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International Conventions and the Failure of a Transnational Approach to Controlling Asian Crime Business

Mark Findlay & Nafis Hanif¹

Abstract

The paper argues that without a realistic understanding of criminal enterprise located against the commercial forces shaping contemporary Asian market contexts, then domestic, bi-lateral, regional and international control initiatives are not only likely to fail in their regulatory objectives, but the premises on which they are constructed may heighten the market conditions for crime business profitability.

The international convention-based approach to regulating transnational and organized crime is the framework from which a critique of non-market centred law enforcement control concentrations is developed. This critique reveals the transposition of flawed normative control considerations from domestic to supra-national control contexts, and shows how this in turn constrains and is constrained by organized crime research.

The paper suggests a novel methodology for understanding Asian crime business in its specific market realities and conditions. The analysis calls for a shift away from the normative ascription to supply directed regulatory emphasis. In conclusion, conventional crime control perspectives and directives can usefully be critiqued from their international as well as their domestic frames, enabling the creation of a refined and holistic legal response at each level that is supported by and not retarded with holistic research understandings.

Key words

International conventions

Criminal enterprise

Market modeling

Organized and transnational crime

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Introduction

What stands in the way of effectively regulating Asian crime business? What follows is the critical case for a new research-led approach to the transnational regulation of Asian crime business. The paper argues that without a realistic understanding of criminal enterprise located against the commercial forces shaping contemporary Asian market contexts, then domestic, bi-lateral, regional and international control initiatives are not only likely to fail in their regulatory objectives, but the premises on which they are constructed may heighten the market conditions for crime business profitability.²

We suggest that the false or masking law enforcement dualities on which much organized crime research is based have retarded the capacity of domestic and international regulators and policy-makers to understand crime business as a market reality and to structure regulatory strategies accordingly. Of particular interest to international law scholars is the recent international legal discourse surrounding the regulation of transnational organized crime which we argue exhibits, and perhaps grows from, the same failings of narrow dualist organized crime research traditions. To establish this critique the paper commences with a brief exploration of the recent UN convention on transnational and organized crime for the purpose of revealing how market understandings and regulatory responses to crime business have been sidelined in these developments, to the specific detriment of vulnerable and compromised Asian jurisdictions. We see this as a consequence of a misguided domestic history of law-enforcement oriented organized crime research and its uncritical translation into international from domestic law. Further, we speculate that the transnational and international legal responses to the pervasive presence of crime business, if not broken free of a self-interested normative law enforcement frame will perpetuate the model dualities which have plagued domestic regulation in the field.

The paper suggests a novel methodology for understanding Asian crime business in its specific market realities and conditions. The analysis calls for a shift away from the normative ascription to supply directed regulatory emphasis. In conclusion, conventional crime control perspectives and directives can usefully be critiqued from their international as well as their domestic frames, enabling the creation of a refined and holistic legal response at each level that is supported by and not retarded with holistic research understandings.

² For a discussion of such a consequence particularly in terms of corrupt legalist regulators see Findlay M. & Hanif N. (forthcoming) 'Disturbing the Rice Pot: Market modelling criminal enterprise'

The UN Convention against Transnational Organised Crime – Ratifying Normative Distractions

After some protracted diplomatic negotiations in the symbolically significant Sicilian capital of Palermo, the United Nations Convention Against Transnational Organised Crime was settled (2000).³ It was a document centred on law enforcement engagement:

If crime crosses borders, so must law enforcement⁴

The foreword to the convention by the then UN Secretary General set a clear law enforcement tone for the purposes⁵ of the 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. If the enemies of progress and human rights seek to exploit the openness and opportunities of globalization for their purposes, then we must exploit those very same factors to defend human rights and defeat the forces of crime, corruption and trafficking in human beings... Criminal groups have wasted no time in embracing today's globalized economy and the sophisticated technology that goes with it. But our efforts to combat them have remained up to now very fragmented and our weapons almost obsolete. The Convention gives us a new tool to address the scourge of crime as a global problem. With enhanced international cooperation, we can have a real impact on the ability of international criminals to operate successfully and can help citizens everywhere in their often bitter struggle for safety and dignity in their homes and communities.⁶

The statement of purpose for the Convention in Article 1 is clear, co-operative and interventionist:

The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.

The identification of offences covered by the act ranged from specific money laundering and corruption to the broader crime of participation in organized criminal groups. The control mechanisms in addition

³ It is not coincidental that the approach of the convention and its prevention strategies is founded on the inextricable nexus between transnational and organised crime.

⁴ Hereafter referred to as UNCAOTC, Foreword p.iii

⁵ For a detailed discussion of the history, origins, emergence and purpose of the convention see Vlassis, D. (2002) *The Global Situation of Transnational Organised Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process*, UNIFAE Resource Material Series No.59

⁶ UNCAOTC, Foreword p.iii-iv

to prosecution conviction and sentence rely upon confiscation and seizure of assets and their disposal, as well as extradition of suspects. Mutual legal assistance and joint investigations emphasise the collaborative intention for investigation, confiscation and prosecution. For instance, Article 26 details particular measures to enhance co-operation between law enforcement agencies. Article 30 identifies inducements for the adoption of the convention obligations, through economic development aid and technical assistance.

The prevention of crimes targeted under the convention is an area where more than law enforcement is envisaged. Article 31 2) proposes:

States Parties shall endeavour, in accordance with fundamental principles of their domestic law, to reduce existing or future opportunities for organized criminal groups to participate in lawful markets with proceeds of crime, through appropriate legislative, administrative or other measures.

That said, all the listed measures to follow relate to law enforcement and legal accountability processes of one form or another.

The only recognition of organized or transnational crime as a market phenomenon appears in article 31 2) and in the context of the subverting legitimate market opportunity. There is no reference to organized or transnational crime as a business or enterprise. As, mentioned earlier none of the prosecution and sanction strategies have a commercial perspective. The use of asset confiscation and disposal as a prevention measure is directed against the capitalization of crime. Even so, these measures are couched as the province of law enforcement.

Law enforcement agency as potentially contributing to the proliferation of crime business is limited in the convention's coverage to recognizing the corruption of public officials. When dealing with this issue the convention prefers to see it as an independent offence type rather than a critical market factor in the proliferation and profitability of particular criminal enterprise. The Secretary General's foreword on the other-hand does tilt at this possibility:

Arrayed against these constructive forces (of civil society), however, in ever greater numbers and with ever stronger weapons, are the forces of what I call "uncivil society". They are terrorists, criminals, drug dealers, traffickers in people and others who undo the good works of civil society. They take advantage of the open borders, free markets and technological advances

that bring so many benefits to the world's people. They thrive in countries with weak institutions, and they show no scruple about resorting to intimidation or violence. Their ruthlessness is the very antithesis of all we regard as civil. They are powerful, representing entrenched interests and the clout of a global enterprise worth billions of dollars, but they are not invincible.⁷

Of the Asian jurisdictions in which our research into crime business has an interest, Indonesia, Malaysia, Singapore, and India have ratified⁸ the convention largely without qualification.⁹

More than a decade on from the signing of the convention there have been critical reflections at the international level regarding its impact and sustainability. At the 64th General Assembly Plenary Session speakers recognized the need, ten years from the convention, for 'stronger global follow-up':

As the General Assembly today concluded its special high-level meeting on transnational organized crime, speakers agreed that the best way to stamp out organized crime and mark the tenth anniversary this year of the landmark United Nations Convention on Transnational Organized Crime and its additional Protocols was through stronger global follow-up and coordination.

