
Dr. Anna Sergi
NYU School of Law Program Affiliate Scholar
University of Essex Centre for Criminology

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1. Introduction

In the modern world, organised crime (OC) features prominently in the criminal justice agendas of many countries, being either a threat to public order, or national security or economic stability. Broadly speaking, the academic community approaches the problem of organised crime either from the point of view of the actors (focusing on the structure of organised crime groups) or from the point of view of the activities (focusing on crimes which ought to be intrinsically organised) (Obokata, 2010; Cancio Melia’, 2008; Paoli and Fijnaut, 2006). Approaches in criminal law against organised crime usually mirror this dichotomy (Sergi, 2013). It can be noted how a criminal justice system willing to focus on the structures and networks of organised crime groups, like Italy or the USA, would ideally target organised crime as a unitary entity, often by criminalising unlawful associations or criminal enterprises. On the other side, a system, like the English system, accepts an ‘activities-based’ definition of organised crime, would engage in targeting serious organised crimes as manifestations of organised crime (Sergi, 2013). This divergence in the way legal systems approach organised crime might create semantic criminogenic asymmetries (Passas, 1999; Arsovska and Kostakos, 2010) legal loopholes, which eventually are exploitable for criminals who learn how to avoid prosecution and where to be successful in committing crimes.

This paper aims to consider the rationale behind these two approaches to OC in criminal law in order to understand the basis of the law on conspiracy in England and
Wales and why this country has refused to amend conspiracy in favour of a membership offence or a criminal enterprise model. The analysis is substantiated through the comparison with the USA’s RICO statute (corroborated by interviewees with law enforcement staff collected in England and others with judges and prosecutors collected in New York City), as example of best practice targeting criminal enterprises in OC cases. The US Federal RICO, in fact, approaches OC as enterprise conspiracy to commit crimes. The paper therefore explores the rationales behind RICO and aims at capturing the concepts at the basis of criminal law choices as well as political changes.

The central idea of this work is to suggest that differences in criminal law are based on different perceptions of the wrongfulness of the offending. For the law to change in England and Wales there is a need to reshape the wrongfulness of organised crime, which, at the same time, embodies the perception of organised crime in the legal system of reference and implies judgements on the real nature of offending in OC cases. The concept of wrongfulness is the primary, often overlooked, element of every offence (Cancio Melia’, 2008) and the way organised crime is valued in terms of its wrongfulness marks the difference between a conspiracy offence (intended as complicity in committing crimes) and offences of unlawful association. The way states perceive the wrongfulness of OC is, therefore, the cause of legislative choices. This exploration is also relevant because of calls for action from the Council of Europe and the United Nations to improve the dialogue on the subject of organised crime criminal law beyond national borders.

Following this introduction on the purposes and relevance of this work, the paper shall introduce the two main forms of OC legislation – conspiracy and membership offences - as described by international documents, before focusing on the English law on conspiracy, compared with the USA’s RICO Statute. As it will be seen, while RICO is meant to deal specifically with organised crime groups’ infiltration in legal businesses, English conspiracy is a general norm, which might or might not apply to organised crime activities. The UK (England and Wales specifically) not only does not have anything like an unlawful association offence for organised crime, but it has in more than one occasions refused to consider introducing such a law on the basis that the law
on conspiracy and joint enterprise suffice. Therefore, this study shall be primarily intended as an opportunity to assess the criminal law tools in this field available in England and Wales. After briefly describing how the two systems (English and American) are intended to work, the paper will develop a discussion on the difficulties and advantages of introducing a RICO-style legislation in England and Wales and shall conclude that it is the way organised crime is perceived in the English/British scenario that justifies the choice to remain on the level of conspiracy and not move towards membership/enterprise offences.

2. Organised Crime and Criminal Law: between conspiracy and membership offences

Criminal law struggles to deal with OC, essentially because organised crime is not a crime of easy definition. Criminal law generally needs a value to protect in order to intervene; however the values behind the fight against OC are not always clear, being at times public order, at times national security and at times fairness in financial competition. As the concept of organised crime differs from country to country, so do control policies (Paoli and Fijnaut, 2006; Sergi, 2013). Organised crime policies in England and Wales respond to an activity model, essentially recognising OC as a set of serious and organised crimes, committed by career criminals (Sergi, 2013). Countries like Italy, or the USA, instead, share a concept of organised crime based on the structure of the network, on the entity that allows and reinforces the commission of criminal activities (Goldstock, 1994; Sergi, 2013). On a general note, anyway, for criminal law to operate it is necessary to understand the wrongfulness of the prohibited conducts.

There are traditionally two main criminal law approaches to fight organised crime and both struggle to capture the dangerousness of the ‘organised’ part of OC manifestations. These two approaches are the criminalisation of OC as a unique offence and the criminalisation of those offences linked to OC and committed in individual agreements. The former comes as criminalisation of participation in, belonging to, or membership of an organisation with a criminal plan. The latter focuses on the severity of
the offences and punishes the engagement of more people in the commission of the offences, in the form of complicity and conspiracy provisions.

Both approaches recognise the centrality of the group activity. However, in conspiracy offences the protected value is the wrongfulness of the agreement; conversely, in membership offences the focus shifts on the wrongfulness of the association, therefore when the agreement is implied. The Legislative Guide for the UN Convention on Organized Crime specifies how states are required to implement either or both conspiracy and criminal association offences, according to different legal traditions (UNODC, 2004; UNODC, 2012). In fact, in compliance to article 5 of the United Nations Convention against Transnational Organised Crime, adopted by General Assembly resolution 55/25 in November 2000 (UN Palermo Convention), states are asked to criminalise participation in an organised criminal group, either in the form of conspiracy or in the form of membership along with the related offences of aiding, abetting, organising or directing such offences. The Legislative Guide to the UN Palermo Convention specifies the requirements for a conspiracy offence (as in article 5 paragraph 1(a)(i) of the UN Convention) (2004:23)

The requirements of this offence include the intentional agreement with one or more other persons to commit a serious crime for a purpose related directly or indirectly to obtaining a financial or other material benefit. This requirement criminalises the mere agreement to commit serious crimes for the purpose of obtaining a financial or other material benefit.

