The Routledge Handbook of Transnational Organized Crime

Felia Allum, Stan Gilmour

Transnational organized crime

Publication details

Joseph Wheatley
Published online on: 09 Nov 2021

How to cite: Joseph Wheatley. 09 Nov 2021, Transnational organized crime from: The Routledge Handbook of Transnational Organized Crime Routledge
Accessed on: 28 Aug 2023

PLEASE SCROLL DOWN FOR DOCUMENT

Full terms and conditions of use: https://www.routledgehandbooks.com/legal-notices/terms

This Document PDF may be used for research, teaching and private study purposes. Any substantial or systematic reproductions, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The publisher shall not be liable for an loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.
3
TRANSNATIONAL
ORGANIZED CRIME

A survey of laws, policies and international conventions

Joseph Wheatley

Introduction

This chapter surveys the legal standing of TOC in (1) the United Nations Convention against TOC and its Protocols; (2) the United States (US); (3) the European Union (EU); and (4) the United Kingdom (UK). To summarize, based on a review of available statutes, the chapter finds that states do not specifically criminalize “TOC.” Instead, states appear to criminalize “organized crime” or similar criminal conduct or groups, such as “criminal organizations” or “enterprises,” without statutory reference to the transnational or international nature of the offense. However, the chapter explains that TOC is referred to in other forms, such as states’ policies and international conventions, which shape the setting of priorities and the focusing of resources upon dangerous and significant TOC groups, including groups that are deemed to pose national security risks.

On April 23, 2008, in a speech before the Center for Strategic and International Studies in Washington, DC, US Attorney General Michael Mukasey announced the release of the Law Enforcement Strategy to Combat International Organized Crime and addressed the challenges presented to law enforcement authorities by TOC groups: “International organized crime poses a greater challenge to law enforcement than did the traditional mafia, in many respects. And the geographical source of the threat is not the only difference. The degree of sophistication is almost markedly different” (Mukasey 2008).

For instance, by their nature, TOC groups cross various jurisdictions, which complicates national law enforcement authorities’ efforts to obtain evidence and prosecute members and associates of groups. Groups move across national borders with less difficulty in comparison to law enforcement authorities, which are confined to their domestic jurisdictions and which must cooperate with foreign authorities to investigate crimes occurring beyond their borders. Additionally, investigating international groups’ elaborate financial and personnel structures, and prosecuting such groups, are time-consuming and expensive.

As TOC groups operate, by definition, across national borders, they invariably raise national security concerns, which are magnified by their tendency to commit serious offenses with a high degree of sophistication (see Helena Carrapiço, Chapter 1). Certain law enforcement efforts, including international cooperation, against TOC relate to national security interests, such as
Joseph Wheatley

protecting a state’s borders or preventing terrorism, as reflected by US Department of Justice policy and other US government initiatives. Other states have also prosecuted TOC and cooperated with one another, in part, on national security grounds, including the UK, EU Member States, and signatories to the United Nations Convention against TOC and its Protocols.

This transnational law enforcement and security approach has been critiqued by authors, including criticism that it is based on a “new global pluralist” theory in which states focus on external threats and insufficiently account for other factors that may contribute to crime (Edwards and Gill 2003: 268). Under this theory, organized crime is “portrayed as an attack on political-economies that are assumed to be satisfactory, or at least non-criminogenic, and should, *ipso facto*, be secured in their existing format” (Edwards and Gill 2003: 268).

However, this chapter does not focus on such criticism or countries’ rationales, including national security, for law enforcement’s efforts against TOC (see Part VI for more on this), as the focus of the chapter is a survey of the legal standing of TOC.

**United Nations**

The United Nations Convention against TOC (“the Palermo Convention”), adopted by General Assembly resolution 55/25 of November 15, 2000, is the principal international instrument against TOC (United Nations 2004). The Palermo Convention was opened for signature by Member States at a conference convened for that purpose in Palermo, Italy, on December 12–15, 2000, and entered into force on September 29, 2003. As of September 20, 2021, 147 Member States have signed the Palermo Convention (United Nations 2021). In 2004, United Nations Secretary-General Kofi Annan wrote of the Palermo Convention, “If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means” (Annan 2004). The United Nations and various signatories to the Palermo Convention have recognized the national security implications of organized crime (see, e.g., Conference of the Parties to the United Nations Convention against TOC 2004, 2005).

