



Combating organised crime in South Africa

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Summary

Organised crime obstructs the healthy functioning of democratic society, especially in the case of developing countries, like South Africa. Organised criminal groups threaten the well-being of a country's citizens, while contravening its laws and financial rules. Hence, combating organised crime requires the implementation of harsh measures, which citizens should support for the good of democracy in general and the rule of law in specific.

Organised criminal groups flourish in developing countries where border controls are weak, corruption levels are high, law enforcement is deteriorating and trade and communication barriers are removed. After 1994, South Africa's re-entry into the international community coincided with an increase of international travel, as well as better banking systems, cell phone technology and communication networks. South Africa is thus increasingly being used as a conduit for organised crime, which generates large amounts of funds that enable organised criminal groups to penetrate and corrupt both government and commercial entities.

While South African criminal law does not provide a general definition of the concept "organised crime", the *South African Police Service Act* sets out certain criteria or circumstances under which criminal conduct will be regarded as organised crime. It is submitted that this situation causes a lack of conceptual clarity, which in turn hampers the effective combating of the phenomenon.

Over the years South Africa adopted various international instruments aimed at combating organised crime, most significant of which is the *United Nations Convention against Transnational Organised Crime* (2000), which requires Member Parties to implement legislative measures to disrupt organised criminal groups. However, since the dawn of democracy in South Africa in the early 1990's, the country has been facing its own

unique challenges in combating organised crime, which are explored in this study. Adding to the complexity of the phenomenon is the influence which America has had on the international view of organised crime, as well as the international strategies and policies aimed at combating it. The American influence has not escaped South Africa, as the *Prevention of Organised Crime Act* is largely based on the American *Racketeer Influenced and Corrupt Organisations Act*, resulting in the South African law courts turning to their American counterparts for guidance on interpreting and applying the relevant legislative provisions. Other legislative measures aimed at combating organised crime in South Africa are also explored in this study.

The law enforcement entities tasked with the combating of organised crime in South Africa fall short in the implementation of the legislative tools at their disposal, especially when compared with their counterparts in the United Kingdom, with whom South African law enforcement structures have close historical ties. Several recommendations are therefore made to strengthen and empower the South African law enforcement structures to effectively disrupt organised criminal groups. These recommendations are based on an in-depth study of definitional shortcomings; international obligations as well as local challenges; American influences; the current South African legislative framework; and comparisons with the law enforcement structures of the United Kingdom. The recommendations encompass a coordinated, multi-disciplinary approach to the combating of organised crime in South Africa.

Keywords: asset forfeiture, corruption, crime intelligence, drugs, drug trafficking, informers, Mafia, money laundering, organised crime, proceeds of crime, psychotropic substances, racketeering, surveillance, traps, undercover operations.

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Chapter 1

Introduction

1.1 *Problem statement*

In just one decade, organised crime has gone from being considered a problem limited to certain countries or regions, the result of specific historical circumstances and scarcely affecting the political decision making, to become one of the basic factors when defining threats to the national security in general and democratic governance in particular.¹

The problematic nature of organised crime is demonstrated by the establishment of a Commission of Crime Prevention and Criminal Justice by the United Nations as far back as 1992. One of the issues addressed by this commission is transnational organised crime. At the World Ministerial Conference on this subject in Naples in November 1994, the opening address of the Secretary-General of the United Nations was rather “sombre”. He stated that criminal groups were becoming “crime multinationals” by transferring proceeds of crime across borders by way of new technology and thus penetrating various national economies.²

This sentiment was echoed a few years later in 1998 at the Grim Reaper Conference, which was a conference hosted by the Institute for Strategic Studies of the University of Pretoria on the implications of organised crime for South and Southern Africa. The then Deputy National Commissioner of the SAPS, Commissioner Zolisa Lavis, stated in his welcoming address that organised criminal groups were becoming increasingly more sophisticated and internationally orientated in their activities.³

There are many perceived dangers in allowing organised crime to flourish. It is argued that organised crime is detrimental to the healthy functioning of a democratic state (especially of third world countries) and undermines its society by threatening the well-being of citizens and contravening financial

¹ Reinares and Resa 1997 <http://www.nato.int/acad/fellow/97-99/reinares.pdf> 3.

² McClean *Transnational Organised Crime* 3.

³ Hough and Du Plessis *Organised Crime* 2.

rules.⁴ Hence, combating organised crime requires the implementation of harsh measures, which citizens should support for the good of democracy in general and the rule of law in specific.⁵

Organised crime groups flourish in developing countries where border controls are weak, corruption is high, law enforcement is declining and trade and communication barriers are removed.⁶ After 1994, South Africa's re-entry into the international community coincided with an increase of international travel, as well as better banking systems, cell phone technology and communication systems.⁷ South Africa is thus increasingly being used as a conduit for organised crime, which generates large amounts of funds enabling organised criminal groups to penetrate and corrupt both government and commercial entities.⁸

The illicit proceeds generated by organised criminal groups are laundered to appear as legitimate business income.⁹ This results in such groups using business mechanisms to hide their criminal activities and further their criminal objectives¹⁰ Thus members of organised crime syndicates may appear as legitimate businessmen and in some instances, like the Russian mob for example, may hold Master and Doctorate degrees.¹¹ The same can be said for members of Chinese Triads in South Africa.¹²

1.1.1 The concept "organised crime"

The above discussion of the concept "organised crime" may evoke images of Italian Mafia bosses, Japanese Yakuza or Chinese Triads, as depicted

⁴ Symeonidou-Kastanidou 2007 *EJC* 90-92.

⁵ Symeonidou-Kastanidou 2007 *EJC* 92.

⁶ Burchell *Principles of Criminal Law* 868.

⁷ Haefele 2000 *Acta Criminologica* 107.

⁸ Hübschle 2010 <http://www.iss.co.za/uploads/OrgCrimeReviewDec2010.pdf> 3.

⁹ De Koker *South African Money Laundering Com* 1-6.

¹⁰ Gottschalk *Criminal Entrepreneurship* 1.

¹¹ Manning *Financial Investigation* 194.

¹² Gastrow 2001 <http://www.issafrica.org/publications/papers/triad-societies-and-chinese-organised-crime-in-south-africa> 4.

in popular Hollywood movies, but this is not always the case.¹³ Various definitions of organised crime are applied and many of these definitions differ with respect to the element of hierarchy required, the minimum number of members who must participate, the level of organisation that must be present and the duration of their interaction. Organisations are furthermore often subdivided into syndicates, clans, gangs or networks in terms of some approaches.¹⁴ South African criminal law does not provide a general definition of “organised crime”. The *South African Police Service Act*¹⁵ (hereafter the *SAPS Act*), however, sets out certain circumstances under which criminal conduct or an endeavour thereto, shall be regarded as organised crime. It is submitted that this classification of activity does not really provide conceptual clarity.

The *United Nations Convention against Transnational Organised Crime*, 2000,¹⁶ (hereafter the *Palermo Convention*¹⁷) defines an organised criminal group as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

While this definition provides more clarity it is also criticized as being too restrictive. Organised crime groups may resort to any form of crime that proves beneficial, not necessarily “profitable”.¹⁸ Adding to the challenge of defining organised crime is the fact that the lines between what was traditionally referred to as “white collar crime” and organised crime have

¹³ Hübschle 2010 <http://www.issafrica.org/iss-today/dispelling-popular-organised-crime-myths>.

¹⁴ Standing 2003 <http://www.iss.org.za/uploads/Mono77.pdf> 70.

¹⁵ Section 16(2) of the *SAPS Act*.

¹⁶ Article 2 of the *United Nations Convention against Transnational Organised Crime* (2000) UN Doc A/RES/55/25 (2001).

¹⁷ Referred to as the *Palermo Convention* because it was signed in Palermo, Italy, on 15 December 2000 – see United Nations 2000 <http://www.un.org/News/Press/docs/2000/20001215.lt4359.doc.html>.

¹⁸ McClean *Transnational Organised Crime* 41.

increasingly become blurred. This is partly because white collar crime has become more violent.¹⁹ Also, the more sophisticated organised crime groups include commercial crime and money laundering as part of their criminal networks.²⁰ Increasing criminalisation of corporate decisions, like cartel forming and anti-competitive behaviour, is also bringing the more traditional corporate management within the ambit of organised crime definitions.

1.1.2 *The national and international context of organised crime*

The 2000 Palermo Convention set the stage for the combating of organised crime at an international level. The Statement of Purpose of the Convention “is to promote cooperation to prevent and combat transnational organised crime more effectively.”²¹ The United Nations Office on Drugs and Crime (UNODC) furthermore issued legislative guides in 2004 to assist member countries seeking to ratify or implement the Convention and its Protocols.²²

The Palermo Convention was a definitive step towards the international combating of organised crime. It requires signatory states to criminalise *inter alia* participation in organised crime, money laundering and corruption in their national legislation. This convention was, however, not the first step in the international war on organised crime. Before the Palermo Convention, the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988,²³ (hereafter the Vienna Convention²⁴) required member states to criminalise drug offences as well as money laundering of the proceeds of drug related crimes.²⁵ The international war on organised crime took a further step in July 1989 when

¹⁹ Brody and Kiehl 2010 *JFC* 352-364.

²⁰ Hübschle 2010 <http://www.iss.co.za/uploads/OrgCrimeReviewDec2010.pdf> 71.

²¹ Article 1 of the Palermo Convention.

²² UNODC *Legislative Guides*.

²³ *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* UN Doc E/CONF.82/15.

²⁴ See Stewart 1989 *DJILP* 388-391 for a brief background of the Vienna Convention, which was adopted in Vienna, Austria, in 1988.