On the contrary, the requirements of the membership offence (article 5, paragraph 1(a)(ii) of the UN Convention) are (UNODC, 2004:24)

For the second type of offences that is criminal association, the required mental element is general knowledge of the criminal nature of the group or of at least one of its criminal activities or objectives. In the case of participating in criminal activities, the mental element of the activity in question would also apply. For instance, active participation in kidnapping or obstruction of justice would require the mental element for those offences.

In the case of taking part in non-criminal but supportive activities, an additional requirement is that of knowledge that such involvement will contribute to the achievement of a criminal aim of the group.

These provisions apply to an idea of organised crime group in the UN Palermo Convention which is
'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' (art. 2(a)),

Whereas a 'structured group' is

'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' (art. 2(c)).

Similarly, article 2 of the Council of Europe Framework Decision of 2008/841/JHA on the fight against organised crime calls upon each member state to take ‘the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences’ (art.2). The two offences proposed are: a) conducts related either to active participation within a criminal organisation, with the aim of contributing to the achievements of the organisation’s criminal plan; b) conducts related to agreements among two or more persons to commit offences that, if carried out, would fall within the scope of article 1 of the Decision (financial gain or material benefits). Also in the Framework Decision descriptions of organised crime and structured groups are similar to the ones in the UN Convention.

These two general definitions of OC offences essentially do not define organised crime in the law. Rather, they state what organised crime is not (a random concerted action of offenders); they serve the purpose precisely because they are general enough to be applied worldwide. The reason why two offences are needed depends on the necessities of different common and civil law traditions (UNODC, 2004). In fact, as conspiracy is a common law product, it is often not recognised in civil law systems. The mere planning of an offence is often not enough to justify interventions of the law in civil law countries (Harding, 2005). Conversely, offences of unlawful association raise issues related to the principle of personal liability and with the difficulty of defining a criminal organisation. Boister (2012) for example, condemns the low threshold set for participation in the UN Palermo Convention because it essentially establishes guilt by association. Furthermore, the definition of criminal association in the law might be
problematic in terms of rule of law and might be perceived as adding very little to existing frameworks.

In order to understand these two different approaches and the blurred boundaries of criminal law practices, this work shall now assess the framework and rationale of the English law on conspiracy followed by a description of the USA’s Federal RICO offences for enterprise conspiracy before proceeding to discussion and remarks on the different perceptions of organised crime portrayed in these two systems.

3. English Criminal Law and Organised Crime

The Attorney’s General Office in England and Wales advises to use conspiracy, and in particular conspiracy to defraud, as charge in organised crime cases (Attorney’s General Office, 2012). However, there is no definition of organised crime in English law, therefore understanding which are the cases classifiable under the ‘organised crime’ label could be problematic. In order to understand the relation between conspiracy, membership offences and organised crime it is necessary to give a brief account of the law on conspiracy as it is today. Afterwards, the paper will introduce the debate around conspiracy and membership offences in the country. As it will be noticed, the issue was only raised after the terminology ‘organised crime’ was successfully introduced in the country’s legal discourse, in 1994 (Hobbs, 2013). Afterwards, the legal question has been approached almost every time there was a change in the organisation of law enforcement agencies.

a. The Law on Conspiracy in English Criminal Law

After establishing the boundaries of this work – the assessment of the law on conspiracy in relation to the debate on membership offences for organised crime – this section shall focus more specifically on conspiracy offences, in common law and statutory forms, to discuss its suitability for organised crime afterwards.
Conspiracy in England and Wales was a common law inchoate crime punishing an agreement to commit a crime. It was committed as soon as two individuals agree to commit a crime even if they abandon their plan afterwards (Ormerod, 2012). The Criminal Law Act (CLA) 1977 preserved only two of the common law offences of conspiracy into statutory offences: conspiracy to defraud and conspiracy to corrupt public morals or to outrage public decency abrogating all the other forms. More importantly for the purposes of this paper, under section 1 of the CLA 1977, an individual might be charged of general conspiracy if s/he agrees with someone else to pursue a conduct or, more importantly, a number of conducts, which, if carried out, will amount to the commission of one or more substantial offences.

Historically, this offence was extended also to non-criminal acts, such as torts, or acts that the judges considered improper, like other common law misdemeanours; traditionally, it was not subject to any maximum punishment (Baker, 2012). As reported by the very significant report of the Law Commission in 1976, under common law, a person could be convicted both of conspiracy and of substantive offences separately; conspiracy did not merge with the consummated offence (Law Commission, 1976). Even though after the CLA in 1977 conspiracy in theory could still not merge with substantial crimes, the joinder of counts is now differently dealt with in practice\(^1\) (CPS, 2012). For example, *DPP v Stewart\(^2\)* ruled that in the event of a double conviction both for the main offences and for the conspiracy, there should be no more than one nominal sentence on the conspiracy count. This, in practice, means that conspiracy is not seen as an aggravating factor *on top* of the crime committed or agreed but as a *modus operandi* through which the offence was planned. In England and Wales there is in fact no possibility to *cumulate*\(^3\) the sentence for conspiracy and the sentence for the substantial

\(^1\) *Practice Direction (Crime: Conspiracy) [1977]* 1 W.L.R.537 clarifies that the judge is required to call upon the prosecution to justify the joinder and, if not satisfied, might ask the prosecutor to elect either count of conspiracy or count for substantive offence.