Member States that ratify the Palermo Convention commit themselves to taking measures against TOC, including the enactment of domestic criminal offenses; the adoption of frameworks for extradition, mutual legal assistance and law enforcement cooperation; and training and technical assistance. The Palermo Convention is supplemented by three Protocols, which target specific areas of organized crime. Before countries can become parties to any of the Protocols, they must become parties to the Palermo Convention itself: (1) The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; (2) The Protocol against the Smuggling of Migrants by Land, Sea and Air; and (3) The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (United Nations 2004: Article 37).

The first subsection summarizes the events leading up to the creation of the Palermo Convention. The second subsection outlines the application and structure of the Palermo Convention. The third subsection discusses the Palermo Convention’s definitions of “organized criminal group” and “participation in an organized criminal group.”

**Summary of events leading to the Palermo Convention**

Although the process was years in the making, international cooperation, culminating in the adoption of the treaty, gained impetus with the creation of the United Nations Commission on Crime Prevention and Criminal Justice (“the Commission”) in 1991 (see generally, Vlassis 2002). The
Commission released an Action Plan in 1993 listing organized crime as a priority. In 1994, the World Ministerial Conference on TOC took place in Naples, Italy (“the Naples Conference”). At the Naples Conference, delegations from 142 countries met to work toward an international convention, which was declared “a matter of urgency,” and which recognized the national security concerns posed by organized crime, calling it a “highly destabilizing and corrupting influence on fundamental social, economic and political institutions” (United Nations 1994).

Application and structure of the Palermo Convention

In general, the Palermo Convention covers four issues: criminalization of various offenses, cooperation, assistance, and implementation. This chapter primarily focuses on the criminalization issue. The Palermo Convention applies to “serious crime” where the offense is “transnational” in nature and involves an “organized criminal group” (United Nations 2004: Article 3, Paragraph 1). An offense is defined as “transnational” in nature if (United Nations 2004: Article 3, Paragraph 2):

1. It is committed in more than one State;
2. It is committed in one State but a substantial part of its preparation, planning, direction, or control takes place in another State;
3. It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
4. It is committed in one State but has substantial effects in another State.

In these four situations, the Palermo Convention applies. The Palermo Convention’s interstate application resembles that of the US’s Racketeer Influenced and Corrupt Organizations (RICO) statute, which is limited to criminalizing conduct relating to interstate or foreign commerce that allows US federal jurisdiction to apply. The RICO statute is discussed in greater detail later in this chapter.

The Palermo Convention requires that four substantive offenses be included in the domestic law of signing states: participation in a criminal group (Article 5); money laundering (Article 6); corruption (Article 8); and obstruction of justice (Article 23) (United Nations 2004). While not every aspect of the Palermo Convention is mandatory upon the signing state, even the mandatory provision regarding the criminalization of offenses does not require that the signing state adopt the verbatim language of the treaty itself when enacting domestic law (United Nations 2004: Article 34, Paragraph 2). Instead, the criminal offenses are to be enacted by a signing state “in accordance with fundamental principles of its domestic law” (United Nations 2004: Article 34, Paragraph 1).

Definitions

This subsection discusses the Convention’s definitions of “organized criminal group” and “participation in an organized criminal group.”

Definition of “organized criminal group”

Article 2 of the Palermo Convention provides the following definitions:

(a) “Organized criminal group” is defined as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or
more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”

(b) “Serious crime” is defined as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”

(c) “Structured group” is defined as “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.”

(United Nations 2004: Article 2, Paragraphs a–c)

The Palermo Convention’s definition of an “organized criminal group” shares terms in common with the definition in The Law Enforcement Strategy to Combat International Organized Crime of the US Department of Justice and other US counter-TOC initiatives, discussed later in this chapter, such as continuity, structure, and criminality for financial or material gain.

The Palermo Convention’s definition of an “organized criminal group” and the offenses relating to such groups raise several concerns, which also apply to the terms of the EU Framework Decision on the Fight against Organized Crime, also discussed later in this chapter.

First, the Palermo Convention’s definition of an “organized criminal group” uses the term “structured group,” which is negatively defined as follows. For instance, under the definition, an “organized criminal group” need not have “formally defined roles for its members, continuity of its membership or a developed structure.” The travaux préparatoires of the Palermo Convention indicate that the term “structured group” is to be interpreted broadly to include “both groups with hierarchical or other elaborate structure” and “non-hierarchical groups where the roles of members of the group need not be formally defined” (United Nations 2000). Due to its use of a negatively defined “structured group,” the Palermo Convention’s concept of an “organized criminal group” spans a variety of organizational types and provides vague criteria for the signatories, which are charged with enacting legislation in conformity with their domestic law. As a result, the legislation enacted in response to the Palermo Convention may vary across signatories, which may frustrate the Palermo Convention’s purpose of promoting cooperation to prevent and combat TOC.

