



The Dutch judicial approach to various types of co-offending among members of Outlaw Motorcycle Gangs

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Abstract

The Dutch criminal law system is based on individual liability, yet part of the crime and violence Outlaw Motorcycle Gang (OMCG) members commit is collective in nature. This study examines the criminal law approach towards collective criminal behavior of OMCG members. The study analyzes police files and court judgements of criminal law cases that were filed against members of Dutch OMCGs. Additionally, interviews were carried out with public prosecutors involved in these criminal cases. The results show that it is often difficult to legally address OMCGs as criminal organizations or weigh the mere symbolic contribution of fellow club members to crime, such as the use of the OMCGs' violent reputation. Furthermore, the results suggest that in order to circumvent legal difficulties in addressing group symbolism and OMCGs as collectives via criminal law, the Dutch Public Prosecution Office has recently opted for a stronger interplay between criminal and civil law, targeting both individual OMCG members and the structural aspects of OMCGs. Future research is needed to establish which (interplays between) legal instruments are most effective in responding to collective criminal behavior.

Keywords Outlaw Motorcycle Gangs · Co-offending · Group crime · Criminal law · Civil bans

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Introduction

Countries have been confronted with crime and violence committed by various types of criminal groups, varying from (juvenile) street gangs to hooligan firms, and from outlaw motorcycle gangs (OMCGs) to mafia-type organizations (Barker 2018; Bjørge 2019; Kazirytski 2017; Klein et al. 2006; Paoli 2003; Van Ham et al. 2020; Varese 2020). Countries use very different judicial approaches to membership and crimes committed by such groups. To target the Italian Mafia, for instance, Italy has introduced the ‘Mafia association’ law (Art. 416 *bis* Italian Criminal Code) which makes Mafia membership a crime in itself (Scotti 2002).¹ Conversely, in the Dutch criminal law system, individual accountability in (more or less) collective behavior is the guiding principle for criminal liability: not membership of a criminal group in itself, but a person’s individual contribution to a particular offense is punishable by law.

As did other countries such as Germany, Australia, and Denmark, the Netherlands experienced numerous violent public confrontations between members of rivalling OMCGs in recent years (Ayling and Broadhurst 2014; Geurtjens et al. 2018; Monterosso 2018; Jahnsen 2018). In 2016, for instance, at least 30 members of the Hells Angels MC and Mongols MC clashed in the lobby of a hotel in Rotterdam. The two rivalling OMCGs went at each other with knives and hammers, and over twenty shots were fired, causing unsuspecting hotel guests to dash for cover in the surrounding shrubbery (Vissers 2016). OMCG history is filled with public feuds between members of rivalling OMCGs, including a clash between the Hells Angels MC and Bandidos MC at a red-light district in Duisburg, and a fight between members of the Finks MC and Bandidos MC in a restaurant in Queensland. Following violent incidents and high number of casualties, escalating enmities between rivalling OMCGs in various Scandinavian countries during the ’90s have become known as ‘the great Nordic biker war’ (Ayling 2017; Bartels et al. 2021; Jahnsen 2018). It is not only the extreme nature of the violence, but also its massiveness that triggers public concern. More generally, prior research shows that many criminal cases involving a member of a Dutch OMCG refer to more than just ‘individual’ acts: of all criminal cases brought before a Dutch judge between 2012 and 2018 in which at least one OMCG member was a prime suspect, 65 percent of the cases included charges in which at least one fellow member was among the case’s prime suspects; 27 percent of all cases included charges in which the OMCG as organizational entity was directly involved in members’ criminal behavior (Van Deuren et al. 2020).

The Dutch criminal law system is based on individual liability. The impact of group membership on crime, however, may extend beyond the physical contribution of fellow group members. OMCG members, for instance, often appear to profit

¹ Although difficulties exist to determine when a person is a member of a Mafia-type organization, in the past, public prosecutors established membership of a Mafia-type organization by using address books of ‘certified’ Mafia members, prison receipts of money orders originating from Mafia-controlled areas, and expert witnesses in the form of collaborators from criminal organizations to establish a person’s Mafia membership (Scotti 2002: 145).

indirectly from OMCG membership by the use of group symbolism that refers to the violent reputation of the OMCG as a collective and the unconditional support of fellow club members (Van Deuren et al. 2020; Wolf 1991). How does a criminal justice system in which individual liability is the guiding principle deal with this indirect contribution of OMCG membership to crime and violence by OMCG members? To explore the Dutch judicial responses to OMCG membership and group crime (i.e., co-offending² among OMCG members), this study uses police files and court judgments of cases that were filed against members of Dutch OMCGs between 2012 and 2018, while distinguishing between a number of Dutch legal qualifications dealing with different types of co-offending: accessoryship, co-principalship, the commission of public violence, and participation in a criminal organization. In addition, by conducting interviews with public prosecutors involved in the criminal law cases against OMCG members, we aim to assess the obstacles and motivations for pursuing one legal classification over others.

The article is organized as follows: in the first part, we review three scenarios that describe the relationship between OMCG membership and the criminal behavior of individual members (i.e. the ‘bad apple’ scenario, ‘club within a club’ scenario, and ‘club as criminal organization’ scenario) and elaborate upon the judicial responses to co-offending available within the context of the Dutch judicial system. We then present the data and methods used for the current study. Subsequently, the empirical results from the file analyses and the interviews with public prosecutors are presented. We finish with our conclusions from the empirical analyses and discuss their implications for future research.

Involvement of OMCG membership in members’ individual criminal behavior

The mounting evidence of OMCG members’ disproportionate involvement in crime and violence (Blokland et al. 2019; Van Deuren et al. 2021b) and even the potential enhancing influence of OMCG membership on members’ offending rates (Blokland et al. 2017; Klement 2016; Van Deuren et al. 2021a), do not yet justify the conclusion that OMCGs always have a direct role in their members’ criminal behavior.