²⁵ De Koker *South African Money Laundering Com* 1-11.

the 7 Summit in Paris, France, established the Financial Action Task Force (FATF) with the purpose to explore ways to combat money laundering. The result of the FATF's work was the so-called Forty Recommendations adopted by the G7 Summit in 1990.²⁶

The FATF was then tasked to monitor the implementation of the Forty Recommendations and its mandate has been extended on several occasions.²⁷ The FATF monitors the progress of member countries through a peer-review system. Non-compliant member countries are dealt with by increasing peer pressure on the relevant governments to take corrective steps. Ultimately if member countries fail to comply with the FATF Forty Recommendations, they can be suspended.²⁸

South Africa became a member state of the FATF in June 2003 and has been evaluated twice for its compliance with the FATF standards (in 2003 and again in 2008). In both evaluation reports several aspects of non-compliance were raised, which South Africa will have to address. The FATF, however, revised its standards in 2012,²⁹ which implies that South Africa is required to take corrective steps to address deficiencies identified in the previous evaluation reports as well as amending its laws to comply with the revised standards of 2012.

1.1.3 *The American Racketeer Influenced and Corrupt Organisations Act*

The United States Congress adopted the *Racketeer Influenced and Corrupt Organisations Act, 1970* (hereafter the *RICO Act*), under Title IX of the *Organised Crime Control Act*.³⁰ The *RICO Act* was enacted to safeguard legitimate businesses from being infiltrated by organised

²⁶ De Koker *South African Money Laundering* Com 1-13.

²⁷ De Koker *South African Money Laundering* Com 1-13.

²⁸ De Koker *South African Money Laundering* Com 1-14.

²⁹ FATF 2012
<http://www.fatfgafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>.

³⁰ *Organised Crime Control Act* 1970, Public Law No. 91-452, 84 Stat 922, 941.

crime.³¹ The racketeering provisions found in South Africa's *Prevention of Organised Crime Act*³² (hereinafter the *POCA*) are largely based on similar provisions found in the *RICO Act*.³³

Because the *RICO Act* does not only target "traditional organised crime" but any conduct that meets the definition of a "pattern of racketeering", the similar definition found in the *POCA* reaches more broadly than mere organised crime.³⁴ Not only does the *POCA* target organised crimes, but also cases of "individual wrongdoing" and "crimes that cannot be categorised as organised crimes".³⁵ Given the influence of The *RICO Act* on the *POCA*, South African courts may turn to American case law when interpreting the *POCA*. The Supreme Court of Appeal (SCA) did so in *Dos Santos*³⁶ where it considered the *RICO Act* and several American cases³⁷ to determine whether there was a splitting of charges when prosecuting an accused for predicate offences and racketeering under the *POCA*. Ponnann JA stated that he could not see any reason why South Africa should adopt a different approach to the American courts.³⁸

The American courts have been very proactive in their interpretation of the *RICO Act* and as a consequence the modern interpretation of the *RICO Act* in America goes beyond the text of the Act itself. South African courts should, however, refer to the American judgments with caution and with due consideration of the Bill of Rights of the *Constitution of the Republic of South Africa*³⁹ (hereafter the *Constitution*).

³¹ Cihlar 2010 JMLC 126.

³² *Prevention of Organised Crime Act* 121 of 1998.

³³ De Koker *South African Money Laundering* Com 3-14.

³⁴ De Koker *South African Money Laundering* Com 3-14.

³⁵ Kruger *Organised Crime* 6-7.

³⁶ *S v Dos Santos* 2010 2 SACR 382 (SCA).

³⁷ *United States v Brooklier* 685 F2d 1208 (1982); *United States v Dotterweich* 320 US 277 (1943); *United States v Hartley* 678 F2d 961 (1982); *United States v Martino* 648 F2d 367 (1981); *United States v Peacock* 654 F2d 339 (1981).

³⁸ *S v Dos Santos* 2010 2 SACR 382 (SCA) 403G.

³⁹ *Constitution of the Republic of South Africa*, 1996. See also Kruger *Organised Crime* 8.

1.1.4 South Africa's legislative framework and law enforcement structures

The role of anti-colonial independence struggles in Southern Africa in the development of organised crime cannot be ignored. Gastrow⁴⁰ holds the view that colonialism placed a damper on the development of organised crime as the independence struggles received the attention of liberation fighters and colonial governments, but as countries received their independence, the resultant diasporas led to the establishment of smuggling routes between these independent countries, although still very “unsophisticated”.

One can, however, hold the view that, instead of placing a damper on the development of organised crime, colonialism paved the way for it. The establishment of the Cape of Good Hope by the Dutch East India Company (*Vereenigde Oost-Indische Compagnie* (VOC)) bears witness to this. The VOC was established in 1602 and carried out colonial activities for the States-General of the Dutch Republic. By 1669, the VOC was “the richest trading company the world had ever seen” yet went bankrupt in 1800.⁴¹

One of the reasons for the demise of the VOC was corruption by its employees, which culminated in the sacking of Governor-General Durven in 1732 for illicit trading. His letter of dismissal mentioned “that the VOC ships were so full of smuggled goods that there was scarcely room for legal cargo”.⁴² The first Commander of the Cape of Good Hope and founder of Cape Town, Jan van Riebeeck, was also eventually dismissed for private trading.⁴³

Henning⁴⁴ states that the “numerous and far flung enterprises” of the VOC created a favourable environment for fraud and corruption and it was

⁴⁰ Gastrow 2003 *ISSa* 6.

⁴¹ Henning 2009 *JFC* 296.

⁴² Henning 2009 *JFC* 296.

⁴³ Henning 2009 *JFC* 296.

⁴⁴ Henning 2009 *JFC* 296.

“facetiously remarked in the declining years of the VOC that its initials meant Victim of Corruption (*Vergaan onder Corruptie*)”.

The British East India Company, established in 1600, is another example of the role played by colonialism in organised crime. The Opium Wars of 1839-1860 between Britain and China were a direct result of British traders defying Chinese laws by smuggling narcotics into China.⁴⁵ Thus the trade routes established by colonialism as well as the decentralisation of activities created the perfect environment needed for organised crime to flourish.

Both the struggle against apartheid in South Africa and its fall in the 1990s had significant influences on the development of organised crime in South Africa. During the trade embargoes of the 1970s the South African government was forced to resort to the smuggling of goods while the government's banning of the African National Congress (ANC) forced freedom fighters to resort to similar smuggling techniques in their struggle, especially when the armed struggle ensued in the 1980s.⁴⁶ This furthermore provided the nexus in South Africa between the ANC and organised crime syndicates. There is a symbiotic relationship between terror groups, freedom fighters and organised crime syndicates. These entities all need financing and they conduct their “business” in much the same manner. They often rely on one another for support and facilitation.⁴⁷

This is, however, not to say that other organised crime groups had not penetrated South Africa earlier. The political situation under apartheid caused the majority of the security forces, including the South African Police Force (SAP), as it was called then, to focus on combating liberation fighters. Little attention was therefore given to organised crime groups. South African detectives were, however, aware of the operation of

⁴⁵ Allingham 2006
<http://www.victorianweb.org/history/empire/opiumwars/opiumwars1.html>.

⁴⁶ Gastrow 2003 *ISSa* 9.

⁴⁷ Tupman 2009 *Journal of Money Laundering Control* 189-205.

Chinese Triads as early as the 1970s (mainly in the shark fin trade) and *FaFi*, a gambling game controlled by the Triads, was played in mines as early as 1902.⁴⁸

Due to the apartheid regime and the liberation struggle mentioned above, the structures in the combating of organised crime in South Africa have undergone significant changes over the years. The SAP had many specialised units focusing on their own speciality areas. The South African Narcotics Bureau (SANAB) was, for example, tasked with the prevention and investigation of drug related offences. The Vehicle Theft Unit, Fire-arm Unit and the Murder and Robbery Unit each also focused on their speciality areas. In the early 1990s the majority of special units were closed down. According to Democratic Alliance MP Diane Kohler Barnard, these units were closed “as part of a drive to centralise control of the Police Service under Commissioner Jackie Selebi”.⁴⁹ Jackie Selebi, former National Commissioner of the South African Police Service (SAPS) and President of Interpol was sentenced to 15 years’ imprisonment after he “was convicted in July (2010) of receiving bribes from a drug dealer”.⁵⁰

The National Prosecuting Authority of South Africa (NPA) was also given the responsibility of combating organised crime. First, the Office for Serious Economic Offences (OSEO) was established.⁵¹ The OSEO then became known as the Investigating Directorate: Serious Economic Offences.⁵² Another directorate, known as the Investigating Directorate: Organised Crime and Public Safety, was also established.⁵³ These two

⁴⁸ Gastrow 2003 *ISSb* 94.

⁴⁹ Barnard 2009 <http://www.da.org.za/newsroom.htm?action=view-news-item&id=73271>.

⁵⁰ Fisher 2010 <http://www.bbc.co.uk/news/world-africa-10849335>.

⁵¹ By the *Investigation of Serious Economic Offences Act* 117 of 1991, which was later repealed by s 44 of the *National Prosecuting Authority Act* 32 of 1998 (hereafter the *NPA Act*).

⁵² Established under s 7 of the *NPA Act* (see Proc R123 in GG 19579 of 4 December 1998).

⁵³ Under s 7 of the *NPA Act* (see Proc R102 in GG 19372 of 16 October 1998).

Investigating Directorates were later collapsed into the Directorate of Special Operations (DSO) or “Scorpions”.⁵⁴

The Scorpions, established by the *National Prosecuting Authority Amendment Act* 61 of 2000, had a turbulent existence before being finally closed in 2009 by means of the *National Prosecuting Authority Amendment Act* 56 of 2008. From the ashes of the Scorpions rose the proverbial phoenix (or rather the hawk). The establishment of the Directorate of Priority Crime Investigation (DPCI) or “Hawks” finally placed the sole responsibility for combating organised crime back with the SAPS. The DPCI was established by the *South African Police Service Amendment Act*⁵⁵ and tasked with preventing, combating and investigating national priority offences and any other offences referred to it.⁵⁶ The DPCI was launched on 6 July 2009 and “focuses on serious organised crime, serious corruption and serious commercial crime”.⁵⁷

When South Africa re-entered the international community after the fall of apartheid, its legislative framework had to be updated to meet the previously mentioned international standards on combating organised crime. This led to the drafting of several pieces of legislation, including the current *POCA*, the *Financial Intelligence Centre Act*⁵⁸ (hereafter the *FICA*) and the *Protection of Constitutional Democracy against Terrorist and Related Activities Act* (hereafter the *POCDATARA*).⁵⁹ These laws were assessed during the FATF evaluations of 2003 and 2008. Their subject matter is also affected by the revised standards of FATF released in 2012. South Africa must therefore continually review these laws and structures against the revised standards.