Organized crime worldwide was on the rise as gangs, terrorists, money launderers, drug and human traffickers, and cybercriminals exploited the more open borders and technological advances spurred by globalization, delegates said. It threatened international peace and security and achievement of the Millennium Development Goals. Trafficking in persons, they stressed, was particularly egregious and a crime against humanity.

Some speakers suggested that the United Nations set up a review mechanism to chart progress and identify obstacles to implementing the United Nations treaty, also known as the Palermo Convention, while others called for formation of a global action plan to combat trafficking in persons by the end of the current General Assembly session.¹⁰

Interestingly among the interventions at the meeting from Asian states:

⁷ UNCAOTC, Foreword p.iii

⁸ On the ratification process see UN General Assembly 58th Session Item 110, Preliminary List, Crime Prevention and Criminal Justice, Promoting the ratification of the United Nations Convention against Transnational Organized Crime and the Protocols thereto; Report of the Secretary-General

⁹ Singapore, for instance, has taken issue with the proposed mechanisms for dispute resolution between party states.

¹⁰ General Assembly GA 10952, Dept of Public Information, News Media Division, New York

Indonesia's representative, however, warned against reinventing the wheel, saying the (review) mechanism (in the convention) already enshrined in the Convention was sufficient to tackle implementation. It was tempting to criticize the treaty, which was still in the early stages, and easier to come up with a new mechanism. But enforcing the current one, albeit a more difficult course of action to follow, was indeed the best way forward.

This status quo approach, much influenced as it is in Asian jurisdictions and their domestic legislation, by US and European law enforcement thinking is common in the political discourse regarding organised and transnational crime regulation across the region.

In a meeting held at the International Peace Institute in New York (Jan 2011) to review the progress over the decade of the convention's operation, the following considerations came in focus:

This (meeting) is part of a renewed international interest in transnational organized crime and in efforts to counter it. The *Palermo Convention*, seen as the main international tool to counter TOC, has therefore also come under renewed scrutiny. How has TOC (transnational organised crime) evolved and changed over the past ten years and what role has the Palermo Convention played in countering it?¹¹

The report from the meeting, indicatively entitled *Transnational Organized Crime and the Palermo Convention: A Reality Check*,¹² in its concluding section considers the *Palermo Convention* as well as some of the main difficulties facing the international community in addressing TOC. One area of difficulty cited recognises the failure to appreciate in a regulatory sense the market reality of TOC as crime business.

The structural changes that seem to have occurred to TOC also suggest new terminology and theoretical models are needed. TOC can no longer be seen as a conspiracy of distinct criminal enterprises. Viewed as an activity, it is increasingly clear that TOC involves a wide range of actors, including corrupt officials, political groups, warlords, and so on. Future research will no doubt have to look into the political economy of organized crime to better understand the interplay among these different actors.

How we go forward from this situation remains a tremendously intricate issue to resolve. Evaluating what has been done appears a vital task, yet arguably the methodology for doing so remains unclear. It is not enough to measure the implementation of the convention; the real

¹¹ International Peace Institute (<http://www.ipacademy.org/publication/meeting-notes/detail/307-transnational-organized-crime-and-the-palermo-convention-a-reality-check.html>)

¹² Standing 2001

challenge lies in making the connection between the convention and real-world changes in the harm caused by organized crime. Moreover, it is worth noting that the mandate to undertake such difficult and controversial evaluations may be hard to gain from the member states of the *Palermo Convention*.¹³

In a critical paper presented to the British Society of Criminology (1999) entitled 'Organised Crime – the Dumbing of Discourse'¹⁴ Michael Woodwiss identified the political imperatives behind international co-operation in controlling organised crime, particularly in the drafting of international preventative instruments:

US influence has helped ensure that most countries have come into step with an international prohibition-based drug control regime built around the framework established by UN conventions, beginning with the 1961 Single Convention on Narcotic Drugs¹⁵. But the war on drugs, according to the UN's own admission, has failed¹⁶... And, as several money laundering scandals have shown, the massive profits available from the distribution as well as production of illegal drugs has encouraged the development of significant international criminal associations and networks amongst professionals, such as lawyers and accountants, corrupt officials, career criminals and simple opportunists¹⁷... By the post-Cold War era, however, American idealists were setting the international agenda and could not countenance conceptualisations of organized crime that implied a critique of American laws and institutions. On the contrary they needed the international community to accept a conceptualisation of organized crime that both excused the failure of national and international efforts against drugs and justified the expansion of these efforts. American politicians, government officials, journalists and academics thus sought ways to reduce the world's complexities to the same type of good versus evil propositions that served so well during the Cold War. The menace of transnational or global organized crime not only helped explain away the failure in the drug war but was as easy-to communicate as the Cold War policy of containing the world-wide spread of communism.

¹³ Ibid p.12

¹⁴ Woodwiss, 1999

¹⁵ Bewley-Taylor, 1999

¹⁶ Tran, 1998

¹⁷ Beare, 1996; Truell and Gurwin, 1992

A Washington DC conference of high level American law enforcement and intelligence community personnel led the way in September 1994 by internationalising America's pluralist revision of the Mafia conspiracy theory. They began to propagate a very simple idea. Because forces outside of mainstream national cultures now threatened national institutions everywhere, American organized crime control techniques should be employed everywhere. These techniques were necessary to combat what the conference title referred to as *Global Organized Crime: The New Empire of Evil*.¹⁸ ...

The keynote speaker at the conference, FBI Director Louis Freeh, stressed that "the ravages of transnational crime" were the greatest long-term threat to the security of the United States' and warned that the very fabric of democratic society was at risk everywhere. He was followed by CIA Director R. James Woolsey, who noted that "the threats from organized crime transcend traditional law enforcement concerns. They affect critical national security interests ... some governments find their authority besieged at home and their foreign policy interests imperilled abroad".¹⁹ This new global threat of organized crime required a tougher and more collaborative international response, more specifically it required more thorough information sharing between police and intelligence officials in different countries and improved methods of transcending jurisdictional frontiers in pursuing and prosecuting criminals.²⁰

Two months after the Washington conference, the United Nations held the World Ministerial Conference on Organized Transnational Crime and provided an international forum for the global pluralist theory of organized crime...The rhetoric and analysis was essentially the same as that employed by Freeh and Woolsey. According to the UN's press-release, participants at the conference recognised the growing threat of organized crime, with its 'highly destabilizing and corrupting influence on fundamental social, economic and political institutions.' This represented a challenge demanding increased and more effective international cooperation. 'The challenge posed by transnational organized crime,' the document continued, 'can only be

¹⁸ According to the executive summary of the conference, the dimensions of global organized crime present a greater international security challenge than anything Western democracies had to cope with during the cold war. Worldwide alliances are being forged in every criminal field from money laundering and currency counterfeiting to trafficking in drugs and nuclear materials. Global organized crime is the world's fastest growing business with profits estimated at \$1 trillion.

¹⁹ Raine and Cilluffo, 1994

²⁰ Naylor, 1995

met if law enforcement authorities are able to display the same ingenuity and innovation, organizational flexibility and cooperation that characterize the criminal organizations themselves'²¹. Essentially, the same line as articulated by American politicians from the 1950s onwards...US-approved organized crime control strategies were emphasised by most speakers and this deferential consensus was most clearly reflected in another background document for this conference which singled out the 1970 Racketeer Influenced and Corrupt Organizations (RICO) statute as an example of 'dynamic' legislation able to 'adapt itself to ... developments.'