One potential solution to the Palermo Convention’s vague definition may be organizational requirements, which were previously considered by parties drafting the Palermo Convention. These requirements could include terms such as continuity of a particular duration, or specified forms of structure that an organized criminal group must have. Such requirements may lead to greater approximation of legislation across signatories and advance the Palermo Convention’s purpose of promoting cooperation against organized crime. Granted, using such specific terms may advance the Convention’s purpose of promoting cooperation, but it may also cause a trade-off in flexibility, as the resulting statutes may not apply to conduct committed by new and different types of criminal groups that emerge. In contrast, the US federal courts have read into the RICO statute flexible terms that do not limit the statute’s ability to respond to new and different groups, such as (1) “a purpose”; (2) “relationships among those associated with the enterprise”; and (3) “longevity sufficient to permit these associates to pursue the enterprise’s purpose” (Boyle v. United States, 129 S.Ct. 2237, 2244 [2009]; see also United States v. Gray, 137 F.3d 765, 772 [4th Cir. 1998]; Bonner v. Henderson, 147 F.3d 457, 459 [5th Cir. 1998]).

Second, the Palermo Convention provides that an organization derives its illegal nature from having an objective of committing offenses that are punishable with at least four years of maximum imprisonment. However, what constitutes a criminal offense and the maximum imprisonment for a given offense varies from signatory to signatory, which means that, across the signatories, different offenses may fall within the ambit of a criminal organization. As a result,
one signatory may deem a group to be a criminal organization that another signatory would not, due to the differing penalties imposed on predicate offenses in each jurisdiction. Such discrepancies complicate cross-border law enforcement and may frustrate the Palermo Convention’s purpose of promoting cooperation. One possible solution to these variances across signatories would be to use a defined list of predicate offenses, similar to the list of offenses qualifying as “racketeering activity” under the US RICO statute (US Code Tit. 18, Sec. 1961(1)). The list may include crimes that would be deemed as serious among all signatories, such as murder, kidnapping, and human and drug trafficking. By specifying the predicate offenses falling under the ambit of a criminal organization, the Palermo Convention may reduce criminal sanctioning discrepancies among signatories, which could promote cooperation and cross-border law enforcement.

**Definition of “participation in an organized criminal group”**

Article 5 of the Palermo Convention, which mandates that signatories enact legislation prohibiting “participation in an organized criminal group,” states in the relevant part:

1. **Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:**

   (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

   (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;

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

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

   (United Nations 2004)

The availability of differing offenses under Article 5(1)(a)(i) and 5(1)(a)(ii), which signatories to the Palermo Convention may choose from to enact legislation, represents a compromise between the differing legal traditions of the signatories. Although either or both offenses may be enacted by a signatory, Article 5(1)(a)(i), criminalizing conspiracy, is of importance to signatories from the common law tradition (such as the UK); whereas Article 5(1)(a)(ii), criminalizing active participation, is of importance to signatories from the civil law tradition (such as France).

However, the availability of the two differing offenses for enactment by signatories raises concerns, primarily that the resulting legislation may differ sufficiently across signatories to
frustrate the Palermo Convention’s purpose of promoting cooperation against organized crime. As offenses from both the civil law and common law traditions are available to signatories, signatories are not obliged to settle on a single type of offense. Indeed, signatories may not have to amend substantively their pre-existing criminal laws regarding participation in an organized criminal group, as their differing civil and common law traditions are accounted for in the Palermo Convention. Accordingly, legislation may vary between signatories, which may complicate cross-border law enforcement. While it is not essential for legislation to be consistent across all signatories, consistency may aid in promoting the Palermo Convention’s purpose of cooperation among signatories, as definitions of criminal conduct would not differ from state to state. For instance, governments engaging in cross-border law enforcement would not have to navigate such differences in their investigations and prosecutions.

United States

The US signed the Palermo Convention on December 13, 2000, and ratified it on November 3, 2005 (United Nations 2021). Although the country does not specifically criminalize “organized crime” or “TOC,” the RICO statute may be used to prosecute TOC groups. US government policies also target TOC. The first subsection reviews the history and text of RICO. The second subsection surveys the TOC threats that US national strategies and Executive Orders have targeted. The third subsection offers concluding remarks about how RICO’s flexibility permits the federal government to respond to TOC groups. While this chapter singles out RICO as a statute for prosecuting TOC, it recognizes that the US law has additional statutes, including Violent Crimes in Aid of Racketeering, that may also be used for that purpose (US Code Tit. 18, Sec. 1959).