\(^2\) *DPP v Stewart [1983]* 2 A.C. 91

\(^3\) Cumulating two sentences means that they are to be served one after the other, thus implying a longer harsher sentence.
crime object of the agreement. The idea of conspiracy is, since the 1977 Act and as affirmed in case law, one of concurrent sentence; this means that absorption or merging occurs when there is both a conspiracy to commit a crime and the commission of that crime itself⁴. Recently, the court in *R v Mendez and Thompson⁵, R v Stringer⁶*, and *R v ABCD⁷* describe the possibility of charging joint enterprises as an aspect or form of secondary liability, and not as an independent source of liability. As The CPS (2012) specifies, even though joint enterprise can be charged, no distinction is made between cases where those involved share a common purpose to commit a certain crime, and cases where there is no shared purpose of committing that same crime but the crime is a result of joint action anyway. The complexity of the overall criminality that can generally be found around organised crime cases is not absent from legislation, both in the form of joinder of offences for prosecution purposes and in sentencing provisions. Remarkably, the sentencing provisions in the Criminal Justice Act 2003 frequently direct the court to take into account ‘associated offences’ when determining the seriousness of the criminality and the appropriate punishment (see section 152.2 or section 225.2b of the Criminal Justice Act 2003). Even though this is clearly a suggestion to consider the overall criminality of a certain criminal conduct, it still comes into play for purposes other than investigation. Indeed, this suggestion to consider associated offences for general purposes of sentencing and punishment, does not affect the way certain crimes are perceived and regulated and certainly does not say much of the overall criminal plan or structure that a membership offences would seek to understand in organised crime cases. The result of a suggestion to consider 'associated offences’ is a harsher sanction linked to the seriousness of a complex and serious criminal scenario. The concept of seriousness, which is a constant trait of recent policies in the UK (see the Serious Crime Act 2007 or the Serious and Organised Crime Strategy 2013 does not change the ‘conspiracy mentality’ of considering criminal acts in their singularity. Even when considering these provisions and the concept of seriousness in

⁴The practical result following the concurrence of sentences is that the two sentences passed are to be served together, in the same time, in practice provoking absorption of the lesser in the greater.
⁵ *R v Mendez and Thompson [2010] EWCA Crim 516* (para 17)
⁶ *R v Stringer [2011] EWCA Crim 1396* (para 57)
⁷ *R v ABCD [2010] EWCA Crim 1622*
fact the idea of a criminal plan, through a criminal association (an association born to commit criminal acts) does not appear clearly in the law.

Indeed, the essence of conspiracy remains the individual agreement to commit a crime; more agreements mean more conspiracies. However, in case of criminal plans stretching over a long period of time prosecutors need to proceed on the basis of several indictments for the substantial offences (where committed) because proving a single conspiracy at the basis of multiple criminal activities committed by multiple conspirators is essentially impossible or at least extremely difficult under the rules of joint enterprise (Ormerod and Hooper, 2013). The Law Commission in 2007, however, has supported the existence of continued acts of conspiracy, in accordance to Rule 14.2 Criminal Procedure Rules 2005. It is possible, says the Law Commission (2007:93), to charge one agreement to commit a course of conduct, which if carried out in accordance with the intentions of the actors, would result in more than one offence. Furthermore, in practice, the CPS (2012:3-5) has specified how there can be three cases of joint conspiracy:

- Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals.
- Where D assists or encourages P to commit a single crime.
- Where P and D participate together in one crime (crime A) and in the course of it P commits a second crime (crime B) which D had foreseen he might commit.

Each of these cases implies individual agreements to engage in criminal activity, which has to be at least foreseen if not mutually agreed.

In 1985\(^8\) already, Courts had held that an agreement amounts to conspiracy only if, once carried out, it involves the commission of an offence by one or more of the parties to the conspiracy (Ormerod, 2009:542). This reasoning is also justified by the views of Viscount Dilhorne in Scott v Comr of Police for the Metropolis\(^9\), according to

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8 \textit{R v Hollinshead} [1985] 2 All ER 769, House of Lords
9 [1974] 3 All ER 1032, [1975] AC 819
whom ‘one must not confuse the object of a conspiracy with the means by which it is intended to be carried out’. As noted in law practice and in accordance to this statement, an agreement between A and B to have C kill D would not amount to conspiracy to murder agreed between A and B, also because an agreement to aid, abet or procure any offence is not a crime under the CLA 1977 (Ormerod, 2009; Stannard and Smith, 2000). However, such an agreement might count as a conspiracy to commit an offence contrary to section 44 of the Serious Crime Act 2007 (Intentionally Encouraging or Assisting an Offence)\textsuperscript{10} under the joint enterprise charge scheme (CPS, 2012). This complicates cases of organised crime. In fact, the difficulty to involve a third party in the conspiracy means that those individuals who work behind the scenes – often the highest ranks of the organised crime chain – remain untouched.

The maximum sanction for a conviction of conspiracy under the CLA is the maximum provided for the offences object of the agreement if they were committed, so even a penalty of life imprisonment can be imposed when the offence is murder or any other offence without a specified maximum term but carrying a sanction of imprisonment. In addition, however diverse the participation in a conspired criminal activity might be, the nature of the conspiracy itself always needs to be assessed, considering that the mens rea for this offence is intention or at least knowledge, whether in active or passive roles. This is a crucial point, because usually for membership offences mens rea requirements to prove belonging to the ‘criminal enterprise’ or ‘association’ are often very different. Finally, as conspiracy no longer carries an indefinite statute of limitations, as it was in common law practice (Law Commission, 1976), it ceases to be a valid charge when the offence committed expires as in section 4(3) of the Criminal Law Act 1977\textsuperscript{11}.