...Western governments had been clearly moving towards the American organized crime control model even before the conference...²²

Interestingly he offered a vision of more effective international legalities based on a more pluralist theorizing of organized crime. At the same time Woodiwiss identified the problems associated with achieving this:

There are, however, two main problems with the global pluralist theory of organized crime. The first is that Mafia-type groups only participate in illegal markets, despite countless claims to the contrary, they rarely, if ever, control them. Instead, as most conscientious researchers have noted, fragmentation and competition characterise drug and other illegal markets, not monopolisation.²³ Governments, whether individually or jointly, would have few problems combating organized crime if it really was dominated by a relatively small number of super-criminal organisations. They would eliminate the leadership of these organisations and that would be the end of the problem.

The second problem with the global pluralist theory is that, like the Mafia conspiracy theory, it uses semantics to camouflage the involvement of respectable institutions in organized criminal activity. Throughout Boutros-Ghali's speech in Naples (Conference), for example, the implication was always that respectable institutions were threatened by organized crime. Organized crime, he said, 'poisons the business climate', it 'corrupts political leaders', it 'infiltrates the State apparatus.' Understood in this way, the only response to the organized crime 'forces of darkness' is a harmonised international effort on behalf of 'legitimate society'.²⁴ However, as a

²¹ United Nations Economic and Social Council, 1994

²² Woodiwiss, 1988

²³ Reuter, 1984; Ruggiero and South 1995

²⁴ United Nations (17 November 1994)

great deal of historical and contemporary research shows, government agencies and key institutions, such as corporations, have frequently gained from and sometimes helped to sustain organized crime.²⁵

The history of US organized crime itself demonstrates the inadequacy of global pluralist analysis as doubtless could the history of organized crime in any of the 138 countries represented at the UN conference. Organized criminal *activity* was never a serious threat to established or evolving economic and political power structures in the United States but more often a fluid, variable and open-ended phenomenon that complemented rather than conflicted with those structures. Seen in this light, the wisdom of using the pretext of organized crime control to give extra powers to the officialdom that supports these structures should at least be questioned.

The international community is, however, unlikely to make any progress towards reducing the destructive impact of organized crime in all its many and varied forms while its understanding of the problem is based on an analytical framework that only serves to justify unworkable laws and whitewash flawed systems.²⁶

It would be incorrect to suggest that within its limited law enforcement frame the UNCAOTC has failed to generate international co-operation in the regulation of TOC. As Hauck and Peterke observe:

A recent evaluation shows, however, that the Convention is being increasingly applied by states as a legal basis for international co-operation, in particular with regard to extradition, mutual legal assistance, and confiscation of proceeds of crime. Yet many states parties still have not fully implemented the Convention. In this respect, important assistance is offered by the United Nations Office for Drugs and Crime (UNODC).²⁷

However, even such measures of influence are not capable of indicating why some states engage and others don't, as well as the practical regulatory effects of the engagement already achieved if it is limited to law enforcement contexts.

²⁵ Block and Chambliss, 1981; Chambliss, 1978; Gardiner, 1970; McCoy, 1991; Pearce, 1976; Rawlinson, 1998; Ruggiero, 1996.

²⁶ Woodwiss, 1999

²⁷ For a summary of the nature and intersection between domestic and international law against organized and transnational law see Hauck & Peterke, 2010

The Collaboration of Research Methodology in Policy Distraction and Flawed Law-making

It is not difficult to establish that recent international convention-based law-making to regulate transnational organised crime reflects a narrow law enforcement normative framework. Nor is it complex to argue that this process is reliant on and supportive of an equally narrow and constrained research tradition investigating the structures and institutions of organised crime. The next section will outline these research traditions and in particular the problematic application of dialectical analysis. Having done this, the paper will advance a research approach which recognises the market significance of crime business. As such this research approach is available to 'evidence-based' law-makers and policy administrators to inspire an integrated and holistic regulatory strategy which, we suggest, better meets the aspirations of the UNCAOTC, and provides a potential answer to Woodwiss' pessimism about self-serving analytical frameworks, and Standing's argument for new terminology and theoretical models around TOC.

Many dialectical understandings of conventional organized crime research, we suggest, are rooted in divergent methodological designs which in turn are informed and bounded by strong, if implicit, ideological and normative commitments to single variant themes such as race, class, business integrity, market corruption or the essential utility of legal regulation²⁸. As we see it, these methodology 'camps' are divided along the following premises:

- the researcher's epistemological stance on the insider/outsider debate constructing the sampling process and observational engagement²⁹,
- the researcher's inability to access the hierarchy of individuals occupying leadership roles in criminal organisation who can speak with mystery more sophisticated and diverse experience of criminal networks and entrepreneurial motivation, instead restricting the research sample to accessible rank and file members of criminal organisations whose knowledge of criminal networks and enterprises are telescoped³⁰,
- the researcher's inclination to causality and falsification, allowing method and the data it procures to advance a narrow deductive theorisation or to subscribe to a value affirming theory that method is then supposed to inductively substantiate and affirm³¹,

²⁸ Soudijn & Kleemans 2009

²⁹ Bovernkerk, Siegel & Zaitch 2003; Fleisher 2005

³⁰ Morselli 2003; Robins 2009

³¹ Layder 1998; Bottoms 2000

- the reluctance or incapacity of the researcher to incorporate the tools developed by researchers from other disciplines into their particular research design in an attempt to expose the research subject to multi-variant analysis³², and
- the ideologies sponsoring and compromising the researchers or any central informants, limiting access and consequent research understandings within an externally legitimated frame³³.

The Foundations of Dialectical Tensions in Organised Crime Theorisation

Contemporary organised crime analyses and research methodologies are replete with the dichotomised representations of businesses, markets and stake-holders. The functions of criminal enterprise are positioned along the axis of 'legal' or 'illegal', 'functional' or 'dysfunctional' and 'orderly' or 'disorderly'. These dualisms have been historically institutionalised through conventional analytical frameworks in criminology like positivism, Merton's social structure and anomie paradigm, sub-cultural studies and the 'crime control' law enforcement perspective. This section of the paper will show that dialectical theorisations of crime business conceal the dynamic reality of criminal networks³⁴ and enterprises, and stunt efforts to realistically appreciate organised crime as entrepreneurial motivation, market preferencing, consumer management and profitable business.³⁵ It commences with a brief overview of originating and influential theoretical positions which operate and confirm distinctions between 'legitimate' and 'illegitimate' society. A duality such as this has infected crime business research by imposing a normative divide across market structures and thereby, we argue, constricting possible research methodologies interested in universal market forces rather than artificial 'legitimacies' determining the nature and dynamics of enterprise. This constriction in turn reduces the explanatory potential of enterprise theory when trying to understand the unique presence of crime business within particular commercial and consumer settings.³⁶

³² Fiorentini & Peltzman 1995; Fiorentini & Zamagni 1999 ; Vaughan 2002 ; Beken 2004 ; McIlwain 2004 ; Albanese 2008.

³³ Woetzel 1963; Morselli & Giguere 2006; Yeager 2009.

³⁴The "criminal network" of an illegal entrepreneur refers to 'all those individuals he or she encounters in the course of his or her criminal activities who are in a position to influence the success or failure of that criminal enterprise' (von Lampe 2001, p. 132).