⁵⁴ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 12.

⁵⁵ *South African Police Service Amendment Act* 57 of 2008.

⁵⁶ Section 17D of the *SAPS Act*.

⁵⁷ SAPS 2009

http://www.saps.gov.za/_dynamicModules/internetsite/OPbuildBP3.asp?myURL=132.

⁵⁸ *Financial Intelligence Centre Act* 38 of 2001.

⁵⁹ *Protection of Constitutional Democracy Against Terrorist and Related Activities Act* 33 of 2004.

1.1.5 Comparison with the United Kingdom structures

Due to the global nature of the organised crime problem, possible solutions for the challenges in the combating of organised crime in South Africa can be found in a study of the strategies of other jurisdictions. The implementation of such solutions may contribute to the development of South Africa as a constitutional state. The international observance of the Palermo Convention as well as the international implementation of the FATF's recommendations means that much can be learned from the way in which member states have complied with their international obligations. The United Kingdom is one such jurisdiction.

Due to the historical ties between South Africa and the United Kingdom, English law has had a large impact on the development of the South African legal order. The colonisation of the sub-continent by Britain, the intensified trade between the Cape Colony and Great Britain, as well as the roles of British-trained legal practitioners and judges, led to the application of English criminal procedure and evidence, as well as English mercantile law in the Cape.⁶⁰ This historical impact of English law has led to a mixed legal system in South Africa, consisting of African customary law and Roman-Dutch law, influenced greatly by English law.

With regards to the combating of organised crime, the South African law regime developed independently from the United Kingdom law regime. Due to the many similarities in the common law of the two regimes, much can be gleaned from a comparative study of the organised crime combating strategies of South Africa and the United Kingdom. Much can for instance also be learned from the United Kingdom on the criminal confiscation of the proceeds of crime in terms of interpretation of chapter 5

⁶⁰ Thomas, Van der Merwe and Stoop *Historical Foundations* 106.

of the *POCA*, which is largely based on legislation of the United Kingdom.⁶¹

The brief preceding discussion sets the stage for this study. Organised crime threatens the socio-economic and political order of a country and if this threat is not dealt with effectively, South Africa may follow the route of Colombia, where organised crime momentarily wrestled the power from the democratic elected government;⁶² Italy, where there was a close link between the political leadership of Giulio Andreotti and the Mafia;⁶³ or Mexico, where the government is waging a desperate war on drug cartels.⁶⁴

The prevention and the combating of organised crime are of great international importance. South Africa, as a member of the international community, has an important role to play in combating organised crime, both at a local and international level. This study will explore the combating of organised crime in South Africa. The main issue to be researched is to what extent South Africa's laws and law enforcement system meet the international standards for combating organised crime.

1.2 Research question

The primary objective of this study is to address the main research question: To what extent do South Africa's laws and law enforcement system meet the international standards for combating organised crime?

1.3 Objectives of the study

The primary objective of the study is to determine to what extent South Africa's laws and law enforcement system meet international standards for

⁶¹ Kruger *Organised Crime* 8.

⁶² Haefele 2000 *Acta Criminologica* 105.

⁶³ Economist 1999 <http://www.economist.com/node/326049>.

⁶⁴ CNN 2014 <http://edition.cnn.com/2011/12/04/world/americas/mexico-president-speech>.

combating organised crime. To accomplish the primary objective of the study, the following secondary objectives need to be reached:

- (i) select the most appropriate definition of “organised crime”;
- (ii) locate South Africa’s organised crime challenges in a national and international context;
- (iii) determine what contributions the *RICO Act* made to the current legal position in South Africa;
- (iv) critically analyse the South African legislative framework for combating organised crime;
- (v) critically analyse South Africa’s law enforcement structures for combating organised crime against their UK counterparts; and
- (vi) formulate appropriate recommendations to strengthen current South African organised crime laws and law enforcement structures.

1.4 Research methodology

The research is based on a literature review of relevant textbooks, academic journals, local and international case law as well as electronic resources in order to critically evaluate the current legal position and law enforcement structures aimed at combating organised crime in South Africa and make relevant recommendations. Comparative studies with the United Kingdom and the United States of America are performed to identify weaknesses in the current South African position.

1.5 Flow of study

Besides the introductory chapter, this study comprises six more chapters. Chapter 2 serves as the foundations on which the remainder of the study is based, for it aims to clarify the concept of organised crime and provide a working definition against which the other objectives are reached. Clarity of concept is essential to the combating of the phenomenon.

Chapters 3 and 4 explore the international action taken against organised crime, firstly by the UN through its conventions and the work of FATF, and secondly by the USA, largely because of its international influence in the combating of the phenomenon, but also because of the influence which its *RICO Act* has on South Africa's *POCA*. South Africa's challenges in meeting its international and local obligations in combating organised crime are also assessed.

Chapters 5 and 6 explore South Africa's legislative framework and law enforcement structures put in place to combat organised crime, with a comparison to United Kingdom's strategies because of South Africa's long history associated with United Kingdom's laws and structures.

Finally, chapter 7 encompasses a summary of the conclusions drawn in the preceding chapters, as well as recommendations to strengthen the combating of organised crime in South Africa, which are based on the answer to the research question.

Chapter 2

Defining organised crime

2.1 Introduction

Defining organised crime is a confusing and often contentious task.⁶⁵ Previous attempts have been largely unsatisfactory,⁶⁶ at times clumsily insisting that criminal groups should meet certain structural requirements before they are classified as “organised” criminal groups.⁶⁷ Some scholars formulate activity-based definitions of organised crime,⁶⁸ but as Morrison⁶⁹ maintains, the distinction between conventional crime and organised crime lies not in the activities of the group, but rather in its nature. Morrison⁷⁰ also holds that the phenomenon developed precisely because the traditional activity-based crime classifiers were insufficient to adequately capture the phenomenon. Juxtaposed to this view, Zhang and Chin⁷¹ argue that organised crime should be studied through analysis of the illicit activities performed by its members.

Debate on the topic thus endures,⁷² with some scholars questioning the usefulness of the concept “organised crime”, while others suggest that it should be replaced in its entirety.⁷³ The problems with defining the concept stem from the descriptor “organised”, with scholars disagreeing about

⁶⁵ Goga 2014 SACQ 64; Finckenauer 2005 *Trends in Organised Crime* 68.

⁶⁶ Leong *The Disruption of International Organised Crime* 7; Morrison 2002 AIC 1.

⁶⁷ Abadinsky *Organised Crime* 2; Gastrow 1998

<http://www.issafrica.org.za/uploads/Mono28.pdf>

⁶⁸ Gastrow 1998 <http://www.issafrica.org.za/uploads/Mono28.pdf> for instance focuses on the activities in his definition as follows: “Organised crime consists of those serious criminal offences committed by a criminal organisation which is based on a structured association of more than two persons acting in concert over a prolonged period of time in pursuit of both their criminal objectives and profits.” Also refer to Morrison 2002 AIC 1, where she states that “operational organisations, such as law enforcement and intelligence agencies, have maintained a preoccupation with the *activities* or *enterprises* of organised criminals” (emphasis original).

⁶⁹ Morrison 2002 AIC 1.

⁷⁰ Morrison 2002 AIC 1.

⁷¹ Zhang and Chin 2002 *Criminology* 760.

⁷² David 2012 AIC 2.

⁷³ Bequai *Organised Crime* 1; Longo “Discoursing organised crime” 15; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 1.

what the exact requirements are for organised crime.⁷⁴ Hence this chapter analyses the various views on organised crime, with the intention on identifying a suitable definition to be used in the remainder of the study.

This approach is necessitated by the fact that the formulation of the concept has also not gone without its challenges in South Africa. In *National Director of Public Prosecutors v Vermaak*⁷⁵, for instance, the court held that the meaning of the term “organised crime” used in the POCA is unclear, as it is “not defined in the Act and is used on only one occasion but in circumstances in which its precise meaning is not critical.”⁷⁶ The court therefore used the term “organised crime” to describe offences “that have organisational features of some kind that distinguish them from individual criminal wrongdoing”.⁷⁷ Exactly what these “organisational features” are, however remains unclear.

The problem with finding a definition for organised crime is exacerbated by the secretive nature of organised crime, which makes researching the phenomenon close to impossible, therefore leaving it difficult to clarify.⁷⁸ The need for clarity, however, remains imperative because organised crime must be dealt with “from both an operational and policy perspective”.⁷⁹ Furthermore, an unambiguous definition of the concept is imperative to the combating of organised crime, for as Levi⁸⁰ maintains, the understanding of *what* one is dealing with is essential to *how* one deals with it.⁸¹ Also, the lack of a clear definition has hampered the successful combating of organised crime in America,⁸² which, as will be seen throughout this study, was the catalyst for the conceptual formulation

⁷⁴ Finckenauer 2005 *Trends in Organised Crime* 64.

⁷⁵ *National Director of Public Prosecutions v Vermaak* 2008 1 SACR 157 (SCA).

⁷⁶ *National Director of Public Prosecutions v Vermaak* 2008 1 SACR 157 (SCA) 161A.

⁷⁷ *National Director of Public Prosecutions v Vermaak* 2008 1 SACR 157 (SCA) 161A-B.

⁷⁸ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 24.

⁷⁹ Morrison 2002 *AIC* 2.

⁸⁰ Levi 1998 *Howard Law Journal* 342.

⁸¹ See also Finckenauer 2005 *Trends in Organised Crime* 68.