Three scenarios have been proposed that may link members’ crime to the OMCG as an organizational entity: the ‘bad apple’ scenario, the ‘club within a club’ scenario, and the ‘club as criminal organization’ scenario (Von Lampe and Blokland 2020). The ‘bad apple’ scenario represents criminal behavior committed by an OMCG member either alone, or with others, on their own behalf. The OMCG as an organization is neither directly involved in nor directly benefits from the crimes of a ‘bad apple’. Prior research based on 60 police records of cases that were filed against members of Dutch OMCGs, shows that the ‘bad apple’ scenario is predominantly present in cases of entrepreneurial crime, such as drug crime, weapons crime, and

² In the current study, co-offending is defined as situations where two or more persons are involved in the commission of a crime.

money laundering (Van Deuren et al. 2020). Dutch OMCG members tend to commit these types of crime as autonomous individuals, without a direct and coordinating role of the OMCG.

The ‘club within a club’ scenario is only different from the ‘bad apple’ scenario in a numerical way, in the sense that the ‘club within a club’ scenario refers to situations where multiple OMCG members and/or leaders are involved in the crime. The sheer number of members and/or leaders engaged in a particular crime, may lead to the erroneous conclusion that the OMCG as an organizational entity is involved in the criminal behavior. Crimes falling under the ‘club within a club’ scenario are, however, committed independently from the OMCG (Von Lampe and Blokland 2020). In the Netherlands, the ‘club within a club’ scenario is particularly present in crimes such as general threatening behavior and extortion (Van Deuren et al. 2020). In both the ‘bad apple’ and the ‘club within a club’ scenario, OMCG members operate as individual offenders both in their decision to commit the crime and in the manner in which the crime is committed. OMCG membership, however, may offer individual OMCG members benefits that enhance their criminal opportunities; for instance, via the OMCG’s violent reputation that is proliferated through wearing the club’s insignia when committing the crime, or by making use of fellow OMCG members as co-offenders (Barker 2011; Van Deuren et al. 2020; Wolf 1991).

Whether crimes can be rightfully attributed to the OMCG as an organizational entity, however, depends on the role the OMCG’s formal organizational structure has in the commission of the crime. Only if the criminal structures of individual members overlap with the OMCG’s formal organizational structure, can the OMCG be said to function as a criminal organization. In the ‘club as a criminal organization’ scenario, leaders of OMCGs, for instance, use their hierarchical position in the club to direct criminal behavior of lower-ranking members who, in turn, perceive these criminal orders as correctly given and unproblematic. Crimes of members falling under the ‘club as a criminal organization’ scenario are committed for the benefit of OMCG and can hence be attributed to the OMCG (Von Lampe and Blokland 2020). Prior research shows that Dutch OMCGs predominantly function as criminal organizations when ordering violent acts towards rival OMCGs and fellow OMCG members (Van Deuren et al. 2020).

It needs to be emphasized that these scenarios represent a situational approach to OMCG crime: OMCG members may in one situation operate as autonomous individuals, while acting as members of a criminal organization in another (Von Lampe and Blokland 2020). The three scenarios may, furthermore, coexist within a single OMCG with regards to different (groups of) members and different types of crime. It is, hence, not so much a question whether OMCGs *are* criminal organizations, but rather whether and when they *act* as criminal organizations.

Co-offending in the Dutch legal framework

How is the contribution of fellow club members to crime in the Netherlands legally qualified? Dutch criminal law defines various forms of criminal liability to qualify a person’s contribution to the joint commission of a crime: via

accessoryship, co-principalship, the commission of public violence, and participation in a criminal organization.³ The difference between accessoryship and (co-)principalship to crime can be found in the nature and intensity of one's contribution to the crime under scrutiny (Yanev 2018). Those who do not commit the offense itself, but assist or encourage its commission are called accessories to crime, while those who commit the crime itself are called principals to crime (Tak 2003; Yanev 2018). If a crime is committed by multiple parties, each person can be held criminally liable for co-principalship to the offense (Tak 2003; Yanev 2018). Importantly, these different judicial qualifications pertain to individuals' liability for their own part in the (more or less) collective behavior (De Hullu 2018). Accessoryship and (co)principalship are not crimes in and of themselves; the conduct becomes criminally liable only when a person's contribution to a particular crime that has actually been committed can be established. This is different for the commission of public violence and participation in a criminal organization: Here a person can be held criminally liable for a crime that can only be committed with two or more persons based on his or her specific conduct. The different Dutch legal qualifications that may represent collective behavior in the commission of crime are discussed below in more detail.

Accessoryship

Accessoryship is punishable under Art. 48 of the Dutch Criminal Code and is the lowest degree of participation in a criminal offense. Accessoryship involves intentionally assisting, providing opportunity, means or information to commit a crime.⁴ Accessoryship is aimed at promoting or facilitating criminal behavior committed by another person by, for instance, giving advice, being on the watch, or assisting in a flight.⁵ The contribution can also consist of neglecting to prevent (escalation of) the crime. This liable passivity of a person is, for example, shown if a person does not actively participate in an assault him- or herself, but is nevertheless present during the commission of the criminal act (De Hullu 2018). To hold a person criminally liable for accessoryship to crime, it needs to be established that the actions or non-actions of a person had an 'effect' on the crime committed. The maximum penalty for a criminal act is reduced by one-third if a person is found guilty of accessoryship to crime.⁶

³ Dutch criminal law has various other ways to hold a person criminally liable for his or her contribution to co-offending, such as Art. 80 (collusion), Art. 11b (Opium act), and Art. 306 (participation in a fight). In this study, however, we only differentiate between those legal qualifications that appeared in the court files of the criminal law cases used in this study.

⁴ HR March 22 2011, ECLI:NL:HR:BO2629, r.o. 2.2.

⁵ HR December 2 2014, ECLI:NL:HR:2014:3474, r.o. 3.3.2.

⁶ HR March 20 2018, ECLI:NL:PHR:2018:211, r.o. 3.14.