³⁵ Morselli & Giguere 2006

³⁶Organised crime converges solely on consumer demand as a common denominator even as its manifestation across and within socio-economic polities and through time varies in the (1) extent of its *prevalence*, (2) *prevalence* of certain criminal endeavours over others, (3) illicit commodities that are the *prevalent* focus of supply, (4) *prevalently* adopted strategic management and organisation of the supply chain of crime business and (5) *prevalent* intra-organisational structure of dominant criminal group suppliers. This is mirrored by

Positivists view criminal groups as necessarily 'dysfunctional' units to be distinguished from the 'functional' nature of legitimate institutions and markets. Theoretically from this normative perspective, criminal groups are unavoidably 'dysfunctional' since they are founded on loose and disorderly associations of 'criminals' with low intelligence and 'pathological' personalities, being afflicted with biological or psychological deficiencies, and socio-pathies, differentiable from 'normal' conformists.³⁷ In their enterprise setting, criminal groups are organisational and structural contexts through which crime and deviance can be unreservedly pursued by families, racial collectives or secret societies with inherent psycho-social deficiencies.³⁸ Criminal organisations are, in any such interpretation, theoretically devoid of ordered structure, rational culture, and entrepreneurial orientation.³⁹ Positivist dichotomies prevail despite the absence of evidence to prove that members of criminal groups are afflicted with psycho-social maladies that predispose them to violence more so compared to the general population of youth from poor areas, or that an association exists between joining a criminal group and low intelligence.⁴⁰

In the seminal "Social Structure and Anomie" Merton perpetuates dialectical tensions in our understanding of organised crime with a taxonomy of 'innovation'/criminality and 'conformity' as mutually exclusive responses to anomie.⁴¹ Merton's anomie results from 'overtly emphasised culturally-prescribed goals un-attenuated by an equally intense accent on the institutional or socially-approved means for achieving those goals, within a social structure where individuals have differential access to

conceptualisations of organised crime that focus on the provision of illicit goods and services as an inextricable facet. Consumer demand and demand management are therefore isolated as crucial starting points in an attempt to holistically understand organised crime across context and through time. Demand is a neglected aspect of organised crime research although it is a defining feature of its conceptualisation. The marginalisation of a demand-side investigation is a corollary of normative assumptions about the distinctions between legal and illegal markets. Illegal markets are perceived to be a monopoly, violent, disorganised and consumers of illicit commodities are perceived to be powerless dependents of criminal entrepreneurs. Supply-side investigations too are prejudiced to analyse the ingenuity of criminal entrepreneurs independent of the underlying demand-management strategy that underlie that ingenuity. To rectify dialectical assumptions about markets, we pursue a modelling exercise that analyses the extent to which the organisational structure of the group, business, which type of criminal trade is pursued are a reflection of demand-management strategies. In this modelling exercise, consumer wants and preferences take centre stage.

³⁷ See Yablonsky 1966; Hirschi & Hindelang 1977; Herrnstein & Murray 1994

³⁸ Wilson & Herrnstein 1986

³⁹ 'Entrepreneurial orientation refers to the processes, practices (proactiveness, risk taking behaviour and innovativeness) and decision-making activities used by entrepreneurs that lead to the initiation of an entrepreneurial enterprise' (Gottschalk 2009, p. 14).

⁴⁰ Sánchez-Jankowski 2003

⁴¹ Merton, 1938, p. 676

institutional means to culturally prescribed goals'.⁴² Individual capacity to access the institutional means for attaining cultural goals within a particular social structure can be potentially facilitated or constrained by a variety of ascribed or achieved statuses within the essential structures and organisational relationships of criminal enterprise. 'Innovators'/criminals adapt to anomie by accepting culturally prescribed goals but rejecting and substituting orthodox institutional means with the most expedient 'innovative' means, including crime, to pursue cultural goals. Merton conceptualises innovators as 'outsiders', whose ideology, values and group-sanctioned behaviour constitute an inversion of mainstream, middle-class culture that is assumed to be uniformly accepted by conformists.

Merton's paradigm was the theoretical foundation for subculture studies. Merton's concept of outsiders fixes sub-cultural ethnographies into describing and analysing the culture of 'innovators' as a unique social system that is unequivocally opposed to the presumably homogeneous middle-class culture embraced by 'conformists' in the legitimate sector of society.⁴³ Bourgois conceptualises organised criminal culture as 'street culture'; 'a complex and conflicting web of beliefs, symbols, modes of interaction, values and ideologies that emerge in the opposition to exclusion from mainstream society'.⁴⁴ This oppositional culture is a lifestyle of violence, substance abuse and internalized rage, with drug dealing as the material base. Therefore, 'street culture' is an alternative forum to any available to 'legitimate' cultural constellations employed by marginalised people as a structure of rewards, gains, profits and sanctions for autonomous personal dignity.

From sub-cultural ethnologies the ecological approach of social disorganization theory cemented the rigid divide between the 'illegitimate' and 'legitimate' sectors of society.⁴⁵ Social disorganisation theory identifies poverty, racial heterogeneity, and the failure of legitimate, regulatory institutions (schools, businesses, policing, families), as typical traits of communities with high crime rates. This perspective draws on social control theory to explain the salience of those characteristics in promoting collective crime.⁴⁶ Organised criminal groups and cultures are theorised as derivatives of the 'subversive'

⁴² Merton, 1938, p. 673

⁴³ Cohen 1955

⁴⁴ Bourgois, 2003, p. 8

⁴⁵ See McKenzie 1924; Park & Burgess 1924; Shaw & McKay 1942

⁴⁶ Shaw & McKay 1942

socialisation of criminals within the dysfunctional, illegitimate context of society, which is assumed to be geographically bounded from the orderly, legitimate sector of society.⁴⁷

Separating society into a legitimate and an illegitimate sector is reinforced by the law enforcement assertions that the relationship between the police and organised crime groups is normatively and behaviourally oppositional. Werthman and Piliavin coined the concept 'ecological contamination' to encapsulate their findings that the underlying hostility between criminal groups and the police emerges because either occupy separate cultural and structural conditions which induce their different responses to, and perceptions of each other, and of the law.⁴⁸ Ecological contamination contradicts recurrent qualitative findings that suggest a symbiotic relationship between corrupt regulators (police, politicians) and organised crime groups to facilitate the profitability, sustainability and expansion of criminal enterprises.⁴⁹ It perpetuates a fragmented understanding of organised crime to protect the ideological role and image of the police as frontline combatants against organised crime.⁵⁰ The normative polarity between crime and law enforcement in an enterprise setting not only ignores the regulatory role played by corrupt legalist regulators⁵¹ in restricting market competition, but it also conceals the commonality between legalist and legal regulation in crime business and its non-criminal competitors⁵². This concealment in turn weakens the explanatory capacity and resultant theoretical potency of market-directed crime theorising, and unfairly hobbles methodologies which emerge from enterprise paradigms.

Nevertheless the placement of law enforcement agents at the intersection between the legitimate and illegitimate spheres of society confirms the ideology, authority (and negotiability) of distinctive knowledge which the law enforcement 'voice' advances over more critical academic research assertions.

⁴⁷ Whyte 1955, p. xv

⁴⁸ Werthman and Piliavin, 1967, p. 75

⁴⁹ See Sellin 1963; Ruth 1967; Ruggiero 2002

⁵⁰ Whish 2003, p. 454

⁵¹ The conceptual parallel between *legalist* and legal regulation exists insofar as the regulatory power of the social control agents, institutions and bureaucratic processes in both contexts is derived from their legal standing. In the service provision sense *legalist regulatory practices* refer to the discretionary granting and/or withdrawal of opportunities, authorisation, favours, privileges and other market access variables. The deviant dimension of legalist regulation involves the abuse of public power for private profit by legally authorised regulators who hold positions in legitimate socio-political apparatuses, and are in our case-studies, by extension candidates for elected office. By extension legalist regulators can compromise candidates for elective offices, through informal methods or by manipulating formal bureaucratic processes, in order to gain preferences and protections for the enterprises which they service. Across cultural contexts, various studies have identified extortion, intimidation, bribery, gift-giving, nepotism, and patron-client networks to be among the foundation for the institutionalisation of legalist regulatory practices

⁵² Findlay M. & Hanif N (forthcoming) 'Disturbing the Rice Pot: market modelling and criminal enterprise'

This placement enables these regulators to monopolise and distort knowledge regarding the reality and extent of their involvement as cross-over agents⁵³ in regulating criminal enterprise, facilitating the flow of illegal commodities between the legitimate and illegitimate sectors of society, and promoting the globalisation of criminal enterprise through discretionary patronage and application of the law. This knowledge-management phenomenon has a greater impact on the reality and viability of research methodologies than results from any more general observations concerning the internal knowledge production of the criminal justice process.⁵⁴ In organised crime research wedded to a law enforcement normative frame (and its essentialist dualities) law enforcement agencies hold the key to accessing particular official data forms, and are established as the official account that legitimates research findings and discounts contrary interpretations.⁵⁵

We will show through the case-study method described below, that dualistic understandings promoted in original organised crime theorisations⁵⁶ cumulatively results in fragmented and distorting research conclusions about organised criminal networks.