\textsuperscript{10} Section 44 of the Serious Crime Act 2007 states:
Intentionally encouraging or assisting an offence
(1)A person commits an offence if—
(a)he does an act capable of encouraging or assisting the commission of an offence; and
(b)he intends to encourage or assist its commission.
(2)But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act.

\textsuperscript{11} Criminal Law Act 1977, section 4(3) states:
As mentioned before, in those cases where the crimes have actually been committed it is not possible to prosecute both the conspiracy and the crimes, without giving valid motivations to the judge. Prosecutors, therefore, need to choose which count is more likely to succeed in a legal action, unless there is reasonable belief that a double charge may be useful for the jury to understand the ‘overall criminality’ (Baker, 2012; Law Commission 2007, para.1.86). In this sense was Lord Justice James’s statement, in *R v Jones* (1974):

’it is not desirable to include a charge of conspiracy which adds nothing to an effective charge of a substantive offence (...) But where charges of substantive offences do not adequately represent the overall criminality, it may be appropriate and right to include a charge of conspiracy’.

Interestingly, for the purposes of this paper and the discussion between conspiracy and membership offence, in cases of multiple crimes object of a conspiracy, it could be at times more practical for the prosecutor to charge conspiracy rather than the crimes. In fact, proving the causal nexus between conspirators and crimes is often more complex than it would be proving just the conspiracy because evidence requirements in conspiracy cases are more permissive and circumstantial than those of some other crimes. A famous definition of conspiracy was given by Judge Learned Hand in *Harrison v United States* at the beginning of the XX century; according to this, conspiracy is defined as *'the darling of the modern prosecutor's nursery'* to highlight how advantageous the flexible rules of evidence in conspiracy laws can be.

a. The debate between conspiracy and membership offences

‘Where
- an offence has been committed in pursuance of any agreement; and
- proceedings may not be instituted for that offence because any time limit applicable to the institution of any such proceedings has expired,

proceedings under section 1 above for conspiracy to commit that offence shall not be instituted against any person on the basis of that agreement’.

13 *Harrison v United States*, 7 F. 2d 259 (2d. Cir. 1925) as cited by Elisabetta Grande, *Accordo Criminoso e Conspiracy* (Cedam 1993) p.77
While drafting the Report on Organised Crime in 1994 (Home Affairs Committee, 1994a), the first real assessment on organised crime in the UK, the House of Commons Home Affairs Committee opened consultations on various issues, such as the definition of organised crime, the level of infiltration of organised crime groups in the UK, conspiracy legislation and the possibility to introduce an offence, similar to the US RICO Statute on enterprise conspiracy. The Committee suggested that there was a need to think about the introduction of an offence punishing the membership or participation in a criminal organisation in criminal law, and received different feedback on that. Firstly, the Crown Prosecution Service (CPS) suggested that there was no example of cases which could not be prosecuted under specific offences or conspiracy laws (Home Affairs Committee, 1994b: 8-1)

‘The law of conspiracy are likely to be adequate for dealing with organised crime, since they have the flexibility to cover circumstances in which no substantive offence has been committed, and also when many such offences have been committed pursuant to an executed agreement’.

As the CPS noticed, however, there are challenges in proving conspiracy, and moreover, it is likely that, even when charging conspiracy, an involvement in actual, specific crimes would be required to give consistency to the agreement at the basis of conspiracy. On the other side, the Association of Chief Police Officers pointed out (Home Affairs Committee, 1994c:115):

‘the proposal to make membership of a criminal organisation an offence stems from the difficulties experienced in instituting criminal proceedings of conspiracy against key organised figures who distance themselves from the criminal activities carried out by junior members, but enjoy the profits from those crimes’.

After the consultations, the Home Affairs Committee advised for the introduction of a new membership offence - along the lines of the US Federal RICO Statute – arguing that its exclusion seemed inconsistent with the proclaimed new focus on prevention and on a better understanding of the threats of organised crime. However, following the report, discussions on this specific issue were not object of interest for policy-makers,
even though, after the National Criminal Intelligence Service (NCIS) had been established in 1992, a new agency, the National Crime Squad (NCS), had been formed and substituted the NCIS in 1998 (Campbell, 2013; Hobbs, 2013).

In 2002, after years of silence on the subject, Levi and Smith drafted a report commissioned by the Home Office on the state of the law of conspiracy in England and Wales in comparison with other jurisdictions for purposes of organised crime legislation. Conspiracy laws in England and Wales were found not appropriate to fight organised crime for four main reasons (Levi and Smith, 2002). First, conspiracy does not adequately address criminal enterprises because it is only capable of incriminating single offences, single agreements. Second, it seems impossible, under the current law on conspiracy, to prove sub-conspiracies, which means that each offender needs to be part of the same agreement to be charged. Third, it seems unrealistic to expect that a discoverable agreement is formed among criminals. Ultimately, conspiracy laws do not allow to capture the whole criminal plan because, in practice, the prosecutors are asked to choose between charging conspiracy and charging substantial offences in spite of the evident link between the two indictments. The report concludes that, even though there are good grounds to consider a reform of conspiracy law, this would be complicated by the inadmissibility of intercept material collected in the UK as evidence in trial, as for section 17 of the Regulation of Investigatory Powers Act (RIPA) 2000. Considering at what lengths investigations and prosecutions of criminal networks rely on wiretapping and interceptions in other states such as Italy or the US, not being able to use interceptions as evidence might significantly hinder pre-trials and trials (UNODC, 2009). Moreover, the fact that foreign interceptions can be admitted in trials, under certain circumstances, represents an incongruence of the law and is in contradiction with the proclaimed aim to protect privacy and to avoid confusion for the jury through the ban (Sergi, 2011).