⁸² Albanese 2000 *JCCJ* 2 410; Finckenauer 2005 *Trends in Organised Crime* 68.

of the phenomenon and has been the driving force behind the combating of organised crime globally.

The difficulty in defining organised crime lies in a number of issues – influenced by the origin of the concept – upon which scholars cannot agree.⁸³ Chief among these are the organisational structure and criminal activities of the various organised criminal groups.⁸⁴ Also, definitions differ according to the needs of the entities or persons who formulate such definitions, be it law enforcement, politicians, or scholars from various disciplines.⁸⁵ This may account for the broad definitions used to define organised crime, because such broad definitions make the concept malleable when serving political interests and institutional requirements.⁸⁶ And it is because of a variety of such broad definitions and the accompanying perceptions of the threat of organised crime that large law enforcement and intelligence infrastructures have been created to combat the threat.⁸⁷ Essentially then, the question when it comes to defining the concept is: what does “organised” mean?⁸⁸

Answering this question has led to various approaches to defining organised crime,⁸⁹ and the various approaches are examined in this chapter in order to select the most appropriate definition for use in the study. The following aspects are considered:

- (i) an overview of the concept “organised crime”;⁹⁰
- (ii) the characteristics of organised crime;⁹¹

⁸³ Leong *The Disruption of International Organised Crime* 7

⁸⁴ Leong *The Disruption of International Organised Crime* 7.

⁸⁵ Leong *The Disruption of International Organised Crime* 7; Morrison 2002 AIC 1.

⁸⁶ Von Lampe 2001 *Forum in Crime and Society* 112.

⁸⁷ Morrison 2002 AIC 4.

⁸⁸ Finckenauer 2005 *Trends in Organised Crime* 81.

⁸⁹ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 24. Leong *The Disruption of International Organised Crime* 8 puts it as follows: “The definitions of organised crime are often determined by the level of targeting within an agency, for example, a local police force would work to a different definition than a national body or an international organisation.”

⁹⁰ See para 2.2 below.

⁹¹ See para 2.3 below.

- (iii) various models for the study of organised crime;⁹²
- (iv) international definitions of organised crime;⁹³
- (v) local definitions of organised crime;⁹⁴
- (vi) organised crime's links with terrorism;⁹⁵ and
- (vii) selecting an appropriate definition.⁹⁶

2.2 Overview of the concept “organised crime”

2.2.1 Historical analysis of the concept “organised crime”

An historical analysis of the development of the concept “organised crime” is helpful in understanding why this concept is so difficult to define. Von Lampe⁹⁷ suggests that organised crime may be difficult to define precisely because it has a long and complex history. The importance of an historical perspective is underlined by Von Lampe⁹⁸ as follows:

Exploring the concept of organised crime, especially in its historical dimension, provides an insight into the breadth and depth as well as into the inconsistencies and contradictions of the meanings attached to the term “organised crime” and alerts us to some of the social and political factors that may play a role in shaping perceptions of organised crime.

To this end, the challenges in conceptualising the concept must be explored.

2.2.1.1 Conceptual challenges

Over time, as the knowledge of organised crime has increased, several myths and assumptions regarding the phenomenon have become embedded in the concept.⁹⁹ And while the media played a large role in cementing such myths,¹⁰⁰ the romanticising of organised crime through the

⁹² See para 2.4 below.

⁹³ See para 2.5 below.

⁹⁴ See para 2.6 below.

⁹⁵ See para 2.7 below.

⁹⁶ See para 2.8 below.

⁹⁷ Von Lampe 2001 *Forum on Crime and Society* 99.

⁹⁸ Von Lampe 2001 *Forum on Crime and Society* 100.

⁹⁹ Morrison 2002 *AIC* 2.

¹⁰⁰ Morrison 2002 *AIC* 2.

use of titles like the Italian Mafia or Colombian drug cartels in novels and movies has also not been helpful in conceptualising the phenomenon.¹⁰¹

Burchell¹⁰² defines criminal law as “the branch of national law that defines certain forms of human conduct as crimes and provides for the punishment of those persons with criminal capacity who unlawfully and with a guilty mind commit crime,” while Snyman¹⁰³ describes the concept of crime as the legally forbidden conduct committed by a person who is prosecuted exclusively by the state with the aim of punishment. For purposes of this study, it must be determined when crime is considered to be organised.

Abadinsky¹⁰⁴ differentiates between “crime that is organised” and “organised crime”, stating that “instrumental violence” is required for organised crime and if it is absent, crime is merely organised. Finckenauer¹⁰⁵ also makes this distinction, stating that “organised crime” is committed by organised criminal groups (for which he has several requirements pertaining to internal characteristics, which is discussed later) and that all other cases of sophisticated crimes are simply “entrepreneurship gone haywire in the form of a crime that is organised”. Accordingly, Finckenauer¹⁰⁶ also concludes that violence is essential to the definition of organised crime.

This differentiation between “organised crime” and “crime that is organised” seems forced and superficial, as some recognised organised crime groups shy away from violence.¹⁰⁷ One example is the Nigerian drug traders, who gained access to the “world’s most cut-throat market,

¹⁰¹ Morrison 2002 AIC 3.

¹⁰² Burchell *Principles of Criminal Law* 3.

¹⁰³ Snyman *Criminal Law* 4.

¹⁰⁴ Abadinsky *Organised Crime* 2.

¹⁰⁵ Finckenauer 2005 *Trends in Organised Crime* 76.

¹⁰⁶ Finckenauer 2005 *Trends in Organised Crime* 81.

¹⁰⁷ Soudijn and Kleemans 2009 CLSC 467.

yet without themselves using violence”.¹⁰⁸ Certain human smuggling criminal groups also show very little reliance on violence in their operations.¹⁰⁹ Also, as will be seen later, scholars cannot agree on what exactly the internal characteristics of a group must be for it to be considered part of organised crime. Therefore, in this study, “organised crime” and “crime that is organised” must carry the same meaning, for the main focus of the concept remains crime, as defined above, the organising aspect merely differentiating it from individual criminal wrongdoing¹¹⁰ (although some scholars view such differentiation as “superficial”).¹¹¹

Concentrating on the root causes of organised crime also does not help to clarify the concept. Mostly, criminals organise themselves around illicit markets, but there are instances where opportunities to commit crime are embraced by individuals who were not involved in crime before, hence such opportunities create new criminals.¹¹² Albanese¹¹³ maintains that the following aspects lead to organised crime: “opportunity factors, the criminal environment, and the skills or access required to carry out criminal activity”. History, however, reveals that many secret societies founded upon religious, revolutionary, political or racial motives either turned to organised crime when their *raison d’être* ceased, or resorted to organised crime as a means of support for their cause.¹¹⁴

Adding to the complexity of defining organised crime, is the confusion among scholars on whether the focus should be on the activities or on the structures of the criminal group, in other words whether “organised crime” refers to the conduct or to the group.¹¹⁵ Those who believe that the term

¹⁰⁸ UNODC *West Africa* 22.

¹⁰⁹ Soudijn and Kleemans 2009 *CLSC* 467.

¹¹⁰ See *National Director of Public Prosecutions v Vermaak* 2008 1 SACR 157 (SCA).

¹¹¹ Morrison 2002 *AIC* 5.

¹¹² Albanese 2000 *JCCJ2* 410.

¹¹³ Albanese 2000 *JCCJ2* 415.

¹¹⁴ Bequai *Organised Crime* 11. Confer Morrison 2002 *AIC* 3, as well as Williams and Godson 2002 *CLSC* 320, for discussions on how the Chinese Triads started out as “revolutionary political organisations”.

¹¹⁵ Leong *The Disruption of International Organised Crime* 8.

carries a group focus, concentrate on identifying the internal characteristics with which the group must comply in order to be “organised crime”, while those who believe the term carries an activity focus, and concentrate on formulating specific sets of crimes which comprise “organised crime”.¹¹⁶ Broadly speaking, then, the concept “organised crime” refers either to the criminal activities that are conducted, where any conduct which is not committed compulsively or spontaneously is labelled as “organised crime”,¹¹⁷ or to the criminal group itself, where criminals who do not act in complete isolation are branded as part of “organised crime”.¹¹⁸

Traditionally, the term “organised crime” denoted tightly knit groups operating in hierarchical structures with the common cause of making a livelihood from racketeering activities.¹¹⁹ As Levi¹²⁰ maintains, the concept is usually used to describe a “group of people who act together on a long-term basis to commit crimes for gain.” This description not only applies to the modern concept of organised crime, but also describes the life-style of the ancient groups of Attila the Hun and Genghis Khan of the Mongols.¹²¹ Due to their nomadic existence and lack of an own unified state, these barbarian tribes used tactics similar to organised crime as a means of survival.¹²² They were also instrumental in the eventual collapse of the Roman Empire, introducing the medieval dark ages, which provides early evidence of the adverse effects of such activity on the sovereignty and effectiveness of the state. Even today, organised criminal activity flourishes under weak governments, or what is referred to as “the failing state”,¹²³ often taking control of the territories of legitimate authorities.¹²⁴

¹¹⁶ Leong *The Disruption of International Organised Crime* 8.

¹¹⁷ Von Lampe 2001 *Forum on Crime and Society* 103.

¹¹⁸ Von Lampe 2001 *Forum on Crime and Society* 103.

¹¹⁹ Woodiwiss “Transnational organised crime” 14.

¹²⁰ Levi 1998 *Howard Law Journal* 335.

¹²¹ Bequai *Organised Crime* 10; Morrison 2002 *AIC* 3.

¹²² Bequai *Organised Crime* 10; Morrison 2002 *AIC* 3.

¹²³ Bequai *Organised Crime* 4; Glenny *McMafia* 3.

¹²⁴ Kruger *Organised Crime* 5.

Glenny¹²⁵ is of the opinion that law enforcement is the first to be “crushed under the rubble of transformation” when a country enters a free-fall.

