ibid s 10(4).

⁶⁴⁷ Ibid s 10(5).

⁶⁴⁸ Section 6(4)(c).

⁶⁴⁹ Section 7. Also see Leong A, supra n. 14 at 142.

⁶⁵⁰ Leong A, ibid at 143.

⁶⁵¹ Ibid.

In the case of *The Queen on the application of the Director of the Assets Recovery Agency v Jeffery David Green* it was held that:

...the Director need neither allege nor prove the commission of any specific criminal offence... she must not merely set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct, but...she must prove that, on the balance of probabilities, the property was obtained by or in return for a particular kind or one of a number of kinds of unlawful conduct.⁶⁵²

Money Laundering

Under previous legislation three types of money laundering offences existed. Which one applied depended on whether the underlying predicate offence was drug trafficking, terrorism or another serious crime.⁶⁵³ This created unnecessary complexity for investigators and prosecutors. Therefore, following recommendations in the PIU report, the concept of predicate offence was abolished and the money laundering offences were consolidated into one piece of legislation.⁶⁵⁴ Part VII of the PCA updates and reforms the criminal law in relation to money laundering offences.⁶⁵⁵ Part VII of the PCA creates three principle money laundering offences:

- i) Concealing criminal property⁶⁵⁶
- ii) Entering into or becoming concerned in an arrangement which is known to facilitate (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person⁶⁵⁷
- iii) Acquiring, using and possessing criminal property.⁶⁵⁸ Section 340(11)(a) further clarifies money laundering as; an act constituting any of the three principle offences mentioned above and an act which:
 - (b) constitutes an attempt, conspiracy or incitement to commit an offence specified in paragraph (a),
 - (c) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a), or
 - (d) would constitute an offence specified in paragraph (a), (b) or (c) if done in the United Kingdom.

⁶⁵² [2005] EWHC 3168 (Admin) at Paragraph 50.

⁶⁵³ Leong A, supra n. 14 at 151.

⁶⁵⁴ Ibid.

⁶⁵⁵ Ibid.

⁶⁵⁶ Under s 327 a person commits an offence if they conceal, disguise, convert, transfer or remove criminal property from England and Wales or from Scotland and Northern Ireland. Section 327(3) states that 'Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it'.

⁶⁵⁷ Section 328.

⁶⁵⁸ Section 329.

Consolidating the previous money laundering legislation into one statute has not only simplified matters, but also, major changes under the PCA have ensured no distinction is made between the proceeds of drug offences and other crime, as was the case under previous legislation.⁶⁵⁹ Furthermore, the three substantive offences under the PCA now apply to the laundering of an offenders own money, as well as those of others. Previously a confusing distinction existed.⁶⁶⁰ Finally, the PCA has removed the requirement from previous legislation that money laundering offences only apply to offences committed for the purpose of avoiding prosecution or to avoid the making, or enforcement, of a confiscation order.⁶⁶¹

Conspiracy/ Participation offence debate

The reluctance to criminalise participation in an organised criminal group has attracted criticism and could potentially undermine, or at least weaken, the ability to fulfil the UK's overall strategy to combat organised crime. It has been argued that measures increasing the personal risk for criminals, involved in organised crime, could be strengthened if participation in such a group was illegal and would result in stiff penalties.⁶⁶²

Conspiracy and participation offences relating to organised crime have been debated for some time in the UK. In 1995 the Home Affairs Committee on Organised Crime considered whether the fight against organised crime required the concept of 'criminal organisation' to be introduced, into the UK legal system.⁶⁶³ The police supported this proposal because they believed traditional conspiracy laws were insufficient to capture key organised crime figures, or other associates, who may distance themselves from the actual commission of

⁶⁵⁹ Leong A, supra n. 14 at 157.

⁶⁶⁰ Ibid.

⁶⁶¹ Ibid.

⁶⁶² Supra n. 595 at 12. United Nations Convention against Transnational Organised Crime (2000) article 5 obligates States to criminalise participation.

⁶⁶³ Leong A, supra n. 14 at 100.

the crime(s).⁶⁶⁴ The police also indicated, in 1995, that even when there were clear links between these ‘immune’ associates and other criminals, coupled with obvious wealth and no visible source of income, it was often not enough to support proceedings for conspiracy, or other substantive offences.⁶⁶⁵ Ultimately the Committee took the stance that organised crime did not need to be approached any differently from other forms of serious crime, and therefore, specific legislative measures to deal with organised crime were not deemed necessary.⁶⁶⁶ Moreover, the Crown Prosecution Service, at the time, indicated that the current laws of conspiracy should be sufficient to deal with organised crime.⁶⁶⁷

In 2002 the Home Office commissioned a report, titled “*A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*” (Conspiracy Legislation Report), which had as its primary purpose; the examination of the operation of the US RICO legislation, and other similar initiatives, to determine their potential applicability to England and Wales.⁶⁶⁸ The authors compiled the following list of reasons demonstrating that the current conspiracy laws may not be fully effective in combating organised crime.⁶⁶⁹

1. Conspiracy 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. It can accommodate certain broad conspiracies such as have been employed in terrorist prosecutions such as ‘conspiracy to cause explosions on the United Kingdom mainland’, but that is a single form of offence.
2. Each defendant in 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 a meeting of two or more minds, does not accord with 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.

Despite criticism of the ability of current conspiracy legislation to combat organised crime, the report indicated that RICO legislation was not entirely

⁶⁶⁴ Ibid.

⁶⁶⁵ Ibid.

⁶⁶⁶ Ibid

⁶⁶⁷ Ibid at 101.

⁶⁶⁸ Levi, M and Smith, A “A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales”, Home Office Online Report 17/02, at ii. Online at <<http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr1702.pdf>>.

⁶⁶⁹ Ibid at 16.

appropriate for the particular conditions in the UK. Primarily because it was deemed that RICO legislation was designed to be employed against hierarchical type criminal groups, such as traditional mafia groups, and these were not prevalent in the UK.⁶⁷⁰

The 2004 Organised Crime White Paper further discussed the need for conspiracy or participation offences, stating⁶⁷¹:

It is commonly believed 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.

After careful consideration of RICO style legislation the UK government determined that it was not necessary for it to be introduced.⁶⁷² The government was not convinced of its need for the following reasons:⁶⁷³

- To work, RICO still needs sufficient evidence to convict on the underlying ‘predicate’ offence before these can be set in the wider racketeering context. It does not, therefore, help against those targets who have evaded detection altogether.
- RICO appears to be more useful against traditional ‘racketeering’ organisations than the sort of large scale trafficking groups which are the main threat in the UK. The latter tend to be prosecuted in the US, as in the UK, for standard conspiracy and trafficking offences.
- Civil RICO is less relevant in the UK, as we do not face the same difficulties of organised crime infiltration of legitimate institutions as the US. Moreover, the Proceeds of Crime Act 2002 already provides a robust framework for dealing with criminal assets.

The authors of the Conspiracy Legislation Report felt it would be worthwhile to consider implementing a more simplified form of statutory conspiracy than the RICO model.⁶⁷⁴ While they believed issues such as a higher prejudicial risk to defendants may occur with a participation offence, they put forward alternative models to RICO such as seen in Canada, New York and New Zealand. For a participation offence to be worthwhile, the authors of the Conspiracy Legislation Report held the opinion that; there must be clear evidence it will be effective in targeting those who organise, or provide

⁶⁷⁰ Ibid at 4. The report also Stated that US interviewees participating in the study believed the RICO legislation would work against ‘flatter’ criminal network structures more commonly found in the UK (page 3).

⁶⁷¹ Supra n. 595 at 40.

⁶⁷² Ibid.

⁶⁷³ Ibid.

⁶⁷⁴ Levi M and Smith A, supra n. 668 at iv.

important contributions to facilitate, criminal offences.⁶⁷⁵ The current UK conspiracy offence is often not sufficient to target those who are clearly involved in organising or facilitating criminal activity, but, who may not be involved in committing the substantive offence(s).⁶⁷⁶

Confused approach

The absence of offences that specifically relate to organised crime appears to contradict the UK governments own organised crime strategy. There is a perceived urgent need to respond strongly to the growing threat of organised crime. Concerted efforts have been undertaken to develop intelligence and knowledge of organised crime, how it operates and, measures to more effectively investigate and prevent it. The government has taken steps to reform legislation to better target particular criminal activities associated with organised crime. Furthermore a powerful agency (SOCA) was created to specifically to deal with organised crime and to centralise and consolidate the response. The entire purpose of SOCA is to combat organised crime, which is viewed as a formidable threat capable of enormous harm, separate to other forms of serious crime.

Despite the intense focus on organised crime as a threat to the UK, the view remains that there is no need to create legislation specifically targeting organised criminal groups, or making participation in such a group illegal. This policy position has been maintained despite a frank admission that:

At present, the criminal law provisions most likely to be invoked against organised criminals require proof of a specific act of supply of a commodity. The evidential importance of seizing the commodity can tend to the prosecution of couriers and minor players rather than the organisers.⁶⁷⁷

A stated aim of the UK's Strategy to combat organised crime is to make organised criminal activity more inherently risky.⁶⁷⁸ A first step to achieving this goal may be better served by including legislation making participation in

⁶⁷⁵ Ibid at v.

⁶⁷⁶ Ibid.

⁶⁷⁷ Ibid at 41.

⁶⁷⁸ Supra n. 595 at 12.

an organised criminal group illegal. However, the UK criminal justice legal system continues to rely on separate offences relating to organised criminal activities. A more unified approach could be achieved by specifically targeting organised crime in legislation; in addition to targeting its most prevalent activities. It, therefore, remains to be seen if the legislative measures implemented in the UK will be effective in the long term. Organised criminal activity has proved very proficient at adapting to legislative or law enforcement measures and their activities naturally evolve over time to meet new or changing illegal markets. In the past this has left the criminal justice system playing catch up and there is little reason to suspect organised criminal groups will become less adaptive.⁶⁷⁹

⁶⁷⁹ See discussion on the inadequacy of traditional measures alone in combating organised crime at chapter 2, of this thesis, section 2.5.1. Also Woodiwiss M, *supra* n. 10 at 25.

Chapter Five

Combating organised crime in New Zealand

5.1 New Zealand's conception of organised crime

Organised Crime Project

In 1998 the New Zealand Police initiated the 'Organised Crime Project' (OCP) for the purpose of preparing a Police strategy to combat organised crime in New Zealand for the period 1999-2004.⁶⁸⁰ One of the first issues encountered by the OCP was developing a working definition of organised crime.⁶⁸¹ The Initial definition used within the OCP was:⁶⁸²

Organised crime constitutes two or more persons engaged in continuing illegal activities for some purpose, irrespective of national boundaries.

This definition was influenced by overseas conceptions, for instances from Europol and the Royal Canadian Mounted Police.⁶⁸³ However the OCP decided that this definition may not encapsulate the complexities of organised crime as it operates in New Zealand and therefore developed the *Organised Crime Group Survey*, published in 1999, to determine the nature and extent of organised crime in New Zealand.⁶⁸⁴ This was the first time that a survey on the subject of organised crime had been conducted by the New Zealand Police.⁶⁸⁵ Although police acknowledged that the survey was limited to police knowledge and perceptions of organised crime groups, the stated aim was to:⁶⁸⁶

- Estimate the number of organised crime groups that Police believe to operate in New Zealand; and
- Identify the general nature of organised crime groups in New Zealand as known to Police.

⁶⁸⁰ New Zealand Police, *Review of Police Administration and Management Structures: Report on the Organised Crime Group Survey* (March 1999) at 3. Online at <<http://www.police.govt.nz/resources/1999/organised-crime-group-survey-report/index.html>>. Retrieved 7 December 2009.

⁶⁸¹ *Ibid* at 9.

⁶⁸² *Ibid* at 10.

⁶⁸³ *Ibid*.

⁶⁸⁴ *Ibid*.

⁶⁸⁵ *Ibid* at 30.

⁶⁸⁶ *Ibid* at 3.

To guide police district responses to the survey, five categories of ‘criminal groups’ were to be classified as ‘organised crime’.⁶⁸⁷

Category A – Structured gangs e.g. patched Incorporated Society outlaw motorcycle gangs;

Category B – Structured groups other than gangs e.g. less overt groups such as Asian secret societies and triad societies;

Category C – Family crime groups e.g. intergenerational criminal families that perpetuate illegal activities within the blood ties of the group;

Category D – Activist/Paedophile crime groups e.g. groups that have ongoing illegal aims and structure, but may not be driven by the profit motive such as religious terrorist groups; and

Category E – Career criminal crime groups e.g. criminal groups that carry out regular illegal enterprises within a network of trusted colleagues.

The Police responses identified 337 known groups including 115 from category A; 44 from category B; 82 from category C; 15 from category D and; 81 from category E.⁶⁸⁸ The groups were found to be spread throughout the country and involved in a wide array of illegal activity.⁶⁸⁹ The most common features ‘bonding’ criminals together to form a ‘group’ were; crime, local ties and drugs. Other factors linking criminals included; blood ties, ethnicity, prison, motorbikes, sporting interests and, in a rare few, religion.⁶⁹⁰

Developing an updated conception of organised crime

The Ministry of Justice (MOJ) is one of the primary government agencies responsible for dealing with organised crime issues. In March 2008 they released the *Organised Crime Strategy* (OCS), which is intended to guide responses to organised crime issues.⁶⁹¹ This involved; building on existing intelligence, and knowledge regarding organised crime, to develop an accurate conception of organised crime. In developing this concept the MOJ has taken a

⁶⁸⁷ Ibid at 12.