In 2004, a White Paper One Step Ahead: a 21st Century Strategy to defeat Organised Crime, reopened consultations on the necessity to reform criminal law in favour of a membership offence. The occasion this time was the establishment of a new
agency, the Serious Organised Crime Agency (SOCA). The White Paper (Home Office, 2004:1.86) noticed:

‘it is commonly believed that the existing conspiracy legislation may not always reach the real 'Godfather' figures, does not provide 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’.

However serious this remark might seem, the Serious Organised Crime and Police Act 2005, which followed the White Paper, rejected RICO-style legislation and explicitly considered conspiracy adequate to face manifestations of organised crime in the UK. The issue of the suitability of conspiracy legislation for today’s criminal world - with the exception of a Law Commission Report in 2009 - has not been discussed any further. In October 2013, SOCA has been replaced by a new agency, the National Crime Agency (NCA). However, the debate around membership offences this time has not emerged at all within political discourses preceding the NCA’s establishment.

The nature of conspiracy offences within criminal law has been questioned on a more general note, without reference to organised crime. As mentioned briefly before, the Law Commission in 2007 and 2009 has released a Consultation Paper and a Report on Conspiracy and Attempt that directly question whether or not conspiracy is a redundant or appropriate offence in English criminal law. Even though the Law Commission does not deal specifically with organised crime, it affirmed how there is a very narrow ground for conspiracy charges alone in the legal system after the Criminal Law Act in 1977 profoundly changed the common law offence. Pure conspiracy does not exist; in practical terms, the agreements existing before the crimes are actually committed seldom come to light and are very difficult to prosecute per se without considering the substantial offences (Law Commission, 2009; Simister et al., 2010).

This section has explored and analysed the rationale for the functioning of the law on conspiracy and has attempted to track the most salient moments on the (thin) debate over the possibility to move from classic conspiracy to a membership offence.
Before engaging in a critical discussion, the next section shall describe the US RICO Statute, to understand the developments of a system of common law, which has chosen to criminalise enterprise conspiracy differently.

2. The Federal RICO statute and enterprise crime in the United States of America

The Racketeer Influenced and Corrupt Organizations Act (RICO) is a federal law of the United States of America, codified as Chapter 96 of Title 18 of the United States Code, enacted in 1970 by section 901(a) of the Organized Crime Control Act and modified a number of times until today (DoJ, 2009). RICO is an extremely powerful tool, whose history is crucial to understand its current capacity (Blakey, 1990).

RICO broadly prohibits ‘enterprise criminality’ (Jacobs et al., 1996) through four types of offences14 primarily concerned with infiltration of legitimate business (Jacobs et al., 1996; Lynch, 1987). As RICO makes it an offence to infiltrate, participate in, or

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14 Title 18 USC § 1962 - Prohibited activities:
(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.
(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.
conduct the business of an enterprise through a pattern of racketeering activities, it became obvious from the start that the Statute needed clarifications in case law on the constituting elements of the law. Definitional issues regarded ‘infiltration’, ‘enterprise’ and ‘pattern of racketeering activities’. The limitless debates on these concepts cannot be reproduced here, as they would exceed the purposes of this paper. However, it is interesting to specify the nature of the criminal enterprise under RICO and what is intended for pattern of racketeering activities.

Because RICO was implicitly intended to target Mafia’s infiltration into legal businesses, its interpretation needed to be extensive, as arguably extensive were possible crimes involving Mafia families (Lynch, 1987). Even if there is no mentioning of La Cosa Nostra, or Mafia, or organised crime - for definitional purposes and possibly also to avoid unwanted labels on (Italian) ethnic groups - it seems undisputed that the target of the Organized Crime Control Act, and RICO, was La Cosa Nostra (Albanese, 1996), intended as a ‘single invisible empire’ (Lynch, 1987:668). However, the lack of a precise definition of organised crime made it possible for the target to be expanded over the years to include other types of organised crime groups, thus serving prosecutors’ needs in various ways and arguably beyond the intended breath of the statute (Lynch, 1987; Anderson and Jackson, 2004). The RICO statute at section 1961(4) defines an enterprise as ‘includ[ing] 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 concept of ‘criminal enterprise’ is both an association-in-law and an ‘association-in-fact’, which can be also completely illegitimate in nature, comprised of two or more people (Jacobs, 1996). As noted by Goldstock (1988:774) ‘under RICO, the criminal enterprise replaces the individual as the cornerstone of each trial’.

It has been argued (Anderson and Jackson, 2004), that RICO is a derivative crime – a crime derived by other crimes - and as such, only provides additional criminalisation for conducts (racketeering activities) which are already criminalised, thus adding nothing to the existing framework if not the possibility to prosecute various defendants and crimes under the same indictment and harsh sentences. Under section 1961(1) ‘racketeering activities’ are (DoJ, 2009:1):

‘State offenses involving murder, robbery, extortion, and several other serious offenses, punishable by imprisonment for more than one year, and more
than one hundred serious federal offenses including extortion, interstate theft, narcotics violations, mail fraud, securities fraud, currency reporting violations, certain immigration offenses, and terrorism related offenses’.