Theory over Methodology: The Negative Repercussions of Integrating Theoretical Dichotomies into Qualitative Methodologies for Researching Asian Crime Business

This section of the paper reveals the reasoning behind limited variant analysis and its disproportionate influence over organised crime research. From this position we suggest that a more interactive and integrated approach to researching crime business frees up methodology to encounter the market complexities of crime business as we have examined it in particular Asian commercial settings.

⁵³ Cross-over agents here corresponds to Murphy and Robinson's (2008, p. 502) concept of "maximizers" referring to 'individuals who simultaneously use and incorporate legitimate and illegitimate means of opportunity in the pursuit of profit and/or monetary gain'.

⁵⁴ For a full critical review of this knowledge/power argument, see Hogg R. (1983) 'Perspectives on the Criminal Justice System' in M. Findlay, S. Egger & J. Sutton (eds.) *Issues in Criminal Justice Administration*, Sydney: George Allen and Unwin.

⁵⁵ For a comprehensive discussion of the influence of official discourse over research interpretations see Burton F & Carlen P. (1979) *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State*, London: Taylor and Francis.

⁵⁶ In focusing on the originators of particular theoretical traditions we do not mean to ignore the more recent refinements and diversifications of these positions through critical analysis. The limited literature review in this section was intended to do no more than identify the source of influential research directions and the essence of their dualistic limitations.

The dialectical understanding of collective criminality, criminal culture, markets and sectors of society, fosters and reinforces the validity of, single variable analytical frameworks. Law enforcement investigations into the organised crime *problem*, for example, are preoccupied with ascertaining whether organized crime groups are hierarchically structured or loose networks of criminal associates and whether their organisation in particular ways pose external threats to otherwise 'licit' political-economies⁵⁷. With such an emphasis the dynamics of crime business culture and market involvement escape consideration in favour of a structuralist concern for organisations and the 'holy grail' of what makes them criminogenic; family, race, ethnicity, secrecy, opportunity etc. Subculture ethnographies, whose analytical focus is the identification of taxonomies to describe organised crime groups (as ethnically-based, indigenous or non-indigenous, hierarchically structured or networked), are concerned with the regularities, common patterns and distinguishing features of organised crime groups, where these groups operate and in what markets.⁵⁸ In the resultant constrained research agenda the researchers' focus is channeled towards the mundane and distinctive features of illegitimate markets and sectors of society in terms of preconceived single variable analytical frameworks whether in terms of positivist biology, subculture's race and class or social disorganisation's ecology. Methodologies which then direct the research gaze to low level operatives and street-crime relationships may tend to confirm the utility of mundane and limited variant analysis not as a consequence of its empirical significance but through a concurrence with the normative commitments of these minor players. These normative commitments in turn may have been consciously confirmed and proliferated by more powerful entities in the enterprise determiner to conceal the complexities of power and to keep the lower orders unstable, factionalised and violent to restrict their commercial access to the orderly profits and expertise of the business.

The influence of dialectical tensions over the scope of contemporary organised crime inquiry and the prevalence of single variable analytical frameworks despite their limited explanatory power and coverage confirms the way earlier theorisations shrouds a "verstehen" methodology⁵⁹. The negative impact of dichotomies on verstehen understanding is exemplified by the law enforcement perspectives that formulate 'the authorised account' of organised crime, concentrating as it does on members

⁵⁷ Edwards & Levi 2008, p. 364

⁵⁸ Edwards & Levi 2008, p. 366; Cohen 1980

⁵⁹ Weber's (1968) "verstehen" relates to the belief that there is objectively knowable meaning behind human action and interaction and functions as a directive to achieve insight into the social components of the participant's interpretative framework and perceptual processes.

occupying lower rungs of the organised crime group. This focus, rather than a holistic appreciation of all levels of the business and their key players, accommodates a prevailing law and order discourse at the expense of distorting the reality of crime as business. Violence, racial division, ethnic rivalry, organisational secrecy, mystical loyalty, and more violence typify the law enforcement representations of Asian crime business, and these are exemplified at the lower level of the organisation.⁶⁰ Yet, they are atypical of profitable crime business as a total enterprise.

Therefore, the researcher's conscious or subconscious mis-interpretation of qualitative data because of preconceived sub-cultural prejudices, denies a *verstehen* understanding of the criminal network, confirmed by these compromised sampling frames. Epistemological discussions about the validity, objectivity and credibility of qualitative data on criminal networks and enterprises are typically critiques of the observational status of and knowledge provided by, 'innovators'/insiders of organised crime as opposed to 'conformists'/outsiders of organised crime⁶¹. 'Insiders' of organised crime, referring to members of organised crime groups, are assumed to:

- (1) monopolise access to knowledge of various aspects of organised crime and
- (2) be endowed with special insight into matters necessarily obscure to others, thus possessed of a penetrating discernment.

Merton (1972) defines the insider–outsider position as an epistemological principle centred on the issue of access and whether insiders of organised crime/innovators can provide a unique perspective that can never be penetrated by an outside/conformist participant observer. The covert nature of organised criminal groups, activities, networks, markets and businesses induces researchers to assume that only members of organised crime groups can provide intimate or insider knowledge of organised crime.

Our interactive and integrated methodology reveals the limitation of a static interpretation of the insider/outsider duality, and offers a more creative potential application for the discourse.⁶² If the insider/outsider distinctive is not viewed as externalised (from say a law enforcement viewing) but is understood as contextually specific and thereby fluid, the capacity of the discourse not to exemplify structural rigidity but rather to reveal participant dynamics is enhanced. We suggest, for instance, to

⁶⁰ Chin 1996

⁶¹ Insiders refer to an individual who possesses intimate knowledge of the community and its members due to previous and ongoing association with that community and its members.

⁶² Hanif & Findlay, 2010

understand why a low level gang member may see himself as an insider and the police an outsider, while a higher level entrepreneur knows in actuality the corrupt police officer is both an insider and an outsider, has the potential to say much about the knowledge management and meaning creation essential at different levels of criminal enterprise.⁶³

By depending on the perspective of overly accessible marginal members in the business network, such 'pigeon-hole sampling' creates stylised and alien market perspectives of criminal enterprise that co-incidentally confirm the insider/outside, legitimate/illegitimate divide, but only as an ideological rather than a methodological tool.⁶⁴ Researchers who adopt a pigeon-hole sampling wrongly claim the self-sufficiency of the 'insider' perspective for understanding collective criminality, criminal network and enterprises. Such a claim ignores qualitative evidence that 'insiders' within a particular criminal organisation do not constitute a homogenous category and their knowledge of the intricacies of criminal networks and the operationalisation of criminal enterprise is fragmented and relative to the position they occupy within the hierarchical structure of the group.⁶⁵

Despite the almost impossible task of gaining access to individuals occupying leadership roles in criminal organisations who speak with authority and not mystery about criminal networks and enterprises, qualitative researchers celebrate the insider perspective, even with only the telescoped knowledge offered by an exclusive population sample of typically accessible 'insiders' like members occupying the lower rungs of criminal groups or leaders of petty gangs.