Law enforcement plays a central role in Levi's¹²⁶ “social definition” of organised crime as a group “whom the police and other agencies of the State, regard or wish us to regard as ‘really dangerous’ to its essential integrity.” This central role of government in identifying organised crime makes sense, because “crime is defined by law”¹²⁷ and the government writes the laws. Hence government plays a key role in the definition of crimes,¹²⁸ because definitions inform policy and affect the allocation of budgets to combat a perceived problem. Finckenauer¹²⁹ puts it as follows:

Public policy making usually focuses upon such elements of definition as the nature of the problem, its magnitude, its seriousness, the rate of change over time, the persons affected by the problem, any geographical aspects, what responses have been attempted, projections of future scenarios, and what appear to be the sources or causes of the problem. Organised crime, where it exists, is clearly a public policy problem.

Policy making is affected firstly by academics and researchers who attempt to understand and explain the phenomenon, and secondly by the media, who inform the general public's opinion on a matter.¹³⁰ And, of course, the bigger the problem, the more money is needed to combat it, and thus policy makers could be inclined to balloon a problem in order to secure more funding. Hence an analysis of the development of the concept in America sheds some light on the modern understanding of organised crime.

¹²⁵ Glenny *McMafia* 24.

¹²⁶ Levi 1998 *Howard Law Journal* 335.

¹²⁷ Finckenauer 2005 *Trends in Organised Crime* 68.

¹²⁸ See Burchell *Principles of Criminal Law* 3 and Snyman *Criminal Law* 4 where their respective definitions of crime show that government plays a central role in determining what constitutes crime.

¹²⁹ Finckenauer 2005 *Trends in Organised Crime* 70.

¹³⁰ Finckenauer 2005 *Trends in Organised Crime* 70-71.

2.2.1.2 Development of the concept in America

Academic interest in the phenomenon started in America in the 1920s and 1930s with the focus on what was termed “systematic criminal activity”.¹³¹ It was thought that the success of such criminal activity required the involvement of public officials in law enforcement and/or justice, as well as other professionals and businessmen.¹³² Thus Moley¹³³ holds the view that an efficient and honest administration of justice is vital in the combating of crime. As Woodiwiss,¹³⁴ however, indicates, only some forms of organised crime, like piracy, need weak governments to flourish, whilst others, like smuggling, flourish no matter how “strong” the government is perceived to be.

The origin of the concept “organised crime” is thus ascribed to the United States of America, where the first official definition was formulated by the Hoover administration in 1929.¹³⁵ Woodiwiss¹³⁶ in fact argues that the United States of America has succeeded in exporting its own views on organised crime to other jurisdictions by means of the Palermo Convention.¹³⁷ In time the concept came to mean the uniform organisation of criminals.¹³⁸ Organised criminals were the members of the enterprise and the meaning of organised crime was therefore determined by whatever the group did.¹³⁹

A number of scholars argue that the enactment of legislation which was difficult to enforce contributed to the success of organised crime.¹⁴⁰ The

¹³¹ Woodiwiss “Transnational organised crime” 14.

¹³² Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 27.

¹³³ Moley 1926 *The Annals* 78.

¹³⁴ Woodiwiss “Transnational organised crime” 13.

¹³⁵ Paoli 2002 *CLSC* 53; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 25.

¹³⁶ Woodiwiss “Transnational organised crime” 13.

¹³⁷ The influences of the United States of America in the drafting of this convention is discussed in para 3.3.2 below.

¹³⁸ Block and Chambliss *Organising Crime* 10; Paoli 2002 *CLSC* 54.

¹³⁹ Block and Chambliss *Organising Crime* 10.

¹⁴⁰ Smith *The Mafia Mystique* 64; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf>; Woodiwiss “Transnational organised crime” 14.

Prohibition in America,¹⁴¹ for instance, was based on legislation which proved to be unenforceable¹⁴² and provided criminals with a financial basis obtained mainly through illicit alcohol smuggling, referred to as “bootlegging”.¹⁴³ The proceeds of these illicit activities, coupled with the modernisation experienced during the Prohibition period, provided the means and opportunities for criminals to start evolving into organised crime groups, which in turn led to the first meeting of heads of crime in May 1929, which was held to discuss how the alcohol trade could be monopolised.¹⁴⁴

As these criminal groups evolved and the unenforceability of the Prohibition became clear, the Roosevelt administration offered Americans a “New Deal”, which led to large-scale legislative reformation and regulation from 1933 onwards.¹⁴⁵ Thus the 1930s saw the birth of the “gangster” label, largely due to the perception that the “gangsters” had evolved into “the criminal equivalent of a modern businessman”.¹⁴⁶ Roosevelt’s reforms also saw the prosecution of large numbers of such gangsters and some of their government protectors.¹⁴⁷ In time the “gangster” label became too narrow to accommodate all the illegal business activities of such criminals, because the term largely denoted robberies, and thus “racketeer” became a more widely used label and included a wider array of illegal business activities, which was seen as “a defect of capitalism rather than as a gang phenomenon”.¹⁴⁸ The term “racketeer”, however, still referred to the individual criminal rather than the

¹⁴¹ The American *National Prohibition Act*, or *Volstead Act* as it was commonly known, came into effect in January 1920 and clamped down on the manufacturing and distribution of alcohol until it was repealed in December 1933. See Schrad 2007 *The Policy Studies Journal* 437-463 for a detailed discussion regarding the unenforceability of such legislation.

¹⁴² Woodiwiss “Transnational organised crime” 14.

¹⁴³ Smith *The Mafia Mystique* 64; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf>; Morrison 2002 *AIC* 3; Woodiwiss “Transnational organised crime” 14.

¹⁴⁴ Hobbs and Antonopoulos 2013 *Global Crime* 32; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 25.

¹⁴⁵ Smith *The Mafia Mystique* 65; Woodiwiss “Transnational organised crime” 14.

¹⁴⁶ Smith *The Mafia Mystique* 65; Woodiwiss “Transnational organised crime” 14.

¹⁴⁷ Woodiwiss “Transnational organised crime” 15.

¹⁴⁸ Smith *The Mafia Mystique* 67; Woodiwiss “Transnational organised crime” 14.

racketeering organisation¹⁴⁹ and was initially used mainly for criminals involved in “labour unions and business associations for the purpose of regulating local markets or to bribe businessmen”.¹⁵⁰ Later other criminal activities like gambling and bootlegging also fell under the meaning of “racketeering”.¹⁵¹ The term, however, ignored the underlying corruption and collusion that made racketeering possible and thus the strategies to combat it were ineffective, as they focussed on extortion, which was perceived to be an essential element of racketeering.¹⁵²

Adding to the confusion, was the work of Edwin Sutherland on what he termed “white-collar crime”, which placed corporate criminals in a separate category to the so-called “gangsters” and “racketeers”.¹⁵³ The “racketeer” label in turn became even more problematic when various attributes were deemed necessary to differentiate the various “categories” of racketeering, as emphasised by the McClellan Committee hearings of 1957 to 1959 (discussed below), which focussed largely on labour racketeering.¹⁵⁴

The solution to the descriptive inadequacy of the “racketeer” label was found in the term “organised crime”.¹⁵⁵ As opposed to the “gangster” and “racketeer” labels, “organised crime” did not refer to individuals, but recognised the social condition associated with the phenomenon where the criminals and their protectors were partners because of their corrupt relationships, thus bringing the so-called “white-collar criminals” into the fold again.¹⁵⁶

¹⁴⁹ Smith *The Mafia Mystique* 72; Woodiwiss “Transnational organised crime” 14.

¹⁵⁰ Von Lampe 2001 *Forum on Crime and Society* 105. As is seen in chapter 4 below, it is precisely this fear of penetration of legal business by racketeers which led the US Congress to enact the *RICO Act* in 1970.

¹⁵¹ Von Lampe 2001 *Forum on Crime and Society* 105.

¹⁵² Smith *The Mafia Mystique* 72.

¹⁵³ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 29.

¹⁵⁴ Smith *The Mafia Mystique* 74.

¹⁵⁵ Smith *The Mafia Mystique* 75.

¹⁵⁶ Smith *The Mafia Mystique* 78; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 28; Woodiwiss “Transnational organised crime” 14.

One of the early influential scholars on organised crime was Donald Cressey, who served as consultant to the President's Commission on Law Enforcement and Administration of Justice and made the first, albeit "tentative", analysis of a systems approach to the study of organised crime in 1967.¹⁵⁷ Cressey's¹⁵⁸ early views on the combating of organised crime were as follows:

Because "organised crime" obviously involves organisation, what is needed as a basis for legal control is detailed and precise specification, by social scientists, engineers, and anyone else with a knowledge of systems, of the formal and informal structures of illicit business and governments.

Cressey's¹⁵⁹ belief that organised crime involved "illicit enterprises", led to his hierarchical model (discussed later in this chapter), which paved the way for the evolution of the concept of a monolithic underground organisation.¹⁶⁰ This belief informed early policies and procedures for combating organised crime and was popularised in the 1940s movies and radio programmes propagating the "Us versus Them approach", with "fearless protectors of the vulnerable law-abiding public" cast against the public enemies, namely "gangsters" and "racketeers".¹⁶¹ In so doing, the early assumptions of organised crime soon morphed into enduring myths about the phenomenon.¹⁶²

The shift of emphasis away from corrupt public officials to members of the underworld, was cemented during the 1950s, when the Mafia as a "conspiracy of Italians" became synonymous with the concept organised crime.¹⁶³ As the bootleggers had exploited the markets created by the prohibition on alcohol, the Mafia exploited the markets created by the

¹⁵⁷ Cressey *Theft of the Nation* 301; Finckenhauer 2005 *Trends in Organised Crime* 71; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 31.

¹⁵⁸ Cressey *Theft of the Nation* 300.

¹⁵⁹ Cressey *Theft of the Nation* 301.

¹⁶⁰ Finckenhauer 2005 *Trends in Organised Crime* 71; Paoli 2002 *CLSC* 54.

¹⁶¹ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 30; Woodiwiss "Transnational organised crime" 15.