⁶⁸⁸ Ibid at 14 and 15.

⁶⁸⁹ Ibid at 24 - Offences included: theft/burglary, drug sales, violence/intimidation, drug cultivation, robbery, fraud, illegal bars, drug importation, gambling, pornography, immigration offences.

⁶⁹⁰ Ibid at 29.

⁶⁹¹ Ministry of Justice Crime Prevention Unit, *Organised Crime Strategy: Developing a whole of government approach to combat organised crime*. (March 2008-June-2009). This paper can be found online at <<http://www.justice.govt.nz/policy-and-consultation/crime/organised-crime/organised-crime-strategy-2008-2009>>. Section 5.3 and 5.3.1 will discuss the *New Zealand Programme of Action for Organised Crime* and the *Organised Crime Strategy* in more detail. For the purpose of this section the concept of organised crime within the OCS is discussed.

careful and grounded approach; not wanting to immediately assume what applies overseas, will necessarily apply to New Zealand's specific situation.

Organised crime in New Zealand is perceived as being characterised by loose networks between groups and individuals.⁶⁹² Because of “*the fluid and constantly evolving*” nature of organised crime the MOJ found it unhelpful to try and define a rigid set of crimes or criminal groups.⁶⁹³ The OCS outlines a number of characteristics that criminal groups may exhibit. For example, organised crime groups may be law enforcement conscious and may use intimidation, violence and corruption to protect themselves.⁶⁹⁴ However, the MOJ makes it clear that organised crime networks or groups vary considerably in size, geographic location, criminal sophistication, modus operandi and the impact they have on the community.⁶⁹⁵ Furthermore, the MOJ stresses that there is great diversity among criminal group membership, with all races and ethnic backgrounds represented.⁶⁹⁶

The OCS outlines four categories of ‘criminal groups’ specific to New Zealand’s experience with organised crime:⁶⁹⁷

- i) *Street Level Gangs*: This category of ‘criminal group’ is considered disorganised engaging in minor crime or territorial aggression. They are not the focus of the OCS. These groups are often made up of youths and therefore the CPU determined that delinquent behaviour common to some youth groups should not be branded as organised crime. However, they are mentioned in the strategy because members of such groups sometimes carry out crimes on behalf of adult gangs and also provide fertile recruitment grounds for more serious criminally-orientated gangs.⁶⁹⁸

⁶⁹² Ibid at 1.

⁶⁹³ Ibid.

⁶⁹⁴ Ibid.

⁶⁹⁵ Ibid at 1 and 2.

⁶⁹⁶ Ibid at 1.

⁶⁹⁷ Ibid at 1 and 2.

⁶⁹⁸ Ibid.

- ii) *Territorial Gangs*: Territorial groups have some similarities to street level gangs, but tend to dominate a specific geographical area and sometimes monopolise the criminal trade in that area. There are a number of well known gangs in this category, which are divided into ‘chapters’ and feature throughout NZ. These groups are often involved in drugs manufacture and sale. They tend to focus on products supplied locally rather than those that need to be sourced from overseas.⁶⁹⁹
- iii) *Organised Gangs*: Organised gangs have some identifying factors similar to territorial groups. Their activity has increased to a national level, but without any strong formal linkages to transnational criminal activity. These criminal groups take greater measures to launder their illegal gains and, subsequently, are often more difficult to detect and target. Typically their offending patterns are more sophisticated and covert than street level or territorial gangs.⁷⁰⁰
- iv) *Transnational Groups*: This category encompasses criminal activity that is organised across national borders including groups primarily based off-shore, but, who target illegal markets in New Zealand. Transnational groups are active in New Zealand exhibiting offending that is fluid and constantly changing. Their activities range from low-level facilitation and commission of offending to large-scale operations driven by transnational ‘crime entities’.⁷⁰¹

5.2 *New Zealand’s Experience with Transnational Organised Crime*

Despite its geographical isolation and relatively small population New Zealand has not remained immune to instances of TNOC. As in every part of the world the exact extent of organised criminal activity in New Zealand is difficult to accurately measure. However, the Ministry of Justice believes that organised

⁶⁹⁹ Ibid at 2.

⁷⁰⁰ Ibid.

⁷⁰¹ Ibid.

crime in New Zealand has both a domestic front, with groups operating around New Zealand, and also an international front with off-shore criminal groups using New Zealand as either a transshipment route, or a destination market, for illicit goods particularly drugs.⁷⁰²

The last decade has seen a significant shift in the New Zealand market for illicit drugs with an increasing number of overseas based groups seeking to 'break into' the New Zealand market.⁷⁰³ Reflecting world trends the illicit drug market in New Zealand is very profitable. Attracting local gangs as well as overseas based groups who wish to exploit the NZ market, particularly the amphetamine market.⁷⁰⁴ The methamphetamine market alone is estimated at over NZ \$1 Billion.⁷⁰⁵ Pure methamphetamine (better known as 'p') production has increased rapidly since the first 'p' lab was discovered in NZ during 1996. Apart from being a highly profitable enterprise for criminal groups, illicit drugs also cause enormous harm to society. For instance during 2005/06 it is estimated that illicit drug use caused \$NZ1.31 Billion of social costs.⁷⁰⁶ Despite a rise in methamphetamine users, cannabis still remains the primary illicit drug of abuse in NZ and plays a significant part in the development and profits for organised criminal groups.⁷⁰⁷

Customs have noted that a number of off-shore groups, from diverse parts of the world⁷⁰⁸, involved in drug smuggling, have been found to operate in or target New Zealand markets.

⁷⁰² Ministry of Justice, Anti-Money Laundering and Countering the Financing of Terrorism: New Zealand's Compliance with FATF Recommendations: Part One – The Response to the First Discussion Document (June 18 2009). Online at <<http://www.justice.govt.nz/publications/global-publications/m/anti-money-laundering-and-countering-the-financing-of-terrorism-new-zealands-compliance-with-fatf-recommendations/part-one-the-response-to-the-first-discussion-document>>. Retrieved 5 December 2009.

⁷⁰³ Ministry of Justice, *supra* n. 691 at 2.

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Ibid.*

⁷⁰⁶ Explanatory note to the Gangs and Organised Crime Bill, No.10 – 2 (2009) at 6.

⁷⁰⁷ Ministry of Justice, *supra* n. 691 at 3.

⁷⁰⁸ *Ibid.* For instances from China, West Africa, South America, the Middle East and Russia. See also New Zealand Customs Service, Annual Report 2007-2008> Part A - Customs 2007-2008> Outcomes (2007/08) Online at <<http://www.customs.govt.nz/library/Accountability+Documents/Annual+Report+2007-2008/Part+A+++Customs+2007-2008/Outcomes/Outcomes.htm>>.

These groups often operate on a larger scale than local offenders and have access to greater resources. Their criminal activity is often organised from offshore and key participants may remain outside New Zealand's jurisdiction. They also present language and cultural barriers that can further inhibit law enforcement.⁷⁰⁹

The Ministry of Justice also identifies other significant organised criminal activities affecting New Zealand as; immigration offences; fisheries and wildlife offences including smuggling of New Zealand's native animals, flora and fauna. Corruption and money laundering offences are also concerning because they are vital in facilitating organised criminal activity.⁷¹⁰

5.3 *Programme of Action for Organised Crime*

On 14 May 2007 Cabinet directed officials from the Ministry of Justice (MOJ) to develop a programme of action and a thorough strategy to combat organised crime in New Zealand.⁷¹¹ MOJ officials were asked to report back on three broad areas aimed at reducing the impact of organised crime in New Zealand.⁷¹² The report makes up the *Programme of Action for Organised Crime* and consists of three papers:

- Paper 1: *Programme of Action for Organised Crime and the Organised Crime Strategy*,⁷¹³
- Paper 2: *Establishment of the Organised Crime Agency and the Disestablishment of the Serious Fraud Office*,⁷¹⁴
- Paper 3: *Reducing the Level and Impact of Organised Crime in New Zealand: Recommendations for Legislative Reform*.⁷¹⁵

⁷⁰⁹ Ibid.

⁷¹⁰ Ibid and supra n. 702.

⁷¹¹ Ministry of Justice, *The Programme of Action for Organised Crime and the Organised Crime Strategy*, (Modified October 15 2009) <<http://www.justice.govt.nz/policy-and-consultation/crime/organised-crime/the-programme-of-action-for-organised-crime-and-the-organised-crime-strategy>>. date accessed 5 Jan 2010

⁷¹² Ibid.

⁷¹³ This paper can be found online at <<http://www.justice.govt.nz/policy-and-consultation/crime/organised-crime/the-programme-of-action-for-organised-crime-and-the-organised-crime-strategy>>.

⁷¹⁴ This paper can be found online at <<http://www.justice.govt.nz/policy-and-consultation/crime/organised-crime/establishment-of-an-organised-crime-agency-and-disestablishment-of-the-serious-fraud-office#1>>.

⁷¹⁵ This paper can be found online at <<http://www.justice.govt.nz/policy-and-consultation/crime/organised-crime/recommendations-for-legislative-reform>>.

5.3.1 Organised Crime Strategy⁷¹⁶

The *Organised Crime Strategy* (OCS), annexed to Paper 1, is intended to provide the framework for all future government action to tackle organised crime and will guide the work of government agencies in their organised crime functions.⁷¹⁷ The OCS emphasises an intelligence led approach to combating organised crime. The strategy will direct law enforcement to focus on upper-levels of organised crime, bring key individuals before the courts and actively disrupt groups by depriving them of the proceeds of crime, access to assets and distribution networks.⁷¹⁸ The OCS acknowledges that organised crime has the ability to evolve and adapt to a changing environment and therefore the OCS hopes to establish a process for identifying and targeting new and developing patterns of criminal activity.

The OCS has four components:⁷¹⁹

- Community based engagement
- Prevention measures
- Intelligence gathering
- Enhanced investigation and law enforcement

These focus areas have been developed, with specific goals and objectives, to reflect the breadth of activities required to reduce the impact of organised crime in New Zealand.⁷²⁰

Community based engagement

This aspect of the OCS reflects the understanding that many New Zealand gangs, with organised crime links, have been able find fertile recruiting grounds among disenfranchised youth. “*Gangs... are strong inter-generational cultural phenomena*”.⁷²¹ The street level youth gangs, identified within the

⁷¹⁶ Ministry of Justice, supra n. 691.

⁷¹⁷ Ministry of Justice, supra n. 711.

⁷¹⁸ Ministry of Justice, supra n. 691 at 1.

⁷¹⁹ Ibid at 4.

⁷²⁰ Ibid.

⁷²¹ Ibid.

OCS, often have connections to more established ‘adult’ gangs.⁷²² To minimise their potential involvement with gangs and serious organised crime the OCS identifies the need to provide counter incentives such as, employment opportunities and building strong family linkages to draw people away from participation in gangs and organised crime.⁷²³

The OCS seeks to build a solid community approach by firstly better informing the public about organised crime and to encourage the public to be more active in addressing the problem. The government has also started several initiatives to prevent and reduce youth offending⁷²⁴ well before it gets to a more serious organised criminal level. A long term strategic aim of the OCS is to deliver social intervention programmes, addressing the issues of gang involvement and participation in organised criminal activity.⁷²⁵

Prevention measures

The OCS identifies that effective prevention of organised crime must rest on a “good understanding of the factors that facilitate and/or inhibit the development of organised crime”.⁷²⁶ One of the key motivators for organised criminal activity is money, and therefore prevention activities must necessarily focus on this aspect.⁷²⁷ Organised criminal activity is also believed to work through the legitimate business sector, and therefore, working with the business sector, to raise awareness of suspicious activity linked to organised crime, is important.⁷²⁸ New Zealand currently has a high ranking internationally as a country perceived to be free of corruption.

⁷²² Ibid.

⁷²³ Ibid.

⁷²⁴ See for instance Ministry of Justice and Ministry of Social Development, *Youth Offending Strategy* (April 2002). Online at <<http://www.justice.govt.nz/policy-and-consultation/youth/documents/youth-strategy.pdf>>, and *Strengthening Families* Online at <<http://www.strengtheningfamilies.govt.nz/>>.

⁷²⁵ Ministry of Justice, supra n. 691 at 4.

⁷²⁶ Ministry of Justice, supra n. 691 at 5.

⁷²⁷ New Zealand’s anti-money laundering measures and measure to confiscate and seize assets will be further discussed in section 5.5.2 of this thesis.

⁷²⁸ Ministry of Justice, supra n. 691 at 5.