The history and text of RICO

In 1970, the US Congress enacted the Organized Crime Control Act, which created RICO. The statute represented a new law enforcement approach for investigating and prosecuting organized crime. Congress enacted RICO with the intention of dismantling organized crime groups (S. Rep. No. 617, 91st Cong., 1st Sess. 36–43 [1969]). To paraphrase, RICO’s most frequently used provision prohibits participating in or conducting the affairs of criminal enterprises, through a pattern of racketeering activity, or conspiracies to commit such conduct. The focus on criminal enterprises, among other aspects, distinguishes RICO from the various US laws targeting organized crime that preceded RICO.

The government utilized RICO to investigate and prosecute the Mafia, a group with Italian origins also called “La Cosa Nostra” and translated as “Our Thing” (S. Rep. No. 617, 91st Cong., 1st Sess. 36–43 [1969]). The Mafia and other sophisticated criminal entities helped prompt Congress to enact RICO, which enabled investigators and prosecutors to pursue members and assets of organized crime groups that may otherwise have escaped prosecution and forfeiture under previous statutes (US Code Tit. 18, Secs. 1961–1968). The law states that it is unlawful for “any person” to (a) use income derived from a pattern of racketeering activity, or derived from the collection of an unlawful debt, to acquire an interest in an enterprise affecting interstate or foreign commerce; (b) acquire or maintain, through a pattern of racketeering activity, or through collection of an unlawful debt, an interest in an enterprise affecting interstate or foreign commerce; (c) conduct or participate in the conduct of the affairs of an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity, or through
collection of an unlawful debt; or (d) conspire to commit any of the violations listed above (US Code Tit. 18, Sec. 1962).

Congress stipulated that RICO should be construed liberally, and the statute broadly defines an “enterprise” to “includ[e] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity” (US Code Tit. 18, Sec. 1964). The courts have ruled that the statute’s definition of an enterprise is not a comprehensive list but is instead a sample list of the types of entities that can qualify as a criminal enterprise. In order to qualify as an association-in-fact, rather than a legal entity, the group must fulfill requirements that the US federal courts have attributed to the statute, such as (1) “a purpose”; (2) “relationships among those associated with the enterprise”; and (3) “longevity sufficient to permit these associates to pursue the enterprise’s purpose” (Boyle v. United States, 129 S.Ct. 2237, 2244 [2009]; see also United States v. Gray, 137 F.3d 765, 772 [4th Cir. 1998]; Bonner v. Henderson, 147 F.3d 457, 459 [5th Cir. 1998]).

Although early RICO prosecutions were primarily directed against members and associates of the Mafia, TOC groups and other types of criminal enterprises have been identified as threats and subject to prosecutions.

**TOC groups**

This subsection discusses the federal government’s identification of TOC groups as threats, in the form of various Executive Orders and national strategies to combat TOC groups, and summarizes the challenges that such groups pose to law enforcement authorities. The next subsection briefly discusses how members and associates of such TOC groups may be subject to prosecution under RICO.

**Law enforcement strategy to combat international organized crime**

*(the “2008 Strategy”)*

The 2008 Strategy was released by the US Department of Justice on April 23, 2008. The 2008 Strategy defines “international organized crime” and targets eight strategic TOC threats. As for the definition, the 2008 Strategy states:

“international organized crime” refers to those self-perpetuating associations of individuals who operate internationally for the purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/or violence. There is no single structure under which international organized criminals operate; they vary from hierarchies to clans, networks and cells, and may evolve to other structures. The crimes they commit also vary.

(US Department of Justice 2008a: 2)

The 2008 Strategy’s definition of “international organized crime” shares terms in common with the Palermo Convention’s definition of an “organized criminal group,” such as continuity and a type of structure.

The 2008 Strategy names four priority action items for the federal government in addressing the threats posed by TOC groups: (1) Gathering and making use of information and intelligence; (2) Setting priorities and targeting the most significant TOC threats; (3) Using the resources of the government in partnership with foreign authorities; and (4) Employing the
enterprise theory in investigating and prosecuting criminal enterprises to dismantle them (US Department of Justice 2008a: 1).

With respect to the 2008 Strategy’s second priority action items, the setting of priorities and targeting of TOC groups by the federal government, according to the Department of Justice, “the 2008 Strategy] aims to create consensus among domestic law enforcement in identifying the most significant priority targets” and create “unified and concerted action among domestic and international law enforcement in significantly disrupting and dismantling those targets” (US Department of Justice 2008b). The 2008 Strategy recognizes that “international organized crime is a national security problem that demands a strategic, targeted and concerted US Government response” (US Department of Justice 2008a: 2–9). Certain law enforcement efforts against TOC, as discussed later, relate to national security interests, such as preventing terrorism.