This divide between 'insider' and 'outsider' in pigeon-hole sampling is challenged by the more holistic appreciations of criminal networks and organised crime, interactive, comparative and dynamic as it is revealed in our the piracy case-study. Exclusive focus on rank and file members of organised crime groups, condemns the representation of organised crime to a moralised 'us-versus-them' narrative wherein legitimate commerce is the unwilling victim of criminal infiltration, long-suffering regulators are out-numbered and out-muscled by a foreign threat and good business is raped by a trade that has no moral limits. This misunderstanding of crime business relationships is particularly so where racist stereotyping constructs the engagement between criminology theorising and more conventional market

⁶³ Hanif & Findlay 2010

⁶⁴ Hanif & Findlay 2010

⁶⁵ See Levitt & Venkatesh 2000; Venkatesh 2008

analysis.⁶⁶ Portrayed this way criminal enterprise is divorced from and destructive of legitimate commerce. Smith argues that the institutionalisation of the dichotomy, business versus crime, through our terminology and statistical categories blinds us to the legal-illegal continuum of enterprise.⁶⁷

Resisting Dialectical Tensions and Rectifying Methodology

The paper now moves on to discuss methodologies for avoiding the distraction of false dialectical tensions, and from there to create methodological dynamism which can critically employ dialectics within the actuality of crime business relationships and specific market contexts. An important strategy we adopted in our research for resisting false dichotomies and resultant methodological distortion is to construct a holistic theorisation of organised criminal enterprise and networks, rejecting pigeon-hole sampling. This section outlines relevant methodological applications in our ethnographic study of the Omega gang in the Singapore prisons, and from there investigating the organisation of broadcast media piracy in the Malaysian state of Kuala Lumpur.⁶⁸ Our method grows from lower rank gang interrogation to incorporate the higher structures of knowledge governing crime syndicates doing profitable crime business.⁶⁹

Our ethnographic study of the Omega gang in the Singapore prisons sampled both insiders and outsiders. We conceptualised 'outsiders' as individuals or groups of people who had no interest in claiming membership as 'insiders' but whose interactions with 'insiders' were systematic (as opposed to incidental and functional) within the specific context of crime business facilitation, and regulatory cross-over.⁷⁰ The outsiders we sampled include members of Chinese secret societies in prison, ex-Omega members who subsequently became affiliated with Chinese secret societies, prison officers and guards and inmates who are unaffiliated with any criminal group. Insiders comprised members occupying various ranks within the hierarchical structure of the Omega gang.⁷¹ This inclusive sampling strategy facilitated the contextualisation of Omega's socio-economic status vis-à-vis established Chinese secret societies within Singapore society in order to:

⁶⁶ Soudjin & Kleeman 2009

⁶⁷ Smith, 1980, p. 361

⁶⁸ Hanif 2008

⁶⁹ Hanif 2008

⁷⁰ Hanif 2008

⁷¹ Hanif 2008

- 1) deconstruct the ideology of ethnic affiliation among ‘Malay-Muslims’ as the sole reason for Omega’s establishment,
- 2) understand the prison context as Omega’s stronghold for recruiting members to facilitate the group’s expansion,
- 3) explain why Omega members target Malay-Muslim members of Chinese secret societies for violent confrontations, and
- 4) investigate the incongruence between the anti-Chinese sentiment espoused by low ranking Omega members and the cooperative relationship Omega leaders claim to secure with an established Chinese syndicate in Kuala Lumpur.⁷²

Interview responses from rank and file Omega members regarding the reasons underlying the gang’s formation, their perception of Malay-Muslim members of Chinese secret societies, and the gang’s interaction with Chinese criminal groups generally revolved around a racialised discourse. Omega was portrayed as an organisation that prevents the victimisation of Malay-Muslims from the tyranny of Chinese secret society members and induces Malay-Muslim members of Chinese secret societies to be conscious of their socio-economic marginalisation vis-à-vis their Chinese counterparts.⁷³ The responses of these rank and file insiders reflected their status as subjects of false consciousness, whose solidarity to the group was a consequence of obligatory ideologies perpetrated by gang leaders. These gang members were largely ignorant of the extent and dynamics of criminal enterprise beyond their limited involvement. Alternatively, the perspective of outsiders like ex-Omega members who shifted their allegiance to established Chinese secret societies challenges Omega’s racial and religious ideologies. The primary reasons for leaving the gang was cited by ex-Omega members as including the failure of Omega’s leaders:

- (1) to provide its members with any regular or significant pecuniary advantages,
- (2) to redress the unstable socio-economic status of the gang relative to established Chinese criminal organisations and
- (3) to secure a symbiotic relationship with corrupt regulators whose patronage will ease the regulatory sanctions over Omega members.⁷⁴

In order to promote solidarity among Omega members and to protect the integrity of the gang where steady business profit is illusive or illusory, Omega’s leaders exploit ethnic and religious affiliation among

⁷² Hanif 2008

⁷³ Hanif 2008, p. 2

⁷⁴ Hanif 2008

its lower ranked members, to further mask their ignorance of how the criminal enterprise really functioned, and to distract attention away from issues of commercial vulnerability. For these lower gang members (and consciously perpetuated by those above them in the syndicate structure, and by corrupt regulators benefitting from a more fluid business environment but relying on sporadic, tokenistic law enforcement intervention against low level disorder) it all seemed to be about race, patronage, instability and violent encounters.⁷⁵

Data gathered from low-ranking members of criminal organisations, who are predisposed to petty conflicts as a demonstration of masculine bravado, direct confrontations with social control agents and inter-gang conflict at an everyday level emphasise disorder, dysfunction and limited understandings of an enterprise perspective. Low ranking Omega members were vehement in their derision of Malay Muslim members of Chinese criminal groups as ‘infidels’ and traitors to their race, in their animosity towards the ‘Chinese’ syndicate that dominates the piracy trade in Kuala Lumpur and Singapore, and their frustration with the Chinese syndicate that curtails Omega’s struggle to operate an independent criminal business. Our interviews with Omega leaders on the other-hand emphasised the necessity to deal with a socio-economically dominant Chinese syndicate in Kuala Lumpur in order to secure a subordinate collaborative relationship and to receive a financial slice of the piracy trade. Without the patronage of corrupt regulators, Omega members are subject to regulatory sanctions, which hinder the gang’s orderly and organised pursuit of, and involvement in the media piracy enterprise at whatever level, and further condemns them to low order service delivery in another network’s trade.⁷⁶

Leaders of Omega offer the Malaysian syndicate leader a portion of their profits for the right to market syndicate-produced pirated digital versatile discs (DVDs) throughout various locations like train stations, bus stations and housing estates in Singapore. The Malaysian syndicate leader benefits economically from the ‘royalty’ paid by street-corner gangs who market their products within Malaysia as well as internationally. This enterprise structure confirms that the visible ‘insider’ status and positioning of individuals does not equate with or essentially enable monopolistic access to knowledge about organised criminal enterprise as some researchers assume, concluding as they do from the narrow knowledge base of low level operatives.⁷⁷ There is only an incomplete understanding of the complex piracy enterprise without an integrated and holistic engagement with the crucial levels of its business

⁷⁵ Hanif 2008

⁷⁶ Hanif 2008

⁷⁷ Hanif & Findlay 2010

structure, with internal enterprise relationships and with external market conditions such as consumer preferencing.

