



1-1-2007

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Recommended Citation

Boaz Sangero, *Are All Forms of Joint Crime Really Organized Crime: On the New Israeli Combating Criminal Organizations Law and Parallel Legislation in the U.S. and Other Countries*, 29 Loy. L.A. Int'l & Comp. L. Rev. 61 (2007).

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Are All Forms of Joint Crime Really “Organized Crime”? : On the New Israeli Combating Criminal Organizations Law and Parallel Legislation in the U.S. and Other Countries

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I. INTRODUCTION

It is seemingly possible to think that the new Israeli Combating Criminal Organizations Law, 2003¹ is a desirable statute. After all – how many struggles are more justified than the fight against organized crime?

This Article will demonstrate that, in view of the extensive and comprehensive legislation already existing in Israel prior to the enactment of the new law, there was no need at all for an additional statute. Furthermore, it will show that the excessively broad definition given to the term “criminal organization” is liable to dominate Israeli criminal law and make the already draconian penal code – which Israel inherited from the British Mandate – even more draconian.

The treatment of this subject also illustrates the danger in a distorted conception of criminal law and the danger of the total dominance of law enforcement officials in the process of criminal legislation. Before it was even possible to enjoy the relative

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1. *Hok Ma'avak BeIrguney Pshia* [Combating Criminal Organizations Law], 5763-2003, *Sefer HaHukim* [SH] 502 [hereinafter *Combating Criminal Organizations Law*], available at <http://www.justice.gov.il/NR/rdonlyres/BAC12283-C24B-4EE8-94E0-30E7547695D9/o/criminal.doc> (unofficial English translation).

progress heralded by Amendment No. 39 of the Penal Law²— which, in 1994, replaced the general part of the Law with better statutory arrangements – the Combating Criminal Organizations Law was already enacted, in effect nullifying one of the major achievements of the 1994 amendment – the cancellation of the joint liability of co-conspirators.

The definition of a “criminal organization” in the new Israeli statute³ is sweeping, is incompatible with criminological studies of organized crime, and does not draw conclusions from statutes in other countries dealing with criminal organizations. It facilitates the circumvention of general arrangements based on fundamental principles of criminal law and arouses discouraging thoughts regarding the practical possibility for generating progress in the criminal law.

Organized crime troubles many societies and it is no wonder that the effort to fight it has led to special legislation in many legal systems.⁴ However, such legislation must also be enacted wisely, while relating to the unique attributes of organized crime, so that, on the one hand, it will be effective against organized crime, and on the other hand, it will not dominate the criminal law in its entirety – making it overly drastic, while trampling the rights of suspects and defendants. The lessons that may be learned from the new Israeli statute are not limited to Israeli reality, but are relevant to all legal systems dealing with this issue.

The first part of this Article (Sections II and III) will focus on the background to the enactment of the new statute – both its true background and the background presented in the media. The second part of the Article (Section IV) will review the severe tools created by the new law. The third part of the Article (Section V) will compare the definition of a “criminal organization” in the new Israeli statute to definitions appearing in the laws of other countries. The fourth part of the Article (Section VI) will relate to criminological research on the topic of organized crime – both in

2. Hōk HaOnshin (Tikun Mispar 39) [Amendment to the Penal Law (no. 39)], 5754 - 1994, SH 348 [hereinafter 1994 Amendment].

3. Combating Criminal Organizations Law, *supra* note 1.

4. See generally Crimes Act 1961, 2005 S.N.Z. §312A (N.Z.) [hereinafter New Zealand Law], available at <http://www.legislation.govt.nz> (follow “Statutes”, then follow “Crimes Act 1961” under “C”); Strafgesetzbuch [StGB] [Penal Code] 1987, as amended Dec. 19, 2001, § 129 (F.R.G), translated in 32 AMERICAN SERIES OF FOREIGN PENAL CODES: GERMAN PENAL CODE 89-90 (Stephen Thaman trans., 2002) [hereinafter German Code]; Strafgesetzbuch [StGB] [Penal Act] 2004 § 278a (Austria).

Israel and in other countries. The fifth part of the Article (Sections VII and VIII) will relate to the enthusiastic and dangerous use of the new statute. Finally, the last part of this Article will propose an alternative approach to this subject. This alternative approach may constitute a suitable model for legislation dealing with organized crime in other countries as well.

II. THE TRUE BACKGROUND TO THE ENACTMENT OF THE NEW STATUTE – THE 1994 AMENDMENT TO THE PENAL LAW

A. *Canceling the joint liability of co-conspirators*

The offense of conspiracy is defined in section 499 of the Israeli Penal Law, 1977.⁵ Subsection (b) was added to this provision within the framework of Amendment No. 39 of the Penal Law from 1994, reading as follows:

A conspirator shall bear criminal liability also for the offense for which the conspiracy was made or which was committed in order to advance its objective, only if he was party to its commission under Article Two, Chapter Five.⁶

The laws of complicity are laid out in Chapter Two (“Parties to an Offense”), Chapter Five (“Derivative Offenses”), of the Penal Law⁷ – i.e., the liability of the perpetrator (alone, in unison with others or through another) and the liability of a person soliciting or aiding in the commission of an offense. The first clause of section 499(b) indicates the legal situation existing prior to the 1994 Amendment.⁸ In the past, without any statutory basis, case law established the joint liability of co-conspirators, whereby “each conspirator is liable for any act that may be committed by one of his co-conspirators in furtherance of the common purpose and for anything deriving from the act, even if only incidental, as one of its natural possibilities.”⁹ Justified criticism has been leveled

5. Penal Law, 5737-1977, Special Volume, LSI 124 (1977) (Isr.) [hereinafter 1977 Penal Law].

6. *Id.*; 1994 Amendment, *supra* note 2 at 348.

7. 1977 Penal Law, *supra* note 5, at 124.

8. Compare 1977 Penal Law, *supra* note 5 and 1994 Amendment, *supra* note 2.

9. CrimA 696/84 Elbaz v. Israel, [1984] IsrSC 38(4) 330, 334, available at http://www.nevo.co.il/Psika_word/elyon/PADI-LG-4-330-L.doc; see also YAAKOV KEDMI, AL HADIN BEPLILIM – HADIN BEREI HAPSIKA [ON CRIMINAL LAW – THE LAW IN VIEW OF THE CASE LAW] 171 (1994) (providing a brief survey of the case law).

at this case law.¹⁰ The offense of conspiracy essentially criminalizes preparatory acts, which, as a rule, are not punishable – in contrast to the attempt to commit a crime. The offense of conspiracy itself constitutes an expansion of and a precursor to criminal liability. The application of the joint liability of co-conspirators leads to criminal liability both without an act and without guilt, in sharp contrast to fundamental principles of criminal law. It enables the imposition of severe criminal liability on a co-conspirator, even for an offense committed without his participation or advanced knowledge.¹¹ There is good reason why conspiracy has been referred to as “the prosecutor’s darling.”¹²

One of the welcome changes in Israeli law, established by the legislature within the framework of the 1994 Amendment, was the explicit cancellation of the joint liability of co-conspirators in section 499(b) of the Penal Law.¹³ However, it would appear that the prosecution could not get used to the loss of its “darling.” As we shall see below, in the numerous cases falling within the scope of the definition of a criminal organization, the new Combating Criminal Organizations Law effectively revives the joint liability of co-conspirators, which the legislature wished to cancel in the 1994 Amendment.

10. See S.Z. Feller, *Ahriut Plilit LeLo Ma'ase, Al Smah Ma?* [Criminal Responsibility Without Overt Act – on What Grounds?], in 29 HAPRAKLIT 19, 29 (1973); S. Z. FELLER, YESODOT BEDINEY ONSHIN [ELEMENTS OF CRIMINAL LAW: PART 2] 350 (1987); S.Z. Feller, *HaKeshet HaPlili Mul HaShutfut LeDvar Avirah* [Conspiracy Contrasted with Participation in a Crime], 7 MISHPATIM 232, 261 (1976) [hereinafter Feller, *Conspiracy*]; YUVAL LEVY & ELIEZER LEDERMAN, IKARIM BEAHRAYUT PLILIT [PRINCIPLES OF CRIMINAL RESPONSIBILITY] 481 (1981); Mordechai Kremnitzer, *Al Mahut HaKeshet HaPlili VeAl Hayahas Beyno LeBeyn HaShidul LeDvar Avera* [On Criminal Conspiracy and the Relationship Between Conspiracy and Incitement], 14 MISHPATIM 231 (1984); ESTER WEIS, DINEY ONESHIN: AVERAT HAKESHER [PENAL LAW: THE CRIME OF CONSPIRACY], 147-152 (1993).

11. See, e.g., Feller, *Conspiracy*, *supra* note 10, at 261.

12. E.g., *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (“darling of the modern prosecutor’s nursery”).

13. HOK HaOnshin (Helek Mikdami VeHelek Klali) [Penal Law (Introductory Part and General Part)] (no. 2098), 1992, HATZA’OT HOK [HH], 115, 141 (Isr.) (explanatory notes); KEDMI, *supra* note 9, at 146. It should be noted that the case law following the 1994 Amendment has partially circumvented the cancellation of the joint liability of co-conspirators by classifying accessories as joint perpetrators and through a very broad interpretation of the derivative liability of accomplices to a different or an additional offense. Boaz Sangero, *Parshanut Marhiva Be’Plilim?! [Broad Construction in Criminal Law?!]*, 3 ALEI MISHPAT 165, 185-86 (2003).

B. Defining a “perpetrator through another” without referring to “organizational control”

In section 29(c) of the Israeli Penal Law, which was enacted within the framework of the 1994 Amendment, the “perpetrator through another” (the main perpetrator in what is known as the “innocent agent doctrine”) is defined as follows: “the perpetrator of an offense through another is someone who contributed to the commission of the act by another person who acted as his instrument, whereas the other person is in one of the following situations, within their meaning in this Law: (1) minority or mental incompetence; (2) a lack of control; (3) without mens rea (awareness); (4) under a mistake of fact; (5) under duress or with justification.”¹⁴

This definition assumes that the “other” is acting without criminal liability (or, at least, without mens rea), as an instrument in the hands of the actor – the main perpetrator. However, this definition excludes those situations in which the “other” serves as an instrument in the hands of the main perpetrator, but also acts as a normal criminal – with awareness and not under conditions of limited criminal liability. In his article, “The Perpetrator in Criminal Law – A Profile,” Professor Kremnitzer has proposed adopting the concept of “organizational control” from German law:

[T]he normal concepts of indirect complicity (aiding and abetting, and solicitation) are not suited to criminal phenomena such as war crimes, offenses committed by a criminal state (Nazi crimes) or a criminal organization (the Mafia) . . . the direct perpetrator indeed has control over the act . . . however, from the perspective of the person giving the order, [the direct perpetrator] is perceived completely different – as an anonymous *replaceable* figure . . . the fungibility of the direct perpetrator turns the person in control of the organization into a “perpetrator through another” (original emphasis).¹⁵

14. 1994 Amendment, *supra* note 2, at 353-54. “Justification” in the Hebrew is referring to something akin to a legal obligation or permission. *Id.* at 356.

15. Mordechai Kremnitzer, *HaMevatse BeDiney HaOnshin - Kavim LeDmuto [The Perpetrator in Criminal Law – A Profile]*, 1 PLILIM 65, 72 (1990); Mordechai Kremnitzer, *Amendment No. 39 of the Penal Law – Five Years Since its Enactment*, in DIRECTIONS IN CRIMINAL LIABILITY: INQUIRIES IN THE THEORY OF CRIMINAL LAW 80-81 (E. Lederman ed., 2001).