The requirement of a pattern of racketeering activities, under section 1961(5), is satisfied with evidence of at least two activities (predicate offences) occurring within 10 years from each other and in relationship with each other. This requirement can slightly change under national version of RICO (see for example the New York legislation on enterprise corruption). To constitute a pattern, it is not necessary that the predicate be similar or even related directly to each other; a pattern might consist of diversified racketeering acts as long as they are related to the enterprise (DoJ, 2009), in what is known as the ‘continuity plus relationship’ clause (as ruled by the Supreme Court in 1985 in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479). The threat, which RICO targets, is, therefore, the ‘continuity’ of the criminal activity, a threat of repetition of racketeering offences, which dangerously expands into the future. As made clear by the Supreme Court in *H.J. Inc.*, 492 U.S. at 240-243 (cited in DoJ, 2009:98),

‘the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase “organized crime”.’

The prevention of the threat of continuity represents the core value protected by criminal law through RICO and also the wrongfulness of organised crime. Furthermore, it needs to be remarked that RICO has substantive offences, section 1962 (a), (b) and (c), and a conspiracy offence in section 1962(d). Whereas section (a), (b) and (c) are more specific in their mandate and are more easily to connect to evidence of enterprise, infiltration and pattern of racketeering activities, section (d) - by declaring unlawful to conspire to commit RICO’s previous counts – *de facto* adds an extra element to prove. In other words, as clarified by the Manual for Federal Prosecutors for Criminal RICO (DoJ, 2009:263)

‘the advantage of charging a substantive RICO offense is that it is somewhat more concrete and understandable than a RICO conspiracy offense’. On the other side, for the conspiracy count ‘it is not necessary to show that any conspirator actually committed the substantive violation - only that the defendant agreed that a conspirator would do so’.
In practice, says the Department of Justice (DoJ, 2009), prosecutors often choose to proceed on two different counts, the RICO substantive offences together with the RICO conspiracy.

The history and other detailed technicalities of RICO offences and procedures cannot be wholly covered in this section, as the purpose is to offer a panoramic view of the Statute and the construction of criminal law out of a growing perception of the wrongfulness of the threat of organised crime in its continuity. What is relevant to acknowledge for the purposes of this work, is that the US Congress opted for a middle ground between the membership offence – requiring the existence of an enterprise and continuity of criminal acts in a pattern – and the conspiracy – with all the benefits of an all-encompassing offence. The wrongfulness that the RICO statute addresses is the dangerousness of an enterprise criminality, which goes beyond the risks posed by the single offences constituting the pattern of racketeering activity and is instead to be found in the dangerousness of a criminal association.

Discussion: the case for a RICO-style offence in England and Wales

The first point to make when looking at organised crime activities is that there is always a tension between the way policies approach and present the phenomenon – usually as if it was a one-entity problem – and legislation attempting to reproduce institutional perceptions into normative precepts. Successful investigations on organised crime require attention both on the activities and on the syndicates (Goldstock, 1994). The story of the RICO statute and the current perception of organised crime at the federal level in the USA shows how criminal law shifted to a constructed conceptualisation of ‘enterprise crime’ in order to respond to the greater threat that organised crime poses. The shared perception on the value of RICO is that the statute acknowledges how the sum of criminal activities is not the same as criminal activities as part of a planned work of a criminal enterprise. A criminal enterprise, a criminal structure multiplies the danger of criminal offences. It is this dangerousness that
constitutes the basis of the wrongfulness of RICO offences and that differentiates them from classic conspiracy. In order to assess whether or not a RICO-style offence would be an added value to the English law of conspiracy, this section shall look at different legal and sociological angles to build the discussion. In particular, to follow the counter-arguments of those who believe that there is no need for a change into the law on conspiracy towards an enterprise offence, it is necessary to look at some salient aspects of what the law allows and does not allow doing in practice.

In England and Wales, section 1(1) of the Criminal Law Act 1977 provides that

if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, (...) he is guilty of conspiracy to commit the offence or offences in question.

Conspiracy offences are therefore based onto an agreement to commit one or more unlawful conducts and de facto target the executors of the crime and those who are directly linked via the criminal agreement. It requires one or more single offences and individual participations to be proven separately. The idea of multiple offences being committed under a single agreement by conspirators who play different roles, is clearly not alien to English law. As case law shows, the adaptation of conspiracy to new frontiers of crime has been questioned in various occasions. It is interesting to report here some accounts extracted from case law on the matter. As early as 1985, before the institutional discussion on organised crime had even started, Lord Bridge had pointed out\(^\text{15}\) that:

in these days of highly organised crime the most serious statutory conspiracies will frequently involve an elaborate and complex agreed course of conduct in which many will consent to play necessary but subordinate roles, not involving them in any direct participation in the commission of the offence or offences at the centre of the conspiracy.

\(^{15}\) R. v. Anderson (1985) 81 Cr.App.R. 253
In a later case\textsuperscript{16}, four had been charged on two counts of conspiracy to contravene section 170(2)(b) of the Customs and Excise Management Act 1979 contrary to section 1(1) of the Criminal Law Act 1977. Count 1 related to cannabis resin, a Class B drug, and count 2 to diamorphine hydrochloride (heroin), a Class A drug. They had all been convicted for two separate offences sharing the same \textit{mens rea} for the importation of prohibited good, three of them (Siracusa, Di Carlo and Monteleone) had been sentenced to 25 years’ imprisonment each and a forth (Luciani) to 22 years’ imprisonment. In the case, the existence of a criminal enterprise was recognised; however, because of the requirements of the law on conspiracy, the defendants were treated separately and each count had to be proven for each person.