¹⁶² Morrison 2002 *AIC* 2.

¹⁶³ Finckenhauer 2005 *Trends in Organised Crime* 71; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 31; Von Lampe 2001 *Forum on Crime and Society* 105; Woodiwiss "Transnational organised crime" 14.

prohibition on other activities, such as gambling and drugs.¹⁶⁴ Thus the phrase “organised crime” moved from its original meaning of “systematic criminal activity” to that of a “hierarchical, centrally organised criminal conspiracy”.¹⁶⁵

This latter view was especially pushed during the 1950s by the Kefauver Committee, when investigators of the United States Senate found evidence of the existence of the Mafia, described as a single national underground organisation led by a small group rather than one individual.¹⁶⁶ Hobbs and Antonopoulos¹⁶⁷ maintain that this theory of organised crime also succeeded in moving the focus away from the socio-economic causes of crime as well as the involvement of elite individuals in organised criminal activities. Similarly, Von Lampe¹⁶⁸ highlights the impact which the Kefauver Committee had on the understanding of organised crime, stating that two significant changes were brought about by the Kefauver Committee. Firstly, a degree of ethnicity was added to the concept of organised crime, because it was seen as an Italian organisation; secondly, the concept was expanded to a national scale as it was no longer seen as localised, but was instead perceived as a national threat from the outside.

The findings of the Kefauver Committee, which was formed to investigate illegal gambling, paved the way for organised crime and the Mafia to eventually mean the same thing.¹⁶⁹ Initially the McClellan Committee hearings of 1957 to 1959, which investigated labour racketeering, adopted the view that organised crime and the Mafia were synonymous with each

¹⁶⁴ Von Lampe 2001 *Forum on Crime and Society* 105; Woodiwiss “Transnational organised crime” 15.

¹⁶⁵ Woodiwiss “Transnational organised crime” 16. See also Paoli 2002 *CLSC* 54.

¹⁶⁶ Bequai *Organised Crime* 2; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 31; Woodiwiss “Transnational organised crime” 15.

¹⁶⁷ Hobbs and Antonopoulos 2013 *Global Crime* 35.

¹⁶⁸ Von Lampe 2001 *Forum on Crime and Society* 106.

¹⁶⁹ Paoli 2002 *CLSC* 54.

other.¹⁷⁰ Then, after the Oyster Bay Conferences of the early 1960s, the term “organised crime” simply meant the Mafia.¹⁷¹ The Oyster Bay Conferences were sponsored by Governor Nelson Rockefeller of New York and focussed on the combating of organised crime in America.¹⁷² The outcome of these conferences was the strengthening of the view of organised crime as “monolith, quasi-military in structure and discipline and ruled by a small central group of conspirators.”¹⁷³ Block and Chambliss¹⁷⁴ criticise this view of organised crime, because it was based on journalists’ and government officials’ accounts rather than any “primary data generated by socialist scientists”. Similarly, Bequai¹⁷⁵ disagrees with these findings, arguing that organised crime groups do not have the ideological or revolutionary objectives of a quasi-military group, but are “a confederation of criminal groups that come together because of economic and political need”.

The context of the above findings of the Oyster Bay Conferences must, however, be kept in mind. The conclusions were drawn at a time when little was known about organised crime and participants at the conferences had “just begun to perceive organised crime as a social system”.¹⁷⁶ Furthermore, during that time organised crime was seen merely as a “social category” and not a “legal category” of crime and therefore law enforcement agencies did not gather information on it as they did for other categories of crime.¹⁷⁷ Hence, organised crime thrived simply because it did not constitute a formal crime and did not receive the necessary attention to combat it.¹⁷⁸

¹⁷⁰ Smith *The Mafia Mystique* 77; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 30.

¹⁷¹ Von Lampe 2001 *Forum on Crime and Society* 106.

¹⁷² Bequai *Organised Crime* 2; Cressey *Theft of the Nation* 314.

¹⁷³ Bequai *Organised Crime* 3.

¹⁷⁴ Block and Chambliss *Organising Crime* 11.

¹⁷⁵ Bequai *Organised Crime* 3.

¹⁷⁶ Cressey *Theft of the Nation* 314.

¹⁷⁷ Cressey *Theft of the Nation* 299.

¹⁷⁸ Cressey *Theft of the Nation* 300.

The previously mentioned 1967 President's Commission on Law Enforcement and the Administration of Justice, referred to as the Katzenbach Commission, gave further credence to the view that organised crime is a monolithic underground organisation when it defined organised crime as "a society that seeks to operate outside the control of the American people and their governments".¹⁷⁹ Academic credibility was given to this perception when Donald Cressey extensively reworked his earlier report to the President's Commission, which he admitted was compiled under severe time constraints, and published it in book-format a year later under the title: *Theft of the Nation*.¹⁸⁰ Critics, however, viewed Cressey's involvement in the commission merely as a ploy to give academic credibility to a model already developed by law enforcement officials.¹⁸¹ This is supported by Von Lampe's¹⁸² assertion that the views on organised crime adopted by the Kefauver Committee was informed by evidence of the Federal Bureau of Investigation.¹⁸³

Further cementing the view of organised crime as a monolithic group, was one of America's leading experts on organised crime, Senator McClellan, who chaired the McClellan Committee hearings mentioned above. McClellan's view was that anyone holding a position in an organisation that commits crime, should legally be classified as a criminal.¹⁸⁴ This view was expressed in Senate Bill 2187, introduced in the 89th Congress of 24 June 1965, entitled *A Bill to Outlaw the Mafia and Other Organised Crime Syndicates*. This Bill was never enacted due to concerns regarding its

¹⁷⁹ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 30-31.

¹⁸⁰ Cressey *Theft of the Nation* ix.

¹⁸¹ Paoli 2002 CLSC 54; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 31.

¹⁸² Von Lampe 2001 *Forum on Crime and Society* 106.

¹⁸³ Paoli 2002 CLSC 53.

¹⁸⁴ Cressey *Theft of the Nation* 317.

constitutionality,¹⁸⁵ but importantly, seems to have been the first step in the thinking of outlawing membership of organised criminal groups.¹⁸⁶

The result of the abovementioned constant and repetitive view of organised crime as a “hierarchical, centrally organised criminal conspiracy”, meant that by the end of the 1960s, the term “organised crime” was understood in this manner by most people.¹⁸⁷ By 1970, the perceived threat of organised crime to the American culture was so large that the American Congress adopted the *RICO Act*, giving widespread and drastic powers to law enforcement agencies in the combating of organised crime.¹⁸⁸

The problem ever since has been that the practice has not supported the theory, for if organised crime was a monolithic organisation controlled by a few so-called “supercriminals”, elimination of the elite would have terminated the problem. In reality, however, the prosecution of the criminal heads did not kill the illicit body, but simply opened up the space for a new head (or heads) to grow.¹⁸⁹ Also, after the initial perceptions of organised crime, researchers confirmed that the illegal drug trade and other illicit markets showed characteristics of fragmentation and intense competition rather than a monopoly, proving that the Mafia simply participated in these illegal markets as opposed to being the controlling entity.¹⁹⁰ Moreover, such an erroneous perception of organised crime has not been conducive to the successful combating of the phenomenon, because proper analysis and policy development are hampered by a lack of proper understanding.¹⁹¹

¹⁸⁵ Cressey *Theft of the Nation* 317.

¹⁸⁶ For a detailed discussion regarding the conceptional deficiencies of this Bill, see Cressey *Theft of the Nation* 317-318.

¹⁸⁷ Woodiwiss “Transnational organised crime” 16.

¹⁸⁸ See Chapter 96 of the *Organised Crime Control Act* 1970, Public Law No. 91-452, 84 Stat 922.

¹⁸⁹ Woodiwiss “Transnational organised crime” 23.

¹⁹⁰ Woodiwiss “Transnational organised crime” 23.

¹⁹¹ Finckenauer 2005 *Trends in Organised Crime* 73; Morrison 2002 *AIC* 3.

The above shift in focus away from the criminal activities to the criminal groups was further strengthened by the Reagan-administration during the early 1980s. President Reagan's commission on organised crime, named the Kaufman Commission after its chairman, Judge Kaufman, investigated specific crime groups, thus differing from previous Presidential commissions, which were geared to investigate specific criminal activities.¹⁹² The perceived threat to the American culture by outsiders was expanded to include the drug cartels, because drug trafficking was identified as the "most profitable organised crime activity".¹⁹³ Furthermore, the shift in focus to criminal groups brought with it the problem that "a successful definition (of organised crime) had to be malleable so as to include the greater number of underlying groups".¹⁹⁴

Focussing on the group and what bound it together (whether race, ethnicity, culture etc.) made a workable definition of organised crime impossible and led to disputes regarding conceptual definitions.¹⁹⁵ According to Woodiwiss,¹⁹⁶ the Kaufman Commission failed to challenge the existing views on organised crime, despite the evidence of the "continuing failure" in combating the phenomenon, and instead proceeded along the same lines as before, although along "a harder line" by calling for more wire taps, more informants, and more undercover agents. Woodiwiss¹⁹⁷ criticises the failure of the Kaufman Commission on two fronts, firstly the failure to consult those who could have highlighted the deficiencies in this approach to organised crime and, secondly, the failure to consider corruption within police and justice ranks, which protected organised crime.

¹⁹² Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 34.

¹⁹³ Woodiwiss "Transnational organised crime" 17.

¹⁹⁴ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 34.

¹⁹⁵ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 34.

¹⁹⁶ Woodiwiss "Transnational organised crime" 17.

¹⁹⁷ Woodiwiss "Transnational organised crime" 17.