The proposal of “organizational control” did not find expression in the definition of the “perpetrator through another” added within the framework of the 1994 Amendment to the Penal Law.¹⁶ Had organizational control been established as an additional aspect of this definition, it would have been possible to deal with the main difficulty that the Combating Criminal Organizations Draft Bill was intended to overcome, as follows:

[I]t is often difficult to prove the link between the heads and leaders of organizations of this type and the commission of crimes by others; this is because of the hierarchical structure of many of these organizations, which distances those making decisions and setting policy from the perpetrators of the crimes.¹⁷

III. THE MEDIA AND THE BACKGROUND TO THE ENACTMENT OF THE NEW STATUTE

As in a cinematic flashback, let us go back in time to the period preceding the enactment of the Israeli statute in 2003. Attempts by criminals to liquidate one another, within the context of gang wars, had resulted in the murder of innocent bystanders.¹⁸ The “star” of the headlines at that time was an Al Capone-like figure named Zeev Rosenstein, and the phenomenon unfolding before the eyes of the public was that of Mafia-style organized crime, entailing the most severe offenses such as murder and drug trafficking.¹⁹

In hearings before the Constitution, Law and Justice Committee of the Knesset (the Israeli Parliament) (“Knesset Law Committee”), which preceded the enactment of the new statute, speakers emphasized the bloodstained streets, the harm to innocent bystanders during the gang wars, and the offenses of extortion, drug trafficking, gambling, trafficking in prostitution,

16. 1994 Amendment, *supra* note 2, at 354.

17. HaTsa'at Hok Ma'avak BeIrguney Pshia [Draft Bill on Combating Criminal Organizations] (no. 3155), 2002, HH, 761, 762 (Isr.) [hereinafter 2002 Draft Bill], *available at* http://www.knesset.gov.il/Laws/Data/BillAllOld/3155/3155_All.html.

18. Va'adat HaHuka, Hok VeMishpat [Constitution, Law and Justice Committee], Knesset [Israeli Parliament], Minutes No. 113, Dec. 16, 2003, 8 [hereinafter Minutes No. 113], <http://www.knesset.gov.il/protocols/data/rtf/huka/2003-12-16.rtf>.

19. *Id.*

and trafficking in weapons.²⁰ Organized crime was even characterized as no less than a “strategic threat to Israeli society.”²¹

On this background, the Knesset Law Committee mobilized for the task of expediting the legislation, and enacted the statute within a very short period of time despite the normally sluggish legislative process.²²

In the spirit of statements made during the hearings that preceded the enactment of the statute,²³ characterizations of organized crime in the explanatory notes of the draft bill spoke of a hierarchically- structured organization, with distance between “commanders” and “soldiers”, a system of discipline and harsh sanctions, and evidentiary difficulties engendered by such a state of affairs. The authors of the draft bill also wrote about infiltration into the corridors of power, violence, and corruption.²⁴

In accordance with this description, the statute’s proponents demanded – and received – very severe tools to combat organized crime, which are briefly discussed in the next section.

IV. THE SEVERE TOOLS CREATED BY THE NEW STATUTE

A. General

The new statute creates several new arrangements, which include: doubling the penalty for existing offenses committed within the context of a criminal organization, new offenses for activity or membership in a criminal organization, and forfeiture of property.²⁵ These arrangements should be examined in light of the excessively broad definition of a criminal organization – which will be discussed below. For even if there was a good reason for establishing these new severe tools, it should be limited to those cases properly included in the definition of a criminal organization. However, even regarding suitable cases, it is still highly doubtful that there was a need for these new tools – given the laws already existing prior to the enactment of the statute. Furthermore, it is

20. See generally Minutes No. 113, *supra* note 18.

21. *Id.* This hearing was, in fact, held subsequent to the enactment of the statute; however, matters discussed in hearings leading up to its enactment were wrapped up during this session.

22. *Id.* at 2.

23. See generally Minutes No. 113, *supra* note 18.

24. See generally 2002 Draft Bill, *supra* note 17.

25. Combating Criminal Organizations Law, *supra* note 1, at 502-05.

questionable whether each tool actually serves the declared objectives of the new statute.

B. Doubling (already excessive) penalties

Section 3 of the Combating Criminal Organizations Law reads as follows:

A person committing an offense within the framework of activities of a criminal organization, not being an offense under this Law or an offense for which the penalty prescribed is mandatory life imprisonment, shall be liable to twice the penalty prescribed for such offense, but no more than imprisonment for twenty-five years.²⁶

The need to double penalties is explained in the explanatory notes of the draft bill, as follows:

In view of the added severity of offenses committed in an organized framework, which increases the risk to the public and the danger of continuous criminal activity, it is proposed to establish that the commission of an offense – defined in section 1 as an offense carrying a penalty of three or more years imprisonment – within the framework of a criminal organization, shall constitute an aggravating circumstance, carrying up to twice the maximum penalty prescribed for said offense; in order that the doubling of the penalty will not lead to sentences that *completely* deviate from the general sentencing framework, an upper limit has been prescribed whereby the overall penalty shall not exceed twenty-five years imprisonment (emphasis added).²⁷

The word “completely” seems to indicate that the statute’s drafters were concerned that this proposal would lead to excessive penalties. Anyone dealing with criminal law can attest to the fact that, even prior to this doubling of penalties, the Israeli Penal Law is already a draconian statute, in the number of offenses enumerated, in the breadth of their definitions, and in the severity of the penalties prescribed therein. This law is a bad inheritance carried over to the State of Israel from the time of the British Mandate, and still approximates the Criminal Code Ordinance, 1936,²⁸ which was a copy of the criminal code of Cyprus from about

26. *Id.* at 503.

27. 2002 Draft Bill, *supra* note 17, at 763.

28. Yoram Shachar, *Mekoroteyah Shel Pkudat HaHok HaPlili* [The Sources of the Criminal Code Ordinance], 7 IYUNEI MISHPAT 75 (1979).

one hundred years ago.²⁹ It is questionable whether this legislation was even considered suitable back then. The British did not even implement it in the British Isles, but only in the distant colonies. English common law did not place an emphasis on guilt, but rather on dangerousness.³⁰ Accordingly, English law from two centuries ago contained almost two hundred offenses carrying the death penalty, including minor offenses such as cutting down a tree in a park, associating with Gypsies, and stealing property worth more than one shilling.³¹ It was for good reason that this law was referred to as “the bloody code.”³² It seems that the British believed that greater deterrence would be achieved in this manner. Apart from the violation of the principles of guilt and retribution, even the hoped-for deterrence was not achieved. For instance, it was reported that pickpockets took advantage of the crowds gathering to watch the executions of other pickpockets in order to pick the pockets of the observers.³³ Later on – with very relative progress – many death penalties were converted into exile (in England) and into life imprisonment (in Israel),³⁴ and eventually, most life sentences were converted into twenty years imprisonment.³⁵ Thus, up to the present, there are far too many offenses in the Israeli Penal Law carrying a penalty of twenty years imprisonment.³⁶ The opinion that the maximum penalties prescribed by law are excessive was also expressed in the Report of the Commission Examining Guidelines for Judicial Discretion in Sentencing, which stated that:

[T]he maximum sentences were prescribed at different times, and there is no logical relation between them . . . [requiring] a

29. *Id.* at 75-76.

30. Boaz Sangero, *Al Onesh HaMavet Bekhlal Ve'Al Onesh HaMavet Begin Retsah BePeulat Teror Bifrat* [On Capital Punishment in General and on the Death Penalty for Murder Committed During a Terrorist Act in Particular], 2 ALEI MISHPAT 127, 129 (2002).

31. *Id.*

32. *Id.*

33. See, e.g., Encyclopedia Britannica Online, Crime and Punishment: The Death Penalty in English Law, <http://searcheb.com/eb/article-53479> (last visited Jan. 30, 2007); see also MARGERY FRY, *ARMS OF THE LAW* 76 (1951).

34. Penal Law Revision (Abolition of the Death Penalty for Murder), 5714-1954, 8 LSI 63 (1953-54) (Isr.).

35. 1977 Penal Law, *supra* note 5, at 20.

36. It should be noted that there are legal systems that reached the conclusion that extremely prolonged incarceration violates human dignity and, therefore, should not be imposed. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 21, 1977, 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187 (F.R.G.).

revision (which all commission members believe should be carried out) in the maximum penalties that are most severe.³⁷

All members of the commission were of the opinion that the maximum penalties set forth in Israeli law are overly severe – including the judges on the panel, even though, in the past, judges have traditionally opposed proposals to limit judicial discretion in sentencing. Alongside the proposal by the majority of commission members (who supported the innovation of “departure penalties”)³⁸, the minority members (who supported the establishment of minimum penalties) proposed as follows:

[I]n recent years we are witness to a recurrent increase in maximum penalties for offenses prescribed by the legislature. Maximum penalties are raised not because the previous maximum was inadequate to the requirements of the penal policy accepted by the legislature, but rather in order to alert the judicial authority and to try, not always successfully, to convince it to implement a stricter sentencing policy suited to the needs of society at a given period of its existence. A further outcome of this process is that the criminal code becomes overly draconian, without any substantive need . . . even more so given the application [of the law] by the courts . . . here is where it should be clarified that our recommendations for the establishment of minimum penalties for a significant portion of the offenses is entailed in a further recommendation to prescribe a new grading for maximum penalties, lower than the grading that exists³⁹

This instructive report is from 1997 – prior to the enactment of the Combating Criminal Organizations Law in 2003.⁴⁰ When penalties are already so steep, why should we want a law that doubles the maximum penalties? And even if such a statute was necessary for the purpose of a battle against real criminal organizations – why is it implemented against mere thieves?⁴¹

37. *HaVa'ada LeBhinat Darkey HaHavnaya Shel Shikul Ha Da'at HaShipui BeGzirat HaDin* [Report of the Commission Examining Guidelines for Judicial Discretion in Sentencing] 15 (1997) (Isr.) (commission headed by former Supreme Court Justice Eliezer Goldberg).

38. *Id.* at 16-17 (giving the judge a suggested starting penalty which would neither serve as a floor nor a ceiling).

39. *Id.* at 43-44.

40. See generally *id.*

41. See discussion *infra* Part VIII.

Moreover, the introduction to the explanatory notes of the draft bill, in which the reasoning for the legislation is presented – “[the difficulty in proving] the link between the heads and leaders of organizations of this type and the commission of crimes by others” – does not provide any support whatsoever for the doubling of penalties.⁴²

Finally, section 37 of the new statute adds “an offense under section 3 of the Combating Criminal Organizations Law” to the First Schedule of the Courts Law [Consolidated Version], 1984,⁴³ so that a single district court judge may sit in judgment regarding such offenses, notwithstanding their apparent severity, as expressed in their penalties – ten years imprisonment or more.⁴⁴ Perhaps this provision oddly reflects the feeling of its drafters that, despite the doubling of the penalty for an offense committed within the framework of a criminal organization, it is still not severe enough to justify the need to hear the case before a panel of three judges.⁴⁵

C. Expanding the circle of liable persons while creating new offenses and reviving the joint liability of co-conspirators

The new offenses are set forth in sections 2 and 4 of the Combating Criminal Organizations Law, as follows:

2. (a) A person who heads a criminal organization or a person who does one of the following acts in a manner that could promote the criminal activity of a criminal organization shall be liable to imprisonment for 10 years:

- (1) he directly or indirectly manages, organizes, directs or supervises activities in a criminal organization;
- (2) he directly or indirectly finances activities of a criminal organization or receives financing for the purpose of operating the organization or decides with respect to the distribution of monies in a criminal organization.

(b) A person providing a consulting service to a criminal

42. 2002 Draft Bill, *supra* note 17, at 762.