In a more recent case\textsuperscript{17}, the appellant was convicted of conspiring to supply a Class A drug, ecstasy, and pleaded guilty to conspiracy to supply cocaine and amphetamines and conspiracy to supply cannabis and cannabis resin. The offences were charged in three separate indictments and were the subject of separate trials. However, in appeal, the court declared that\textsuperscript{18}

It is not necessary for the purposes of this appeal to go into the facts of the three conspiracies in any detail. It is accepted that the appellant was the leading organiser for the distribution of very large quantities of ecstasy, cocaine, amphetamines and forms of cannabis over a period of time. The organisation was sophisticated. It is also accepted that the judge was correct to state, at the end of the first trial, that the appellant was at the heart of the conspiracy and that, amongst the conspirators, he was nearest to the source of the drugs. The judge described the appellant as “careful, clever and cunning” and someone who had a useful knowledge of anti-surveillance techniques which he could use to advantage and so be able to reorganise after setbacks.

According to the Court this was one series of crimes that were all connected and arose out of the same facts, and the fact that the case had been heard in three different trials, had allowed in practice for consecutive – tougher - sentences instead of concurrent – more lenient in practice - ones. Investigations, however, had been fragmented and frustrated by the lack of unity.

\textsuperscript{17} R. v Z, Court of Appeal [2007] EWCA Crim 1473, [2008] 1 Cr. App. R. (S.) 60
In a 2012 case\textsuperscript{19}, prosecution arose from an investigation into a gang based in Cardiff, responsible for the facilitation, transportation and distribution of quantities of cocaine and heroin throughout South Wales. The person who was considered the hub of the conspiracy, Legall, had been sentenced to 12 years’ imprisonment. As the Court of Appeal confirmed\textsuperscript{20},

It is clear that Legall is a professional who deals in the supply of destructive drugs. He was, however it is represented, at the heart of this group of conspirators. (...) These were conspiracies which involved significant quantities of drugs. The overall sentence had to reflect both counts, the criminality which was revealed, and the totality of the offending during the period of the conspiracy in which Legall was involved throughout.

There is, in this case, an understanding of the enterprise and of the different roles of the four defendants. However, as the Court says, the involvement of the remaining members of the gangs goes beyond the purposes and remit of the Court.

These cases are good examples of the practice and reasoning of English courts. It seems that there is not a pressing necessity to switch to a different model of conspiracy. However, from the official transcripts of the cases, it appears that the Court, when dealing with conspiracies related to drug offences, always needs to leave out passages (people, conducts, details) of the overall criminality. Furthermore, because there are various ways to bring conspiracy before a judge, it seems that most of the time the Court engages in extra steps (more trials, fragmented investigations, dispersed evidence) to bring a case to justice. Among English practitioners, however, the view has often been that the length of the sentences and the practical results at trials are not frustrated by the lack of a criminal enterprise offence. Sentencing for drug offences, money laundering and other serious (organised) crimes are in fact appropriately severe. Additionally, because of the possibility to join offences of conspiracy even by preserving

the separate counts, there is somehow the possibility to reconstruct a more comprehensive picture of a criminal network’s activities. However, even in these cases, conspiracy trials fail to address the threat of continuity posed by the sole existence of criminal organisations, which is instead a concern of the RICO offences. The ‘continuity plus relationship’ requirement in RICO cases allows not only to understand patterns in racketeering but also to track connections among offences that *prima facie* would go unnoticed. Indeed, by looking at personal connections and patterns of offending, thus allowing to connect crimes and individuals - which could otherwise easily remain disconnected - RICO also consents to overcome the statutes of limitations for single offences. The advantage of this is that the joinder of persons and the joinder of offences in certain patterns and for the affairs of an enterprise allow to narrate stories and to collect evidence differently. In practice, whereas conspiracy is historically concerned with what happens at a specific place and time, RICO offences overcome this contingency by shifting the focus on the whole syndicate, with a huge impact on the investigation stage to prove the criminal plan beyond the mere agreement (Goldstock, 1994).

Whereas on one side the RICO statute was passed for some very specific reasons and with a distinct threat in mind, the use of RICO offences has been definitely larger than intended and expected. The rejection of a RICO-style offence in England and Wales on the basis of a different scenario of organised crime groups, very far indeed from traditional Italian-American mafia settings, does not seem to be justified. RICO offences, far from being used only for traditional La Cosa Nostra families, have been used for all varieties of enterprise crimes, including fraud schemes, white collar and corporate crime or looser gangs. The corruptive power at the basis of infiltration of criminal enterprises in the legitimate businesses is what distinguishes RICO offences and what has made RICO’s conspiracy so flexible. Arguably, the recognition of the dangerousness of this corruptive power of criminal syndicates is what the UK has never fully understood even though the recent organised crime strategies do take into consideration corruption (Home Office, 2013; Sergi, 2013). However, the flexibility of RICO has not been exploited from the beginning; it took more than 10 years for the statute to be fully implemented in criminal practice. The idea of individuals bearing
criminal responsibility only in case of commission of a criminal offence or of an attempt of a criminal offence is a very rooted principle in common law systems. However, the real nature of offending in organised crime cases, whether for more traditional groups and for looser networks, is always more complex than just a chain of events. In organised crime cases, as for RICO perceptions, the whole is more than the sums of its parts, essentially because not everything that is relevant to organised crime groups’ activities happens in the ‘criminal’ zone: the networks, the preparation, the political side of the activities could be pre-criminal or non-criminal. As previously mentioned, the success of RICO, even in shaping the perceptions of organised crime, has mostly relied on the value of electronic surveillance and the use of intelligence techniques with the aim to build strong prosecutions. The importance of electronic surveillance, and especially wiretaps, is deemed vital for the success of investigations and the ban on national intercepted materials as evidence would be an obstacle when attempting to show the dangerousness of a criminal enterprise, which usually lies in the words and the ways members approach each other.