Co-principalship

Co-principalship is punishable under Art. 47 of the Dutch Criminal Code and involves two or more persons that ‘deliberately and closely cooperate’ in the commission of crime.⁷⁸ It needs to be established that the offender has had an ‘intellectual or material’ contribution of sufficient weight in the criminal act. The courts can, for example, consider (a combination of) the intensity of the collaboration, the division of tasks between offenders, a person’s role in the planning and execution of crime, and not disassociating oneself from a criminal act, as factors to substantiate evidence for co-principalship.⁹ It is possible that a person can be held criminally liable for co-principalship in a certain crime even when he or she was not present during the commission of a crime, but was nevertheless of influence in the planning and preparation phase of the criminal act. Contrasted to accessoryship, co-principalship requires a major involvement of a person in the crime and hence often results in an aggravating circumstance, influencing the sentencing outcome.¹⁰

The commission of public violence

The commission of public violence is punishable under Art. 141 of the Dutch Criminal Code and is particularly important for crimes, such as vandalism, riots, and collective violence (De Hullu 2018). The commission of public violence involves at least two or more persons who openly commit a violent act against a person or a property. To hold a person criminally liable under Art. 141 Dutch Criminal Code, it must be established that the person made a sufficiently substantial and fundamental contribution to the violent act.¹¹ A person’s contribution must facilitate or must have an escalating ‘effect’ on the violence and may also constitute a non-violent act (De Hullu 2018). A non-violent act may, for instance, involve supporting the violence by providing tools or vocal encouragement.¹² Merely numerically bolstering the group is, however, not enough to hold a person criminally liable for public violence: the offender must actually be involved in an act.¹³ Furthermore, it needs to be established that the offenders ‘deliberately and closely cooperated’ in the commission of the violent act. In contrast to co-principalship (Art. 47 Dutch Criminal Code), the commission of public violence involves a less severe type of collaboration (Nan 2016). The commission of public violence may, for instance, occur within an unstructured and spontaneous collaboration between two or more persons.¹⁴ Participation in public violence can be punished by imprisonment for a maximum of four and a half years or a fine of the fourth category (maximum of € 20.500).

⁷ HR December 2 2014, ECLI:NL:HR:2014:3474, r.o. 3.3.2.

⁸ HR March 24 2015, ECLI:NL:HR:2015:716, r.o. 3.2.1.

⁹ HR December 2 2014, ECLI:NL:HR:2014:3474, r.o. 3.2.2.

¹⁰ HR July 5 2016, ECLI:NL:HR:2016:1316, r.o. 3.2.3.

¹¹ HR July 5 2016, ECLI:NL:HR:2016:1320, r.o. 3.1.

¹² Ibid.

¹³ HR July 7 2009, ECLI:NL:HR:BH9029, r.o. 2.6.

¹⁴ HR September 27 2016, ECLI:NL:HR:2016:2191, r.o. 3.2.

Participation in a criminal organization

Finally, participation in a criminal organization is punishable under Art. 140 of the Dutch Criminal Code, which is used in the fight against organized crime (Kesteloo 2011). Participation in a criminal organization consists of three elements: the ‘organization’, the ‘aim of committing crimes’, and the criminally liable act of ‘participation in’. The component ‘organization’ involves a lasting (period of time, planning of crime) and structured (the extent to which agreements have been made or certain rules apply) collaboration between two or more persons.¹⁵ The collaboration can consist of natural or legal persons. Furthermore, the purpose of the organization must be aimed at committing (multiple) offenses.¹⁶ Contrasted with the prior judicial classifications of co-offending, a person can be held criminally liable for participation in a criminal organization even if the crimes the organization is aimed for are not yet committed – the intention to commit a crime is already sufficient for criminal prosecution of participation in a criminal organization.¹⁷ Lastly, for the criminally liable act ‘participation in’ it needs to be established that a person (1) belongs to the collaboration, and (2) participated in, or supported the conduct conducive to the accomplishment of the criminal purpose.¹⁸ A person does not necessarily need to be directly involved in the criminal act(s) upon which the aim of the organization is based; knowledge of the criminal aim(s) of the collaboration is sufficient to hold a person criminally liable by means of Art. 140. Participation in a criminal organization can be punished with imprisonment for a maximum of six years or a fine of the fifth category (maximum of € 87.000).

Important to note here is that in the case of multiple offenses carrying a prison sentence, the Dutch courts cannot impose a cumulation of prison sentences. The courts can instead impose a joint sentence, the maximum term of which may be one third higher than the maximum prison sentence for one of the criminal acts (Tak 2003).¹⁹ For example, if a suspect is found guilty of hostage-taking and theft with violence, the suspect’s maximum prison sentence may then consist of the maximum sentence of 15 years (hostage-taking) increased by one-third, which amounts to 20 years in prison.

Present study

The aim of the present study is to examine the judicial responses to co-offending among OMCG members while distinguishing between the different scenarios that may link crime to OMCGs. By analyzing police files and court judgements of cases that were filed against members of Dutch OMCGs and by conducting interviews with public prosecutors involved in these cases, we specifically address the following research questions:

¹⁵ HR October 26 1993, ECLI:NL:HR:1993:AD1974.

¹⁶ HR May 15 2007, ECLI:NL:HR:2007:BA0502, r.o. 3.4.

¹⁷ Ibid.

¹⁸ HR December 21 2010, ECLI:NL:HR:2010:BM4415, r.o. 3.5.2.

¹⁹ Art. 55 and Art. 57 Dutch Criminal Code (concurrence of criminal offences).

1. How is co-offending among OMCG members classified in legal terms?
2. To what extent is that legal classification associated with the different scenarios that link crime to the OMCG as an organizational entity?
3. To what extent does the symbolic contribution of OMCG membership to instances of co-offending among OMCG members play a role in legal outcomes?
4. What are the obstacles and motivations for public prosecution in pursuing one legal classification above others?