43. Courts Law (Consolidated Version), 5744-1984, 38 LSI 271, 281, 300 (1983-84) (Isr.); Combating Criminal Organizations Law, *supra* note 1, at 507.

44. According to section 37(a)(1) of the Israeli Courts Law, cases in the district court are heard before a panel of *three* judges when a grave offense with a penalty of ten years imprisonment or more is involved, unless the offense is mentioned at the First Schedule of the law. Courts Law (Consolidated Version), 38 LSI 271, 281.

45. Of course, a different explanation is offered in the explanatory notes of the draft law. See 2002 Draft Bill, *supra* note 17, at 763.

organization with the object of promoting the criminal activities of the criminal organization shall be liable to imprisonment for ten years.

(c) Where an offense as stated in subsections (a) and (b) has been committed with respect to a criminal organization whose activities also include an offense for which the penalty prescribed exceeds imprisonment for 20 years, the person committing such an offense shall be liable to imprisonment for 20 years.

...

4. A public servant who abuses his office or powers in a manner that could promote the criminal activity of a criminal organization shall be liable to imprisonment for ten years.⁴⁶

The need for these new offenses was explained in the draft bill as follows:

Section 2 – it is proposed to establish that holding significant positions in a criminal organization shall, in and of itself, constitute a criminal offense carrying a prison term of ten or twenty years, in accordance with the severity of the organization's activity; this provision is designed to cope with the difficulty in proving the link between those holding positions in criminal organizations and the offenses actually committed, and it states that it is enough to head, manage, finance the organization, and so forth, in order for this to be considered an offense.

...

Section 4 – one of the gravest dangers of organized crime is the corruption of the public system; therefore, it is proposed that an offense be established for the use by a public servant of his office or powers in order to promote the activity of a criminal organization.⁴⁷

Some comments regarding the new offenses: first, whereas it is possible to accept the offense for actually heading a criminal organization, the offenses for holding other positions in the organization are far too broad, both from the perspective of their aforementioned definitions and from the perspective of the very broad definition of a criminal organization on which they rely, which will be discussed below.

46. Combating Criminal Organizations Law, *supra* note 1, at 502-03.

47. 2002 Draft Bill, *supra* note 17, at 763, 765.

Second, the new offenses are even broader than the joint liability of co-conspirators, which was cancelled by the legislature within the context of the 1994 Amendment to the Penal Law.⁴⁸ Proof of the existence of a conspiracy is not even required.⁴⁹ Given the broad scope of the definition of a criminal organization, the practical outcome is to frustrate the effect of section 499(b) of the Penal Law, to revive the joint liability of co-conspirators while circumventing the requirements of complicity and, as stated, to even expand the scope of the joint liability of co-conspirators.

Third, the penalties for the new offenses are excessive – ten, and even twenty, years of imprisonment – without any need to prove the commission of an existing offense. It is enough to just hold a position – and not necessarily a senior position – in the organization. However, whereas the explanation given for enacting the new statute was the difficulty in proving a link between the heads of an organization and the offenses committed by others,⁵⁰ the penalties prescribed therein for cases where no such link has been proven are even more severe than those that would have been expected had such a link been proven.

Fourth, as to the new offense regarding a public servant, not only is the definition of a criminal organization overly broad, but the definition of a public servant is also too broad – “including an employee of a body corporate that provides a service to the public.”⁵¹

Fifth, if we at least had an adequate definition for a criminal organization, then it might have been possible to somewhat limit the definitions of the new offenses and prescribe penalties that are more proportional, and more acceptable. However, as we shall see below, the all-embracing definition of a criminal organization makes the new offenses unacceptable.

48. 1994 Amendment, *supra* note 2, at 353-54.

49. Yifat Raveh, *HaAverot HaPlilot BeHok Ma'avak Belrguney Pshia* [*The Criminal Offenses in the Combating Criminal Organizations Law*], 76 HASANEGOR 5, 5-6 (2003) (Ms. Raveh, an attorney from the Ministry of Justice, contributed to the formulation of the draft bill.).

50. 2002 Draft Bill, *supra* note 17, at 762.

51. 1977 Penal Law, *supra* note 5, at 79 (as stated in section 290(b) of the Penal Law, which is referred to in section 1 of the new statute).

D. Forfeiture of property while reversing the burden of production

No fewer than twenty-nine of the thirty-eight provisions of the new statute are devoted to a mechanism for the forfeiture of property.⁵² Most of the discussion in hearings before the Knesset Law Committee concentrated on this subject.⁵³ It is true that this sanction is pecuniary, and does not entail incarceration, but there is no significant limit to the indirect fine that may be imposed in this manner – even without a conviction. A person who has rented out an apartment, subsequently used by a “criminal organization,” is liable to discover that the apartment has been forfeited and become the property of the state; and when he claims that he did not agree and did not even know of such use, he will find that he carries the burden to prove this.

However, although the members of the committee were not significantly deterred by the massive violation of freedom facilitated by the broad definitions of a “criminal organization,” the new offenses, and the doubling of penalties, they did see fit to soften the blow of the forfeiture of property sanction, somewhat.⁵⁴

V. THE CENTER OF GRAVITY OF THE NEW STATUTE – THE DEFINITION OF A “CRIMINAL ORGANIZATION” – A COMPARATIVE PERSPECTIVE

A. General

As already mentioned, when characterizing organized crime in the explanatory notes of the draft bill, its authors wrote of an organization with a hierarchical structure, distance between

52. Combating Criminal Organizations Law, *supra* note 1, at 503-07.

53. See generally Va'adat HaHuka, Hok VeMishpat [Constitution, Law and Justice Committee], Knesset [Israeli Parliament], Minutes No. 531, Oct. 28, 2002, <http://www.knesset.gov.il/protocols/data/rtf/huka/2002-10-28-01.rtf> (sixty-five pages of minutes and nearly four hours of discussion); Minutes No. 526, Oct. 21, 2002, <http://www.knesset.gov.il/protocols/data/rtf/huka/2002-10-21-01.rtf> (thirty-seven pages of minutes and over two hours of discussion, almost all of it dealing with the forfeiture of property). The fact that no fewer than three representatives of the banks were invited to the committee's hearings attests to the considerable weight given to the forfeiture of property in these hearings.

54. Perhaps this was because of the powerful banking lobby present at the committee's sessions that reiterated its fears regarding the future of the banks as property holders. For a comprehensive discussion of the forfeiture of property in American law, see generally James M. Rosenthal, *Should Courts Impose RICO's Pretrial Restraint Measures on Substitute Assets?*, 93 MICH. L. REV. 1139 (1995).

“commanders” and “soldiers”, a mechanism for discipline and harsh sanctions for its breach, and the resulting evidentiary difficulties.⁵⁵ They also wrote about infiltration into the corridors of power, violence, and corruption.⁵⁶

As we shall see in the next section, which deals with the criminological research, these are all typical attributes of organized crime. Based on these frightening characteristics, the statute’s proponents demanded of the legislature, and received, very severe tools of law enforcement, which we have examined in the previous section.

The problem is that not a single one of these major attributes of organized crime found its way into the definition of a criminal organization established in the new statute. In comparison to many laws from other countries,⁵⁷ the Israeli definition is the broadest to be found:

“[C]riminal organization” means an incorporated or unincorporated body of persons acting in an organized, systematic and continuous format for the commission of offenses which, under the laws of Israel, fall within the category of a felony or the offenses enumerated within the First Schedule, except offenses falling within the category of a felony enumerated within the Second Schedule; for this purpose, it is irrelevant –

- (1) whether or not the members of the organization know the identity of the other members;
- (2) whether the composition of the members of the group is fixed or changing;
- (3) whether the aforesaid offenses . . . are committed or intended to be committed in Israel or abroad . . . ;
- (4) whether the organization also commits lawful acts and whether it also acts for lawful purposes.⁵⁸

In effect, the definition encompasses nearly all forms of joint crime, whether it entails complicity in a felony – while circumventing the requirements for imposing criminal liability on accomplices, as prescribed in the general part of the Penal Law⁵⁹ – or whether it only entails the formation of a conspiracy. Most offenses are not committed by only one person, but rather, in

55. 2002 Draft Bill, *supra* note 17, at 762.

56. *See generally* 2002 Draft Bill, *supra* note 17.

57. *See discussion infra* Part V.B.

58. Combating Criminal Organizations Law, *supra* note 1, at Section 1 of the statute.

59. 1994 Amendment, *supra* note 2, at 354.

unison, by two or more persons⁶⁰ and many offenders are habitual criminals. Therefore, a very significant number of crimes actually committed is liable to fall within the purview of this drastic statute, which is designed to deal with the special phenomenon of organized crime.

How did this come about? Why has Israeli law taken matters even further than Italy, where the dimensions of the Mafia phenomenon – and its inherent violence and corruption – have reached epidemic proportions? There, the situation included the murder of judges and politicians who fought against the Mafia and, thus, ultimately required the enactment of special legislation.⁶¹

After reading hundreds of pages of minutes from the hearings of the Knesset Law Committee, as well as numerous statutes from other countries,⁶² surprisingly, it seems that narrower definitions of a criminal organization were actually brought to the attention of the drafters of the statute and rejected.

B. Narrower definitions of a “criminal organization” – comparative law and its rejection in Israel

Before the discussion of possible narrower definitions of a criminal organization, which may be observed through a comparative study of other legal systems, it should be noted that the broad Israeli definition was not established because of a lack of familiarity with alternative definitions. The Ministry of Justice conducted an extensive study in which it examined these narrower definitions.⁶³ The main flaw in the preparatory legislative work is that each and every one of these narrower alternatives was essentially rejected because it was not considered to be ideal – without giving proper attention to the overall picture. The rejection of these narrower definitions in their entirety has resulted in a definition so broad that, in effect, it no longer characterizes a criminal organization. Following is a survey of the proposals to restrict the definition of a criminal organization:

60. SHLOMO GIORA SHOHAM ET AL., *KRIMINOLOGIA* [CRIMINOLOGY] 528 (2001).

61. Raveh, *supra* note 49, at 10. Perhaps the Israeli definition is a result of having learned the wrong lessons from extreme and exceptional cases.

62. See, e.g., [StGB] [Penal Act] 2004 § 278a (Austria); Code pénal suisse [Cp] [Swiss Penal Code], Mar. 19, 1994, Recueil systématique du droit fédéral [RS] 311, art. 260ter (Switz.) [hereinafter Swiss Code], available at <http://www.admin.ch/ch/f/rs/3/311.0.fr.pdf>.

63. Raveh, *supra* note 49, at 6.

1. For the purpose of financial or material benefit

The United Nations Palermo Treaty of 2000 refers to an “organized criminal group” whose aim is to commit serious crimes for the purpose of obtaining financial or material benefit.⁶⁴ A similarly narrow definition may be found in the penal law of New Zealand.⁶⁵

In the explanatory notes of the Israeli draft bill, the rejection of this narrower definition was explained as follows:

[The definition] was adapted to the needs of the State of Israel; thus, in some models, an emphasis was placed on the financial objectives of the organization, whereas the proposed definition does not limit the objectives of the organization, so that it may also include other objectives, such as ideological objectives . . .⁶⁶

One of the authors of the draft bill has given a further explanation for rejecting this narrower definition:

For if this is an organization that commits serious crimes, there is no reason why it should not be considered a criminal organization, whether or not its objectives are financial.⁶⁷

However, as we shall see below, the new statute does not even require that this be “an organization that commits serious crimes.”