Two factors from our ethnographic study of the Omega gang strengthen belief in an inclusive, interactive and integrated sampling frame to understand the complex criminal networks that facilitate the profitability, sustainability and globalisation of the Malaysian broadcast media piracy trade. First factor is learning about Omega's (the street gang's) function as franchisers of syndicate-produced pirated DVDs of Hollywood, Bollywood and Chinese blockbusters which directs us to explore the networks facilitating media piracy beyond the unilateral perspective of the dominant syndicate leader. This must be an understanding which engages with 'foot-soldiers' and their single variant understanding of gang solidarity, as well as the higher gang operatives who liaise outside the gang, seeing the upper economic motivations of syndicate enterprise while perpetuating lower level misperceptions for their own disciplinary and control purposes. Second is the recognition that insider knowledge regarding the organisation of the media piracy trade and the intricacies of criminal networks that support piracy is not uniformly distributed either:

- 1) throughout the ranks of any particular criminal entity whether the syndicate or the Omega street-corner gang or
- 2) among criminal entities whether the syndicate or the Omega gang within the illegitimate sector of society.⁷⁸

With this recognition comes the opportunity for a more holistic methodology which interrogates layers of enterprise and employs an attitude to insider/outsider dialectics which is much more nuanced, reflective and dynamic.

Researching criminal networks based on the organisation of the media piracy enterprise requires a methodological inquiry into the negotiated cooperative relationships between groups of social actors integral to the profitability, sustainability, 'orderability' and advancement of media piracy as a national, regional and international criminal enterprise. The profit-generating and market-sustaining potential of these relationships became apparent from qualitative interviews with the syndicate leader, gang leaders and foot soldiers of the Omega gang and cross-over agents including the police, custom officers and

⁷⁸ Hanif & Findlay 2010

directors of the Malaysian Film Censorship Board (MFCB).⁷⁹ 'Outsiders' (when viewed from a gang perspective) in the form of corrupt regulators who negotiate and interact directly and systematically with leaders of the syndicate and the Omega gang, but who are not members of these organisations *per se*, possess a cross-market view of crime business and what distinguishes the grey porous barrier of market legitimacy. The perspective of these corrupt regulators, as insiders depending on the aspect of the piracy business they facilitate and as outsiders unaffiliated with any organised crime groups, possess the capacity to illuminate the contextual variables necessary for the profitability and practicality of the media piracy enterprise, and crucially to its consumer persistence and normalcy. Corrupt legalist regulators employ naive normative distinctions to their advantage in concealing their cross-over and in adding value to their perverted regulatory service. At the same time their opinions and understandings shed light on the intersection between crime business and its non-criminal competitors, and challenge the simple dialectic between legitimate and illegitimate market. That said, outside the research setting the views of legalist regulators and cross-over agents commonly tend to perpetuate the law and order mystification of the law enforcement opposition to crime business and illegal markets. The researcher needs to be mindful of role such informants may be playing in the provision of insights and understandings in different operational contexts.

Chasing levels of knowledge and engagements within and without criminal enterprise networks provides the additional methodological attraction of triangulating and telescoping information sources and relationships. For instance, the insights offered by several MFCB directors focused our inquiry into the syndicate leader's strategies to ensure the marketability of syndicate-produced pirated DVDs over legitimate products. This took our research into the realm of market modelling when it became clear that crime business was not to be understood (and normatively qualified) primarily in terms of supply. The train of understanding then required a methodological progression from the burgeoning pirated DVD market operated by individuals and criminal groups, to the satisfaction of normalised consumer demands⁸⁰.

At the upper levels of criminal enterprise and regulatory cross-over in the trade of broadcast piracy, the process of negotiating the interests of the directors of MFCB in order to obtain original copies of new

⁷⁹ Hanif & Findlay 2010

⁸⁰ The MFCB directors elaborated that the production of high quality pirated DVDs, marked by visual and sound clarity, is systematically achievable only by duplicating original copies of new films released to the MFCB, a ministry of the Malaysian government in charge of vetting all films.

film releases is of paramount importance to the syndicate leader, in ensuring a lucrative enterprise of piracy. In a market sense, and of equal and co-incidentally critical importance as a criminal entrepreneur's motivation is the generation and perpetuation of a loyal and recurrent consumer market. Following an acceptance of a financial settlement from the syndicate leader, corrupt police officials exercise their cooperative and facilitative role in the piracy venture by executing the following tasks:

- to overlook the illicit relationship between the syndicate leaders and the directors of the MFCB, which facilitates the enterprise of piracy and violates copyright law,
- to exploit their rank, status and authority to eliminate potential disruptions posed by other criminal entities that attempt to subvert the arrangement among the syndicate, directors of the film censorship board and the police.

The crime boss in turn deals with the politicians and senior regulators crucial for the profit of his trade as might any legitimate businessman negotiating with regulatory agencies and competition frameworks.⁸¹ His capacity for seamless cross over between the transaction of social and commercial legitimacy is indicative of his status in the 'two societies' and the eventual normalcy of this crime business, whether it be from the perspective of the compromised government official or the normalised recurrent consumer.

Our qualitative investigation into the enterprise of broadcast media piracy revealed that the profitability, sustainability and globalisation of the market-oriented media piracy trade are dependent on the illicit negotiations prompted by the syndicate leader to bring about the following:

- 1) the corruptibility of regulators like Malaysian police, politicians, custom officers and the Film Censorship Board to enhance consumer satisfaction and syndicate dominance over the piracy trade,
- 2) consumer normalisation of the illegitimacy of selling, distributing and consuming pirated DVDs as a global enterprise on the basis of prevalence, convenience and price-sensitivity, and
- 3) the collaboration of the Omega street-corner gang as franchisers of the syndicate-produced pirated DVDs in neighbouring countries like Singapore and Thailand.

⁸¹ This 'cross-over' is harder to distinguish when political patronage and public sector corruption is a common feature of doing any profitable business in Malaysia.

Participants in the media piracy network cross-over boundaries of class, race, gang membership, and bridge the legitimate and illegitimate commercial and political sectors of society to establish a collaborative and lucrative crime business by negotiating their asymmetrical social capital, according to any conventional commercial cost-benefit analysis.⁸² Contrary to the violence and disorder that typically characterise descriptions of Asian organised crime, the narrative of Omega leaders exposes the ordered and functional organisation of the illegitimate Malaysian markets for the sale and distribution of pirated materials. While Omega's rank and file celebrate violence and intimidation, in network reality these ways of doing business are seen as disorderly and are disvalued and discouraged at the decision-making end of the enterprise. Data on this gathered from the syndicate leader at the other end of the enterprise from a violent and disorderly foot soldier reveals dynamic negotiations to be the primary mode of conflict resolution among key players within the enterprise of piracy to protect the stability of criminal business, and to improve market positioning.⁸³

During participant observation in nightclubs owned by the syndicate leader, we witness the commercial interaction between the syndicate leader, Omega's leaders and corrupt regulators, both the police and a few directors of the MFCB, and were also able to engage them in informal conversation to gain insight into their negotiated collaboration with the syndicate leader.⁸⁴ The similarities between this and any normal trade negotiation in the legitimate market were remarkable.