Maintaining the integrity of NZ government officials and a well functioning and transparent justice system is critical. A 2006 Organisation for Economic Co-operation and Development (OECD) *Report on the Implementation of the OECD Anti-Bribery Convention*⁷²⁹ was overall positive for New Zealand but did recommend some changes including broadening the criteria for the criminal liability of legal persons for foreign bribery. The OCS notes that the MOJ and other agencies have been implementing the recommendations of the OECD report, with encouraging progress made.⁷³⁰

Intelligence Gathering

The OCS stresses the importance of sound intelligence to the overall success in efforts to combat organised crime.

Intelligence is critical for decision-making, effective planning, strategic targeting and resource deployment. Law enforcement agencies cannot function effectively without collecting, processing, analysing and using intelligence. Risk assessments and prioritisation also require a strong intelligence base.⁷³¹

The OCS mentions the development of a National Intelligence Model (NIM) which will provide a method for intelligence to be centrally collated, assessed and disseminated to relevant agencies.⁷³² The rationale behind a ‘shared’ NIM is to ensure that information is freely available and confidentially shared amongst key agencies. A number of police agencies have important roles in gathering, analysing and disseminating intelligence, for instance, the Police National Intelligence Centre (NIC) is tasked with maintaining an intelligence view across the entire spectrum of crime in New Zealand.⁷³³

⁷²⁹ OECD: Directorate for Financial and Enterprise Affairs, *New Zealand: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, (27 October 2006). Online at <<http://www.oecd.org/dataoecd/57/38/37658136.pdf>>. Retrieved 7 Jan 2010.

⁷³⁰ Ministry of Justice, *supra* n. 691 at 5.

⁷³¹ *Ibid* at 6.

⁷³² *Ibid*.

⁷³³ Organised and Financial Crime Agency New Zealand, *Tasking Framework (Organised Crime)*, at 3 and 4. Online at <<http://ofcanz.govt.nz/sites/default/files/OFCANZ-tasking-framework-20081217.pdf>>. The NIC has been established along similar timelines to OFCANZ with the aim of providing whole of government intelligence to Police and OFCANZ. The NIC is designed to provide nationally coordinated intelligence systems providing a more effective and efficient approaches to crime reduction work at every level. See also New Zealand Police, *Illicit Drug Strategy* (2010) at 19. Online at: <http://www.police.govt.nz/resources/2009/NZ_Police_Illicit_Drug_Strategy_2009.pdf>.

The Police National Targeting and Analysis Group will facilitate the sharing of high quality intelligence, in accordance with the whole of government approach.⁷³⁴ Furthermore, the recently established Organised and Financial Crime Agency New Zealand (OFCANZ) is set up to adopt an intelligence led approach with a focus on ‘high level’ national and transnational organised crime.⁷³⁵

Enhanced Investigation and law enforcement

The enforcement aspect of the OCS focuses on developing effective responses, to emerging organised crime threats, and the investigation and disruption of those threats.⁷³⁶ The outcome of successfully achieving these elements will be reducing risk, building strong criminal cases and achieving successful prosecution against key targets. The OCS acknowledges that organised criminal networks vary greatly, and therefore, approaches to weaken or disrupt them must reflect this diversity. However, there is an assumption within the OCS that targeting key assets and people within criminal networks will lead to a significant weakening of criminal infrastructure.⁷³⁷ This approach is not unique and has been attempted by law enforcement agencies around the world with variable results.⁷³⁸ Nevertheless, it is believed that this ‘enhanced’ approach will lead to a reduction in the following key areas of organised crime:⁷³⁹

- Networking between local and international groups
- High level awareness of law enforcement, for example counter surveillance measures
- Inter-relationship between different types of offending
- Difficulty in developing information sources

⁷³⁴ Ibid.

⁷³⁵ Ibid. The important role OFCANZ has to play in combating organised crime in New Zealand will be discussed in further detail at section 5.4 of this thesis.

⁷³⁶ Ministry of Justice, *supra* n. 691 at 6 and 7.

⁷³⁷ Ibid at 7.

⁷³⁸ As outlined in chapter 2 there is debate as to how effective ‘dismantling’ is in reducing overall criminal activity. Furthermore, there is also debate as to whether targeting ‘king pin’ figures will significantly affect criminal networks, which have proved very adaptable to law enforcement disruptions. See for example Levi M and Maguire M, *supra* n.1 at 401 and Klerks P, *supra* n. 92 at 102.

⁷³⁹ Ministry of Justice, *supra* n. 691 at 7.

- Use of fear and violence to intimidate witnesses and victims, discipline members etc
- Ability to operate over longer periods of time and ability to suspend activities temporarily
- Access to considerable financial resources
- Ability to corrupt officials and organisations and gather information on enforcement capability
- Access to support, financing and criminal modus operandi from overseas counterparts.

The OCS is rightly critical of traditional methods measuring the success of law enforcement ‘interruptions’.⁷⁴⁰ The traditional methods include counting; arrests, seizures of illicit goods (such as drugs), warrants executed and searches undertaken.⁷⁴¹ The OCS points out that this approach merely measures the disruption processes, rather than measuring the actual impact on organised crime and crime in general. Therefore, the OCS notes, it is important to gain a ‘real’ understanding of the effectiveness of disruption tactics against organised crime. However, the OCS does not discuss in detail what measures will be implemented, to enable agencies to quantify the extent of disruption, only mentioning that they are needed, and will be developed.⁷⁴²

Updated Organised Crime Strategy stalled

The OCS covers the period, March 2008-June 2009 and is supposed to be the first in an ongoing cycle of strategies. The *Programme of Action for Organised Crime* directed officials to provide an update on the OCS to cabinet in May 2009.⁷⁴³ It was envisaged that an updated full term strategy for the period July 2009-June 2012 would be developed.⁷⁴⁴ Furthermore, the strategy sought to ensure the development of annual risk assessments that would provide details and scope of organised crime activities, highlighting trends and developments over each twelve-month period.⁷⁴⁵ Both of these objectives are considered important developments to ensure the ongoing success of New Zealand’s

⁷⁴⁰ Levi M and Maguire M, supra n. 1 at 398-410, are very critical of traditional methods to measure the success of law enforcement at 410-423 the authors outline necessary non-traditional measures to combat organised crime including; community engagement, regulatory disruption and private sector involvement (particularly relevant to combating money-laundering).

⁷⁴¹ Ministry of Justice, supra n. 691 at 7 see also Edwards A and Gill P, supra n. 275 at 269.

⁷⁴² Ibid.

⁷⁴³ Ministry of Justice, supra n. 711.

⁷⁴⁴ Ibid and see Ministry of Justice, supra n. 691 at 1.

⁷⁴⁵ Ministry of Justice, supra n. 691 at 5.

efforts to combat organised crime, particularly in the areas of intelligence gathering, anticipating criminal patterns, risk assessment and developing focus areas.⁷⁴⁶

The OCS has, thus far, not been updated due in part to a restructuring in the MOJ, which has seen the CPU disestablished and responsibility for the OCS shifted to the International Criminal Law Team. The MOJ is currently reviewing the scope of the strategy and the OCS is listed as a priority within the MOJ operating intentions for 2008/09-2010/11.⁷⁴⁷ However, no exact date is given for when the updated strategy will be completed.

5.4 OFCANZ

In 2007, coinciding with the *Programme of Action for Organised Crime*, Cabinet directed officials to develop a model for an Organised Crime Agency in New Zealand.⁷⁴⁸ On 3 September 2007 Cabinet agreed that an Organised Crime Agency, focusing on serious and organised crime, should be created and hosted within the New Zealand Police.⁷⁴⁹ The agency has been modelled, to some extent, on the UK's Serious Organised Crime Agency.⁷⁵⁰ The name of the agency was proposed as the 'Organised and Financial Crime Agency New Zealand' (OFCANZ) to fit the theme 'policing the New Zealand way' and also because OFCANZ was to incorporate the functions of the Serious Fraud Office

⁷⁴⁶ Ministry of Justice, *supra* n. 691 4-6. The OCS guides the work of OFCANZ, and moreover, as New Zealand has recognised that organised crime evolves and changes over time, the annual assessments are supposed to inform and guide the development of risk assessments and focus areas. See also Organised and Financial Crime Agency of New Zealand, *What does OFCANZ do?* Online at <<http://ofcanz.govt.nz/about/what-does-ofcanz-do>>.

⁷⁴⁷ Ministry of Justice, *Statement of Intent: 2008/09 - 2010/11: Operating Intentions 2008/09–2010/11* (Modified June 18 2009). Online at <<http://www.justice.govt.nz/publications/global-publications/m/ministry-of-justice-statement-of-intent-2008-09-2010-11/operating-intentions-2008-0920132010-11>>. Retrieved 8 January 2009.

⁷⁴⁸ Ministry of Justice, *Establishment of an Organised Crime Agency and Disestablishment of the Serious Fraud Office*. Online at <<http://www.justice.govt.nz/policy-and-consultation/crime/organised-crime/establishment-of-an-organised-crime-agency-and-disestablishment-of-the-serious-fraud-office>>.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ Edwards, A and Levi, M. "Researching the organization of serious crimes". *Criminology and Criminal Justice* 2008 Vol. 8 at 381.

(SFO).⁷⁵¹ The SFO was to be disestablished and merged into OFCANZ. The reasons cited for this decision were; “*there is no justification for retaining separate powers that the SFO currently holds in relation to the investigation of serious or complex fraud.*”⁷⁵² This decision was made under the former, Labour led, Government and when the National led Government took power, in 2008, they decided to maintain the SFO, as a distinct and separate entity working closely with OFCANZ.⁷⁵³

OFCANZ is guided by the following mission statement:⁷⁵⁴

To improve the safety and security of New Zealand by combating serious and organised crime and serious or complex fraud through an inter-agency partnership approach.

In addition OFCANZ has been tasked with achieving and maintaining the following objectives:⁷⁵⁵

- to centralise and enhance intelligence gathering capabilities against organised crime networks and those committing serious or complex fraud and to ensure information is shared between law enforcement and other agencies;
- to collaborate with, and enhance co-operation between, law enforcement and other agencies in the planning and conducting of operations, both nationally and internationally; and
- to detect, investigate and successfully prosecute serious and organised crime and serious or complex fraud;
- to interrupt organised criminal activity through operations to restrain and forfeit the proceeds of crime;
- to confront and disrupt the activities of serious and organised criminals and those committing serious or complex fraud;
- to improve understanding of the activities of organised crime networks and the harm they cause; and
- to prevent risks arising or potentially arising from serious and organised crime and serious or complex fraud.

Its core functions consist of:⁷⁵⁶

- Leading, and enhancing co-operation between, law enforcement and other agencies in the planning and conducting of operations against organised crime;
- Using a variety of methods to combat organised crime, including investigating and prosecuting, disrupting activities and linkages, and confronting serious and organised crime;
- Interrupting organised criminal activity through following the money trail, and through operations to restrain and forfeit the proceeds of crime;

⁷⁵¹ Ibid.

⁷⁵² Ibid.

⁷⁵³ Organised and Financial Crime Agency New Zealand, *Background*. Online at <<http://ofcanz.govt.nz/about/background>>. Retrieved 28 May 2009.

⁷⁵⁴ Ministry of Justice, supra n. 748 at paragraph 55.

⁷⁵⁵ Ibid.

⁷⁵⁶ Organised and Financial Crime Agency New Zealand, *Key Functions*. Online at <<http://ofcanz.govt.nz/about/key-functions>>. Retrieved 28 May 2009.

- Driving the intelligence process on organised crime to gather information, and to ensure information is shared between law enforcement and other agencies;
- Improving understanding of the activities and harm of organised crime networks; and
- Preventing risks arising from serious and organised crime.

Intelligence led approach

The intelligence led approach will see the (NIC) developing an annual strategic assessment, but also involves providing other on-going assessments as new risks or threats arise.⁷⁵⁷ Based on the strategic assessments, OFCANZ will work with other agencies to agree on ‘Focus Areas’ to concentrate its efforts upon.⁷⁵⁸ By refining the ‘Focus Areas’ based on a risk prioritisation process,⁷⁵⁹ OFCANZ will identify which areas they will focus on and areas that other agencies may respond to.⁷⁶⁰ All risk areas must first be presented before the Officials Committee for Domestic and External Security Co-ordination⁷⁶¹ (ODESC) for approval. Once the Focus Areas are agreed on OFCANZ will proceed on a more detailed, and specific examination, of each area and then develop subsequent intervention strategies.⁷⁶² The evolving nature and constant development of criminal networks, requires OFCANZ to have flexibility and the ability to re-prioritise, to cope with emerging operational issues.⁷⁶³

⁷⁵⁷ Organised and Financial Crime Agency New Zealand, *Tasking Framework (Organised Crime)*, online at <<http://ofcanz.govt.nz/sites/default/files/OFCANZ-tasking-framework-20081217.pdf>>. Accessed 12-04-2009.

⁷⁵⁸ Ibid.

⁷⁵⁹ Organised and Financial Crime Agency New Zealand, *Risk Prioritisation (Organised Crime)*, online at <<http://ofcanz.govt.nz/sites/default/files/OFCANZ-risk-prioritisation-proposal-20081217.pdf>>. OFCANZ will prioritise based impact criteria including impact on 1. New Zealand’s national interests 2. impact on the community and 3. impact or thematic issue on multiple New Zealand agencies. Organised criminal groups or activities that impact on a significant number of the criteria within the three categories above will be agreed on as Focus Areas.