The 2008 Strategy targets the following eight TOC threats, in no particular order (US Department of Justice 2008a: 2–9): (1) Control of energy markets and other strategic sectors of the economy; (2) Logistical and other support to terrorist groups, foreign intelligence services, and governments; (3) Smuggling/trafficking people and contraband/counterfeit goods into the United States; (4) Exploiting the US and international financial systems to transfer illicit funds; (5) Use of cyberspace to target US victims and infrastructure; (6) Manipulation of securities exchanges and sophisticated frauds; (7) Corruption and attempted corruption of public officials; and (8) Use of violence and the threat of violence. As an example of the eighth threat, the 2008 Strategy cites Iouri Mikhel and Jurijus Kadamovas, who were sentenced to death in Los Angeles on March 12, 2007, for leading an international kidnapping group that murdered five people in the United States and laundered the ransom payments through various countries.

Strategy to combat transnational organized crime (the “2011 strategy”)

The 2011 Strategy was released by the National Security Staff on July 25, 2011 (National Security Staff 2011). Apart from its references to “transnational organized crime,” it shares the same definition as that of “international organized crime” in the 2008 Strategy and also identifies priority action items that are consistent with it: (1) Evaluating what steps the United States can take domestically to lessen the domestic and foreign threat and impact of TOC; (2) Enhancing intelligence and information sharing; (3) Protecting the financial systems and strategic markets against TOC; (4) Strengthening the interdiction, investigation, and prosecution of TOC; (5) Disrupting drug trafficking and its facilitation of other transnational threats; and (6) Building international capacity, cooperation, and partnerships (National Security Staff 2011: 4).

With respect to the TOC threats to be targeted, the 2011 Strategy focuses primarily on the national security dimensions of TOC, compared to the 2008 Strategy, which is law enforcement-centric. The 2011 Strategy identifies the following as “a significant and growing threat to national and international security, with dire implications for public safety, public health, democratic institutions, and economic stability across the globe”: (1) Penetration of government institutions and threats to governance through corruption and coercion, particularly in developing countries with “weak rule of law”; (2) Threats to the global economy, US competitiveness, and strategic markets, such as TOC’s “subversion, exploitation, and distortion of legitimate markets and economic activity”; (3) The nexus of TOC groups, terrorist groups, and insurgent groups; (4) The expansion of drug trafficking in various regions; (5) Human smuggling; (6) Trafficking in persons; (7) Weapons trafficking; (8) Intellectual property theft, including “intrusions into corporate and proprietary computer networks”; (9) Cybercrime, whether a computer is either “the target or the weapon used in the crime”; and (10) Facilitators, such as
“accountants, attorneys, notaries, bankers, and real estate brokers, who cross both the licit and illicit worlds” (National Security Staff 2011: 5–8).

**Executive Orders 13581 and 13863**

The 2011 *Strategy* also announced a new tool in the US government’s fight against TOC, Executive Order 13581, which blocks the property of and prohibits transactions with “significant transnational criminal organizations” as they “constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States” (Executive Office of the President 2011). Issued on July 25, 2011, Executive Order 13581 attacks the financial lifeblood of “significant transnational criminal organization[s],” which it defines as a

> group[s] of persons . . . that includes one or more foreign persons; that engages in an ongoing pattern of serious criminal activity involving the jurisdictions of at least two foreign states; and that threatens the national security, foreign policy, or economy of the United States.

(Executive Office of the President 2019)

On March 15, 2019, Executive Order 13863 amended Executive Order 13581’s definition of “significant transnational criminal organization,” which now encompasses the facilitation of criminal activity, and TOC groups that also impact the United States and at least one foreign state:

> a group of persons that includes one or more foreign persons; that engages in or facilitates an ongoing pattern of serious criminal activity involving the jurisdictions of at least two foreign states, or one foreign state and the United States; and that threatens the national security, foreign policy, or economy of the United States.

(Executive Office of the President)

**Executive order 13773 and the national security strategy of the United States of America (the “2017 strategy”)**

Issued on February 9, 2017, Executive Order 13773 further enhanced the US government’s abilities against TOC groups. The order directed a whole-of-government effort to develop, coordinate, and execute plans to degrade and dismantle such groups. In particular, the order tasked the US Departments of Justice, Homeland Security, and State, and the Office of the Director for National Intelligence, to work with each other in support of this mission (Executive Office of the President 2017a).

