CHAPTER TWO

CRIMINALISING ORGANISED CRIME:
THE NEED FOR SPECIAL LAWS

The criminal law is the first line of defence against organised crime. Organised crime poses significant challenges to the criminal justice system. Criminal law and law enforcement are traditionally designed to prosecute and punish isolated crimes committed by individuals. Investigations and prosecutions are usually set up to hold a person criminally responsible for his/her acts and case files are often closed once a conviction is made.

The structure and modi operandi of criminal associations, however, do not fit well into the usual concept and limits of criminal liability. For example, it is difficult to hold directors and financiers of organised crime responsible as they plan and oversee the criminal organisation but frequently have no physical involvement in the execution of the organisation’s criminal activities. Equally, those who are only loosely associated with a criminal gang and provide support on an ad hoc basis often fall outside existing concepts of accessorial liability. These associates may provide the organisation with essential supplies but are often not involved in any of the organisation’s criminal activities. Organised crime operates on a sustained basis and larger organisations operate independently from individual persons. The structure and strength of organised crime transcends its membership.

The traditional confines of criminal law are ill-suited to deal with collective behaviour. Thus, even if arrests of gang members are made, criminal organisations frequently continue to operate. “[C]riminal enterprises can thrive despite successful individual prosecutions”, remarks Michael Goldsmith.

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Furthermore, there is a widely held view that ‘group enterprises are more worthy of punishment than acts committed by individuals’ and thus require special attention.11 ‘The crime committed by an enterprise, like the crime of conspiracy,’ notes Ethan Gerber, ‘is worthy of greater punishment because collective action toward an illegal end poses greater risk to society than individual action toward the same end.’12 According to Estelle Baker, the ‘truly invidious character’ of criminal organisations stems ‘from the potential of such organisations to accumulate a concentration of illicit power of such magnitude that they can begin to challenge the authority of the state.’13 ‘In the same manner, society has an immense interest in preventing crime committed by gangs’, remarks Raffy Astvasadoorian.14

The following Sections explore the scope of contemporary criminal law and discuss the need—if any—to extend criminal liability further in order to prevent and suppress organised crime more effectively.

2.1 Existing Extensions of Criminal Liability

For criminal liability to arise, it is necessary that an accused commit an offence. In very basic terms this requires proof that the accused completed all the elements of the offence he or she is charged with. This generally includes:

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