The result was that the topic of organised crime started receiving worldwide attention from the late 1980s and, with the decline of the Cold War in the last decades of the 20th century, came the rise of “transnational organised crime”,¹⁹⁸ which entails organised criminal groups operating at a global level.¹⁹⁹ Thus, as the understanding of organised crime grew, the notion that organised crime simply meant the Mafia made way for the expansion of the understanding of the concept to other organised groups.²⁰⁰ And so the term “organised crime” was not reconceptualised. Instead, “a concept of non-traditional organised crime emerged that merely transferred the Mafia model to other ethnically defined criminal organisations”.²⁰¹ This in turn led to the internationalisation of the prevailing understanding of organised crime. Von Lampe²⁰² summarises the development of the American concept of organised crime as follows:

[T]he original systematic view of the relation between organised crime and society has been replaced by a dichotomic view that in recent years has been carried to extremes with the concept of global “mafias”.

Finckenauer²⁰³ maintains that this understanding of the Mafia is a “social construct” which “extends beyond the people, the places and the activities that comprise it”. Finckenauer instead believes that it is only one of the forms of organised crime, not the only form. Hobbs and Antonopoulos²⁰⁴ agree, stating that the American view of organised crime has been tainted by the alien conspiracy theory, where organised crime is constructed through the “prism” of foreigners importing organised crime to America. Hobbs and Antonopoulos²⁰⁵ go as far as saying that the term organised crime originated as a catch-phrase to describe the illegal activities of the urban poor and to steer attention away from the own illegal dealings of the violent and wealthy entrepreneurs. They also maintain that America has

¹⁹⁸ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 36.

¹⁹⁹ Von Lampe 2001 *Forum on Crime and Society* 108.

²⁰⁰ Von Lampe 2001 *Forum on Crime and Society* 107.

²⁰¹ Von Lampe 2001 *Forum on Crime and Society* 107.

²⁰² Von Lampe 2001 *Forum on Crime and Society* 108.

²⁰³ Finckenauer 2005 *Trends in Organised Crime* 73-74.

²⁰⁴ Hobbs and Antonopoulos 2013 *Global Crime* 28.

²⁰⁵ Hobbs and Antonopoulos 2013 *Global Crime* 28.

been very successful in exporting this construct to other jurisdictions.²⁰⁶ The next section therefore examines how this American concept of organised crime became the international view in such a way that one can speak of a “uniform global conception of organised crime”.²⁰⁷

2.2.1.3 Internationalisation of the American concept of organised crime

Globalisation provided the foundation for the formation of transnational organised crime.²⁰⁸ Even though some scholars perceive the threat of transnational organised crime as bigger than mere national organised crime,²⁰⁹ Woodiwiss²¹⁰ maintains that it was merely the American concept of organised crime which became internationalised through the United States of America’s influence from within the United Nations, which was eventually cemented in the Palermo Convention.

The fall of communism on the one hand, and the liberation of international markets on the other, allowed the shadow economy to flourish.²¹¹ Criminals saw the opportunity of increased trade and migration, especially in jurisdictions where governments were unable to police their countries, and soon transnational organised crime was visible from Eastern Europe to India, Colombia and Japan, deflating the initial euphoria of the fall of communism.²¹² This phenomenon is often referred to as the “dark side of globalisation”.²¹³ Morrison²¹⁴ however warns that transnational organised criminal groups should not be viewed as following “the same blueprint” as one another, because such groups vary in their characteristics and activities, much like legitimate international companies differ in

²⁰⁶ Hobbs and Antonopoulos 2013 *Global Crime* 28.

²⁰⁷ Von Lampe 2001 *Forum on Crime and Society* 108.

²⁰⁸ Morrison 2002 *AIC* 4; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 36.

²⁰⁹ Morrison 2002 *AIC* 3.

²¹⁰ Woodiwiss “Transnational organised crime” 19.

²¹¹ Glenny *McMafia* 8.

²¹² Glenny *McMafia* 5-6.

²¹³ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 37.

²¹⁴ Morrison 2002 *AIC* 4.

composition and strategies. Glenny²¹⁵ furthermore bemoans the fact that academics and researchers channel so much energy into understanding the “process of ‘licit’ globalisation”, yet devote surprisingly little effort to the understanding of the shadow economy and its ties to the licit economy, for there is no country in modern times that does not have some sort of organised crime network operating within its borders.²¹⁶

According to Woodiwiss,²¹⁷ American influence on the global view of organised crime started as early as the 1983 President’s Commission on Organised Crime, when the Reagan Group made recommendations on “foreign assistance”, which “was a clear statement that the United States of America intended to internationalise drug prohibition as a response to its own organised crime problems.” These recommendations on “foreign assistance” lay the foundation for what Woodiwiss²¹⁸ calls the “‘Americanisation’ of the international community’s response to drugs”, which according to him was “built around the framework established by United Nations conventions” as follows: ²¹⁹

The 1961 Single Convention on Narcotic Drugs was followed by the 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. These were all established largely as a result of intense and long-term US pressure.

As is shown in chapter 3, not much energy went into the implementation of these conventions, which could be because of reluctance to accept the American position. Woodiwiss²²⁰ maintains that the continuing failure of the war on drugs and ineffectiveness of the abovementioned United Nations conventions is evidenced by money laundering scandals and the development of “significant international criminal associations and networks amongst professionals”.

²¹⁵ Glenny *McMafia* 8.

²¹⁶ Bequai *Organised Crime* 19.

²¹⁷ Woodiwiss “Transnational organised crime” 18.

²¹⁸ Woodiwiss “Transnational organised crime” 19.

²¹⁹ Woodiwiss “Transnational organised crime” 19.

²²⁰ Woodiwiss “Transnational organised crime” 20.

Transnational organised crime subsequently became the scapegoat for explaining the failure of the war on drugs and, in order to focus on this new menace, a “global pluralist understanding of organised crime” was formulated, which in turn required a collaborated international response.²²¹ Thus, when the United Nations decided to address this issue in the Palermo Convention, a suitable definition for the concept of transnational organised crime had to be formulated. Although the definition ultimately formulated in the Palermo Convention is discussed later, it suffices to say that many obstacles were encountered in conceptualising the exact meaning of “transnational organised crime”, with countries like Australia and Canada expressing concerns regarding the possibility of member states agreeing on a suitable definition.²²²

That these concerns were warranted is evidenced by the manifestation of the issue during the negotiation process of the Palermo Convention. During the drafting process of the Palermo Convention, it took as much as ten sessions of the Ad Hoc Committee to finalise the definition of “organised criminal group” and seven more sessions to define “serious crime”.²²³

Formulating a definition for “transnational organised crime” was, however, more problematic. Initially, the following three approaches were supported:

- (i) define “transnational organised crime” in the text;
- (ii) leave “transnational organised crime” undefined; and
- (iii) base “transnational organised crime” on a combination of three aspects, namely the presence of serious crime, which was defined elsewhere in the convention; the involvement of an organised

²²¹ Woodiwiss “Transnational organised crime” 20-21.

²²² McClean *Transnational Organised Crime* 6-7.

²²³ McClean *Transnational Organised Crime* 43.

criminal group, which was also defined elsewhere in the convention; and the requirement of a transnational element.²²⁴

The final form was adopted at the tenth session of the Ad Hoc Committee and followed more or less the third option above. The end result was that “organised crime” had developed into an international concept with a “transnational” element ascribed to it under certain circumstances (discussed below).²²⁵

The preceding discussion of the development process of the concept “organised crime” makes it clear that much disagreement persists about the phenomenon. The shift in focus from the criminal activities to the criminal group itself, means that definitions are formulated according to the characteristics of an organised criminal group and not according to the criminal activities. Maltz²²⁶ thus contends that it is important to analyse the essential characteristics of organised crime before attempting to define it. This illustrates precisely where the contention regarding organised crime lies: what internal characteristics should be present for a group to be considered an “organised criminal group”. Hence, the next section of this study analyses the internal characteristics of organised crime as proposed by various scholars in attempts to clarify the concept.

2.3 The characteristics of organised crime

The characteristics of organised crime are important to those who formulate group-based definitions of the phenomenon, as opposed to activity-based definitions.²²⁷ Even though scholars agree that the traditional transaction-based approach to prosecuting criminal behaviour is insufficient to combat organised crime, there is little consensus about what

²²⁴ McClean *Transnational Organised Crime* 47.

²²⁵ McClean *Transnational Organised Crime* 50; Woodiwiss “Transnational organised crime” 23.

²²⁶ Maltz “Defining organised crime” 26.

²²⁷ Leong *The Disruption of International Organised Crime* 8.

the characteristics of organised crime are.²²⁸ The thinking is that because of the difficulty in defining organised crime, common characteristics should be identified against which criminal groups are measured to determine whether they are part of the organised crime phenomenon.²²⁹

Von Lampe²³⁰ lists three approaches to identifying the characteristics of organised crime, namely activity, organisation and system approaches. The activity approach focuses on the types of crimes conducted by the group and is therefore not concerned with the degree of organisation among the members of the group, nor with their social-political position.²³¹ The organisation approach focuses on the organisational structure within the group, regardless of the criminal activities or social-political position of members.²³² The system approach sees organised crime as a social condition where criminals interact with legitimate structures to form a corrupt socio-political system, irrespective of their activities or degree of organisation.²³³ A fourth approach is multi-dimensional and encompasses aspects of each of the three abovementioned approaches, albeit in varying degrees.²³⁴ Such multi-dimensional approaches however still “tend to be based on an organisation-centred understanding of organised crime”.²³⁵

2.3.1 *Early attempts at formulating common characteristics*

As Von Lampe²³⁶ points out, an analysis of the frequency with which the term “organised crime” was used in the media, shows that the term was used for “rather short periods of time between the late 1960s and mid-1980s”. One of the earliest attempts at formulating the central characteristics in the identification of organised crime was made by

²²⁸ Morrison 2002 AIC 1.

²²⁹ Leong *The Disruption of International Organised Crime* 8.

²³⁰ Von Lampe 2001 *Forum on Crime and Society* 102.

²³¹ Von Lampe 2001 *Forum on Crime and Society* 102.

²³² Von Lampe 2001 *Forum on Crime and Society* 102.

²³³ Von Lampe 2001 *Forum on Crime and Society* 102.