Last but not least, in organised crime cases corruptive behaviours, infiltration and penetration in the legal businesses help crossing the line from the criminal dimension of conspiracy to the whole story behind the criminal groups, by highlighting the ties with the non-criminal world. In this sense, the use of conspiracy is limited to single aspects of a much larger and complex story that, even when it is known by the investigators, it is not fully covered by the law. The wrongfulness of organised crime in RICO-style conspiracies is not simply the serious crimes committed, but the existence of intention to indulge in an enduring criminal lifestyle. Notably, there is a convergence in this case also in English law. The Proceeds of Crime Act 2002, at section 75, introduces the concept of criminal lifestyles for purposes of confiscation. Under POCA, a person has a criminal lifestyle if the offence is one of those specified in Schedule 2 (such as drug trafficking, money laundering, terrorism, people trafficking and so on); if the offence constitutes conduct forming part of a course of criminal activity; and/or it is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence (CPS, 2009). More specifically, schedule 2 of POCA also includes ‘an offence of attempting, conspiring, inciting, aiding, abetting,
counselling or procuring an offence specified in Schedule 2’, thus creating an opening for a wider use of single and joint enterprise conspiracies in view of confiscating assets originated from organised crime activities. The reference to the criminal lifestyle notion in POCA seems, however, another example of fragmentation in the law and extra steps to merge all relevant concepts and legislation on a subject matter.

**Final Remarks**

If it is acceptable to claim that ‘it is better to have a smaller number of clear, general offences than a large number of separate offences with very different, context-dependent, conduct and fault elements’ (Law Commission, 2007:33) then the nature of the conspiracy offence in England is in need of revision, because in cases of organised crime a separate offence to target the relationships within members of a criminal group has proven to be more successful in the way manifestations of organised crime have been understood and approached at the national level. Criminal law as it is in England and Wales appears not incomplete, but certainly fragmented, confused, and not specialised enough for organised crime cases.

The distinction between the use of conspiracy and the use of RICO-style offences or membership offences is strongly based on perceptions of organised crime, its dangerousness and its wrongfulness. The perception of organised crime when RICO-style offences are employed, either for traditional (as in the La Cosa Nostra cases) or in forms of looser criminal networks, is one of a criminal planning, which endures beyond the commission of single crimes and implies, but not constantly confirms, the agreement to commit one or more crimes. The wrongfulness of organised crime is the long-term pact to conduct such a criminal lifestyle for the benefit of a criminal enterprise of which individuals are members. In simple conspiracy instead, the focus stays on the seriousness of the offence committed after the agreement has been perfected or after the offence has been committed. Criminal law cannot move from one concept to the other that easily because such a shift would require a change in the protected value behind the criminal law norm. In the UK, for example, there exist an
offence of membership in a proscribed terrorist organisation\textsuperscript{21}, but in practice such an offence has not been used extensively and is highly criticised (Walker, 2009), thus confirming that the simple changing of the law does not suffice is not accompanied by a change of perception in the wrongfulness of the phenomenon.

Furthermore, the RICO-style offences are based on a certain use of intelligence and evidence aimed at reaching sensible results in sentencing. It is arguable that the same sentencing outcomes might be reached through the penalties attached to conspiracies for single offences, which insist on the seriousness of the criminal activity. However, the aim behind RICO sentences is punishing the dangerousness of continuous criminal lifestyle as wrongful conduct shared by various individuals, therefore acquiring a different meaning.

In conclusion, even though RICO-style offences for enterprise conspiracies arguably represent a more accurate picture of organised crime patterns of activities, a criminal law system cannot simply introduce such offences without working on the implications of these changes in the criminal justice system (primarily in terms of policing, intelligence collection and evidence validation) and on the consequences in the way the values protected by criminal law is set to change. It needs to be reminded that RICO offences were not immediately and successfully employed after the law was introduced in 1970. Indeed, enterprise corruption was a concept alien to common law even in the United States and required an ambitious alteration of legal boundaries modelled on what was the perceived reality of organised crime in the country, to start working properly. Without the same shift in the perception of the wrongfulness of organised crime – demonstrated by the rejection of RICO-style legislation – and changes in the way intelligence and evidence are collected, criminal law in England and Wales will not be able to act within the requirements of enterprise conspiracies, which remain a desirable, and yet still immature, alteration of common law practices.

\textsuperscript{21}An example is section 56(1) of the Terrorism Act 2000: 'A person commits an offence if he directs, at any level, the activities of an organisation which is concerned in the commission of acts of terrorism'.
Conclusion

This paper has presented the two most common ways to criminalise organised crime across jurisdictions: conspiracy models and membership offences. As example of the former, the work has focused on the conspiracy offence in England and Wales, assessing the practice of such an offence and criticising the fragmentation of the law in relation to organised crime cases. The critique has been corroborated by examples from the USA RICO Federal Statute 1970, which is a best practice example of a common law country shifting from simple conspiracy to enterprise criminality. Reasoning around the various aspects and implications of RICO has allowed introducing some considerations on peculiar aspects of the law on conspiracy.

In conclusion this paper would welcome the shift towards a RICO-style offence in England and Wales, but warns about some complications in allowing such a change. Apart from difficulties in the way intelligence and evidence requirements work, that could still be changed in favour of an enterprise criminality, the main problem that such an alteration would be presented with is actually a perception problem. There is indeed the need, as it happened also in the US, to change the perception of what is wrong with organised crime. This includes reassessing the wrongfulness and the dangerousness of organised crime groups within society and economy of a country. Because in England and Wales organised crime is seen as a series of serious crimes and not as syndicate crime, like in the US, before any change can be promoted in the law, this social and institutional perception should change first.

References