64. See United Nations Convention Against Transnational Organized Crime, Dec. 12, 2000, S. TREATY DOC. NO. 108-16, 40 I.L.M. 335 (2001) [hereinafter Crime Convention], available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf. Article 2 defines an “organized criminal group” in a manner whereby, among other things, the following objective is required: “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.” The word “transnational” should be stressed, because, in relying on this convention, the drafters of the Israeli statute apparently forgot that it deals with international organized crime – as can be seen from the statute itself. See generally Combating Criminal Organizations Law, *supra* note 1.

65. New Zealand Law, *supra* note 4 (defining an “organized criminal enterprise” as “a continuing association of 3 or more persons having as its object or as one of its objects the acquisition of substantial income or assets by means of a continuing course of criminal conduct”).

66. 2002 Draft Bill, *supra* note 17, at 762.

67. Raveh, *supra* note 49, at 10; Va’adat HaHuka, Hok VeMishpat [Constitution, Law and Justice Committee], Knesset [Israeli Parliament], Minutes No. 521, Oct. 14, 2002, 17 [hereinafter Minutes No. 521], <http://www.knesset.gov.il/protocols/data/rtf/huka/2002-10-14.rtf>.

2. An organization the main objective of which is the commission of crimes

Such a restriction in the definition of a criminal organization may be found in statutes in Canada, Austria, and Germany.⁶⁸ The drafters of the Israeli statute rejected this narrower definition, as well, “because there may be organizations operating in a legal disguise, whereby it is difficult to define the criminal objective as the main objective.”⁶⁹ Furthermore, in the definition of a “criminal organization” in the new Israeli statute, it was expressly established that “it is irrelevant . . . whether the organization also commits lawful acts and whether it also acts for lawful purposes.”⁷⁰

3. Secrecy

Reference to a criminal organization in the Swiss Criminal Code is limited to an organization that keeps its structure and membership secret, the objective of which is to conduct violent criminal activity or to obtain benefit through criminal means.⁷¹ The element of secrecy was rejected in Israel, “since even if this element often characterizes criminal organizations, there is no reason that an organization not be classified as a criminal organization simply because it operates openly.”⁷²

4. The hierarchical structure of an organization

Israel rejected a narrower definition entailing the hierarchical nature of an organization, found in several legal systems,⁷³ with the following argument:

68. [StGB] [Penal Code] 2004 § 278a (Austria); German Code, *supra* note 4; Raveh, *supra* note 49, at 7.

69. Raveh, *supra* note 49, at 7; Minutes No. 521, *supra* note 67, at 23.

70. Combating Criminal Organizations Law, *supra* note 1.

71. Swiss Code, *supra* note 62 (“Any person who participates in an organization which keeps secret its structure and members and which pursues the objective of committing violent criminal acts or of obtaining revenue by criminal means, or any person who supports such an organization in its criminal activity, shall be punished by a maximum of five years imprisonment.”).

72. Raveh, *supra* note 49, at 7.

73. See, e.g., Menachem Amir, *Pesha Meurgan Ben-Leumi: Tehilata Shel Teoria VeShikuley Mediniut* [International Organized Crime: The Beginning of a Theory and Policy Considerations], in MEGAMOT BEKRIMINOLOGIA: TEORIA, MEDINIUT VEYISUM [TRENDS IN CRIMINOLOGY: THEORY, POLICY AND PRACTICE] 639, 645 (Meir Hovav et al. eds., 2003) [hereinafter *International Organized Crime*] (“Regardless of whether the organization is small or large, it always has a division of labor and a hierarchy . . .”).

Even a hierarchical structure, which characterizes many of the criminal organizations that the statute is meant to deal with, has not been established as part of the definition, since, if an organization possesses the remaining elements (an organized, systematic and continuous format for the commission of crime), its existence is dangerous even without proof of a defined hierarchical structure.⁷⁴

The rejection took place despite the fact that, in the draft bill, the hierarchical structure of a criminal organization served as one of the attributes of an organization justifying the enactment of the statute.⁷⁵

5. Infiltrating the corridors of power

A narrower definition of a criminal organization, entailing infiltration into the corridors of power, was also rejected in Israel “for reasons similar” to those for rejecting the requirement regarding the hierarchical structure of the organization.⁷⁶ This is despite the fact that, in the draft bill, “infiltrating government in order to ensure protection for continued activity” served as an attribute of criminal organizations justifying a new statute designed to fight them.⁷⁷

6. Use of measures of intimidation (a Mafia-type organization)

The Italian Criminal Code refers to a Mafia-type criminal organization as one in which members use measures of intimidation deriving from a bond of membership and a vow of silence to commit crimes and acquire gains and advantages.⁷⁸

This narrower definition was also presented before the members of the Knesset Law Committee, but was not included in the new statute.⁷⁹

74. Raveh, *supra* note 49, at 7.

75. See 2002 Draft Bill, *supra* note 17, at 762 (explanatory notes).

76. Raveh, *supra* note 49, at 7.

77. 2002 Draft Bill, *supra* note 17 (explanatory notes).

78. CODICE PENALE [C.P.] art. 416bis (Italy).

79. Minutes No. 521, *supra* note 67, at 24-25 (statement of Yifat Raveh, Esq., Ministry of Justice).

7. An attempt to corrupt or intimidate

As we shall see in the next section, which deals with the criminological research, the two key elements of organized crime are violence and corruption. In the statutory definition of a criminal organization, both of these elements may be required together;⁸⁰ a specific one of the two may be required on its own (as we have seen in the last two sections: infiltrating the corridors of power;⁸¹ use of measures of intimidation⁸²); or either one of them may be required, on its own, without specifying which one (thus, according to the definition of a criminal organization contained in the Austrian Criminal Code, it is required to show an attempt to corrupt or intimidate others⁸³). The new Israeli statute did not even contain this basic and minor restriction.⁸⁴

8. Serious crimes

In criminal statutes dealing with organized crime, it is accepted to restrict the definition of a criminal organization so that it refers to an organization the members of which commit serious crimes.⁸⁵ The attitude of the drafters of the Israeli statute towards this restriction will be discussed after dealing with a similar restriction accepted in American law.

9. Classic offenses of organized crime – the American RICO statute

In 1970, the Organized Crime Control Act was enacted in the United States.⁸⁶ Title IX of this statute, under the heading Racketeer Influenced and Corrupt Organizations (“RICO”), applies to both federal law and, in one variation or another, to the

80. See discussion *infra* Part V.B.9.

81. See discussion *supra* Part V.B.5.

82. See discussion *supra* Part V.B.6.

83. This is in addition to the requirement that there be an objective to commit certain serious crimes; and that there be an objective to obtain financial or political benefit or influence. [StGB] [Penal Code] 2004 § 278a (Austria).

84. See discussion *supra* Part V.A.

85. See, e.g., New Zealand Law, *supra* note 4 (defining an “organized criminal group” by referring to serious violent offenses with a penalty of ten years imprisonment or more— alongside certain less serious offenses in which the actors derive material benefit).

86. Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C.S. §§ 1961-1968 (2002)).

laws of many individual states.⁸⁷ From the heading of the title itself, we can already identify two of the key elements of organized crime: corruption and violence. In section 1961 of the law, “racketeering activity” is defined by enumerating thirty serious offenses characteristic of organized crime.⁸⁸

C. Returning to the definition of a “criminal organization” in the Israeli statute

The minutes of the hearings that took place in the Knesset Law Committee, as well as other sources, demonstrate that various narrower definitions of a criminal organization appearing in the laws of other countries were rejected one after another. As discussed above, the following requirements were rejected: the purpose of obtaining financial or material benefit, the primary objective of committing offenses, secrecy, the hierarchical structure of an organization, infiltrating the corridors of power, the use of measures of intimidation, and the attempt to corrupt or intimidate.

In regard to every proposed restriction, law enforcement and prosecutorial officials raised the argument that one case or another would thus escape the grasp of the statute. Following the rejection of all the restrictions designed to characterize a criminal organization, it would have been appropriate, at the very least, to take a restrictive approach regarding the class of offenses that the Combating Criminal Organizations Law would apply to. As

87. *Id.* (commentary explaining the effect of RICO on the Federal-State Relationship). See generally Tracy Doherty et al., *Racketeer Influenced and Corrupt Organizations*, 31 AM. CRIM. L. REV. 769 (1994) (providing detailed interpretations of the RICO act); 31A AM. JUR. 2D *Extortion, Blackmail, and Threats* Ch. VI (2002) (providing detailed interpretation of the RICO act). The legislation adopting the RICO provisions in the laws of different U.S. states is known as “Little RICO.” 31A AM. JUR. 2D *Extortion, Blackmail, and Threats* § 208 (2002). It should be noted that RICO legislation does not focus on the actual criminal activity, but rather combats criminal organizations by attacking their profits and financial activities. 31A AM. JUR. 2D *Extortion, Blackmail, and Threats* § 107 (2002).

88. HOWARD ABADINSKY, *ORGANIZED CRIME* 403 (Sabra Horne et al. eds., 6th ed. 2000) (providing a detailed critique of the RICO act). Abadinsky notes that the definition of a criminal organization in RICO legislation is too broad and, therefore, the very sharp teeth of this statute are also liable to be directed at persons and phenomena totally unrelated to organized crime. This is also because of the absence of the fundamental elements of corruption and violence. See *id.* This critique is correct especially with respect to the definition of a criminal organization in the new Israeli statute since, as discussed *infra*, the legislative process in Israel rejected even the minimal restriction in the definition of a criminal organization established in the American RICO statute.

previously noted, this could be done in two ways: first, by restricting it to serious crimes, such as offenses with a penalty of ten years imprisonment or more (New Zealand);⁸⁹ and, second, by setting forth the specific offenses that the statute would apply to (RICO).

As stated, maximum penalties prescribed in Israeli criminal law are already excessive – following the spirit of legislation from the period of the British Mandate.⁹⁰ Accordingly, stiff penalties – too often, twenty years imprisonment – are prescribed even for relatively minor offenses.⁹¹ On this background, it could have been expected that the level of seriousness of the offenses that the Combating Criminal Organizations Law relates to would be high – offenses carrying at least ten years imprisonment, as is accepted in some other legal systems.⁹² However, the definition of a criminal organization in the new statute extends to all offenses within the category of a felony – namely, offenses carrying only a penalty of over three years imprisonment.⁹³

A person reading the Israeli Penal Law will see that this definition covers hundreds of felony offenses, in addition to the numerous felony offenses dispersed throughout other statutes.⁹⁴ The attempt by the chairperson of the Knesset Law Committee to raise the lower limit to a more significant level – of five years imprisonment – met the firm opposition of law enforcement officials attending the hearings, and was shelved.⁹⁵

89. New Zealand Law, *supra* note 4 (defining a “specified offence” as “[a]n offence punishable by a period of imprisonment for a term of 10 years or more”).

90. See generally LESLIE SEBBA ET AL., CRIMINAL JUSTICE SYSTEMS IN EUROPE AND NORTH AMERICA (2003), available at <http://www.heuni.fi/uploads/j6hs3o3ru64zn5.pdf>.

91. *Id.* at 61.

92. See, e.g., New Zealand Law, *supra* note 4, §§ 98A, 312A (§ 98A(2) states “a group is an organized criminal group if it is a group of 3 or more people who have their objective or one of their objectives . . . the commission of serious violent offenses (within the meaning of section 312A(1)) that are punishable by imprisonment for a term of 10 years or more” and § 312A(1) defines “specified offence” as “[a]n offence punishable by a period of imprisonment for a term of 10 years or more”).

93. See 1977 Penal Law, *supra* note 5, § 24(1).

94. It is puzzling why nearly every law enacted in Israel – including laws of a wholly civic nature – usually contains criminal provisions under the heading “penalties.” The notion that all aspects of life in a society must be regulated through the severe tools (including incarceration) of the criminal law is very mistaken, and contrary to the principle whereby the criminal law should only be used as a last resort.