⁷⁶⁰ Ibid.

⁷⁶¹ Department of the Prime Minister and Cabinet, *Security in the Government Sector*, (2002) “The Officials Committee for Domestic and External Security Co-ordination (ODESC) is the committee of government officials charged with giving the Prime Minister strategic policy advice on domestic and external security matters. The committee reports to the Prime Minister and is chaired by the Chief Executive of the Department of the Prime Minister and Cabinet, with membership being drawn from Chief Executives of appropriate government agencies.” From Chapter 1 page 5. Online at <www.security.govt.nz/sigs/chapter-1-security-policy.doc>. Retrieved 8 January 2010.

⁷⁶² Ibid.

⁷⁶³ OFCANZ, *supra* n. 759.

An example of how OFCANZ operates in practise is evident during OFCANZ's first completed operational phase.⁷⁶⁴ 'Taskforce Abyss' was an operation against members of the Tribesman Motorcycle Gang resulting in the arrest of 14 members, accounting for 160 charges, in relation to; "selling, supplying and conspiracy to supply and manufacture of methamphetamine". Over 100 personnel were involved across a number of agencies including; the SFO, Customs, Ministry of Fisheries, Ministry of Social Development, Police and the Department of Corrections. Taskforce Abyss was run under the leadership of OFCANZ. The operation demonstrates how OFCANZ, as a central figure in the fight against organised crime, is able to guide and organise relevant agencies to participate effectively in particular operations.

Although in its infant stages⁷⁶⁵ OFCANZ offers a promising central agency in New Zealand's efforts to combat organised crime. Committing itself to an intelligence led approach will keep OFCANZ from stagnating and allow it to keep up with organised crime trends and adapt as necessary to the constantly changing nature of criminal networks.

5.5 Legal tools to combat Organised Crime in New Zealand

Since becoming a signatory to the Palermo Convention in December 2000 New Zealand has undertaken a number of legal reforms to ensure its obligations under the convention are met.⁷⁶⁶ The most significant legal reforms, in regards to combating organised crime, have centred on making participation in an organised criminal group illegal and targeting the finances of criminal groups. New Zealand has also worked to ensure that its domestic legislation provides for wide ranging assistances of extradition and other criminal matters. The

⁷⁶⁴ OFCANZ: Press Release, *OFCANZ leads its first strike against organised crime* (27 September 2009) online at <<http://ofcanz.govt.nz/publications>>.

⁷⁶⁵ Organised and Financial Crime Agency New Zealand, *Tasking Framework (Organised Crime)*, at 10. Online at <<http://ofcanz.govt.nz/sites/default/files/OFCANZ-tasking-framework-20081217.pdf>>. The initial staffing levels for OFCANZ were proposed to be just 35 capable of running two major taskforces or 3-4 smaller ones. It is expected that staffing levels will be gradually increased over the years to give OFCANZ greater capabilities.

⁷⁶⁶ New Zealand National Interest Analysis, *United Nations Convention against Transnational Organised Crime* (2001) at 3 and 4.

sections below will outline and discuss New Zealand’s legal measures to combat organised crime, focusing on areas relating to:

- Criminalising participation in an organised criminal group
- Targeting criminal proceeds of crime
- Targeting money laundering
- Measures to foster cooperation with foreign countries.

5.5.1 Participation Offence

Under section 98A of the Crimes Act 1961, participation in an organised criminal group is illegal and liable for an imprisonment term not exceeding 10 years.⁷⁶⁷ The statutory definition of organised crime is kept broad, reflecting the need to encompass the wide variety of groups involved in organised criminal activities. Section 98A (2) of the Crimes Act 1961 defines an organised criminal group:

a group is an organised criminal group if it is a group of 3 or more people who have as their objective or one of their objectives—

- (a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
- (b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
- (c) the commission of serious violent offences (within the meaning of section 312A(1)) ...; or
- (d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of serious violent offences (within the meaning of section 312A(1))

Furthermore section 98A (3) goes on to say:

A group of people is capable of being an organised criminal group for the purposes of this Act whether or not—

- (a) some of them are subordinates or employees of others; or
- (b) only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or
- (c) its membership changes from time to time.

The case of *R v Cara*⁷⁶⁸ held that under section 98A of the Crimes Act it is not necessary for a criminal group to display longevity or continuous membership to be considered ‘organised’. Moreover, it is not necessary to prove the

⁷⁶⁷ Section 98A(1).

⁷⁶⁸ (2004) 21 CRNZ 283.

existence of any formal roles for members of the group⁷⁶⁹ or the existence of any type of formal membership system within the group.⁷⁷⁰ *R v Cara* also held that a group may be considered an ‘organised criminal group’ under s 98A of the Crimes Act when they formed for the commission of a single offence.⁷⁷¹ However, in such a case, there must be evidence showing the group deliberately formed for that particular offence, otherwise the onus is on the prosecution to prove the alleged group has some degree of permanence, regularity or an acknowledgment by the members of some commonality.⁷⁷²

Section 98A had not been as effective as initially hoped, in combating organised crime, due in part to the low penalty, which often did not reflect the culpability of gang leaders and criminal organisers.⁷⁷³ Furthermore, prosecutors had found the evidential burden, for proving participation, onerous and somewhat complicated.⁷⁷⁴ Consequently s 98A(1) of the Crimes Act was amended by s 5 of the Crimes Amendment Act 2009. This amendment increased the length of imprisonment, for participating in an organised criminal group, from a maximum of 5 years to a maximum of 10 years. Section 5 of the Crimes Amendment Act also seeks to clarify, and simplify, the evidential burden for prosecution to prove participation in an organised criminal group.⁷⁷⁵

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *R v Robinson* 23/6/06, Asher J, HC Auckland CRI-2004-004-10413.

⁷⁷¹ (2004) 21 CRNZ 283 at p 322.

⁷⁷² *R v Robinson* 23/6/06, Asher J, HC Auckland CRI-2004-004-10413.

⁷⁷³ Explanatory Note in the Gangs and Organised Crime Bill, No.10 – 2 (2009) at1 and 2.

⁷⁷⁴ *Ibid.*

⁷⁷⁵ *Ibid.* Section 5(1)(1)(a)-(c) of the Crimes Amendment Act 2009 substituted the original text of section 98A(1) of the Crimes Act1961:

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

With:

- (1) Every person commits an offence and is liable to imprisonment for a term not exceeding 10 years who participates in an organised criminal group—
 - (a) knowing that 3 or more people share any 1 or more of the objectives (the particular objective or particular objectives) described in paragraphs (a) to (d) of subsection (2) (whether or not the person himself or herself shares the particular objective or particular objectives); and
 - (b) either knowing that his or her conduct contributes, or being reckless as to whether his or her conduct may contribute, to the occurrence of any criminal activity; and

These amendments are intended to make section 98A a more effective tool in prosecuting organised criminal groups and to send a strong warning to criminal leaders, facilitators, and others, who assist criminal groups to achieve their objectives.⁷⁷⁶ This message is strengthened by concurrent measures amending the Sentencing Act 2009, to include participation in an organised criminal group as an aggravating factor in sentencing.⁷⁷⁷

5.5.2 Targeting criminal finances

As mentioned previously in this thesis, and as outlined in the New Zealand OCS, targeting criminal finances is considered both an effective measure to prosecute organised criminals, and to ensure they do not profit from their illegal gains. Thus, targeting criminal finances is also regarded as a potential preventive measure. New Zealand legislation in these areas has recently been reformed, and updated, to ensure New Zealand meets its international obligations, and to better target organised crime and terrorist funding.

Criminal Proceeds (Recovery) Act 2009

The Criminal Proceeds (Recovery) Act 2009 (CPRA) replaces the Proceeds of Crime Act 1991 (PCA). It is hoped that the CPRA will be a more effective tool in combating organised crime. The former PCA provided for the confiscation of property only where the owner has been convicted of a criminal offence. Experience has shown that this is insufficient to target all parties involved in organised crime.⁷⁷⁸ Some members (often the organisers or facilitators) of these criminal groups effectively distance themselves from the actual commission of crimes, and therefore were not targeted by the 1991 PCA. Subsequently the total amount confiscated under the former Act was relatively

(c) either knowing that the criminal activity contributes, or being reckless as to whether the criminal activity may contribute, to achieving the particular objective or particular objectives of the organised criminal group.

⁷⁷⁶ Explanatory Note in the Gangs and Organised Crime Bill, No.10 – 2 (2009) at 2.

⁷⁷⁷ See s 9(1)(hb) of the Sentencing Act 2002 as amended by s 4 Sentencing Amendment Act (No 3) 2009.

⁷⁷⁸ Explanatory note to the Criminal Proceeds (Recovery) Bill, No. 81 – 3 (2009) at 1.

small.⁷⁷⁹ Therefore, the CPRA provides a conviction based regime, limited to instruments of crime, *and* a non-conviction based regime (civil regime) dealing with all other property representing the proceeds of crime, or assessed to be the value of a person's unlawfully derived income.⁷⁸⁰

Section 15 makes it clear that the criminal activity, on which a civil forfeiture order is made, does not need to be the subject of any, prior or current, criminal proceedings in New Zealand or overseas.⁷⁸¹ The CPRA follows similar legislative initiatives implemented in other jurisdictions; such as Australia, Ireland and the UK, which are proving more effective in those countries experience.⁷⁸²

Purpose of the Criminal Proceeds (Recovery) Act

The primary purpose of the Act is to establish a regime for the forfeiture of property that has been derived from significant criminal activity, or that represents the value of a person's unlawfully derived income.⁷⁸³ The policy objectives of the PRCA are stated as:⁷⁸⁴

- To confiscate property from persons who have engaged in or profited from significant criminal activity:
- To reduce the rewards from crime for the individual:
- To reduce the attraction of crime for potential offenders:
- To reduce the resources that could potentially be used for criminal activity.

Furthermore, the CPRA seeks to facilitate cooperation with other jurisdictions by addressing matters relating to foreign forfeiture and restraining orders.⁷⁸⁵

⁷⁷⁹ Ibid.

⁷⁸⁰ Ibid at 2. Under the Criminal Proceeds (Recovery) Act a person unlawfully benefits from significant criminal activity if they have knowingly, directly or indirectly, derived a benefit from significant criminal activity (whether or not that person undertook or was involved in the significant criminal activity) see section 7. Under the previous Proceeds of Crime Act 1991 only offenders were liable for forfeiture in relation to benefits derived from their own serious offending.

⁷⁸¹ Moreover, s 16 of the Criminal Proceeds (Recovery) Act states that even when criminal proceedings have been quashed or set aside this will not affect civil recovery proceedings.

⁷⁸² Supra n. 778.

⁷⁸³ Criminal Proceeds (Recovery) Act 2009 s 3(1)(a) and (b)

⁷⁸⁴ Supra n. 778 at 1.

⁷⁸⁵ Criminal Proceeds (Recovery) Act 2009 s 3(1)(2)(d) and Supra n. 778 at 1.

Significant criminal activity is defined under s 6 of the CPRA as;

“an activity engaged in by a person that if proceeded against as a criminal offence would amount to offending—

(a) that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or

Conviction based regime

Subpart 4 of the CPRA deals with the forfeiture of instruments of crime. In addition, many aspects of New Zealand's conviction-based forfeiture regime are included in the Sentencing Act 2002. An instrument forfeiture order is one made under s 142N of the Sentencing Act, which allows the Court to order that the instrument of crime, or any part of it, be forfeited to the Crown. An instrument of crime refers to any property "*used (wholly or in part) to commit or facilitate the commission of a qualifying instrument forfeiture offence*".⁷⁸⁶ A qualifying instrument offence is an offence punishable by a maximum imprisonment term of 5 years or more.⁷⁸⁷ Previously; property used to commit, or facilitate, a serious crime was included in the definition of 'tainted property', under the Proceeds of Crime Act 1991⁷⁸⁸ and was liable for forfeiture under that Act.⁷⁸⁹ Forfeiture of 'instruments of crime' is now dealt with as part of the sentencing process.⁷⁹⁰

Civil based regime

The weakness of the 1991 Proceeds of Crime Act was due to its inability to target those criminals, who are involved in organised criminal activity but, who do not 'get their hands dirty'. Often these criminals play a key part.⁷⁹¹ Therefore, the civil forfeiture regime in the CPRA seeks to ensure that criminal's who organise, facilitate, or in any other way aid, organised criminal activity are not exempt from forfeiture measures.⁷⁹² Under the CPRA the

(b) from which property, proceeds, or benefits of a value of \$30,000 or more have, directly or indirectly, been acquired or derived."

⁷⁸⁶ Section 5 Criminal Proceeds (Recovery Act) 2009. This also includes the proceeds of any disposition of that property or any other property into which that property is converted after the commission of the qualifying instrument offence.

⁷⁸⁷ Ibid. Includes an attempt to commit, conspiring to commit, or being an accessory to an offence if the maximum term of imprisonment for that attempt, conspiracy, or activity is 5 years or more.