Methodology

Police files and court judgements

We analyzed police files of cases that were filed against members of Dutch OMCGs since the start of the so-called ‘whole-of-government approach’ in 2012 up to 2018. The approach aimed to target OMCGs and their members via all legal options available, including criminal, civil, and administrative means.²⁰ We received a list from the Dutch Public Prosecution Office involving 110 police files of criminal cases in which members of Dutch OMCGs were accused of being involved in various types of criminal behavior. After a first inspection of the police files, some police files were found to merely concern project proposals (without any concrete police action: 13 files), some police files were related to people who were not members of Dutch OMCGs (2 files), and other police files could not be found by the regional Public Prosecution Offices (20 files). This resulted in 75 police files that involved criminal law cases against OMCG members. Next, we excluded police files if these documents consisted of solely procedural reports (i.e. only providing information on the investigative methods, without substantive case information) or police arrests (8 files); files that led to a ‘policy dismissal’ (2 files); and files that had an unclear link to a particular OMCG (i.e. no specific OMCG was mentioned, and only general terms, such as ‘motor club’, were used). The latter comprised only five of the files.

Consequently, for the present analysis, we were left with 60 police files in which at least one OMCG member was charged with a crime. The police files varied in size and degree of OMCG involvement: police investigations sometimes pertained to one or more OMCG members and/or leaders (individual level), and at other times to complete chapters (organizational level). The police files included transcripts of interrogations with suspects, victims, and witnesses, as well as observational and wiretap information, providing a unique opportunity to examine crime among members of Dutch OMCGs more closely. All police files were analyzed using an extensive checklist that was previously used in the Dutch Organized Crime Monitor (Kleemans 2014). The checklist involved various topics, such as an overview of the criminal investigation, suspects involved, activities and *modus operandi*, specific criminal charges, and convictions. Based on the information resulting from the

²⁰ TK II 2011/12, 29,911, 59.

police files, each of the 60 police files (case level) and each of the 202 criminal charges (offense level) were classified under one of the three scenarios in a previous study (see, for a detailed description, Van Deuren et al. 2020).

Court judgements of 40 criminal law cases were included in the police files. Court judgements for an additional 18 police files were retrieved from Rechtspraak.nl.²¹ Two police files (3.3%) and six (3%) criminal charges were still awaiting a final court decision at the time of data collection, and six police files (10%) and 58 (28.7%) criminal charges resulted in an acquittal and were left out of the analysis.²²

The resulting 52 unique police files and court judgements used for this study contained 138 convictions in total. 37 (71.2%) police files and 66 (47.8%) convictions could be classified as a 'bad apple' scenario: of which 50 (75.8%) convictions involved crime committed by one OMCG member and 16 (24.2%) convictions involve crime committed by multiple parties, including one OMCG member.

Since our aim was to investigate the judicial qualifications of co-offending among Dutch OMCG members, we only took police files and court judgements into account in which at least two or more OMCG members were involved (i.e., the 'club within a club' scenario and the 'club as a criminal organization' scenario). The 'club within a club' scenario was present in 20 (38.5%) police files and 40 (29.0%) convictions, of which 25 (62.5%) convictions involved crime committed by solely OMCG members and 15 (37.5%) convictions involved crime committed by multiple OMCG members, and one or more non-OMCG members. The 'club as a criminal organization' was present in 13 (25.0%) police files and 32 (23.2%) convictions, of which 27 (84.4%) convictions involved crime committed by solely OMCG members (including the leadership of the OMCG) and 5 (15.6%) convictions involved crime committed by multiple OMCGs, and one or more non-OMCG members.

Two important issues with regard to the validity of the present study should be taken into account: (1) the extent to which the police files involving co-offending among OMCG members used for this study include the total number of criminal cases involving OMCG co-offending in the period 2012 up to 2018 and (2) whether the police files and convictions are rightfully classified under the different scenarios. Dutch law enforcement agencies have prioritized the prosecution of OMCG members as part of the whole-of-government approach since 2012. It is therefore highly likely that the cases studied here represent all criminal cases involving an OMCG member in this period. However, by definition the case files refer to registered crimes only, and we cannot rule out the possibility that over time, law enforcement actions increasingly focused on those OMCGs deemed most heavily involved in violence and crime. Allocation of each criminal case to a theoretical scenario is based on information available in the case file. To the extent that it is more difficult

²¹ Rechtspraak.nl is a website that publishes Dutch court files of various jurisdictions, such as criminal, civil, and administrative law cases.

²² Art. 140 is charged in nine (15%) police files, one (11.1%) police file is still awaiting a final court decision, three (33.3%) police files resulted in an acquittal, and five (55.6%) police files resulted in a conviction for participation in a criminal organization.

to prosecute OMCG members for being part of a criminal organization – see below – law enforcement might have focused on individual members instead of organizational aspects, the proportion of cases falling under the ‘club as criminal organization’ scenario might hence be underestimated.

Members of Dutch OMCGs were convicted of various types of offenses, ranging from more entrepreneurial (drug crime, weapons crime, and extortion) to violent crimes (assault, threatening, and public violence). The judicial qualifications of the convictions were examined on the case level. For instance, a police file with four OMCG members convicted for participation in a criminal organization, was counted as a police file that involved participation in a criminal organization only once. Police files in which OMCG members were convicted under different legal qualifications were counted separately per police file. Furthermore, on occasion a police file involved two or more OMCG suspects, but not all were convicted of the criminal offense.

Interviews with public prosecutors

To increase our understanding of the Dutch judicial responses to OMCG members, we also interviewed five public prosecutors involved in various (large) criminal law cases examined for the current study. In total, the police files included nine criminal cases in which OMCG members were prosecuted for Art. 140 of the Dutch Criminal Code. Thirteen different public prosecutors were involved in these criminal cases, of which several were involved in more than one criminal case. The public prosecutors interviewed for the present study, were involved in five of the nine police files regarding the prosecutions of OMCG members for Art. 140, of which one resulted in an acquittal and four resulted in convictions for Art. 140.

The public prosecutors were selected via the Dutch Public Prosecution Office. The interviews started with an introduction and the signing of the informed consent forms. All interviews were tape-recorded and lasted between 1 and 1.5 h. The interviews were semi-structured, following a list of topics and questions. The public prosecutors were interviewed about the choices and dilemmas in the investigation and prosecution of criminal law cases involving (multiple) OMCG members, the link between members’ crime and OMCGs (and which links are relevant for criminal prosecution), and considerations in the investigation and prosecution of OMCG members under Art. 140 of the Dutch Criminal Code (Participation in a criminal organization). In addition to these questions, the public prosecutors were free to add anything they deemed important. All tape-recorded interviews were transcribed verbatim and analyzed with the program Atlas-ti. The transcriptions of the interviews were coded along the themes of the topic list. The interviews were conducted in Dutch and held in the period May–June 2021. For privacy and safety reasons, quotes and statements of public prosecutors are generally shown without respondent identification numbers; similarly, information specific to criminal cases and names of OMCGs are also omitted.