As with prior definitions of transnational organized crime, Executive Order 13773 broadly defines the term, as to both its organizational type and its predicate offenses. It targets:

> transnational criminal organizations and subsidiary organizations, including criminal gangs, cartels, racketeering organizations, and other groups engaged in illicit activities that present a threat to public safety and national security and that are related to, for example: (i) the illegal smuggling and trafficking of humans, drugs or other substances, wildlife, and weapons; (ii) corruption, cybercrime, fraud, financial crimes, and intellectual-property theft; or (iii) the illegal concealment or transfer of proceeds derived from such illicit activities.

(Id.)
The 2017 Strategy, released in December 2017, further promotes the dismantlement of TOC groups. Among its action items, the 2017 Strategy supported US agencies and foreign partners targeting the leaders of TOC groups and their support infrastructure (Executive Office of the President 2017b).

**US national strategies and executive orders targeting TOC: in summary**

The flexible definitions of TOC and identification of TOC threats discussed previously may assist law enforcement authorities in assigning resources to investigate and prosecute organized crime groups. A strength of the various national strategies and Executive Orders is that their definition of organized crime characteristics includes more than one group or organizational form, in the same sense that the RICO statute does not limit itself to any particular criminal enterprise. Due to such flexibility, they may guide law enforcement authorities in responding to new and different forms of TOC groups as they emerge.

**Use of RICO to prosecute TOC groups**

This section examines whether the “enterprise” element of RICO may apply to a TOC group and whether the use of RICO to prosecute such groups is appropriate. First, regarding RICO’s “enterprise” element, federal courts have found that a group must fulfill requirements for it to qualify as an “enterprise,” such as (1) “a purpose”; (2) “relationships among those associated with the enterprise”; and (3) “longevity sufficient to permit these associates to pursue the enterprise’s purpose” (*Boyle v. United States*, 129 S.Ct. 2237, 2244 [2009]; see also *United States v. Gray*, 137 F.3d 765, 772 [4th Cir. 1998]; *Bonner v. Henderson*, 147 F.3d 457, 459 [5th Cir. 1998]). For example, the Mikhel and Kadamovas kidnapping group, cited by the 2008 Strategy as a TOC group under the eighth threat: (1) shared a common purpose, such as abducting and murdering its victims; (2) had relationships between associates of the group, including a structure for making decisions and carrying them out; and (3) operated as a group long enough for the group’s associates to achieve the group’s criminal purpose. Various other TOC groups also satisfy those criteria for prosecution, such as transnational gangs, cartels, human traffickers, and money laundering organizations.

Second, is the use of RICO to prosecute TOC groups appropriate under the intent of the statute? When enacting RICO, Congress expressed its statutory intent of eliminating organized crime groups and their damaging influence on the US (S. Rep. No. 617, 91st Cong., 1st Sess. 36–43 [1969]). Although TOC groups may differ from the Mafia that partly prompted Congress to enact RICO, such groups are damaging in their own fashion. For instance, TOC groups engage in a variety of offenses, including fraud, human trafficking, and murder. As Congress stipulated that RICO should be construed liberally, the statute is not limited to one particular organizational type and may appropriately be used to prosecute TOC groups.

**European Union**

The Framework sets forth the objective of improving “the common capability of the Union and the Member States for the purpose, among others, of combating TOC” and implicitly recognizes the national security threat posed by TOC, stating, “[c]loser cooperation between the Member States of the EU is needed in order to counter the dangers and proliferation of criminal organisations” (Council of the European Union 2008: Paragraph 1). Achieving this objective may be done by the “approximation of legislation” by Member States (Council of the European Union 2008: Paragraph 1).

The Framework replaced the EU’s Joint Action “on making it a criminal offence to participate in a criminal organization in the Member States of the European Union” of 1998 (98/733/JHA, “Joint Action”), which provided:

Within the meaning of this joint action, a criminal organization shall mean a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.

(Council of the European Union 1998: Article 1, Paragraph 1)

The Framework’s definition of a criminal organization roughly tracks the Joint Action’s definition, with the exception that the Framework’s definition does not appear to apply to improper influence of public authorities. The Framework defines a “criminal organization” as:

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

(Council of the European Union 2008: Article 1, Point 1)

The Framework’s definition of a “criminal organization,” like the Palermo Convention’s definition of an “organized criminal group,” shares terms in common with the US Strategy’s definition, such as continuity, structure, and criminality for financial or material gain.