⁷⁸⁸ Under Section 2 'tainted property' refers to property used to commit, or to facilitate the commission of, the offence; or proceeds of the offence.

⁷⁸⁹ See s 15 of the Proceeds of Crime Act 1991.

⁷⁹⁰ See ss 142A-142Q of the the Sentencing Act 2002 and also ss 70-79 and 80 of the Criminal Proceeds (Recovery) Act 2009.

⁷⁹¹ Failitators and organisers key players- See peter Klerks also Australian Threat assessment

⁷⁹² Supra n. 778 at 2.

Commissioner of the Police is empowered to apply to the High Court for either; an assets forfeiture order or, a profit forfeiture order.⁷⁹³

The assets forfeiture regime rests on the ability of the Court to order the forfeiture of ‘tainted property’. Tainted property refers to⁷⁹⁴:

- (a)...property that has, wholly or in part, been—
 - (i) acquired as a result of significant criminal activity; or
 - (ii) directly or indirectly derived from significant criminal activity; and
- (b) includes any property that has been acquired as a result of, or directly or indirectly derived from, more than 1 activity if at least 1 of those activities is a significant criminal activity.

Assets forfeiture is aimed at property rather than people and requires the Crown to prove, on the balance of probabilities, that the property is ‘tainted property’.⁷⁹⁵ On application for an assets forfeiture order, if the High Court is satisfied on the ‘balance of probabilities’ that specific property is ‘tainted property’, the Court must make an assets forfeiture order in respect of that property.⁷⁹⁶

In regards to a profit forfeiture order; if the Court is satisfied, on the balance of probabilities, that the respondent has unlawfully benefited from significant criminal activity, in the relevant period of criminal activity, and has interests in property, then a profit forfeiture order will be made.⁷⁹⁷ ‘The relevant period of criminal activity’ refers to profit, for criminal activity, received not more than 7 years prior to an application for forfeiture or restraint.⁷⁹⁸ The policy rationale, for the 7 year period, is to allow for confiscation of wealth, derived over a significant period, without going so far back in time as run the risk of unreliable assessments.⁷⁹⁹

Before making a ‘profit forfeiture order’, the Court must determine the maximum recoverable amount. The determined amount is recoverable, from the respondent, by the Official Assignee on behalf of the Crown, as a debt due

⁷⁹³ Criminal Proceeds (Recovery) Act 2009 ss 5, 43, 44.

⁷⁹⁴ Ibid at s 5.

⁷⁹⁵ Supra n. 778 at 4.

⁷⁹⁶ Criminal Proceeds (Recovery) Act 2009 s 50.

⁷⁹⁷ Ibid at s 55.

⁷⁹⁸ Ibid at s 5. See also supra n. 778 at 3.

⁷⁹⁹ Supra n. 778 at 3.

to the Crown.⁸⁰⁰ Once the Commissioner has established, on the balance of probabilities, the respondent has unlawfully benefited from significant criminal activity (within the relevant period of criminal activity) the value of that benefit is presumed to be the value stated in the application for the profit forfeiture order.⁸⁰¹ Therefore the onus is on the respondent to prove, that on the balance of probabilities, the stated value is too great.⁸⁰² The justification for the reverse onus is based on the belief that; requiring the Crown to establish the value of the profit, for significant criminal activity, is too onerous a test.⁸⁰³ It is a difficult task to obtain evidence showing the unlawful origins of property. On the other hand, if the property comes from lawful means, then the respondent should not have a significant difficulty proving its legitimate origins.⁸⁰⁴

Restraining Orders

Under a restraining order, property specified within the order may not be disposed of, or dealt with other than is provided for in the order.⁸⁰⁵ Furthermore, the property will be under the Official Assignees custody and control. Under the CPRA the Court may make a restraining order for the following reasons:

- The court is satisfied it has reasonable grounds to believe that the respondent has unlawfully benefited from significant criminal activity.⁸⁰⁶
- If the court is satisfied it has reasonable grounds to believe that any property is ‘tainted property’.⁸⁰⁷
- The respondent has been charged with a qualifying instrument forfeiture offence and the court is satisfied it has reasonable grounds to believe that the property, referred to in the application, is an instrument

⁸⁰⁰ Criminal Proceeds (Recovery) Act 2009 s 54 and s 55(4).

⁸⁰¹ Ibid at s 53(1).

⁸⁰² Ibid at s 53(2).

⁸⁰³ Supra n. 778 at 3.

⁸⁰⁴ Ibid at 3.

⁸⁰⁵ Ibid at 7 and 8.

⁸⁰⁶ Criminal Proceeds (Recovery) Act 2009 s 25.

⁸⁰⁷ Ibid at s 24.

of crime used to facilitate that qualifying instrument forfeiture offence.⁸⁰⁸

- The court is satisfied it has reasonable grounds to believe that the respondent will be charged with a qualifying instrument forfeiture offence within 48 hours and the property referred to in the application is an instrument of crime used to facilitate that qualifying instrument forfeiture offence.⁸⁰⁹

Money laundering under the Crimes Act 1961

Under s 243(2) of the Crimes Act every person who; in respect of any property⁸¹⁰ that is the proceeds of a serious offence⁸¹¹, engages in a money laundering transaction is liable for an imprisonment term not exceeding 7 years. In addition, every person is liable for an imprisonment term not exceeding 5 years who obtains, or has in their position, property that is the proceeds of a serious offence⁸¹²;

- a) With intent to engage in a money laundering transaction in respect of that property; and
- b) Knowing or believing that all or part of the property is the proceeds of a serious offence, or being reckless as to whether or not the property is the proceeds of a serious offence.

Under the Crimes Act a person engages in a money laundering transaction if, for the purposes of concealing⁸¹³ any property, or enabling another to conceal any property, that person deals⁸¹⁴ with the property or, assists another person to deal with the property.⁸¹⁵

⁸⁰⁸ Ibid at s 26(2)(a).

⁸⁰⁹ Ibid at s 26(2)(b).

⁸¹⁰ Property means real or personal property of any description, whether situated in New Zealand or elsewhere and whether tangible or intangible; and includes an interest in any such real or personal property - Crimes Act 1961 s 1.

⁸¹¹ Serious offence means any offence punishable by imprisonment of 5 years or more - Crimes Act 1961 s 1.

⁸¹² Crimes Act 1961 s 243(3)(a) and (b).

⁸¹³ Concealing property means to conceal or disguise the property and includes (without limitation) converting the property from one form to another; concealing or disguising the nature, source, location, disposition or ownership of the property. Crimes Act 1961 s 1

⁸¹⁴ deal with, in relation to property, means to deal with the property in any manner and by any means; and includes, without limitation,—

(a) to dispose of the property, whether by way of sale, purchase, gift, or otherwise:

(b) to transfer possession of the property:

(c) to bring the property into New Zealand:

***Anti-Money Laundering and Countering Financing of Terrorism Act 2009
(AML/CFT Act)***

The AML/CFT Act represents New Zealand's efforts to come into line with international standards, for anti-money laundering and countering financing of terrorism (AML/CFT) measures, as set out by the Financial Action Task Force (FATF).⁸¹⁶ The Act represents the first reforms on this area since 1996. It became clear, that to meet international standards, New Zealand's legal framework needed to be improved.⁸¹⁷ This was particularly true in key areas such as customer due diligence, record keeping standards, and in the supervision of AML/CFT activity.⁸¹⁸ As far as possible the measures, outlined in the AML/CFT Act, have been harmonised with the Australian anti-money laundering regime.⁸¹⁹ The level of integration between New Zealand and Australia, moving towards a single market, requires that both countries legislation, on this issue, be closely aligned to be effective.⁸²⁰

Purpose of the AML/CFT Act

The AML/CFT Act has three primary objectives:⁸²¹

- Deter money laundering and the financing of terrorism
- Maintain and enhance New Zealand's international reputation by adopting, where appropriate in the New Zealand context, recommendations issued by the FATF
- Contribute to public confidence in the financial system.

The Act seeks to facilitate co-operation amongst reporting entities, AML/CFT Act supervisors, and various government agencies, in particular law enforcement and regulatory agencies.⁸²²

(d) to remove the property from New Zealand
Crimes Act 1961 s 1.

⁸¹⁵ Ibid at s 243(4)(a) and (b).

⁸¹⁶ Explanatory note to the Anti-Money Laundering and Countering Financing of Terrorism Bill, No. 46 – 2 (2009) at 1.

⁸¹⁷ Ibid at 2.

⁸¹⁸ Ibid at 2.

⁸¹⁹ Ibid. The relevant Australian statute is the Anti-Money Laundering and Counter-Terrorism Financing Act 2006.

⁸²⁰ Ibid.

⁸²¹ Anti-Money Laundering and Countering Financing of Terrorism Act 2009 s 3(1).

Method for achieving objectives

To bring New Zealand into line with international standards the AML/CFT Act provides the following innovations⁸²³:

- A set of reporting requirements for reporting entities (financial service providers, casino's and any person (natural or legal) declared by regulations to be required to comply with the Act)
- A risk based approach to tracking possible money laundering and terrorist financing activity. This approach is intended to minimise compliance costs.
- A supervision, monitoring and enforcement regime. Three supervisors have been nominated namely; the Reserve Bank of New Zealand, the Securities Commission and the Department of Internal Affairs.⁸²⁴
- An enforcement regime which includes civil and criminal offences.

The Foreign Affairs, Defence and Trade Committee was critical of having three separate supervising entities; preferring the Australian approach which has just one supervisory agency, the Australian Transactions Reports and Analysis Centre.⁸²⁵

*Obligations for reporting entities*⁸²⁶

The AML/CFT Act requires reporting entities to provide a risk assessment, of money laundering and the financing of terrorism activity, that it may

⁸²² Ibid at s 3(2).

⁸²³ Supra n. 816 at 2. Also see Ministry of Justice, *Anti-Money Laundering and Countering Financing of Terrorism Act 2009* (October 16 2009). Online at <<http://www.justice.govt.nz/policy-and-consultation/crime/anti-money-laundering-and-countering-the-financing-of-terrorism/aml-cft-act-2009>>. Accessed 14 January 2010 and Reserve Bank of New Zealand, *Anti-Money Laundering and Countering Financing of Terrorism Act 2009*. Online at <<http://www.rbnz.govt.nz/aml/index.html>>. Accessed 14 Jan 10.

⁸²⁴ Ibid. The Reserve Bank is responsible for supervision of banks, life insurers and non-bank deposit takers. The Securities Commission will be the supervisor of securities; trustee companies, futures dealers, collective investment schemes, brokers and financial advisers. The Department of Internal Affairs will supervise casinos, non-deposit taking lenders, money changers and other reporting entities that are not covered by the Reserve Bank or Securities Commission.

⁸²⁵ Supra n. 816 at 2.

⁸²⁶ Reserve Bank of New Zealand, *Anti-Money Laundering and Countering Financing of Terrorism Act 2009*. Online at <<http://www.rbnz.govt.nz/aml/index.html>>. This link provides a useful overview and structure of these obligations.

reasonably expect to face in the course of its business.⁸²⁷ A reporting entity must also develop an AML/CFT compliance programme, based on the risk assessment, this includes; internal procedures, policies and controls to, detect, manage and mitigate money laundering activity.⁸²⁸

Reporting entities are required, under Part 2(Subpart 1) of the AML/CFT Act, to undertake customer due diligence on any of the following:⁸²⁹

- A customer
- Any beneficial owner of the customer
- Any person acting on behalf of the customer

Under s 40 of the AML/CFT Act reporting entities are required to report suspicious transactions. This section will apply when⁸³⁰;

...the reporting entity has reasonable grounds to suspect that the transaction or proposed transaction is or may be—

- (i) relevant to the investigation or prosecution of any person for a money laundering offence; or
- (ii) relevant to the enforcement of the Misuse of Drugs Act 1975; or
- (iii) relevant to the enforcement of the Terrorism Suppression Act 2002; or
- (iv) relevant to the enforcement of the Proceeds of Crime Act 1991 or the Criminal Proceeds (Recovery) Act 2009; or
- (v) relevant to the investigation or prosecution of a serious offence within the meaning of section 243(1) of the Crimes Act 1961.

The reporting entity is required to act as soon as practicable when it suspects a suspicious transaction, but no later than three days after forming the suspicion.⁸³¹ Furthermore, reporting entities are required to keep transaction records⁸³²; identity and verification records⁸³³; and, in addition, the following miscellaneous records⁸³⁴:

- (a) records that are relevant to the establishment of the business relationship; and
- (b) records relating to risk assessments, AML/CFT programmes, and audits; and
- (c) any other records (for example, account files, business correspondence, and written findings) relating to, and obtained during the course of, a business relationship that are reasonably necessary to establish the nature and purpose of, and activities relating to, the business relationship.

⁸²⁷ Section 58.

⁸²⁸ Section 57 outlines the minimum requirements for reporting entities.

⁸²⁹ Section 11.

⁸³⁰ Section 40.

⁸³¹ Section 40(2).

⁸³² Section 49.

⁸³³ Section 50.

⁸³⁴ Section 51.