95. Minutes No. 521, *supra* note 67, at 26 (statement of Michael Eitan, Chairperson, Constitution, Law and Justice Committee and the following dialogue).

Furthermore, the statute's drafters were not satisfied even with this definition. The statute's definition of a criminal organization does not make do with the hundreds of felony offenses, but also includes "offenses which, under the laws of Israel, fall within the category of a felony or the offenses enumerated within the First Schedule, except offenses falling within the category of a felony enumerated within the Second Schedule."⁹⁶ A reading of the statute's First Schedule shows that an additional thirty-eight offenses from the Penal Law – constituting a considerable portion of the misdemeanors contained therein – were added here, as well as numerous misdemeanors from other statutes.⁹⁷ Does this mean that only petty offenses, such as parking infractions, do not fall within the bounds of "organized crime"?

Prima facie, the definition creates a balanced impression, since – in addition to the First Schedule, which adds minor offenses that do not fall within the category of a felony – it also refers to the Second Schedule, intended to exclude minor offenses, which, although they do fall within the category of a felony, are not suited to a statute as drastic as the Combating Criminal Organizations Law. It does not take long, however, to read the Second Schedule, which is a "list" of only one offense: section 155 of the Penal Law ("continued rioting after an order to disperse").⁹⁸ All of the remaining felony offenses seem, to the legislature, to be very serious, demanding a struggle through the use of the most drastic measures.

When a proposal was raised during the hearings before the Knesset Law Committee to adopt the American RICO model and to enumerate the offenses that are characteristic of organized crime,⁹⁹ the deputy attorney general stated that this would require "a full volume with a list of offenses."¹⁰⁰ Given this assessment by the expert in the matter, the chairperson of the Committee immediately announced that this proposal, too, would be shelved.¹⁰¹

96. Combating Criminal Organizations Law, *supra* note 1, § 1.

97. Combating Criminal Organizations Law, *supra* note 1, at 13.

98. *Id.*

99. Minutes No. 521, *supra* note 67, at 28 (statement of Attorney Layla Margalit, The Association for Civil Rights in Israel).

100. *Id.* (statement of Attorney Yehudit Karp, Deputy Attorney General, Ministry of Justice).

101. *Id.* (statement of Michael Eitan, Chairperson, Constitution, Law and Justice Committee).

But why is a full volume of offenses necessary? First, a proper approach to criminal law dictates a limitation in the class of offenses to which the new statute applies. Second, it is unnecessary to repeat all of the definitions of the criminal offenses, and sufficient to refer to the numbers of the relevant provisions in the Penal Law (and, perhaps, in other statutes as well). Third, there is no convincing argument for the belief that the Israeli legislator is currently unable to achieve what the American legislator succeeded to accomplish over three decades ago. Fourth, even with this approach, the statute's proponents did not spare us a "laundry list" of offenses – for the First Schedule of the law, also extends its applicability to no fewer than thirty-eight misdemeanors from the Penal Law, as well as many additional misdemeanors from other statutes.¹⁰²

In similar fashion, despite all options to place the definition of a criminal organization within reasonable proportions, law enforcement and prosecutorial officials, as well as officials from the legislative department in the Ministry of Justice, argued before the Knesset Law Committee that a narrower definition would lead to a situation in which one case or another would fall outside of the purview of the statute. This seems to reflect a distorted approach to the criminal law. Ensuring that a given case falls within the scope of the definition requires some thought and a bit of intellectual effort, and does not justify an infinite expansion of the definition. Such thinking completely ignores the principle of legality (*nullum crimen, nulla poena sine lege*). Nearly all forms of joint crime fall within the broad definition in the new statute.¹⁰³ By not adequately defining a criminal organization – in a statute that relies completely on such a definition – the legislature failed to fulfill its role, giving absolute discretion to the police, the prosecution, and the courts, to decide whether or not to apply the new drastic statute in each case.

The question is not whether there is a need to fight actual criminal organizations, but rather, whether there was a need for any revision in existing criminal legislation; and, if there was such a need, whether excessive harm was caused to the balances that reflect – and should reflect – the criminal law.

102. See Combating Criminal Organizations Law, *supra* note 1, at 13.

103. See *id.*

In order to accurately assess the new statute, one needs to imagine the “veil of ignorance” conceived of by the philosopher John Rawls.¹⁰⁴ One should not assume that the world is divided into “good” and “bad,” or “them” versus “us.” Laws that unnecessarily restrict freedom should not be enacted. And statutes that grant law enforcement officials almost absolute discretion should not be enacted. The proper attitude towards government and governmental authorities is to be respectful but suspicious. Accordingly, the legislature must define offenses precisely, and prescribe proportional, not excessive, penalties. The border between the role of the legislator and the role of the judge must be the extent of the legislator’s capabilities: everything that may be generally established in advance is the responsibility of the latter.¹⁰⁵

Once again, the overall picture created by the new statute’s definition of a criminal organization should be emphasized. This Article is not intended to persuade the reader that a particular narrow definition of a criminal organization should be adopted. The next section, which deals with the criminological research, may convince some readers that a proper definition of a criminal organization should incorporate the fundamental elements of violence and corruption as a means for achieving the material purpose, together with an appropriate restriction as to the severity of the offenses that it refers to (such as ten years imprisonment). The main objective of this Article, however, is more modest: to persuade the reader that the all-embracing definition that does exist is unacceptable. It is not enough to argue – even convincingly – that one restriction or another in the definition is not ideal. At the end of the day, the statute’s drafters should have limited the definition in some meaningful way, which, unfortunately, they did not do.

At this point, a closer look at the criminological research on this subject will show how “organized crime” and a “criminal organization” might be defined and characterized.

104. JOHN RAWLS, *A THEORY OF JUSTICE* 12, 136-41 (1971).

105. Mordechai Kremnitzer, *Ikarey Mivne VeIrgun Shel HaAverot HaSpetsifiot* [Principles of Structure And System of The Specific Offenses] 106 (1980) (Doctoral Thesis, Hebrew University).

VI. "ORGANIZED CRIME" ACCORDING TO CRIMINOLOGICAL RESEARCH IN VARIOUS COUNTRIES

A. *General – the systematic use of violence and corruption for the purpose of obtaining financial or material benefit*

Legal research in the field of criminal law is lacking if it does not draw conclusions from criminological research.¹⁰⁶ This Article does not purport to represent a criminological study, but rather, its intention is to propose a legal perspective on this topic that is different from the perspective of those individuals and entities that were behind the enactment of the Combating Criminal Organizations Law. Therefore, even before diving into the sea of criminological research, the key insight on this subject that can be repeatedly discovered in the criminological research should first be pointed out. Notwithstanding the variety of opinions, theories, and descriptions regarding organized crime, it has two attributes running like a leitmotif throughout the criminological literature on the subject: violence and corruption.¹⁰⁷ The most characteristic *modus operandi* of a criminal organization is the systematic use of violence (including the threat of violence, intimidation, and extortion) and corruption (primarily, the bribery of public servants), as well as infiltration into the corridors of power, in order to achieve its objectives. The main objective of a criminal organization is financial or material benefit.¹⁰⁸ Secondary goals (designed to achieve the main objective) are the accumulation of influence and power, and the establishment of a monopoly of control over specific geographic regions and spheres of operation (such as narcotics or gambling).

As seen in the previous section, these major attributes of a criminal organization did not find any expression whatsoever in the definition contained in the Israeli statute. Other attributes, as

106. See, e.g., ABADINSKY, *supra* note 88; M.D. LYMAN & G.W. POTTER, ORGANIZED CRIME 426-27 (1997); BEYOND THE MAFIA – ORGANIZED CRIME IN THE AMERICAS (S. Mahan & K. O'Neil eds., 1998) [hereinafter BEYOND THE MAFIA]; THE CRIME ESTABLISHMENT: ORGANIZED CRIME AND AMERICAN SOCIETY (John E. Conklin ed., 1973); ORGANIZED CRIME: UNCERTAINTIES AND DILEMMAS (S. Einstein & M. Amir eds., 1999); A.A. BLOCK, SPACE, TIME AND ORGANIZED CRIME (2d ed. 1994); see also sources cited *infra* Part VI.A.

107. See, e.g., LYMAN & POTTER, *supra* note 106, at 8.

108. See THE CRIME ESTABLISHMENT: ORGANIZED CRIME AND AMERICAN SOCIETY, *supra* note 106, at 5.

well, which will be discussed below, did not leave any mark on the new statute's broad definition. A review of the criminological research follows.

B. The criminological research

A study of the criminological research shows that the overwhelming majority of researchers point out the difficulty of precisely defining organized crime (and a "criminal organization"), but eventually accept Abadinsky's definition of eight attributes, which is the most widely cited in this field. According to Abadinsky, "organized crime": (1) is non ideological; (2) is hierarchical; (3) has a limited or exclusive membership; (4) perpetuates itself; (5) exhibits a willingness to use illegal violence and bribery; (6) demonstrates specialization / division of labor; (7) is monopolistic; (8) is governed by explicit rules and regulations."¹⁰⁹

Regarding the above list of attributes, the following should be noted:¹¹⁰

(1) A criminal organization is non-ideological, given that its objectives are to obtain money, power and influence. Political involvement is only a means for achieving its material goals. (2) A criminal organization has a hierarchical power structure, with at least three permanent ranks, each of which has authority over the level below it. Those holding given positions may be replaced over time, but the structure remains intact. (3) A criminal organization has limited membership. This exclusivity may be based on ethnic origin, criminal record or other criteria. There is a period of apprenticeship during which a candidate must demonstrate a willingness to commit criminal acts, obey the rules of the organization, follow orders and maintain secrecy. (4) A criminal organization constitutes an ongoing criminal conspiracy designed to persist through time, namely, beyond the lifetimes of its current members. (5) In a criminal organization, violence is a means that is used routinely. When necessary, the criminal organization resorts to bribery in order to protect its operations or its members. The use of violence and corruption is not subject to ethical considerations but rather to practical limitations. (6) In a criminal organization there exist certain functional positions filled by

109. ABADINSKY, *supra* note 88, at 1; *see also* BEYOND THE MAFIA, *supra* note 106, at xi; LYMAN & POTTER, *supra* note 106, at 7.

110. *See* ABADINSKY, *supra* note 88, at 1.

qualified members with special training. Thus, for instance, there is an enforcer, who is in charge of the rational use of violence (including murder) for the purpose of achieving the organization's objectives. In sophisticated organizations there exist additional positions for overseeing areas such as bribery (a "fixer"), money laundering and intelligence. (7) A criminal organization eschews competition and strives to achieve a monopoly – hegemony over geographical regions and spheres of business. A monopoly facilitates increased profits. A monopoly is achieved and maintained through violence or the threat of violence and through corrupt relationships with law enforcement officials. The aspiration for a monopoly is not always fulfilled, but it always exists. (8) The members of a criminal organization take upon themselves certain laws and rules and abide by them.

As pointed out by many researchers, most, if not all, of the attributes enumerated by Abadinsky exist in criminal organizations.¹¹¹

In the past, a common error was the exclusive identification of organized crime with the Italian-American Mafia crime family model.¹¹² In 1969, Cressey's famous book was the premier source of this limited view of organized crime.¹¹³ Based on American police data, Cressey's study had a great influence for a period of nearly twenty years, that is, until it came under increasing criticism.¹¹⁴ Moreover, the focus on models of organized crime among Irish, Jewish, and Chinese immigrants in the United States is deceptive. Indeed, organized crime (and crime, in general) is explained, in part, by immigration and the attempts of immigrants to integrate themselves into the middle class of society;¹¹⁵ however, there are many other explanations, which effectively merge together with

111. See, e.g., LYMAN & POTTER, *supra* note 106, at 1-9; ABADINSKY, *supra* note 88, at 3-4.

112. See LYMAN & POTTER, *supra* note 106, at 4.

113. See *id.* at 4 (providing a description and critique of Cressey's research); see also DONALD R. CRESSEY, *THEFT OF THE NATION: THE STRUCTURE AND OPERATIONS OF ORGANIZED CRIME IN AMERICA* (1969).