Whereas the Joint Action did not specify what constitutes a “structured association,” the Framework follows the Palermo Convention’s definition of a “structured group” in providing that a “structured association” is “an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure” (Council of the European Union 2008: Article 1, Point 2). The term “structured association” is negatively defined, in that it provides what a “structured association” is not, in two respects. First, it excludes randomly formed groups that are generated for the purpose of committing a single offense. Second, it provides that defined membership roles, continuity, and complex structure are not mandatory requirements for a “structured association.”

The Framework’s definition of a “criminal organization” and the offenses relating to such groups raise several concerns. First, as is the case with the Palermo Convention, the Framework’s definition of a “criminal organization” draws upon the terms of a “structured association,” which is negatively defined. The resultant legislation may vary widely in the EU and may frustrate the Framework’s purpose of approximating legislation across Member States. One
possible solution to the Framework’s vague definition would be to insert organizational requirements, such as continuity of a particular duration or specified forms of structure that an organized criminal group must have. Using such specific terms may lead to greater approximation of legislation across the EU, but they may also render the legislation less flexible, as the resulting statutes may not apply to conduct committed by new and different types of criminal groups that emerge.

Second, the Framework provides that an organization derives its illegal nature from having an objective of committing offenses that are punishable with at least four years of maximum imprisonment, a threshold requirement carried over from the Joint Action and Palermo Convention. However, what constitutes a criminal offense and the maximum imprisonment for a given offense varies from Member State to Member State, which means that, across the EU, different offenses may fall within the ambit of a criminal organization. This complicates cross-border law enforcement and may frustrate the Framework’s purpose of approximating legislation. One possible solution to these variances across Member States would be to use a defined list of predicate offenses, similar to the list of offenses qualifying as “racketeering activity” under the US RICO statute ($US$ Code Tit. 18, Sec. 1961(1)). By specifying the predicate offenses falling under the ambit of a criminal organization, the Framework may encourage greater approximation of national legislation and cross-border law enforcement.

Third, as is the case with the Palermo Convention, legislation under the Framework regarding participation in a criminal organization may vary between Member States (Council of the European Union 2008: Article 2). Such inconsistency may frustrate the Framework’s purpose of approximating legislation, as definitions of criminal conduct may differ from state to state.

### United Kingdom

The UK signed the Palermo Convention on December 14, 2000, and ratified it on February 9, 2006 (United Nations 2021). Although the country does not specifically criminalize “TOC,” UK laws targeting organized crime, such as the powers under the Serious Organised Crime and Police Act of 2005, may be used to investigate and prosecute TOC groups. UK government policies also identify and target organized crime, including TOC, as a threat to the UK. In *A Comprehensive Approach to Tackling Serious Organised Crime*, the UK’s Home Office identified organized crime as a national security threat (United Kingdom Home Office 2009). Certain law enforcement initiatives against TOC, as discussed later, address national security concerns, such as border protection.

This chapter will examine the threats in the context of *National Strategic Assessment of Serious and Organised Crime 2020* (“National Strategic Assessment”), which was released by the UK National Crime Agency in April 2020 (National Crime Agency 2020), and other UK government publications. The *National Strategic Assessment* defines “serious and organised crime” as follows:

Serious and organised crime is defined in the 2018 *Serious and Organised Crime Strategy* as individuals planning, coordinating and committing serious offences, whether individually, in groups and/or as part of transnational networks. The main categories of serious offences covered by the term are: child sexual abuse; modern slavery and human trafficking; organised immigration crime; illegal drugs; illegal firearms; organised acquisitive crime; cyber crime; fraud; money laundering; and bribery, corruption and sanctions evasion.

(National Crime Agency 2020: Preface)
As the National Strategic Assessment’s definition folds crime by individuals and groups together, further context is necessary on the UK perspective. The National Crime Agency’s predecessor, the Serious Organised Crime Agency, provided a sample of common traits found in organized crime groups, in its 2009 Threat Assessment of Organised Crime (the “Threat Assessment”):

Criminal structures vary. Successful organised crime groups often consist of a durable core of key individuals, around which there is a cluster of subordinates, specialists, and other more transient members, plus an extended network of disposable associates. Many groups are in practice loose networks of criminals that come together for the duration of a criminal activity, acting in different roles depending on their skills and expertise. Collaboration is reinforced by shared experiences (such as prison), family or ethnic ties, or recommendation from trusted individuals . . . Violence or the threat of violence is often implicit in the activities of organised criminals, and some are willing to commit or sponsor kidnapping, attacks, and murder, to protect their interests, including the recovery of debts . . . Organised criminals use corruption to secure assistance from those with information or influence in order to protect or enhance their criminal activities.