Results

Judicial qualifications of co-offending among OMCG members

Figure 1 depicts, for each type of crime, which percentage is related to the ‘club within a club’ scenario or the ‘club as a criminal organization’ scenario.²³ Figure 1 shows that the ‘club within a club’ scenario predominantly involves convictions of profit-making crime, such as drugs, weapon crime, and theft.²⁴ The ‘club as a criminal organization’ scenario is often present in convictions of violent crime, including convictions of extortion (with violence) and arson. Closer inspection of police files revealed that these criminal cases typically involve collective violence aimed at rival OMCGs or fellow (ex-)club members. The police files show, for instance, that extortion (with violence) and arson may be the result of expulsion from the OMCG in so-called ‘bad standing’ – the heaviest sentence used by OMCGs as organizations to punish (ex-)OMCG members.

Next, we examined the judicial qualifications of different types of co-offending on the case level by the two scenarios (Table 1). Table 1 shows that 55.3% of the total convictions can be classified as a ‘club within a club’ scenario, the remaining 44.7% is characterized as falling under the ‘club as criminal organization’ scenario. Crimes falling under the ‘club as a criminal organization’ scenario are predominantly legally qualified as co-principalship to crime (73.5%). Only in 8.8% of the crimes under this scenario are OMCG members convicted of Art. 140. These convictions of Art. 140 involve police investigations in which an OMCG itself was the subject of the ‘criminal organization’. In comparison, in 4.8% of the crimes falling under the ‘club within a club’ scenario, OMCG members were convicted of Art. 140. This percentage relates to police investigations in which a collaboration between OMCG members and non-members was regarded as the ‘criminal organization’, rather than the OMCG itself or the criminal structures of the OMCG members and the club’s organizational structure did not overlap.

The role of OMCGs’ group symbolism in legal outcomes of co-offending among OMCG members

Prior research shows that during the commission of a crime, OMCG members may use group symbolism as a reference to their OMCG membership to stress numerical power (Van Deuren et al. 2020). Inspection of the court judgements involving instances of co-offending indicates that this so-called ‘power of the patch’ may be considered as an aggravating circumstance, influencing the sentencing outcome of individual OMCG members. In their sentencing decisions, judges take relevant

²³ The category ‘remaining’ consists of convictions, such as vandalism (1), coercion (2), body disposal (1), forgery (1), and trademark counterfeiting (1).

²⁴ The present study omits crimes falling under the ‘bad apple’ scenario. Consequently, contrasted to prior research of Van Deuren et al. 2020, the current study shows a shift in the types of crime that predominantly can be classified under the ‘club within a club’ scenario.

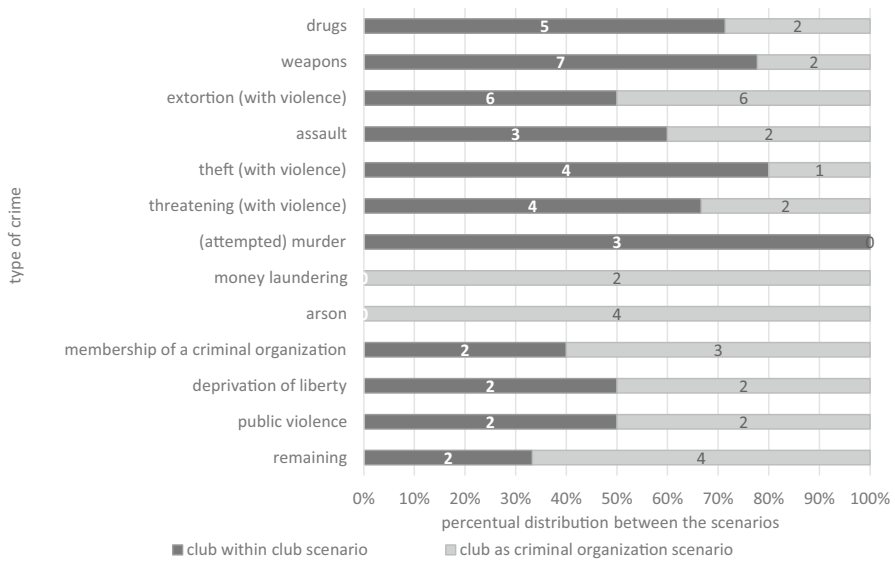


Fig. 1 Type of crime by the scenarios

aspects of the modus operandi of crimes committed by OMCG members into account, such as the verbal and visual presentation of OMCG membership. The sentencing decision in one of the court judgements, for instance, reads: *'The suspect and his co-offender(s) were members of an OMCG, and the victim was aware of this. This knowledge will have reinforced the intimidating effect of the extortion'*.

The court judgements also show that when OMCG members commit crime and violence together, the members are predominantly convicted for co-principalship

Table 1 Judicial qualifications of co-offending by the scenarios (on case level)

	Club within a club scenario		Club as criminal organization scenario		Total	
Principal	10	83,3%	2	16,7%	12	100%
		23,8%		5,9%		16,9%
Accessoryship	2	50,0%	2	50,0%	4	100%
		4,8%		5,9%		5,6%
Co-principalship	26	51,0%	25	49,0%	51	100%
		61,9%		73,5%		66,2%
Art. 141 (public violence)	2	50,0%	2	50,0%	4	100%
		4,8%		5,9%		5,6%
Art. 140 (participation criminal organization)	2	40,0%	3	60,0%	5	100%
		4,8%		8,8%		5,6%
Total	42	55,3%	34	44,7%	76	100%
		100%		100%		100%

to a particular crime, even when there are indications that the OMCG as an organizational entity had a coordinating role in the criminal behavior of the individual members. We interviewed five public prosecutors involved in various criminal cases used for this study, to get a better understanding of the legal decisions made during the investigation and prosecution of OMCG members. Why did the public prosecutors choose to prosecute OMCG members mainly for co-principalship, while there were indications that OMCGs were directly involved in crimes of their members? Which obstacles and opportunities do prosecutors see to include the indirect role of OMCG membership in the prosecution of the crimes committed?