Cross-border transportation of cash

Section 68 of the AML/CFT Act states; a person shall not move cash into or out of New Zealand, if the total amount of cash is more than the applicable threshold value. Section 68 also applies if the movement of cash is not exempted under regulations, and the person has not given a report in respect of the cash movement. Furthermore, under s 69, a person is not allowed to receive cash moved from outside of New Zealand, if the same conditions exist as outlined in s 68.

The ‘applicable threshold value’ is defined in s 5 as the threshold value prescribed in regulations and applies to a particular person, class of persons, transaction, class of transactions, financial activity, or class of financial activities prescribed in regulations. At the time of writing this thesis, the applicable regulations, guidelines and codes of practise are still in development waiting on public consultation.⁸³⁵

Enforcement Regime

The enforcement regime under the AML/CFT Act includes both civil and criminal offences.

Civil liability act

A civil liability act occurs when a reporting entity fails to comply with any of the AML/CFT requirements set out in the act. This includes, without limitation, when a reporting entity;⁸³⁶

- (a) fails to conduct customer due diligence as required by subpart 1 of Part 2:
- (b) fails to adequately monitor accounts and transactions:
- (c) enters into or continues a business relationship with a person who does not produce or provide satisfactory evidence of the person’s identity:
- (d) enters into or continues a correspondent banking relationship with a shell bank:
- (e) fails to keep records in accordance with the requirements of subpart 3 of Part 2 (which relates to record keeping)
- (f) fails to establish, implement, or maintain an AML/CFT programme:
- (g) fails to ensure that its branches and subsidiaries comply with the relevant AML/CFT requirements.

⁸³⁵ Ministry of Justice, *Anti-Money Laundering and Countering Financing of Terrorism Act 2009*. Online at <<http://www.justice.govt.nz/policy-and-consultation/crime/anti-money-laundering-and-countering-the-financing-of-terrorism/aml-cft-act-2009>>. accessed 15 Jan 2010.

⁸³⁶ Section 78.

When a civil liability act occurs the relevant AML/CFT supervisor is empowered to take one or a combination of the following courses of action:⁸³⁷

- issue a formal warning under s 80
- accept an enforceable undertaking and seek in order in court if the undertaking is breached⁸³⁸
- seek an injunction from the High Court under s 85 or 87; or apply to the Court for a pecuniary penalty under s 90.

Offences

Under s 91 a civil liability act is considered an offence, if the reporting entity engages in that conduct knowingly or recklessly. Furthermore ss 92-97 covers a number of other offences such as failing to report suspicious transactions, providing false or misleading information, in regards to a suspicious transactions report, and failing to adequately keep or retain records relating to suspicious transactions. The penalties for reporting entities who commit an offence under ss 91-97 include:⁸³⁹

- (a) in the case of an individual, either or both of the following:
 - (i) a term of imprisonment of not more than 2 years;
 - (ii) a fine of up to \$300,000; and
- (b) in the case of a body corporate, a fine of up to \$5 million.

Conclusions

The AML/CFT Act is a complex piece of legislation that, arguably, imposes onerous duties on reporting entities. However, the Act provides necessary, non-traditional measures, to target organised crime. Profit is the primary motive of organised criminals. Hiding their illegal gains often requires a level of integration with legitimate private sector financial institutions and casino's.⁸⁴⁰

⁸³⁷ Section 79.

⁸³⁸ Under s 81 the relevant AML/CFT supervisor may accept a written undertaking given by a person in connection with compliance with this Act or regulations. Under s 82 if the supervisor believes the undertaking has been breached they may apply to the Court for an order which, if the Court finds the undertaking has been breached, may include;

- (a) an order directing the person to comply with any of the terms of the undertaking;
- (b) an order directing the person to pay to the AML/CFT supervisor an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
- (c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach.

⁸³⁹ Section 100.

⁸⁴⁰ Levi M, supra n. 2 at 899-902.

By building cooperation with the private sector on this matter, there is a far more realistic and long term potential, that criminals will find it harder to launder their illegal profits. Furthermore, if New Zealand was to lag behind international standards, relating to AML/CFT, it would become a weak link in international efforts to combat TNOC. Therefore the AML/CFT Act represents a step in the right direction.

5.6 *International Cooperation*

New Zealand is a signatory to many multilateral treaties, relevant to combating TNOC, including the Palermo Convention. Accordingly, New Zealand has undertaken steps to ensure it will provide the widest possible mutual assistance on criminal matters and extradition. New Zealand has relatively few bilateral agreements relating to extradition or mutual assistance. Rather New Zealand's domestic legislation provides for assistance on these matters. This section will focus on New Zealand's legislation relating to extradition, and mutual legal assistance in criminal matters.

5.6.1 *Mutual Assistance in Criminal Matters Act 1992*

The object of the Mutual Assistance in Criminal Matters Act (Mutual Assistance Act) is to facilitate the provision and obtaining, by New Zealand, of international assistance in criminal matters including;⁸⁴¹

- (a) The identification and location of persons:
- (b) The obtaining of evidence, documents, or other articles:
- (c) The production of documents and other articles:
- (d) The making of arrangements for persons to give evidence or assist investigations:
- (e) The service of documents:
- (f) The execution of requests for search and seizure:
- (g) The forfeiture or confiscation of tainted property:
- (h) The recovery of pecuniary penalties in respect of offences:
- (i) The restraining of dealings in property, or the freezing of assets, that may be forfeited or confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences:
- (j) The location of property that may be forfeited, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences.

⁸⁴¹ Section 4.

The act has been designed to provide ‘wide ranging’ mutual assistance and adheres to the, minimum, standards set out under the Palermo Convention.⁸⁴²

Requests by New Zealand

Part 2 of the Act makes provision for mutual assistance requests made by New Zealand. Section 8 designates responsibility to the Attorney-General for making mutual assistance requests.

Section 11 refers to obtaining evidence for use in New Zealand Courts. Under this section the Attorney-General may make a request, to a foreign authority, when there are reasonable grounds to believe that evidence or other information is relevant to any criminal proceedings in New Zealand.⁸⁴³ Any deposition or document received from the foreign authority, pursuant to a request, may be put forward as evidence in the relevant criminal proceedings, subject to the rules of law relating to admission of evidence.⁸⁴⁴ This section illustrates how a request for foreign assistance is, totally, reliant on the foreign authority producing the evidence promptly, in a manner that satisfies procedural matters and rules relating to admission of evidence.

Requests made to New Zealand

Requests for mutual assistance under the Mutual Assistance Act may be made by prescribed foreign countries⁸⁴⁵ and convention countries (including Palermo Convention countries).⁸⁴⁶ Section 25A also provides for ad hoc assistance with countries not included in the above two categories. Requests are to be made to the Attorney-General⁸⁴⁷ and should specify the purpose for, and type of, assistance required.⁸⁴⁸ The authority applying for assistance should include details of the procedures, which the foreign country wishes New Zealand to

⁸⁴² New Zealand National Interest Analysis, *United Nations Convention against Transnational Organised Crime* (2001).

⁸⁴³ Section 11(1).

⁸⁴⁴ Section 11(2).

⁸⁴⁵ See regulations for instance Mutual Assistance in Criminal Matters (Prescribed Foreign Country) (United Kingdom) Regulations 1993.

⁸⁴⁶ See Mutual Assistance in Criminal Matters Act 1992: Schedule Limitations on requests by convention countries for a list of the relevant conventions.

⁸⁴⁷ Section 25.

⁸⁴⁸ Section 26.

follow, in giving effect to the request.⁸⁴⁹ This helps enable New Zealand to fulfil the request for assistance in a manner which will be acceptable for use in the requesting countries Courts.

5.6.2 Extradition Act 1999

The Extradition Act consolidates the law relating to extradition of persons to and from New Zealand. The object of the Act, as outlined in s 12, is:

The object of the Act is to provide for the surrender of an accused or convicted person from New Zealand to an extradition country or from an extradition country to New Zealand, and in particular—

- (a) To enable New Zealand to carry out its obligations under extradition treaties; and
- (b) To provide a means for New Zealand to give effect to requests for extradition from Commonwealth countries; and
- (c) To provide a means for New Zealand to give effect to requests for extradition from non-Commonwealth countries with which New Zealand does not have an extradition treaty; and
- (d) To provide a simplified procedure for New Zealand to give effect to requests for extradition from Australia and certain other countries; and
- (e) To facilitate the making of requests for the extradition of persons to New Zealand.

Under the Act a person may be extradited to an ‘extradition country’ for.⁸⁵⁰

- Committing an offence against the law of that country or,
- They have been convicted for an offence against the law of that country.

The extradition country must intend to impose a maximum imprisonment term of not less than 12 months and the offence must also be one that would incur the same penalty (i.e. imprisonment of 12 months or more) had it occurred in New Zealand.⁸⁵¹

Different Parts of the Extradition Act apply to different countries:

- Part 4 applies to Australia and designated countries.⁸⁵²
- Part 3 applies to any commonwealth country, regardless if a treaty exists with them.⁸⁵³

⁸⁴⁹ Section 26(c)(iii).

⁸⁵⁰ Section 3.

⁸⁵¹ Section 4.

⁸⁵² See Part 4. Section 40 states that designated countries are countries who by Order of Council are designated as having Part 4 apply to them. For example Extradition (United Kingdom and Pitcairn Islands) Order 2003 (SR 2003/254) which has applied from 16 October 2003.

⁸⁵³ Section 14.

- Part 3 applies to countries with whom NZ has an extradition treaty and the Governor-General, by order of council, may apply this part to them.⁸⁵⁴
- Part 3 also applies to other non-commonwealth countries whereby the Governor-General, on order of council, may apply part 3 to them, subject to limitations specified in the order.⁸⁵⁵
- Section 60 allows for the extension of the Extradition Act to countries who do not fit into the above categories of countries or the offence does not meet the 12 month imprisonment test. If it is determined that the Act may apply, to a request under section 60, then it will be carried out in the manner prescribed under Part 3.

⁸⁵⁴ Section 15.

⁸⁵⁵ Section 16.

Chapter Six

Ways forward

6.1 *International Community*

The international community has forged a remarkable, uniformed response to the perceived growing threat of organised crime. Conventions relating to specific offences, such as corruption and illicit drug trafficking, have created widespread international obligations in respect to those offences. The Palermo Convention, and its protocols, is the culmination of intense international effort to produce an accepted consensus, on how the international community will meet the challenge of transnational organised crime and its associated activities. It is the most important international convention in regards to organised crime, and has been widely accepted by the international community.

The Palermo Convention has received 140 signatories and 137 ratifications,⁸⁵⁶ representing a remarkable international consensus on what constitutes organised crime and the appropriate measures to combat it. It provides a mechanism for achieving uniformed minimum standards that States are expected to adhere to. The convention has delivered important uniformed obligations for States to implement in respect of;

- criminalising participation in an organised criminal group;⁸⁵⁷
- criminalising and taking measures against the laundering of proceeds of crime;⁸⁵⁸
- criminalising and taking measures against corruption;⁸⁵⁹

⁸⁵⁶ In addition, many other States have accepted or implemented the provisions of the convention thorough acceptance, approval, accession or succession. See “*Status of responses of States to the checklist/ questionnaires on the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: first and second reporting cycles*”. Online at, <http://www.unodc.org/documents/treaties/UNTOC/1._STATUS_of_responses_to_the_questionnaires_Update19_Jan_10.pdf>.

⁸⁵⁷ United Nations Convention against Transnational Organised Crime (2000) Article 5.

⁸⁵⁸ Ibid at article 6 and 7.

- criminalising and taking measures against obstruction of justice;⁸⁶⁰
- enhancing international cooperation, including extradition and mutual legal assistance⁸⁶¹

The Palermo Convention also seeks to encourage and provide mechanisms for technical cooperation and technical help, for the implementation of the convention.⁸⁶²

Impact of international efforts to combat transnational organised crime

The Implementation Review⁸⁶³ of the Palermo Convention acknowledges that; despite the appearance of significant improvements in the level of compliance, which provide a solid foundation to build on, the survey was only superficial and a more in depth study needs to be conducted to determine the efficacy and efficiency of the regimes already in place at the national and international levels.⁸⁶⁴ Stefano Betti believes the Palermo Convention needs a comprehensive monitoring system and notes that the use of normative criteria alone is not sufficient. State Parties need to provide the COTP with reports containing data on the impact of implementation.⁸⁶⁵ Although closer international conformity with the provisions of leading conventions is strongly encouraged; evidence of their ability to foster progress and success, in combating TNOC, cannot be conclusively determined without further inquiry into impacts.

Giuseppe Di Gennaro writes, in his article titled ‘*Strengthening the International Legal System in Order to Combat Transnational Crime*’, that the

⁸⁵⁹ Ibid at article 8 and 9.

⁸⁶⁰ Ibid at article 23-25.

⁸⁶¹ Ibid at article 16 (dealing with extradition) and article 18 (mutual legal assistance).

⁸⁶² Ibid at article 29 and 30.