(Serious Organised Crime Agency 2009: Key Judgements, Paragraphs 2, 4–5)

Read together, the National Strategic Assessment’s and Threat Assessment’s descriptions of organized crime groups share terms in common with the US 2008 Strategy’s and 2011 Strategy’s definitions, such as continuity, structure, and the use of violence and corruption.

As for the threat posed by “serious and organized crime,” the National Strategic Assessment finds that such crime has “more impact on UK citizens than any other national security threat,” citing its “chronic and corrosive impact on daily [life]” across the country. The report assessed the economic and social cost of such crime at approximately £37 billion per year. It sorts the threats into three broad categories, which are not ranked in any particular order:

(1) Exploitation of the Vulnerable, including child sexual abuse, modern slavery and human trafficking, and organised immigration crime;
(2) Communities and Violence, including drugs, firearms, and organised acquisitive crime; and
(3) Harm to the UK’s Economy and Institutions, including cyber crime, fraud, money laundering, and bribery, corruption, and sanctions evasion.

A strength of the Threat Assessment is that it accounts for more than one group or organizational form, in a similar sense as the US 2008 Strategy and 2011 Strategy. Due to such flexibility, the Threat Assessment may assist law enforcement authorities in investigating and prosecuting new and different types of TOC groups as they emerge.

Conclusions

This chapter has surveyed the legal standing of TOC in (1) the United Nations Convention against TOC and its Protocols; (2) the US; (3) the EU; and (4) the UK.

Based on a review of available statutes, countries do not criminalize “TOC” per se. The Palermo Convention provides offenses regarding an “organized criminal group” that are to be enacted in conformity with states’ domestic laws, as part of its purpose of promoting cooperation between states to combat TOC more effectively. States appear to criminalize “organized
crime” or similar criminal conduct or groups, such as “criminal organizations” or “enterprises,” without statutory reference to the transnational or international aspect of the offense.

However, states address TOC in other forms, such as policy initiatives. Initiatives, such as the US Executive Order 13773 and the *National Strategic Assessment*, help law enforcement authorities set priorities and focus resources upon investigating and prosecuting significant TOC groups, including groups that raise national security concerns. TOC groups invariably raise national security concerns, as they operate, by definition, across national borders. Moreover, their tendency to commit serious offenses and their high degree of sophistication heightens national security concerns. As discussed earlier, certain law enforcement efforts against TOC address national security issues, such as terrorism and border protection. This transnational law enforcement and security approach has been critiqued by authors, including criticism that it is based on a “new global pluralist” theory, “where security is defined in relation to the external threats encountered by nation states” and where other factors that may contribute to crime are insufficiently considered (Edwards and Gill 2003: 268). However, this chapter has not evaluated such criticism and countries’ rationales, including national security, for law enforcement’s efforts against TOC, as the focus of the chapter is a survey of the legal standing of TOC.

This chapter has shown that states combat organized crime in different ways, even if they are signatories to the Palermo Convention, because legislation regarding organized crime may conform to each state’s own domestic laws. For instance, the EU’s Framework and the Palermo Convention provide that an organization derives its illegal nature from having an objective of committing offenses that are punishable with at least four years of maximum imprisonment, whereas the US RICO statute provides a list of specified predicate offenses qualifying as “racketeering activity.” In addition to statutory differences, states vary in their domestic policy initiatives and strategies to combat organized crime, including TOC.

Organized crime groups move across national borders with less difficulty than do national law enforcement authorities, which are confined to their domestic jurisdictions and which must cooperate with foreign authorities to investigate crimes occurring beyond their borders. Accordingly, differences in legislation and policies across states may result in uneven progress against a given group in the places where it operates, since a group may move its operations to less risky jurisdictions. It is not essential for legislation and policies to be consistent from state to state. However, greater consistency may facilitate progress against organized crime groups, as governments engaging in cross-border law enforcement would not have to navigate such differences in their investigations and prosecutions. Likewise, organized crime groups would be less able to capitalize on differences in legal systems to limit risks to their groups.

International and domestic law enforcement measures against TOC are a work in progress. However, the Palermo Convention’s promotion of cooperation between states, and initiatives such as the 2008 Strategy and Executive Order 13773, represent positive steps in combating TOC groups.

**Note**

1 This chapter does not make allegations regarding, or otherwise take a position upon, any indictments pending in courts of law. All persons are innocent unless and until found guilty in a court of law.

**References**


*Bonner v. Henderson*, 147 F.3d 457, 459 [5th Cir. 1998].
Transnational organized crime

Boyle v. United States, 129 S.Ct. 2237, 2244 [2009].


United States v. Gray, 137 F.3d 765, 772 [4th Cir. 1998].