Obstacles and incentives for pursuing one legal classification over others

Manpower and complexity

According to public prosecutors, prosecuting collective criminal behavior has a limited number of available options: *'You could use legal qualifications, such as Art. 11a and 11b of the Opium act; however, it often involves more than just drugs offenses. Actually, only Art. 140 (Participation in a criminal organization) works well to address collective crime'*. Though the interviewees indicate that Art. 140 is considered to be the only way to address OMCG members as a collective, Table 1 shows that it is rarely used in criminal law cases involving multiple OMCG members. From the interviews we learned that public prosecutors have various reasons to address OMCG members through legal qualifications other than Art. 140.

First, the decision whether or not to prosecute OMCG members through Art. 140 is influenced by the issue of manpower: *'do we have enough people and time, and do we see opportunities to start an investigation of OMCG members who show some form of criminal cooperation'*. As all elements of the article need to be established (the organization, the criminal purpose of the organization, and participation in the criminal purpose of the organization), a lack of manpower at the police and Public Prosecution Office can result in foregoing the opportunity to start an Art. 140 investigation. Second, prosecutors report that Art. 140 may entail many complexities with regard to the investigation and prosecution phase of OMCG members. One public prosecutor mentioned that it is particularly difficult to gather evidence that substantiates the assumption that criminal behavior of individual members can be legally attributed to the OMCG (e.g., the criminal purpose of the organization):

'One of the core problems in recent years has been that OMCGs are organized in such a way that it is difficult to gather evidence for a criminal case. Several things worked out very well, such as wiretaps in clubhouses, or in the case that some members were simply too foolish and told too much. OMCG members are not going to make that mistake again, so next time it will be more difficult to gather evidence for Art. 140. To gather evidence about the things OMCG members do, that that is really part of, almost part of the essence of the organization, of how OMCGs are organized [...]. That the criminal acts

are not just being committed by individual OMCG members, but are committed for the benefit of or in relation to the club’.

Evidence to legally qualify the link between crimes of individual OMCG members and OMCGs as organizations can, for instance, be found by agreements made in a particular OMCG about committing certain crimes (for example during club meetings), the OMCG coordinating members’ criminal behavior, or may result from finding evidence of criminal acts that benefit the OMCG (e.g., money, resources). The mere (visual) appearance as OMCG member in a criminal act does not provide sufficient evidence to assume that the purpose of the OMCG is aimed at committing crimes.²⁵ In addition, according to the public prosecutors, OMCGs are often successful in shielding their criminal activities from law enforcement:

‘The shielding techniques of OMCGs make it hard to gather evidence of what has happened. You have to be really lucky to have wiretaps somewhere. We have been able to substantiate some criminal cases by using information resulting from the wiretaps [...]. That is really something that makes the investigation phase difficult, the shielding of activities and the fear of (ex-)members and victims to talk’.

The complexities regarding the investigation and prosecution of Art. 140 are, furthermore, amplified by the role of legal professionals. Several of the public prosecutors interviewed indicated that the prosecution of OMCG members through Art. 140 results in numerous investigatory requests by their defense lawyers, such as the hearing of many witnesses. Moreover, additional legal disclosure requests are made when (parts of) the criminal act takes place in a foreign country, for example, in the international drug- and weapon trade, resulting in more red tape and delays:

‘Art. 140 opens the door for various requests from lawyers, to hear a lot of people who can say anything about the criminal organization. Most of the time, judges find it hard to reject the requests, so that often results in a lot of needless witness interviews, meaning that a case completely runs away from you, and that a case may sometimes take years, literally years [...]. If there is a way to avoid that, try to avoid that, so that is often an element in the decision not to prosecute members through Art. 140’.

‘Also, if you are dealing with a criminal organization involved in the import of drugs, then do not say that the drugs are imported from Colombia, because that results in even more hearing requests. We deliberately choose to keep the criminal charges limited, honestly I always look to what a criminal case needs to deliver in terms of sentencing outcomes and what is useful for that’.

The various investigatory requests by lawyers frequently have a negative influence on the pace of a criminal case. As a result, the ‘reasonable’ period of time

²⁵ Rb Limburg July 9 2021, ECLI:NL:RBLIM:2021:5442.

for the prosecution of a criminal case may be violated, which, in turn, can lead to OMCG members receiving a reduction of their final sentencing outcome.²⁶

Limited added value of Art. 140 regarding sentencing outcomes

The decisions of public prosecutors to use legal qualifications other than Art. 140 in order to combat collective crime and violence of OMCG members are, furthermore, driven by the perceived limited added value of Art. 140 regarding individual sentence outcomes:

‘For example, if you have a criminal case in which a person is suspected of the import of 200 kilo drugs. Then I am, but not only me, then we are all convinced that there is not a judge that would say: you have imported 200 kilo drugs, and you are also member of a criminal organization, thus your sentence outcome will be extra high. The same applies to criminal cases involving a violent crime, or extortion. Then you do not have to prosecute a person also for participation in a criminal organization (Art. 140) because, if you have a criminal case in which you can prosecute someone for 8 to 9 years, yes...that is fine... Art. 140, then, does not add that much to the level of the sentencing outcome’.

In contrast to Anglo-Saxon countries, Dutch prison sentences of individual offenses do not result in consecutive sentencing. Therefore, in a criminal case involving multiple custodial offenses, the added value of prosecuting OMCG members *also* for Art. 140 for the sentencing outcome is restricted due to being prosecuted alongside other crimes carrying high maximum penalties, such as drugs and violent crimes.