⁸⁶³ Conference of the Parties to the United Nations Convention against Transnational Organized Crime (CTOC/COP/2006/2/Rev.1), *Implementation of the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the second reporting cycle, Report of the Secretariat* (2008) at 27. Online at <<http://www.unodc.org/documents/treaties/COP2008/CTOC%20COP%202006%202%20Rev1%20Final%20E.pdf>>.

⁸⁶⁴ Ibid.

⁸⁶⁵ Stefano, B “New prospects for inter-state co-operation in criminal matters: The Palermo Convention.” *International Criminal Law Review* (2003) Vol. 3:151-167 at 166.

international community has made little progress in combating organised crime.⁸⁶⁶ He notes that, despite the copious amount of initiatives undertaken by national governments and international bodies, particularly the UN, there has been little evidence to suggest significant successes; rather he suggests the situation has deteriorated.⁸⁶⁷ Di Gennaro describes how networks of criminals have invaded previously immune areas; and these criminal groups have increased in quantity and type around the world. However, he does acknowledge that if nothing had been done it could be a whole lot worse.⁸⁶⁸

The tone of Di Gennaro's article reflects the findings in a UN report titled; "*A more secure world: our shared responsibility Report of the High-level Panel on Threats*" (Threats Report).⁸⁶⁹ This report outlines a number of serious threats facing the international community including TNOC. The report is critical, declaring:⁸⁷⁰

States and international organizations have reacted too slowly to the threat of organized crime and corruption. Statements about the seriousness of the threat have rarely been matched by action. Three basic impediments stand in the way of more effective international responses: insufficient cooperation among States, weak coordination among international agencies and inadequate compliance by many States.

The Threats Report also criticises international efforts to combat TNOC, which continue to suffer from a lack of commitment and understanding by many States, particularly in the area of corruption. Furthermore, national demand reduction initiatives have largely been a failure. This is glaringly evident in the area of illicit drugs where the availability and use of drugs, over the last decade, has either remained relatively stable or even grown in some areas of the world.⁸⁷¹

⁸⁶⁶ Di Gennaro G, *Strengthening the International Legal System in order to Combat Transnational Crime* in Williams, P and Vlassis, D (eds). *Combating Transnational Crime: Concepts, Activities and Responses* (2001) at 259 and 260.

⁸⁶⁷ Ibid.

⁸⁶⁸ Ibid at 260.

⁸⁶⁹ United Nations General-Assembly A/59/565, "*A More Secure World: Our Shared Responsibility*", Report of the Secretary-General's High Level Panel on Threats, Challenges and Change. Online at:

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/gaA.59.565_En.pdf>.

⁸⁷⁰ Ibid at 49.

⁸⁷¹ Ibid and see RAND, *Assessing Changes in Global Drugs Problems, 1998-2007: Main Report*, Contributors – Peter H. Reuter, Franz Trautmann, Rosalie Liccardo Pacula, Beau Kilmer, Andre Gageldonk, Daan van der Gouwe, prepared for the European Commission at 57.

6.1.2 Steps to strengthen the international system

The Threats Report highlights that the fluid and agile nature of organised criminal networks, is in stark contrast to the cumbersome and weak international efforts to achieve cooperation.⁸⁷² The report does suggest that if States widely ratify the Palermo Convention, and effectively implement its provisions, then there is the potential to level the playing field with criminal networks, by providing for swifter and closer international cooperation.⁸⁷³ Criminal groups are extremely successful at crossing international borders to achieve their goals whereas legal cooperation is often impeded by them. For this reason the Panel stresses the necessity for States to set up a central authority to handle requests for assistance, which will facilitate the exchange of many types of assistance, as outlined in the Palermo Convention.⁸⁷⁴

Achieving effective international cooperation continues to prove elusive, seriously impeding efforts to combat TNOC. Too many States have failed to bring their domestic legal regimes up to a level that will not hamper extradition and MLA.⁸⁷⁵ The Palermo Convention provides only minimum requirements to foster an effective global effort to combat TNOC. When States continue to fail to reach even this minimum level there is little chance of achieving a coordinated and uniform approach in dealing with the networks of criminal groups operating across the globe. Moreover, countries who fail to take effective measures against organised crime are at risk of being viewed as safe havens for criminals, or they provide an option for criminals to hide their proceeds from criminal activity.

⁸⁷² Supra n. 869 at 50.

⁸⁷³ Ibid.

⁸⁷⁴ Ibid at 50 and 51.

⁸⁷⁵ Conference of the Parties to the United Nations Convention against Transnational Organized Crime (CTOC/COP/2005/2/Rev.2), Implementation of the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the first reporting cycle, Report of the Secretariat (2008) at 31. Online at <<http://www.unodc.org/documents/treaties/COP2008/CTOC%20COP%202005%202%20Rev2%20Final%20E.pdf>>.

Developing the capability of struggling States

Many States do not have the level of expertise, or technical ability, needed to fully implement the Palermo Convention's provisions.⁸⁷⁶ Therefore, it is necessary that the UN through the services of the UNODC⁸⁷⁷, and in partnership with regional initiatives, continues to work to provide technical assistance and training to build the capacity of those States in need.⁸⁷⁸ Furthermore, many States also suffer from a lack of resources and thus the UN needs to ensure such efforts are adequately funded.⁸⁷⁹

The UNCOTF has an important job of monitoring and reviewing State Parties implementation, in relation to the Palermo Convention, and it has been suggested that this mandate be expanded to also review and analyse the effectiveness of the measures taken by States, in implementing the convention.⁸⁸⁰ States would need to collate and provide the UN with empirical data that illustrates the effectiveness of the measures they have implemented, in conjunction with the normative data outlining the measures they have taken.⁸⁸¹ This is important in analysing the effectiveness of prior measures and for building future strategies and to combat TNOC.

Specific Money Laundering Convention

The UN Threats Report indicates that anti-money laundering measures, and measures to take the profit out of crime, can be among the most effective in combating TNOC.⁸⁸² Therefore, the report calls for the creation of a specific UN Convention relating to money laundering to increase the effectiveness and uniformity of measures to combat money laundering.⁸⁸³ A specific

⁸⁷⁶ Ibid at 28.

⁸⁷⁷ For instance, the UNODC offers a Legal Advisory Programme to promote and assist with the practical implementation of conventions relevant in combating TNOC including the Palermo Convention. See UNODC, *Legal Tools*, online at <<http://www.unodc.org/unodc/en/legal-tools/index.html?ref=menuaside>>.

⁸⁷⁸ Supra n. 875 at 31 and supra n. 869 51.

⁸⁷⁹ Supra n. 869 51.

⁸⁸⁰ Stefano B, supra n. 865 at 164-167.

⁸⁸¹ Ibid.

⁸⁸² Supra n. 869 at 51.

⁸⁸³ Ibid.

international convention focusing on money laundering would be a valuable tool for developing international norms and a uniformed approach in this area. Uniformity in international measures to combat money laundering is absolutely necessary, to ensure that criminals cannot exploit countries with weaker laws and regulatory measures, to hide their illegal profits.⁸⁸⁴

Developing non-traditional measures to combat organised crime

The international community has achieved little in the way of encouraging States to address social and other conditions, which allow TNOC to flourish. Very few States reported non-traditional anti-organised crime measures, such as public awareness campaigns or promoting the participation of society in efforts to curb organised crime, which can be used to compliment traditional law enforcement approaches.⁸⁸⁵ Article 31 of the Palermo Convention, on prevention, contains only weakly worded suggestions and no concrete mandatory obligations. Essentially the Palermo Convention represents a re-doubling of efforts using, more-or-less, traditional measures to combat organised crime.⁸⁸⁶

The Palermo Convention is based on an understanding of transnational organised crime as an attack on national political-economies that are assumed to be satisfactory, and therefore, should be secured in their existing format.⁸⁸⁷ Because of this portrayal of organised crime, the convention is primarily focused on criminalising ‘outsiders’ who are deemed to be intent on corrupting institutions and otherwise morally sound citizens. By emphasising ‘outsiders’ as the primary force driving TNOC, the convention focuses on traditional criminal justice measures and does not encourage an understanding of what is

⁸⁸⁴ This is particularly true in regions with close economic and social ties. For instance, New Zealand has, as much as possible, aligned its anti-money laundering legislation with Australia’s because of the close tie between the countries. In an increasingly global world, this uniformity becomes important internationally as criminals have proved adept at exploiting national borders to evade justice and hide their illicit gains. See discussion in chapter 2, of this thesis, at section 5.5.2.

⁸⁸⁵ Supra n. 863 at 26.

⁸⁸⁶ Woodiwiss M, supra n. 10 at 25.

⁸⁸⁷ Ibid at 24 and see Edwards A and Gill P, supra n. 275 at 269.

driving participation in organised crime and the demand for illegal goods and services, at either an international, national or local level.⁸⁸⁸

Understanding the factors and conditions that allow TNOC to flourish

‘Intelligent action requires knowledge’; Michael Woodiwiss laments the international community’s lack of comprehensive and objective inquiry into criminal problems, associated with both legal and illegal markets.⁸⁸⁹ Rather, world leaders have, essentially, adopted uniformed, traditional criminal justice measures to combat organised crime and extended their application to TNOC, through the creation of the Palermo Convention.⁸⁹⁰ There has been a failure, generally, at the international level to instigate an objective inquiry into the factors that give rise to illicit markets and the factors that attract people to participate in TNOC.⁸⁹¹ The mandatory provisions of the Palermo Convention, and the conventions against illicit drugs, are primarily focused on traditional crime suppression, encouraging measures directed at; enforcement, punishment, containment, disturbance and dismantling.⁸⁹² While these measures are necessary, by themselves they are not sufficient to combat organised crime in a comprehensive manner.

There is an assumption that closely implementing the Palermo Convention will result in a substantial reduction in organised crime and serious crime.⁸⁹³ Subsequently, monitoring and review measures, relating to the Convention, are focused predominantly on issues such as; how closely have States implemented key provisions and what can be done to assist States to effectively implement provisions.⁸⁹⁴ No review or study has been undertaken to determine the

⁸⁸⁸ Edwards A, supra n. 96 at 213.

⁸⁸⁹ Woodiwiss M, supra n. 10 at 25.

⁸⁹⁰ Ibid.

⁸⁹¹ Woodiwiss M, supra n.10 25.

⁸⁹² Edwards A and Gill P, supra n. 275 at 269.

⁸⁹³ Woodiwiss M, supra n.10 at 25.

⁸⁹⁴ The latest report from the COTP is primarily focused on strengthening and assisting States to thoroughly implement the provisions of the Palermo Convention. See Conference of the Parties to the United Nations Convention against Transnational Organized Crime *Open-ended Intergovernmental Meeting of Experts on Possible Mechanisms to Review Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (Vienna, 25-26 January 2010). CTOC/COP/WG.1/2010/3 (3 February 2009) [Non-

effectiveness of the measures promoted by the Palermo Convention in combating organised crime and serious crime generally.⁸⁹⁵ To assess the ongoing effectiveness of the Palermo Convention a mechanism must be created that can accurately measure the impact of the convention on organised crime and levels of serious crime generally.

Re-conceiving TNOC as an ‘internal challenge’

National governments cannot expect that carefully implementing the mandatory provisions of the Palermo Convention will be the sole answer to suppressing and reducing organised crime. Criminal networks have proved to be exceptionally adaptable to traditional criminal justice and law enforcement measures.⁸⁹⁶ The international community needs to re-think its preconception with TNOC as primarily an ‘external alien threat’. The focus must shift to challenge States to view TNOC as an ‘internal challenge’ in addition to the external threat narrative.⁸⁹⁷ States must, increasingly, focus on the prevention, or at least reduction, of opportunities for particular offences and find ways to reduce motivation for participation in organised crime.⁸⁹⁸ Reducing the opportunities for the exchange and consumption of illicit goods and services will help reduce the motivation for criminal groups to be involved in providing illicit goods and services.⁸⁹⁹

Ratifying the Palermo Convention is an essential step, but national governments also need to implement specific programmes at a local community level, to understand and mitigate the factors, which allow illegal markets to flourish and which encourage participation in organised crime.⁹⁰⁰ In addition, at an international level and complementing the Palermo Convention, work needs to be done to persuade and assist States to take effective

Edited – Non-Official]. Online at <http://www.unodc.org/documents/treaties/organized_crime/ReportReviewMechanismsubmitted3Feb_website.pdf>.

⁸⁹⁵ Ibid.

⁸⁹⁶ Klerks P, supra n. 92 at 102.

⁸⁹⁷ Edwards A and Gill P, supra n. 275 at 275.

⁸⁹⁸ Ibid at 270 and 271.

⁸⁹⁹ Ibid at 271.

⁹⁰⁰ Levi M supra n. 2 at 897-899 and Edwards A and Gill P, supra n. 275 at 271.

community based action against organised crime.⁹⁰¹ Viewing organised crime as an internal challenge to certain social formations, will provide the impetus for governments to address the social preconditions, which foster the formation and reproduction of criminal groups and networks.⁹⁰² Without international pressure and assistance many States will not be willing or able to implement effective community and social based measures. As criminals are able to operate in and across multiple jurisdictions, community crime prevention, as a concept to assist measures to combat organised crime, will have limited effectiveness if some State's fail to take an interest in community based measures.⁹⁰³

6.2. *Ways forward for New Zealand*

Over the last few years New Zealand has developed a comprehensive Organised Crime Strategy and undertaken vigorous reforms to ensure its organised crime legislation, proceeds of crime legislation and anti-money laundering legislation adheres to international obligations. New Zealand has clearly been influenced by the United Kingdom and United States in its proceeds of crime legislation⁹⁰⁴, and the creation of OFCANZ mirrors, in many ways, the creation of SOCA, in the UK. While drawing on lessons from overseas experiences New Zealand has also been careful to avoid adopting measures that are inappropriate to its circumstances.