114. See LYMAN & POTTER, *supra* note 106, at 4.

115. See, e.g., H. Abadinsky, *The Future of Traditional Organized Crime in the United States*, in *ORGANIZED CRIME: UNCERTAINTIES AND DILEMMAS*, *supra* note 106, at 187 (suggesting that, whereas, in the past, immigration was the cause for joining an organized crime group, currently, it is "romantization of the mob" and nostalgia, along with an admiration for the image of the "wiseguy").

general criminological theories on the causes of crime.¹¹⁶ In fact, it would appear that a significant portion of the analysis of organized crime, in the past and present, is tainted by racism and a fear of immigrants.¹¹⁷ The fear of immigrants has also led to conspiracy theories regarding a syndicate that supposedly coordinates all organized crime in the United States; a theory that has never been proven.¹¹⁸ Since organized crime is not limited to the Italian-American Mafia paradigm, it is possible that there are different models, including, but not limited to a bureaucratic/corporate model and a patrimonial/patron-client network model.¹¹⁹

A major factor appearing in various descriptions of criminal organizations is that of “protectors”¹²⁰ – public figures, businesspeople, judges, lawyers, financial consultants, etc. – who assist the criminal organization. In my opinion, these supporting actors – who some view as the main players, with the gangsters playing the supporting roles¹²¹ – are significant as an additional basis for establishing the aspect of corruption as a key element in the definition of a criminal organization.

116. See, e.g., LYMAN & POTTER, *supra* note 106, at 63-96 (surveys various theories found in every basic textbook on theories of criminology and the causes of crime, such as deterrence theory, psychological theories, conflict theory, social theories, etc.); ABADINSKY, *supra* note 88, at 32-48 (explaining organized crime).

117. See, e.g., BEYOND THE MAFIA, *supra* note 106, at x.

118. See THE CRIME ESTABLISHMENT: ORGANIZED CRIME AND AMERICAN SOCIETY, *supra* note 106, at 43-72. G. Hawkins draws a parallel between the “proof” that has been offered to establish a belief in the existence of organized crime on a national level in the United States (a centralized nationwide syndicate) and the “proof” for the belief in existence of God based on “the argument from design” used by the eighteenth- and nineteenth-century rationalist theologians. Hawkins shows that there is no acceptable criterion for ruling out the existence of organized crime (in this wider sense of a syndicate that dominates crime throughout the United States). Everything said by witnesses appearing before the congressional committee investigating organized crime was interpreted, tautologically, as proof of its existence: if they remained silent (and most of them did), it was said that their silence proved the existence of organized crime, whereas, if they did testify, and denied the existence of organized crime, it was said that this was a lie that proved its existence. Even Hawkins does not dispute the assumption that small organizations of criminals do exist and that there have been such organizations for hundreds of years. However, he does dispute the conspiracy theory expressed, for example, in statements by Attorney General Robert F. Kennedy before a congressional investigating committee in 1963, according to which there is (supposedly) a “private government” of organized crime.

119. See LYMAN & POTTER, *supra* note 106, at 39 (discussing these and other possible models); ABADINSKY, *supra* note 88, at 4.

120. See, e.g., LYMAN & POTTER, *supra* note 106, at 41.

121. See BEYOND THE MAFIA, *supra* note 106, at ix (providing an unconventional and fascinating analysis).

Returning to violence and corruption, as already stated, despite the differences between descriptions of organized crime offered by various researchers, there is a conspicuous consensus regarding the elements of violence and corruption as key methods for achieving the financial objective. Thus, for example, Conklin points to violence and corruption as the major difference between organized crime and other forms of organized criminality.¹²² The elements of violence and corruption are repeatedly and strongly emphasized in the book by Mahan & O'Neil,¹²³ which is also the case in other criminological studies.¹²⁴

In the end, the centrality of corruption emerges, unequivocally, in the appendix to Einstein & Amir's book, where the leading researchers on the subject of organized crime throughout the world were asked to indicate what, in their opinion, is "the most critical unresolved issue associated with contemporary organized crime."¹²⁵ Nearly all researchers pointed to corruption as *the most* critical issue (J. Albin, M. Amir, G.W. Potter) or as *one of the* critical issues (P. Williams, R. Kelly – who also cites the potential threat of RICO legislation to the civil rights of the accused).¹²⁶

C. Organized crime in Israel and its criminological study

1. The development of the research

An examination of the criminological research of organized crime in Israel passes directly through the writings of Professor Menachem Amir, who has studied the phenomenon for decades – even before law enforcement officials were aware of its existence.¹²⁷

122. See THE CRIME ESTABLISHMENT: ORGANIZED CRIME AND AMERICAN SOCIETY, *supra* note 106, at 1, 7, 16, 27, 37.

123. See BEYOND THE MAFIA, *supra* note 106, at 237, 239. See also *id.* at x (in the authors' opinion, the real menace of organized crime is its silent control of the political process).

124. See, e.g., LYMAN & POTTER, *supra* note 106, at 3, 8, 41.

125. ORGANIZED CRIME: UNCERTAINTIES AND DILEMMAS, *supra* note 106, app.

126. See ORGANIZED CRIME: UNCERTAINTIES AND DILEMMAS, *supra* note 106, at 465-72.

127. See, e.g., MENACHEM AMIR, *Organized Crime in Israel*, in ORGANIZED CRIME: UNCERTAINTIES AND DILEMMAS, *supra* note 106, at 231-48 [hereinafter AMIR, *Organized Crime in Israel*]; Menachem Amir, *Is There Organized Crime in Israel?*, 2 SHAREI MISHPAT 321 (2001) [hereinafter Amir, *Is There Organized Crime in Israel?*]; Menachem Amir, *Pesha Meurgan [Organized Crime]* [hereinafter Amir, *Pesha Meurgan*], 4 PLILIM 189 (1994); *International Organized Crime*, *supra* note 73, at 645, 659.

Amir divides the development of the study of organized crime in Israel into several phases: the “media era,” the “commission era,” the “scientific era,” and, finally, the “new era.”¹²⁸ In the first phase, the police denied the existence of organized crime in Israel, and it could only be learned about from investigative newspaper reporting of the 1970s.¹²⁹ Indeed, during this period, the Attorney General’s Report on Newspaper Reports on Organized Crime was published (“Shamgar Report”);¹³⁰ however, this report relied upon Cressey’s Italian-American paradigm as the only possible model and, therefore, reached the conclusion – erroneously, in Amir’s opinion – that, although “organized criminality” does indeed exist in Israel, in the absence of significant corruption on a national level, there is no “organized crime.”¹³¹

In 1976, the Israel Police established an internal commission to study “serious crime.”¹³² The commission recommended the creation of a special police unit charged with investigating organized criminality and organized crime called the Unit for the Investigation of Serious Crime.¹³³ In 1978, the Report of the Commission to Study Crime in Israel was published (“Shimron Report”).¹³⁴ Whereas the Shamgar Report ruled out the existence of organized crime in Israel – arguing that, beyond the local level, no cases of corruption had been discovered among police, politicians and public officials – the Shimron Report stated that corruption also existed on the national political level in the form of social relations and mutual assistance between prominent businessmen, political leaders, and senior military officers.¹³⁵ In reaching the conclusion that organized crime does exist in Israel, Amir, who served as adviser to the commission, proposed a definition of organized crime different from Cressey’s traditional definition. The absence of a syndicated form of organized crime was explained by the fact that the State of Israel is too small a

128. See AMIR, *Organized Crime in Israel*, *supra* note 127.

129. See, e.g., *id.* at 232-37.

130. See *id.* at 233 (citing ISR. MINISTRY OF JUSTICE, ATT’Y GEN. REP., NEWSPAPER REPS. ON ORGANIZED CRIME (1971) (also referred to as the “Shamgar Report”).

131. *Id.*

132. *Id.* at 234 (citing ISR. POLICE, INTERNAL REPT: SERIOUS CRIME IN ISR. (1976) (referencing a commission that was led by R. Buchner, Head of the Investigations Unit of the Tel Aviv Police) (also referred to as “The Buchner Commission”).

133. *Id.*

134. *Id.* at 235-36 (citing ISR. MINISTRY OF JUSTICE, REP. OF THE COMM’N TO STUDY CRIME IN ISR. (1978) (also referred to as the “Shimron Commission”).

135. AMIR, *Organized Crime in Israel*, *supra* note 127, at 235-36.

country to allow the development of such a large-scale criminal organization, as well as the fact that there is almost no corruption in the police department, the judicial system, and the administrative branches of government – both on the local and the national levels.¹³⁶

Amir views his 1986 study of organized crime among Georgian immigrants as the climax of the “scientific era”,¹³⁷ and he designates the immigration of Jews from the countries of the former Soviet Union at the end of the 1980s and the beginning of the 1990s as the “new era.”¹³⁸ While mapping the phenomenon he views as organized crime in present-day Israel, Amir discusses native Jewish organized crime, Arab-Israeli organized crime, organized crime in the Palestinian Authority, organized criminality and organized crime among Russian immigrants, and “high organized crime.”¹³⁹ At the end of the day, it would seem that the use of ethnic and racial labels to discuss organized crime is not particularly useful, but rather of an anecdotal nature, and that one must explore the major attributes of organized crime, such as the use of violence and corruption for the purpose of achieving material objectives, rather than the origins of its participants because they belong to nearly all bands of the ethnic and racial spectrum.¹⁴⁰ The head of the intelligence department of police states the organized crime of Russian immigrants poses a “strategic threat” to the State of Israel;¹⁴¹ this opinion proves Mahan & O’Neil’s belief that the current analyses of the phenomenon are tainted by racism and a fear of immigrants.¹⁴²

136. *Id.* at 236.

137. *Id.* at 237.

138. *Id.* at 239.

139. *Id.* at 239-245. The treatment of organized crime among Russian immigrants is especially emphasized in this article. It should be noted that the author’s conclusions regarding organized crime among immigrants from the former Soviet Union are based on the fact that he “was able to read some internal police reports on the problem of Russian criminality.” *Id.* at 240. Although, he is properly critical of the reliance on media/police reports when he describes the part of his study dealing with Georgian immigrants, stating that “for the first time the total or sole reliance on media reports, leaked by the police, was abandoned” *Id.* at 238.

140. Amir, *Is There Organized Crime in Israel?*, *supra* note 127, at 325. Amir himself criticizes Cressey’s study, which characterized organized crime in the US solely on the basis of the Italian-American Mafia crime family model.

141. *Id.* at 330.

142. See BEYOND THE MAFIA, *supra* note 106, at ix.

2. The definition of organized crime and its characteristics

In his writings, Amir proposes that a distinction be made between “professional organized criminality” and “organized crime”; the major difference being that only organized crime strives to achieve a monopoly.¹⁴³ The main flaw in the Combating Criminal Organizations Law’s definition of a criminal organization is that it encompasses all forms of organized criminality, even when they lack the special attributes of organized crime.