Summing up, Art. 140 adds complexities to the investigation and prosecution phase of OMCG members and often does not result in notably higher individual sentences. Some public prosecutors, however, note that the prosecution of OMCG members through Art. 140 can be useful in order to address OMCG members who did not *directly* take part in the criminal act. Most of the judicial qualifications of co-offending, such as complicity and co-principalship, require an individual contribution to a criminal act. Yet, the mere *knowledge* of the criminal aim(s) of the organization is sufficient to prosecute OMCG members through Art. 140. As a result, Art. 140 can be used to target those individuals who are predominantly indirectly involved in the criminal organization:

‘The added value of Art. 140 is, for example, limited for those individuals who are involved in an extortion. However, if you want to address other people of the organization, then Art. 140 can really add something. So, for instance,

²⁶ Starting point for a ‘reasonable’ period of time is that a criminal case should have a verdict within two years (HR June 17 2008, ECLI:NL:HR:2008:BD2578, r.o. 3.14). In a criminal law case involving a member of the Bandidos MC, the judge points to the period of time between the arrest and conviction of the person in play (almost 5.5 years), and, as a result, reduces the sentence outcome by one-third (Rb July 9 2021, ECLI:NL:RBLIM:2021:5493).

when a motorcycle is stolen and you have people who subsequently unscrew the motorcycle for the benefit of the OMCG or other OMCG members, people who do that kind of stuff, that really takes place in club context, if you want to address those people, yes then Art. 140 can really add something'

Difficulties in the criminal prosecution of OMCGs' group symbolism

The court judgements show that the use of group symbolism as a reference to the OMCG as a collective, may raise the sentencing outcomes of individual members. Nevertheless, throughout the interviews, we learned that it is quite challenging for public prosecutors to prosecute the mere contribution of 'the power of the patch' to instances of co-offending among OMCG members:

'For example, in the case of an extortion, in which an appointment in a McDonald's restaurant is made and two people conduct the actual conversation, but other OMCG members are visually present, they just sit there to numerically bolster the group. If you look at such a criminal act, then it is really hard to hold these OMCG members criminally liable for complicity or co-principalship. I think we managed to do that in our case, by using wiretap conversations, to establish that everybody who was present at the extortion also knew why they were there and what their role was. In the sense that they were there to show that the victim has to deal with an OMCG. If you do not have wiretaps, then it becomes quite difficult to prosecute the other OMCG members for complicity or co-principalship, because then you just have people who sit somewhere, not doing much, but who contribute to the image of having to do with a preponderance of people from a violent club'.

The organized and shielded subculture of OMCGs ensures that it is not only difficult for public prosecutors to prove the direct organizing role of OMCGs in criminal behavior, but also to prosecute the role of the 'power of the patch' by merely wearing the colors in crime through criminal law.

The civil bans of Dutch OMCGs

The premise of criminal law is that it addresses a person's individual contribution to crime. Consequently, convictions of individual OMCG members through Art. 140 do not jeopardize the OMCG as a legal entity: only the criminally liable act of 'participation in' a criminal organization is punishable. The impossibilities of combating OMCGs through criminal law have led the Dutch Public Prosecution Office to seek other judicial approaches to combat the more structural aspects of OMCGs.

OMCGs' non-criminal origins have allowed them to register as legal associations. Therefore, Dutch law enforcement agencies recently sought to ban those Dutch OMCGs deemed to be most heavily involved in crime and violence via a civil court ruling (Art. 2:20 of the Civil Code). For an association to be banned in the Netherlands, it needs to be established that the association in question is purposely creating

a persistent environment or culture that facilitates actions contravening public order, for example, by showing that there is a link between the OMCG and criminal behavior of members, in such a way that the criminal behavior is part of the OMCGs' activities (Van der Ploeg 2012). In contrast to criminal law, the civil bans address OMCGs as a collective: after an irrevocable civil ban, the OMCG as such is dissolved.

According to the interviewees, the motivation to prosecute OMCGs and their members through Art. 140 in recent years, does not primarily relate to the individual convictions of OMCG members themselves, but rather to the contribution of the evidence gathered in prosecuting an OMCG and their members under Art. 140 to the evidence needed for a successful civil ban.

'Back then, the idea was that we would start a criminal investigation based on Art. 140, and that the evidence gathered during the criminal law case, would be used to support the civil bans'.

One public prosecutor stated that, in recent years, the investigation of OMCGs and their members has been increasingly aimed at gathering evidence showing that the criminal behavior of individual members can be attributed to the OMCGs as a legal entity. By using the convictions of OMCG members for Art. 140, public prosecutors have tried to link crime of individual OMCG members to the OMCGs' activities.

'When we just started with the civil bans, we indicated to also search for minutes or bad standing letters linked to money or things that have something to do with the coordination of crime by the OMCG. Things that for the prosecution of individual OMCG members through criminal law may not be relevant at all'.

A civil ban of Dutch OMCGs, in turn, increases the possibilities to address the symbolic contribution of OMCG membership to members' crime through criminal law. After an irrevocable civil ban, individual OMCG members can be prosecuted for participation in the *continuation* of the activities of an organization that has been prohibited (Art. 140, subsection 2).²⁷ We came across various examples in the interviews showing that public prosecutors deemed acts, such as publicly wearing the colors of the prohibited OMCG, were likely to be punishable through Art. 140, subsection 2. Consequently, the civil bans do not only address OMCGs as organizations, but also increase the public prosecutor's opportunities to prosecute individual members for contributing to the continuation of a prohibited organization on the basis of the mere visual appearance as member of a banned OMCG.

Discussion

Various countries have experienced crime and violence committed by groups (Ayling and Broadhurst 2014; Geurtjens et al. 2018; Kazrytski 2017; Klein et al. 2006; Monterosso 2018; Paoli 2003; Van Ham et al. 2020; Varese 2020). These

²⁷ Participation to the *continuation* of the prohibited activity of the organization can be punished by imprisonment for a maximum of one year or a fine of the third category (maximum of € 8.700).

countries have developed their own legal approach to combat the crimes and membership of these groups. The current study examined the Dutch judicial responses to various types of co-offending among OMCG members. To do so, we studied the police files and court judgements of criminal law cases that were filed against members of Dutch OMCGs between 2012 and 2018 involving multiple OMCG members. Furthermore, we conducted interviews with public prosecutors involved in criminal law cases to explore the dynamics behind the Dutch legal practice towards OMCGs and their members' crime.