Conclusion

This paper offers in outline a fresh approach to the study of crime business, hopefully unburdened by much of the conventional organised crime⁸⁵ thinking which, we argue, has deflected a balanced understanding of criminal enterprise particularly in Asia, and has infected the recent development of international regulatory conventions. Not only have such understandings been constrained by externally constructed, limited variant analysis, but particularly in the analysis of Asian crime business, they have

⁸² Hanif & Findlay 2010

⁸³ Hanif & Findlay 2010

⁸⁴ Hanif & Findlay 2010

⁸⁵ In an attempt to overcome the definitional and theoretical challenge surrounding the meaning, nature and conceptualisation of organised crime, we have drawn on Albanese's work, in its emphasis on enterprise and market location. Albanese's (2004, p. 4) definition of organised crime is as follows:

Organised crime is a continuing criminal enterprise that rationally works to profit from illicit activities that are often in great public demand. Its continuing existence is maintained through the use of force, threats, monopoly control, and/or the corruption of public officials.

de-legitimated fertile theorising such as enterprise and crime analysis by dominating research discourse with false causalities such as the critical role of race in crime organisation.

The paper's critical engagement with flawed methodologies commences by confronting and exposing the ideological motivations for dualism in conventional organised crime research. So as to suggest a cognitive pathway beyond this restrictive normative frame, we argue it is essential to appreciate the potency and resilience of certain normative preconditions allowing some methodologies in organised crime research and quarantining others. For instance, law enforcement language buoyed up by popular culture representations of gangs, syndicates and crime bosses has become the accepted starting point for much research in the field, and for consequent law-making, domestic and international.⁸⁶ Data collection and analysis from this perspective, we suggest, plays its own part in organised crime mystification and as such retards the critical utility of market appreciations of crime business and enterprise theory explanatory as it can be of the dynamics of Asian black commerce.

The paper moves on to reveal how distracted and distorted theorising infects research methodology and its conclusions. In this way method becomes the flawed bi-product of value-laden theorising rather than realistic methodology informing and confirming value-free theorising. We advance an alternative relationship between theorising and method so that resultant analytical approach is to crime business as it operates in the market, and not as law enforcement perspectives want us to believe it to be. From here, it is reasonable to speculate that the foundations of international law-making as a regulatory intervention against TOC will have at their disposal alternative considerations of crime business in the market-place and realistic expectations for law-enforcement influence.

The paper concludes by propounding an integrated theoretical perspective minus the distraction of duality. Based on our field experience with Asian crime business and market conditions, we formulate and introduce an integrative methodology which is a dynamic, interactive and multi-dimensional framework for understanding criminal enterprise, entrepreneurial motivation and crime business market conditions. If law-making it to emerge as a research-based exercise then, particularly at the international level, we believe an integrative methodology avoids for legal outcomes naïve pluralism or the dominance of any politicized normative position. Law in such an informed context can give voice to

⁸⁶ Brotherton 2008

the new theories, models and language of TOC which Standing seeks to be produced from more realistic research.

The need to manage distracting or dysfunctional dualities about crime business as essentially disorderly and confrontational is one major critical motivation for developing a multi-variant and comparative research methodology with capacity to interrogate crucial decision sites in crime business, so as to reflect the dynamic, fluid and interactive internal organisation of criminal enterprise, and its external dependencies. Such a comparative research frame requires viewing crime business from cross-over agency perspectives to the extent that non-member maximisers comfortably make the switch without/within criminal enterprise structures in order to facilitate profitability and market share.

Any attempt to understand the organisation of criminal or legitimate business must focus on at least two groups of dynamically interacting social actors, communities or enterprise frames. Ethnographies of particular criminal entities make little sense without including a second napkin. Comparative possibilities include:

- analysing inter-gang relations,
- the interaction between a criminal organisation and the community of which it is a part,
- parts of the business to each other,
- service gangs and umbrella syndicates,
- business to the consumer, and
- a criminal organisation to law enforcement agents, and the markets they regulate.

Social control perspectives are distracting and distorted without advancing an analysis of the interaction between discretionary law enforcement and its impact on criminal entities. International law advancing a functionalist law enforcement agenda in denial of or out of touch with the market location of crime business and the market preferencing potential of corrupt legalist regulators, exemplifies this criticism. No doubt international law in all its forms is taking the issue of TOC seriously. Yet commentators accept that the success of this engagement is not a matter for lawyers alone.

Dealing with organized crime and gang violence is a practical and also a theoretical challenge involving highly complex and dynamic phenomena. While national legislators have reacted in very different ways according to the peculiarities that they (believe they) identify, the fight against organized crime, gangs, and gang violence has increasingly become the subject of

international regulation. It focuses on the transnational dimensions of organized crime and expresses the will of states to co-operate more effectively and to harmonize national laws. A complex international framework has been established, but it still lacks universal acceptance and full implementation. According to the prevailing doctrine, international law governing the use of force can become relevant only insofar as the criminal acts in question can be attributed to a state. In exceptional circumstances, however, organized crime and gang violence may fall within the scope of IHL and international criminal law; in general, this requires that the criminal collectives have developed into organizations possessing powers and/or structures similar to those of states.⁸⁷

Interestingly, holistic and integrated research into crime business can enable more effective law-making at the international level, as well as offering a means for critically evaluating international law interventions, a feature which is distinctly absent from the transformation of international law into global governance policy.

An interactive and comparative methodology is indispensable in a context where the research attempts to grasp the dynamic interaction among groups of social actors who cooperate in the interest of facilitating criminal enterprises or any other ancillary venture (legitimate business, political campaigns), the nature of that cooperation, its basis and how it is established. Our work envisages criminal enterprise as an interactive, integrated and dynamic field of commercial relationships and arrangements. This field flows across a range of regulatory situations and 'boundaries of permission'. The resultant crime opportunities in a business sense are as a consequence, adaptable to the conditions of market profit as may be any legitimate commercial endeavour. They need to be researched as such. At the risk of simply hinting at the dimensions of a comparative aspirations for enterprise theory they are these:

- Within the context of the gang and the syndicate it is crucial to employ two napkins methodology, breaking free of a single variant, mono-perspective analytical tool, whether race, gender, class, religion, to research the emergence, organisation, legitimacy and authority of a particular criminal entity;
- In our analysis between the syndicate and the Omega gang at the meso level, interactive methodology isolates the analytical tools that explain the motivation of the Omega gang to negotiate a subordinate position to the syndicate, the reason for the syndicate allowing the

⁸⁷ Hauck & Peterke, 2010, p.436

Omega gang to franchise its DVDs, and the way this relationship of dependency leads to essential service delivery and facilitation, determines power relations, defining the organisational structure of each criminal entity;

- Analysing the interaction between syndicate leaders and corrupt regulators at the macro level, interactive methodology illuminates the way the regulatory market frames are negotiated and utilised for individual and collective benefit, as well as for determining and certifying market boundary meanings;
- Interactive methodology enables a comparison between legitimate enterprise and criminal business, specifically the commercial interests and arrangements that eventuate in a profitable crime business and its proliferation/perpetuation in order to dissolve stylised representations of criminal business as disorderly and dysfunctional (antithetical to legitimate business).
- Across complementary business enterprises, recognising particularly in market positioning and capital sourcing in trade relations, enterprises (legitimate and illegitimate) collaborate and complete. Where do illegitimate arrangements form the linkages for these relations?
- Interactive research method dissolves the insider/outsider dichotomy that has typically plagued the sampling process, repositioning the epistemological debate surrounding the validity, credibility and objectivity of insider versus outsider data, and moving on to a new methodological consideration of the research mission with cross-over at its centre.

Distinguishing between illegitimate and legitimate market representation is not the reason for or the reality of the proposed interactive analysis, and is potential influence over international law making, if such research is to be given political and economic purchase. A mandate to take research seriously as a law-making and policy-generating precursor rests in the resounding ratification of the UNCAOTC, the powerful political rhetoric behind its limited purposes and expansive intent, and the reiteration of these commitments ten years on.

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