The definition of “organized crime” proposed by Amir is relatively broad:

Organized crime is a continuous organizational system of criminal and legitimate businesses, without any sociopolitical ideology, created and operated by groups of individuals, of various sizes, or by a network of groups cooperating, willingly or forcibly, that operate in the same field of business, or in the same region or proximate regions, and sometimes even in distant regions. These groups have limited membership . . . hierarchical power relations and norms of prestige and achievement (“honor”). The purpose of the organization is, first, to ensure constant and, if possible, immediate and high, but concealed, profits, and, second, to accumulate financial and “political” power in order to obtain, if possible, exclusive control over markets or their management through cartel arrangements . . .¹⁴⁴

As Amir explains, this “broad descriptive definition” is designed so that the researcher may cover the entire phenomenon, and it provides an advantage “in gathering information.”¹⁴⁵ In Amir’s words, “the official definition clouds the distinction between organized criminality and organized crime.”¹⁴⁶ Therefore, if one wishes to clarify the distinction – and insofar as it regards the Combating Criminal Organizations Law’s definition of a criminal organization, which drastic mechanisms of law enforcement are based on, we should undoubtedly strive to clarify the distinction and limit the definition to the bare minimum – one must go beyond the initial definition proposed by Amir, and move on to the important attributes that he lists as characteristic of the phenomenon. These include: extortion and protection; the

143. AMIR, *Organized Crime in Israel*, *supra* note 127, at 231.

144. Amir, *Is There Organized Crime in Israel?*, *supra* note 127, at 322-23.

145. Amir, *Pesha Meurgan*, *supra* note 127, at 197.

146. *Id.* at 204.

rational and systematic use of corruption and violence; the use of intimidation, extortion, and the threat or the actual use of strategic and tactical violence;¹⁴⁷ and the special relationship between organized crime and government, which is a relationship characterized by mutual dependence and corruption.¹⁴⁸

As Amir explains, “[O]rganized crime’s special solution is the systematic use of violence or the threat of violence. These are designed both to enforce discipline and obedience to the rules of the organization and to its leaders, as well as to deal with problems of government interference.”¹⁴⁹ Organized crime systematically uses corruption and other illegal methods of persuasion, whereby the role of violence and corruption are not only to protect the organization and its leaders, but to protect its members and businesses, as well as promote those businesses.¹⁵⁰ Thus, “in all definitions, violence and corruption applied rationally – planned and systematic – are considered to be recognized characteristics of organized crime.”¹⁵¹

The linguistic pairing, “violence and corruption,” appears repeatedly both in Amir’s writings as well as in other criminological studies of organized crime.¹⁵² However, notwithstanding all writing on the subject, and despite the unanimity regarding the necessity of including the attributes of violence and corruption in the definition of organized crime, the new statute’s definition of a criminal organization does not make any mention at all of violence and corruption. And, therefore, as discussed below, even thieves who operate in unison, without the use of violence and corruption (although professionally), are caught within the talons of the new statute, and the drastic measures specified therein are applied against them as well.

How, then, did such a broad definition of a criminal organization find its way into the Israeli statute?

147. *Id.* at 195-96.

148. *Id.* at 190.

149. *Id.* at 192.

150. *Id.* at 192.

151. *Id.* at 195; see also *International Organized Crime*, *supra* note 73, at 641, 643, 645, 649, 656, 681.

152. *E.g.*, Amir, *Pesha Meurgan*, *supra* note 127, at 195. See generally *International Organized Crime*, *supra* note 73.

VII. THE STRUGGLE OVER THE DEFINITION OF “ORGANIZED CRIME” – THE EASY “VICTORY” OF THOSE PRESENT OVER THOSE ABSENT

Amir writes:

The process of definition is, thus, of a competitive nature: who will succeed to impose their definition on the authorities. And, therefore, as with the definition of all crime, the definition of organized crime is also a political definition, since it entails a struggle between interest groups in order to impose their own definition. That is to say: in order to accuse individuals, organizations and their activities as criminal. Academics and politicians may also be found among the competing groups, but they mainly include professional groups, such as police intelligence officers or criminal prosecutors and, facing them, defense attorneys . . . eventually, the state adopts into law a theoretical definition that constitutes, for the most part, a compromise between the definitions and between the groups proposing them . . . such a compromise is unnecessary when one group or several groups are able to express the phenomenon in a legal definition and impose it on society.¹⁵³

The above quote appears in an article published in 1994 – nearly a decade prior to the enactment of the Combating Criminal Organizations Law in 2003. The process that took place in the Knesset Law Committee hearings on the draft bill may be compared to the process described by Amir. This comparison may be offered as a central explanation for the final result – the new statute, in general, and the excessively broad definition of a criminal organization, in particular.

First, it should be noted that the academics dealing with the criminal law were not present. They were not asked to provide opinions regarding the definitions in the statute and the drastic measures prescribed therein.¹⁵⁴

153. Amir, *Pesha Meurgan*, *supra* note 127, at 189-90.

154. See, e.g., Minutes No. 521, *supra* note 67. At the main hearing held on October 14, 2002 regarding the statute's definition of a “criminal organization,” in addition to the Knesset members of the committee, the following persons were invited and in attendance: three representatives from the Ministry of Justice; one representative from the State Attorney's Office; eight representatives from the Ministry of Public Security (i.e. the police); three bank representatives; and one representative from each of six other bodies: the Foreign Ministry, the Association for Civil Rights, the Money Laundering Prohibition Authority, the Bar Association, the Public Defender's Office and the Tel Aviv – Yafo Municipality. *Id.*

The demand to enact such a law came from the Israel Police, with the support of the State Attorney's Office.¹⁵⁵ If the police find it difficult to obtain sufficient evidence for a conviction, then they should make a greater effort to do so. Investigative efforts should not focus on extracting confessions from suspects, but rather on a sophisticated search for objective and concrete evidence, extrinsic to the suspect. As the late Justice Haim Cohn wrote, "[I]n effect, practically the entire police investigation following the apprehension of a suspect is directed towards extracting a confession."¹⁵⁶ And once the confession is obtained – the investigation ceases.¹⁵⁷ The police tend – in general – to be quite lazy, and not particularly sophisticated; they repeatedly take the easy path of trying to extract confessions from the persons under investigation.¹⁵⁸

The explanation that I offer for the methods of police investigators is complicated and, briefly, as follows:¹⁵⁹ *first*, the police operate according to an erroneous conception of the guilt of the suspect (in direct contrast to the presumption of innocence¹⁶⁰). *Second*, the confession is still considered especially strong, almost conclusive, evidence (often referred to as "the queen of evidence", although it should perhaps be termed "the empress of false convictions"). *Third*, a key measure of the success of the police (and, unfortunately, also of the success of the prosecution) and a major criterion for the promotion of investigators (and, perhaps, also for the promotion of prosecutors) is still the high percentage of convictions. *Fourth*, extracting a confession is easy and inexpensive in comparison to other investigative methods. *Fifth*, judges tend not to exclude confessions, even when they are obtained by illegal means, thus sending investigators a message that compelling suspects to provide confessions is an acceptable method, and perhaps even a "necessary evil". *Sixth*, judges allow the police to routinely use arrest – in degrading conditions – or the threat of arrest, as a means for applying pressure on persons under investigation so that they confess to crimes that they are suspected

155. *See generally id.*

156. HAIM H. COHN, HAMISHPAT [THE LAW] 475 (1991).

157. *See id.* at 475-76.

158. *Id.*

159. *See* Boaz Sangero, *Miranda Is Not Enough: A New Justification For Demanding "Strong Corroboration" to a Confession*, 29 CARDOZO L. REV. (forthcoming 2007) (presenting a detailed explanation with references).

160. *See generally* R. Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257 (2002).

of having committed (“to cooperate” with the investigators against themselves, as if they were an instrument for the supply of self-incriminating evidence).

And, when the central investigative methods of the Israel Police (arrest-confession-conviction) do not achieve their objectives,¹⁶¹ the police run to the legislature, complain about existing legislation, which, supposedly does not give them adequate tools, and they request – and receive – a new drastic statute for the battle against criminal organizations.

How can the police seriously make such a claim in view of the draconian Penal Law, from the period of the British Mandate, through which a person may be criminally charged for almost any act or omission?¹⁶² And given a reality of convictions in over 90 percent of cases? The revision called for in Israeli criminal legislation was actually in the opposite direction of the new statute: a substantial reduction in the number of offenses, a considerable narrowing of the definitions of the offenses, and a significant reduction in the penalties prescribed therein.¹⁶³

As already stated, a central argument raised by the police and the prosecution in support of the new statute is the difficulty in proving that an offense was committed. However, the rules of law that create evidentiary burdens are not intended to hinder police investigators and prosecutors. They have very important objectives, such as: the desire to minimize the possibility that an innocent person will be convicted, the desire not to restrict the freedom of the individual – of us all – to an unnecessary degree, and the desire to avoid a situation in which a person is punished for thoughts alone, without any harmful behavior. There is no greater injustice than a wrongful conviction. It causes significant harm to society as a whole. As discussed above, the laws of evidence were not revised, but rather, new offenses were added – circumventing the difficulty in proving existing offenses – and the already excessive penalties for existing offenses were doubled.

161. See AMIR, *Organized Crime in Israel*, *supra* note 127, at 243 (finding that Israeli police claim that criminals from among the populace of Russian immigrants are not broken and do not confess during investigations).

162. E.g. 1977 Penal Law, *supra* note 5, § 378 (the very broad definition of the offense of “assault”); 1977 Penal Law, *supra* note 5, § 198 (“A person who does any act likely to cause a public mischief is liable to imprisonment for three years.”).

163. *HaVa'ada LeBhinat Darkey HaHavnaya Shel Shikul Ha Da'at HaShiputi BeGzirat HaDin* [Report of the Commission Examining Guidelines for Judicial Discretion in Sentencing], *supra* note 37, at 15-16, 43-44; Kremnitzer, *supra* note 105.

Returning to Amir's aforementioned description of the legislative process, if it were applied to the process that took place during the hearings held before the Knesset Law Committee, it seems that, in this instance, there was no real "competition," no real "struggle," and no "compromise" between various definitions, since "such a compromise is unnecessary when one group or several groups¹⁶⁴ are able to express the phenomenon in a legal definition and to impose it on society."¹⁶⁵ And, indeed, at hearings in which a dozen police, prosecutorial and Ministry of Justice representatives participated, without even a single representative from academia, it is no wonder that those present were "victorious" over those absent.¹⁶⁶ It is also doubtful that – despite their good intentions – Knesset members, who are not experts in criminal law, were capable of withstanding the "threat" stated by the deputy attorney general, that the attempt to be more specific about the offenses entailed in the definition of a criminal organization was doomed to failure because this would require "a full volume."¹⁶⁷

When describing the legislative process, Amir also states that "the definition adopted by the government is, in effect, a compromise between ideologies, prejudices, social theories, human rights considerations and budgetary factors."¹⁶⁸ Given the incomplete delegation that participated in the hearings where the inadequate definition was formulated, no "compromise between ideologies" was achieved, but rather the crime control, law-and-order approach easily prevailed – perhaps even based on "prejudices."¹⁶⁹

In the end, it would appear that, in this instance, the "human rights considerations" in the aforesaid equation have disappeared altogether. Perhaps this is because of the conception dividing the world into "good" versus "evil" and "them" versus "us." Where is Rawls' "veil of ignorance"? It seems that all one has to do is

164. The police and the prosecution.

165. Amir, *Pesha Meurgan*, *supra* note 127, at 189-90.

166. See generally Minutes No. 521, *supra* note 67.

167. See *id.* (statements of Yehudit Karp, Deputy Attorney General, Ministry of Justice).

168. Amir, *Pesha Meurgan*, *supra* note 127, at 207.

169. Minutes No. 521, *supra* note 67, at 5 (statement of Yuri Stern, Member of the Knesset) (raising serious objections in regard to the attitude towards Russian immigration).

mention the magic words “organized crime” for any means to be perceived as legitimate.