NZ has developed a broad and flexible definition of organised crime, which encompasses the diverse groups operating in the country. A flexible conception of organised crime is important, as negative experiences in the US have shown,

⁹⁰¹ The United Nations Office of Drugs and Crime is already involved in providing technical assistance and training to States who request it. A natural extension to their function could be providing assistance to States in understanding and implementing effective, national and local, community based crime reduction and suppression measures.

⁹⁰² Edwards A and Gill P, *supra* n. 275 at 275.

⁹⁰³ Levi M, *supra* n. 2 at 899.

⁹⁰⁴ New Zealand has introduced a civil recovery based regime within the Criminal Proceeds (Recovery) Act 2009 to compliment the criminal recovery regime, which in many ways mirrors the legislation implemented in the US (RICO) and in the UK (Proceeds of Crime Act 2002).

to ensure that government policies, legal systems and law enforcement measures can continue to keep up with the evolving nature of organised crime. The US has retained a traditional, outdated conception of organised crime; which has caused confusion in US courts, led to law enforcement measures that specifically target ethnic groups, and failed to encompass the multifaceted nature of modern organised crime.

The creation of OFCANZ signals an intelligence led approach to combating organised crime, and reflects developments and experiences in the UK. NZ has committed itself, through the development of the OCS, to continually developing an understanding of the nature of organised crime and knowledge of organised crime trends. The intelligence gathered, regarding organised crime, will be used to direct future measures to combat organised crime.

Traditional measures to combat organised crime

New Zealand has developed a robust criminal justice framework for combating organised crime. The s 98A of the Crimes Act 1961, criminalising participation in an organised criminal group, helps to ensure that involvement in organised crime is inherently risky for members, even when they may not be involved in the commission of an offence, but are integral in the organisation or facilitation of an offence. In comparison to The UK's sectorial approach, New Zealand's determination to criminalise participation provides a more unified and coherent base for targeting key organisers and facilitators of organised crime. Moreover, the Criminal Proceeds (Recovery) Act 2009 provides more comprehensive measures, than previous legislation, to ensure criminals do not profit from their illegal activity, even when they have not been involved in the commission of a particular offence. As a signatory to the Palermo Convention, NZ has undertaken exemplary efforts to ensure that its provisions are fully implemented into domestic law, including ensuring that cooperation with foreign States is provided to a very wide extent.

Non-traditional measures to combat organised crime

Perhaps one of the most encouraging aspects of the OCS is a commitment to introducing non-traditional measures to combat organised crime. The OCS has as one of its focus areas a dedication to community based engagement. Links between youth and organised criminal groups (particularly local and national level gangs) have been recognised in New Zealand prompting interventions at a youth level.⁹⁰⁵

The OCS seeks to introduce measures that will reduce incentives to participate in organised crime and focuses on providing counter incentives, such as, employment and building strong family and community links. This indicates a willingness to develop an understanding of the social conditions that lead to the development and participation in organised crime. Furthermore, New Zealand has identified key activities, associated with organised crime, and is seeking to reduce demand for these goods and services and reduce opportunities and motivation for criminals and criminal networks to be involved in these markets. For instance, as part of the New Zealand Police Illicit Drug Strategy,⁹⁰⁶ the NZ government has introduced a number of initiatives to reduce supply and demand for illicit drugs. This includes engaging with communities to educate and equip people to resist drugs, and furthermore, to encourage communities to take ownership of illicit drug issues.⁹⁰⁷

The OCS is intended to provide a coherent framework for all relevant NZ agencies to combat organised crime. The OCS is the first stage, in what is supposed to be an ongoing cycle of strategies and threat assessments that will guide responses to organised crime. Therefore the initial OCS is not overly specific in describing the measures needed to combat organised crime but provides a very encouraging framework to build on for the future.

⁹⁰⁵ Ministry of Justice, supra n. 691 and supra n. 724.

⁹⁰⁶ New Zealand Police, *New Zealand Police Illicit Drug Strategy to 2010*, (February 2009).
Online at:

<http://www.police.govt.nz/resources/2009/NZ_Police_Illicit_Drug_Strategy_2009.pdf>.

⁹⁰⁷ Ibid at page 14.

The AML/CFT Act also represents a strong non-traditional approach to combating organised crime. It encourages engagement with the private sector and minimises opportunities for organised crime to infiltrate legitimate businesses in their attempts to launder money. New Zealand has pulled itself into line with recognised international standards, as outlined by the FATF and within the Palermo Convention.

6.2.1 Looking to the future

New Zealand has developed strong traditional criminal justice measures to combat organised crime, and has thoroughly implemented the provisions and spirit of the Palermo Convention into its domestic framework. New Zealand's strategy to combat TNOC is in its infancy. NZ has taken encouraging steps as it develops its response to TNOC. The recently created OCS, AML/CFT Act and the Proceeds of Crime (Recovery) Act are innovative and important developments, but NZ needs to ensure that it builds on these initial measures.

Developing intelligence led approach

Learning from the UK, New Zealand needs to ensure that it continues to develop sound intelligence relating to organised crime. SOCA, in the UK, has played an important role in developing an accurate conception of organised crime and in the development of law enforcement strategies to combat TNOC. Furthermore, intelligence collected and analysed by SOCA and other key agencies, is vital for informing and shaping future policy decisions.⁹⁰⁸

In New Zealand's context, OFCANZ is an important agency in this regard and will be instrumental, along side the Police NIC, in developing annual threat assessments and mapping out future trends relating to organised criminal activity. OFCANZ and the NIC have important roles in gathering and disseminating intelligence to other agencies. OFCANZ will drive the intelligence process. They are responsible, along with the NIC, for collecting

⁹⁰⁸ Supra n. 604 at 22.

intelligence, and ensuring intelligence is disseminated efficiently, between law enforcement and other agencies. However, at this stage, OFCANZ is still developing and is a very small agency with limited capabilities.⁹⁰⁹

Developing the capabilities of OFCANZ will enable it to more effectively lead and coordinate NZ agencies, as they respond to instances of organised crime. Moreover, OFCANZ has a responsibility to raise public awareness regarding organised crime, but releases only limited publications and keeps threat assessments restricted.⁹¹⁰ The threat assessments released to the public in countries like the UK, enable the public to understand how organised crime operates and the activities associated with it. If OFCANZ wishes to educate and inform the public on risks associated with organised crime it would be advisable to publically release, even modified, threat assessments.

Avoiding the 'ethnicity trap'

How the problem of organised crime is constructed will be a significant factor in how future laws are framed and how investigations and prosecutions are conducted.⁹¹¹ New Zealand agencies must ensure they do not fall into the 'ethnicity trap'; focusing on and attributing organised crime problems to particular ethnicity. Despite the OCS portraying organised crime as a multifaceted problem that involves many ethnic groups, the New Zealand police continue to identify organised crime by ethnicity and OFCANZ, in establishing particular Focus Areas, is specifically targeting 'Asian organised crime'.⁹¹² The law enforcement response to organised crime in the US should serve as a reminder of how conceiving organised crime in terms of ethnicity

⁹⁰⁹ Organised and Financial Crime Agency New Zealand, *Taskforce Operations* (Organised Crime) at 10, online at <<http://ofcanz.govt.nz/sites/default/files/taskforce-operations-0081217.pdf>>. OFCANZ initial staffing numbers was proposed at 35, only enough to be able to handle 2 major task forces or 3-4 minor task forces. OFCANZ hopes to grow its capability to handle 4-6 concurrent major task forces over the next few years.

⁹¹⁰ See *Organised and Financial Crime Agency New Zealand*, online at: <<http://ofcanz.govt.nz/>>.

⁹¹¹ Finckenauer J, supra n. 15 at 68.

⁹¹² See New Zealand Police, *Organised Crime in New Zealand*, online at: <http://www.police.govt.nz/service/cib/organised_crime.html> and OFCANZ, *Focus Areas*, <<http://ofcanz.govt.nz/about/focus-areas>>.

leads to mistaking ethnicity as a necessary organising feature.⁹¹³ This approach ignores the importance of other factors associated with the criminal network paradigm, such as ‘criminal contact brokers’ and other key intermediaries who often ‘transcend’ ethnicity.⁹¹⁴ Furthermore, focusing on ethnically defined groups obscures the fact that criminal groups, even ethnically monolithic ones, must expand, operate and recruit beyond familiar contacts to effectively participate in the production, exchange and consumption of illicit goods and services.⁹¹⁵

New Zealand can learn valuable lessons from the contrasting approaches taken by the US and UK, in defining organised crime. The US has remained mired in traditional beliefs of organised crime, and accordingly, the legislative tools and law enforcement response to organised crime have been undermined by these inaccurate conceptions. The US continues to perceive organised crime as an ethnically defined ‘outsider’ threat.⁹¹⁶ In contrast the UK has taken a flexible, intelligence led approach towards defining organised crime. The UK has developed a broad concept of organised crime, allowing its definitions to encompass the wide variety of groups involved in organised crime. The UK has achieved this by constantly reviewing its concept of organised crime based on intelligence gathered by various agencies, in particular SOCA.⁹¹⁷ To avoid the problems and inaccuracies associated with the US response to organised crime, NZ should seek to emulate the UK’s determination to develop intelligence and knowledge, relating to organised crime, and how it operates in legal and illegal markets.

Developing New Zealand’s Organised Crime Strategy and knowledge regarding organised crime

An important factor for the UK in developing its knowledge and understanding of organised crime has been the development of annual threat assessments and

⁹¹³ Edwards A, supra n. 96 at 220.

⁹¹⁴ Ibid.

⁹¹⁵ Ibid at 220 and 221.

⁹¹⁶ Refer to the US case study in chapter 4 of this paper.

⁹¹⁷ Refer to the UK case study in chapter 4 of this paper.

frequent reviews of strategies to combat organised crime. The UK has acknowledged that illicit markets and organised criminal groups are constantly changing, and therefore, has actively sought to build its intelligence and understanding of the threats posed by organised crime.⁹¹⁸

Building on the initial OCS, New Zealand must also develop its understanding of criminal problems associated with both legal and illegal markets.⁹¹⁹ The OCS is designated as the building block for the development of future research, analysis and strategies to combat organised crime. Therefore, it is concerning that the new updated strategy has not been released as scheduled, and moreover, no exact timeframe has been given for its release. The OCS, and its successors, were designed to establish up-to-date processes for identifying and targeting new and developing patterns of criminal activity and will underpin policy responses to developing organised crime trends.⁹²⁰

Organised crime is a constantly evolving phenomenon; the networks associated with it adapt quickly to legal and law enforcement measures. It is fluid and agile by nature, existing to provide illicit goods and services to illegal markets. Intelligence relating to developing illicit markets and organised crime trends is vital in facilitating responses to organised crime. Therefore, the OCS plays an important part, as it underpins responses to organised crime by government agencies. The OCS has an objective to guide and ensure the completion of regular and informed revisions of legislation, governing relevant investigative and prosecutorial procedures and tools.⁹²¹ It plays a vital part in underpinning New Zealand's response to TNOC. If the OCS becomes out-dated or inaccurate, then New Zealand's response to organised crime will also become out-dated and ineffective. The NZ government needs to ensure that updating

⁹¹⁸ *Supra* n. 595 at 29 and 30.

⁹¹⁹ Woodiwiss M, *supra* n. 10 at 25. As Woodiwiss strongly emphasises, to comprehensively combat organised crime must undertake thorough objective inquiry into the criminal problems associated with both legal and illegal markets.

⁹²⁰ Ministry of Justice, *supra* n. 691 and Goodson R, and Williams P *supra* n. 7 at 336 point to how vital updated strategies and threat assessments are in combating organised crime, at both a national and international level. Research and analysis needs to be cumulative with each strategy building on the previous. The threat assessments and strategies are required to facilitate and underpin future policy decisions.

⁹²¹ Ministry of Justice, *supra* n. 691 at 7.

the OCS remains a high priority, and furthermore, that it is up-dated in a timely matter in keeping with the schedule outlined in the initial OCS.

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Useful websites

- Federal Bureau of Investigation <www.fbi.gov>.
- Home Office <www.homeoffice.gov.uk>.
- Ministry of Justice <www.justice.govt.nz>.
- New Zealand Police <www.police.govt.nz>.
- Organised and Financial Crime Agency New Zealand <www.ofcanz.govt.nz>.
- RAND Corporation <www.rand.org>.
- Serious Organised Crime Agency <www.soca.gov.uk>.
- United Nations Office on Drugs and Crime <www.unodc.org>.
- U.S. Department of States <www.state.gov>.