The findings from this study show that there are a number of barriers to address OMCGs as (criminal) collectives and to take into account the symbolic contribution of group membership to crime through criminal law. Dutch law enforcement agencies therefore recently opted for requesting civil bans, focusing on OMCGs as legal associations and the use of 'the power of the patch'. A drawback of the civil bans, however, is that the judicial process towards an irrevocable ban is time-consuming. The civil procedures may take years and until then OMCG members may freely associate and engage in club activities, including wearing their biker vests in public. Aiming for a faster response to the problem of OMCGs, the Dutch government is working on a new administrative law that will enable the Minister of Justice and Security to issue an administrative ban on OMCGs. An important difference between the civil and the administrative ban is that the latter will be effective immediately, while OMCGs can only appeal in court afterwards.²⁸

A similar administrative measure already exists in Germany (the 'Vereinsverbot'), where the Minister of Internal Affairs is authorized to ban criminal OMCGs. After this administrative ban, the OMCG is dissolved and members of the banned OMCG can be prosecuted for publicly wearing their club insignia and establishing new OMCGs that are in essence a continuation of the banned OMCG. Whether an OMCG is a continuation of a banned OMCG depends upon the extent to which the board of new established OMCG bears similarities to the board of the banned OMCG (Koornstra et al. 2019). Although Australian law does not provide a legal option to ban OMCGs as collectives, the Australian state Queensland has implemented the Vicious Lawless Association Disestablishment (VLAD) laws.²⁹ The VLAD laws provide the Attorney-General, instead of the courts, the possibility to declare an OMCG as 'criminal'. The VLAD laws predominantly address individual OMCG members: after an OMCG has been declared criminal, members of the criminal OMCG are, for instance, prohibited to associate with three or more other members of the same OMCG in public and cannot recruit individuals to become members of the 'criminal' OMCG, without making themselves liable to criminal prosecution (Ayling 2017; Bartels et al. 2021; Monterosso 2018). In Queensland, it is also possible for a Minister to add

²⁸ TK 2018/2019, 35,079 nr. 3.

²⁹ Given members' fundamental human rights, such as freedom of assembly and expression, a large part of the VLAD laws was recently abolished, hence it is no longer possible to declare an organization as 'criminal' (see Bartels et al. 2021, for a review on the Australian legislation targeting OMCG members).

an OMCG to the ‘Liquor Regulation 2002’ list, upon which OMCG members are barred to wear their club colors in public areas, such as restaurants and bars (Koorstra et al. 2019).

Although it remains to be seen whether the Dutch administrative ban will come into effect and, if so, what the consequences will be for Dutch OMCGs and their members, future research could focus on interviewing public prosecutors involved in (criminal) cases following such an administrative ban to examine the expected sentencing outcomes, for instance for members using the club insignia in public places. This is particularly interesting, as until recently over 200 municipalities in the Netherlands applied a local ‘color ban’, stating that members are not allowed to publicly wear visible expressions of prohibited organizations. A member of the Hells Angels – an association that by that time was not yet irrevocably banned in the Netherlands – successfully challenged the legal validity of the municipalities’ ‘color ban’. In November 2021, the Dutch Supreme Court ruled that the municipal ‘color ban’ indeed infringes upon human rights, such as the freedom of expression, and argued that wearing club colors in public is only punishable – after an irrevocable civil ban—through a formal law, such as Art. 140 subsection 2 Dutch Criminal Code.³⁰

Civil bans may be requested on the grounds of facilitating a culture contravening public order—a strategy sparsely used in the past to criminalize extreme right political parties and pedophile association ‘Martijn’.³¹ Especially the successful ban of the latter seems to have provided a legal option for banning OMCGs and OMCG-like brotherhoods. Dutch law enforcement, however, is able to request the civil court to ban OMCGs given the OMCGs’ status as legal associations. More commonly, group crime is committed by groups without any legal basis, such as street gangs and organized crime groups (Kazyrytski 2017; Klein et al. 2006; Paoli 2003; Varese 2020). Therefore, it would be interesting to compare the legal instrument(s) used to address membership of and crimes committed by such groups to those committed by OMCG members, in the Netherlands and in other countries.

The current study focused on the Netherlands. Other countries, such as Germany, Australia, and Denmark, are also confronted with (violent) incidents involving OMCG members. Studies, similar to the current one, could result in a different picture due to differences between the criminal law systems of these countries.³² More generally, countries vary considerably in the ways they have addressed OMCGs and their members’ crime, yet much is still unclear about the actual impact of the various approaches and legal instruments used to respond to OMCG membership and members’ criminal behavior. The mere observation that different approaches

³⁰ HR November 2 2021, ECLI:NL:PHR:2021:1028.

³¹ HR April 18 2014, ECLI:NL:HR:2014:948.

³² It should be noted that the criminal law systems *between* and—at times—*within* these countries differ considerably. Countries, such as the Netherlands, Germany and Denmark, are known for using a civil law system in which the law is based on codified legislation. Australia, on the other hand, has nine jurisdictions—six states, two territories, and the Commonwealth jurisdiction—with each having their own set of laws. Australia employs a hybrid criminal law system, combining common law jurisdictions, in which the law is based on court judgements and code law jurisdictions (Ayling 2011; 2017).

towards outlaw biker crime exist, calls for a rigorous evaluation of the effects of these various legal instruments and interventions on members' criminal behavior. This will help establish which approaches are most successful to combat the crimes and, if needed, the membership of such groups.

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Declarations

Ethics statement Approval was obtained by the Dutch Public Prosecution Office and the Ethics Advisory Board (CERCO) of the Faculty of Law (Vrije Universiteit Amsterdam).

Informed consent The research involved interviews with Dutch public prosecutors. There is an informed consent from all the public prosecutors to participate in the interviews.

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