VIII. THE ENTHUSIASTIC USE OF THE NEW STATUTE

The American experience demonstrates an overly enthusiastic use by law enforcement officials of legislation such as the previously mentioned RICO statutes, in a manner violating the rights of suspects and defendants.¹⁷⁰ In Abadinsky’s opinion, this is made possible because the definitions in the RICO legislation are overly broad, turning it into an instrument that tempts federal prosecutors into also using it against persons not linked to organized crime and for phenomena that do not entail any use of violence or corruption.¹⁷¹ This fear is multiplied in Israel, since – as discussed in section V above – the definition of a criminal organization in the Combating Criminal Organizations Law is significantly broader than that appearing in the American legislation.

About a decade prior to the enactment of the Israeli legislation, Amir wrote: “[I]t is the official definition that will determine how the government acts in formulating a legislative, prosecutorial and penal policy[, and] even in how it organizes the police and the investigations”;¹⁷² and he pointed out two problems discussed by criminologists in this context: first, excessive criminalization; second, excessive penalties and the use of measures that are overly drastic.¹⁷³

The Israeli statute is very young, and there is still not enough data available to assess all of its harm. Fears of excessive enthusiasm for the new statute by law enforcement officials, which is liable to lead to a situation in which it will dominate Israeli criminal law instead of being used especially for the most severe manifestations of organized crime, are reinforced in view of guidelines issued by prosecutorial and law enforcement officials

170. See ABADINSKY, *supra* note 88; LYMAN & POTTER, *supra* note 106, at 448; ORGANIZED CRIME: UNCERTAINTIES AND DILEMMAS, *supra* note 106, at 467 (Kelly’s assessment). Similarly, the very harsh legislation designed to fight terror, which was enacted following the terrorist attacks of September 11, 2001, has been used for the purpose of investigative measures in the criminal field (unrelated to terror), while trampling the rights of suspects. See, e.g., Michael Isikoff, *Show Me the Money*, NEWSWEEK, Dec. 1, 2003, at 36.

171. ABADINSKY, *supra* note 88.

172. Amir, *Pesha Meurgan*, *supra* note 127, at 207.

173. *Id.* at 210.

and – particularly – in view of the initial case law on the subject. In guidelines that have already been issued by the State Attorney's Office for "Handling Cases pursuant to the Combating Criminal Organizations Law," the general feeling is one of excessive enthusiasm for the potential use of the new statute. Thus, for example, these guidelines state as follows:

The definition of a criminal organization is based, therefore, on the unique character and structure of criminal organizations, whereas the underlying rationale is that a systematic and continuous infrastructure for the commission of offenses should be prevented in advance, and a situation should not be created in which law enforcement officials are only able to begin taking action against a criminal organization from the moment when it has committed offenses. It should be noted that the statute is not limited to organizations the goal of which is to obtain financial benefit.¹⁷⁴

The enthusiasm of the Israel Police for the new statute is apparent from statements made at a hearing held before the Knesset Law Committee about six months following the enactment of the statute. At this hearing, the head of the police intelligence department reported as follows:

The statute is "celebrating" a half year . . . and the Israel Police maintains that it has received one of the most important working tools . . . in recent years, as an instrument for the war on crime . . . an outstanding attack platform previously unavailable to us . . . we have assimilated this statute . . . also by the legal department, also by the investigations department, and also by the intelligence department. This law has been incorporated into the framework of police training . . . and we explain the uniqueness of the statute and the aggressiveness that it allows for the Israel Police.¹⁷⁵

Given the widespread focus of the Israel Police on attempts to extract confessions from suspects,¹⁷⁶ now, even less effort will be made to find significant objective evidence, extrinsic to the

174. HANĤAYOT PRAKLITUT HAMEDINA [GUIDELINES OF STATE ATTY'S OFF.], GUIDELINE NO. 14.16 – TIPUL LEFI ĤOK MA'AVAK BEĪRGUNEY PSHIA [HANDLING CASES PURSUANT TO THE COMBATING CRIMINAL ORGANIZATIONS LAW], (Dec. 10, 2003).

175. Minutes No. 113, *supra* note 18 (statement of Major General Ilan Franko, Head of Intelligence, Ministry of Public Security).

176. Sangero, *supra* note 159.

suspect, through the use of sophisticated, modern investigative methods.

The statute was enacted, and the police and prosecution seem to think that they have found a treasure – and the Supreme Court does not place any boundaries on the widespread application of the law. Thus, for example, in the *Pinto* case,¹⁷⁷ the Court approved the extremely drastic step of remand in custody until the end of proceedings for the offense of theft because it was committed within an organized context defined as a criminal organization. Serious crimes, such as murder, were not attributed to this criminal organization, but rather only theft from the containers in a port. The members of the group were not even accused of having bribed police officers or public servants. There was no violence and no corruption. Indeed, theft, too, is a criminal offense. However, the arrangements already established for this offense in the Penal Law are sufficient and there is no need to apply the extreme measures enacted in the new statute, which should be reserved for the purpose of dealing with the most serious and dangerous “Mafia” phenomena, such as murder and the like.

Since the statute is new, there are very few verdicts based on it. However, a worrisome trend is taking shape of a lowering of the evidentiary standard and of decisions for remand in custody until the end of proceedings that are rendered too easily whenever the prosecution expressly mentions the magic term “criminal organization.”¹⁷⁸

177. CrimA 2617/04 Pinchas Pinto v. Israel, [2004] IsrSC ¶ 6, available at http://www.nevo.co.il/Psika_word/elyon/0402617.doc (Justice Grunis).

178. See, e.g., MiscApp (Hi) 4357/03 Israel v. Kakun, [2003] IsrDC 106, available at http://www.nevo.co.il/Psika_word/mechozi/m034357.doc.

The new statute, indeed, does not apply to offenses that were committed prior to the date of its enactment, and there is nothing in the statute that refers to grounds for arrest when concerning organized crime. Nevertheless, it is impossible to ignore the enactment of the law . . . the balancing point has been altered between the nature of the evidence, the dangerousness of the accused persons and their right to freedom. When an application for remand in custody until the end of proceedings is heard for offenses related to organized crime, the individual circumstances and hardship caused by detention itself retreat in the face of the duty to protect the public from the dangerousness of the accused persons . . . in some cases, not involving organized crime, the evidentiary basis may be insufficient to hold accused persons in custody until the end of proceedings. When the events that are the subject of the indictment occur within the context of organized crime, the same evidentiary basis will be sufficient and will justify remand in custody until the end of proceedings . . . the weight of dangerousness prevails over deficiencies in the evidentiary material.

Detention is a tool that is used much too often in the State of Israel.¹⁷⁹ Attempts by the legislature to reduce the number of detentions and to give greater weight to the presumption of innocence – which finds expression in the Criminal Procedure (Powers of Enforcement – Detention) Law, 1996¹⁸⁰ – have been to no avail. Whereas, pursuant to this Law, detention is intended for exceptional cases, such as when there is a danger that legal proceedings will be hindered, in the Israeli reality people are arrested and detained in order to exert pressure on them to confess to the offenses attributed to them.¹⁸¹ It is concerning that, following the enactment of the Combating Criminal Organizations Law, new heights will be reached in the State of Israel, both in the number and in the length of detentions.

IX. EPILOGUE – DESIRABLE LAW AND THOUGHTS ON THE ROLE OF CRIMINAL LAW

This Article's first proposal is to repeal the Combating Criminal Organizations Law. As this Article has tried to show, this is a bad law; its harm is infinitely greater than its benefit, and, accordingly, it should be repealed altogether. This should be done even prior to the establishment of an alternative arrangement.

A second proposal is to expand the definition of a "perpetrator through another" in the general part of the Penal Law, so that it will also encompass organizational control. This will provide the optimal answer for the difficulty in proving the activities of the heads of criminal organizations, who – incidentally – even today, are not "discriminated against" by the criminal law, but are considered "solicitors" according to substantive law, and face full penalties – just like the main perpetrators of the offenses.¹⁸²

Id. at § 8.

179. This is reflected, among other things, in all annual reports by the police, in the state comptroller's report, in the report of the Public Defender's Office and in the report of the Association for Civil Rights. See, e.g., Israel Police Website, <http://www.police.gov.il> (last visited Mar. 8, 2007).

180. See generally *Hok Seder HaDin HaPili – Samhuyot Ahifa - Ma'atzarim* [Law of Criminal Procedure: Powers of Enforcement - Detention], 1996, SH 338.

181. See Sangero, *supra* note 159; Kitai, *supra* note 160, at 284-87 (regarding the connection between detention and obtaining confessions and convictions).

182. See 1977 Penal Law, *supra* note 5, § 29(c); discussion *supra* Section II.B.

Being both pessimistic and realistic as to the chances that the new statute will be repealed, this Article offers a third proposal – which is relevant to other legal systems as well: to significantly restrict the definition of a criminal organization, by adding the elements of a systematic use of violence and corruption for the purpose of obtaining benefits, and by limiting the application of the statute to a restricted list of offenses characteristic of organized crime; to reduce the scope of the new offenses in the new statute; and to substantially lower the penalties prescribed therein. In other words: to leave a “slender” statute (or, at least, not one that is “bloated”) referring to criminal organizations involved in serious crime – then, and only then, is there justification for an all out war against the junior members of the organization as well.

Finally, this Article proposes reconsidering the wisdom of the massive use of the criminal law to fight certain phenomena, when it is doubtful that its use is appropriate for such cases. There is extensive criminological literature indicating that at least some manifestations of organized crime, such as gambling and drug trafficking, derive from a strong need that exists in society.¹⁸³ Therefore, even when criminals are arrested and thrown into prison, other criminals immediately take their place and these phenomena continue to flourish. In many areas, organized crime would die out on its own if it did not have the cooperation of the public-at-large, which is (for the most part) law-abiding.¹⁸⁴ The criminal law is designed to guide behavior through the use of drastic measures of enforcement; primarily, the negation of freedom entailed in the penalty of imprisonment. There is no point to impose laws on the public that it cannot comply with. Therefore, in certain areas, such as gambling and the use of “soft” drugs, decriminalization (or legalization) should be seriously considered, instead of turning a large segment of the public into criminals or into persons cooperating with criminals. Even after almost one hundred years since the repeal of Prohibition in the United States, there are still areas where it is not just organized crime that

183. See, e.g., LYMAN & POTTER, *supra* note 106, at 216; THE CRIME ESTABLISHMENT: ORGANIZED CRIME AND AMERICAN SOCIETY, *supra* note 106, at 21-22.

184. BEYOND THE MAFIA, *supra* note 106, at 238.

engenders a need for the criminal law, but also the criminal law that engenders a need for organized crime.¹⁸⁵

185. See, e.g., LYMAN & POTTER, *supra* note 106, at 216, 448-49; THE CRIME ESTABLISHMENT: ORGANIZED CRIME AND AMERICAN SOCIETY, *supra* note 106, at 21-22; BEYOND THE MAFIA, *supra* note 106, at xiv, 237-39; Abraham Tennenbaum, *HaGisha HaAbulisiunistit: Halm Higiiah Ha'Et Levatel Et HaAnisha HaPliit?* [*Abolitionism: Is it Time to Cancel Criminal Punishment?*], 2 SHAREI MISHPAT 261 (2000); ORGANIZED CRIME: UNCERTAINTIES AND DILEMMAS, *supra* note 106, at 470-72 (position of Phil Williams); see also MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 280 (Alan Sheridan trans., Vintage Books 1979) (1975).