²³⁴ Von Lampe 2001 *Forum on Crime and Society* 102.

²³⁵ Von Lampe 2001 *Forum on Crime and Society* 102.

²³⁶ Von Lampe 2001 *Forum on Crime and Society* 100.

Cressey,²³⁷ for whom “structure” was the most important characteristic, because “structure means organisation”.²³⁸ Elsewhere, Cressey²³⁹ states:

[D]escription of organisational structure, including especially, description of corruptor, corruptee, and enforcer positions, is essential to understanding and controlling organised crime.

Although Cressey²⁴⁰ concedes that these positions of corruptor, corruptee and enforcer are not the only positions within an organised crime group, he suggests that they are the formal positions which are “both essential to and unique to the organisation which is organised crime”. Cressey identifies the “corruptor” as someone who has the duty to bribe public officials in order to secure the group’s immunity from the law. The “corruptee” is of course the public official who is so influenced, while the “enforcer” must ensure order within the group by administering penalties to offenders, usually in the form of violence. Cressey²⁴¹ maintains that these three positions are essential for a criminal group to be considered as an organised crime group and therefore formulates his definition of organised crime on these positions as follows:

An organised crime is any crime committed by a person occupying, in an established division of labour, a position designed for the commission of crime, providing that such division of labour also includes at least one position for a corruptor, one position for a corruptee, and one position for an enforcer.

Cressey²⁴² maintains that a definition based on these three “essential” positions leads to clarity, because legislative experts are able to define them as “precisely as they have defined ‘larceny,’ ‘robbery,’ and ‘taking indecent liberties with a minor’”. The problem with this approach is that Cressey²⁴³ muddles the difference between the concepts of “organised crime” and “the Mafia” so much, that he does not differentiate between the

²³⁷ Cressey *Theft of the Nation* 315.

²³⁸ Cressey *Theft of the Nation* 315.

²³⁹ Cressey *Theft of the Nation* 317.

²⁴⁰ Cressey *Theft of the Nation* 320.

²⁴¹ Cressey *Theft of the Nation* 316.

²⁴² Cressey *Theft of the Nation* 319.

²⁴³ Cressey *Theft of the Nation* 316.

two, stating that the phenomenon “customarily called ‘organised crime’ (is) now called ‘Cosa Nostra’”. Using these three “positions” in an organisation to identify the characteristics for organised crime, therefore does not lead to a definition of organised crime that is currently relevant. What Cressey did however identify early on, is the close link between organised crime and corruption, which, as is seen throughout this study, is the catalyst for growth of organised crime.

Shortly after Cressey, Albin²⁴⁴ also attempted to identify common internal characteristics of organised crime groups. Albin²⁴⁵ maintains that the characteristics of organised crime are so important that they form an “integral part of it by virtue of the relationship of syndicated criminal activity to legitimate society” and believes that these characteristics “have become the norms, values, and roles expected of syndicated criminals”, which everyone must comply with in order to participate.

Albin²⁴⁶ lists secrecy as the first of these characteristics. It seems questionable whether secrecy differentiates “organised” crime from normal crime, for the vast majority of crimes are cloaked in secrecy and few criminals are eager to publish their fetes. The second characteristic that Albin²⁴⁷ lists, is violence, but again violence does not seem to delineate the grounds between organised and normal crime sufficiently,²⁴⁸ and as discussed below, some organised crime operations actually shun the use of violence. Albin²⁴⁹ himself furthermore concedes that nonviolent techniques are used when they are more effective. The third characteristic which Albin²⁵⁰ finds in organised crime is protection, which according to him is based on factors such as “friendship, obligation, agreement, extending a favour, or the desire to create a new patron-client

²⁴⁴ Albin *The American Mafia* 267.

²⁴⁵ Albin *The American Mafia* 267.

²⁴⁶ Albin *The American Mafia* 267.

²⁴⁷ Albin *The American Mafia* 269.

²⁴⁸ Finckenauer 2005 *Trends in Organised Crime* 74.

²⁴⁹ Albin *The American Mafia* 275.

²⁵⁰ Albin *The American Mafia* 277.

relationship". This protection includes legal assistance upon arrest, providing for family members upon imprisonment, and in some instances, even assistance to secure an early parole.²⁵¹ Albin²⁵² furthermore maintains that these three internal characteristics, namely secrecy, violence and political protection, are the main similarities between American and Sicilian organised crime operations.

Shortly after the spike in usage of the term "organised crime" in the 1980s,²⁵³ Maltz²⁵⁴ analysed the internal characteristics of organised criminal groups, focussing more on the acts of organised crime than "the connections that tie the acts together, the group". Maltz,²⁵⁵ however, warns that organised crime cannot be defined by focusing on the acts alone, but must also include those who work together to commit these acts. Paoli²⁵⁶ refers to this as "circular reasoning", where confusion is created by failure to differentiate between offence and offender. Accordingly, Maltz²⁵⁷ states that "corruption, violence, continuity, and involvement in multiple enterprises may be characteristic of essentially all OC groups." It is interesting that Maltz²⁵⁸ still refers to organised crime *groups* when he maintains that he is focusing on the characteristic acts of organised crime rather than the groups, which may validate Paoli's²⁵⁹ criticism that proponents of the so-called "illicit enterprise" view of organised crime have come full circle, still viewing organised crime as bureaucratic organisations. Once again, the close link between organised crime and corruption is evident in the early attempts at identifying its

²⁵¹ Albin *The American Mafia* 277.

²⁵² Albin *The American Mafia* 302.

²⁵³ Confer Von Lampe 2001 *Forum on Crime and Society* 100.

²⁵⁴ Maltz "Defining organised crime" 35.

²⁵⁵ Maltz "Defining organised crime" 35.

²⁵⁶ Paoli 2002 *CLSC* 55.

²⁵⁷ Maltz "Defining organised crime" 34.

²⁵⁸ Maltz "Defining organised crime" 34.

²⁵⁹ Paoli 2002 *CLSC* 56-57.

characteristics. Even in modern times, scholars like Finckenauer²⁶⁰ list corruption as one of the “defining characteristics of organised crime”.

2.3.2 *The modern concept of organised crime*

Von Lampe²⁶¹ maintains that the modern concept of organised crime remains contentious or, as he puts it: “heterogeneous and contradictory”. The prevailing view in America identifies the characteristics of the criminal group as “ethnically homogenous, formally structured, multifunctional (and) monopolistic”, striving to “undermine and subdue the legal institutions of society”. Thus Americans still view organised criminals as foreigners whose criminal structures threaten the integrity of the establishment and aim at monopolising their markets.²⁶²

Abadinsky²⁶³ seems to go further than the abovementioned scholars when he lists the following as the attributes of organised crime:

- (i) it has no political goals;
- (ii) it is hierarchical;
- (iii) it has limited or exclusive membership;
- (iv) it constitutes a unique subculture;
- (v) it perpetuates itself;
- (vi) it exhibits a willingness to use illegal violence;
- (vii) it is monopolistic; and
- (viii) it is governed by explicit rules and regulations.

This list of “attributes” is also not without problems and the various issues will be discussed separately:

²⁶⁰ Finckenauer 2005 *Trends in Organised Crime* 65.

²⁶¹ Von Lampe 2001 *Forum on Crime and Society* 102.

²⁶² Von Lampe 2001 *Forum on Crime and Society* 103.

²⁶³ Abadinsky *Organised Crime* 3.

2.3.2.1 No political goals

According to Abadinsky²⁶⁴ the goals of an organised crime group are to obtain money and power by any means, which includes resorting to illegal and/or immoral ways. He also states that an organised crime group is not motivated by ideology or politics. As has been stated above, however, many organised crime groups have developed from secret societies with political or ideological motives.²⁶⁵ Abadinsky²⁶⁶ also admits that a group whose mission is no longer relevant, may decide to turn to organised crime rather than disband. A group's purpose may, however, be blurred, because often such groups use organised crime to fund their ideologies and there may be a variety of relationships between organised crime and terrorism.²⁶⁷ The inclusion of "terrorist acts" during the negotiation process of the Palermo Convention led to much disagreement and the final text does not refer to terrorism, however, the interpretive notes express with concern the growing links between organised crime and terrorism.²⁶⁸ During the negotiation process, the Turkish delegation continually raised concerns regarding the links between terrorism and organised crime and eventually expressed its disappointment when terrorism was not mentioned in the final text,²⁶⁹ because as Glenny²⁷⁰ states: "[o]rganisations like the Taliban and Al-Qaeda fund their activities through the narcotics trade."

The viewpoint that organised crime has no political goals also ignores the influence of organised crime groups in politics, or what Glenny²⁷¹ calls the "new breed – the Political Criminal Nexus (PCN), a profoundly corrupt

²⁶⁴ Abadinsky *Organised Crime* 3.

²⁶⁵ Morrison 2002 *AIC* 3.

²⁶⁶ Abadinsky *Organised Crime* 3.

²⁶⁷ Tupman 2009 *Journal of Money Laundering Control* 191.

²⁶⁸ As McClean *Transnational Organised Crime* 49 states, agreement on an international definition of terrorism has proved impossible.

²⁶⁹ McClean *Transnational Organised Crime* 40.

²⁷⁰ Glenny *McMafia* 261.

²⁷¹ Glenny *McMafia* 362.

relationship between the local tycoons and party leaders.” Paoli²⁷² maintains that many organised criminal groups have had political motives, which have been ignored in the discourse on organised crime. Granted, ideological and/or political ideology is not the main objective of organised crime groups, but to state that these organised crime groups have “no political goals” is an oversimplification.

2.3.2.2 Hierarchical

Abadinsky²⁷³ states that an organised crime group cannot consist of only a leader and followers but must have at least “three permanent ranks” with a “vertical power structure” with a level of authority ascribed to each rank. Many organised crime groups are, however, loosely structured and comprise changeable associations of criminals, which may include corrupt government officials and businessmen.²⁷⁴ These organisations therefore do not contain the required vertical power structure of the three permanent ranks mentioned above, but also do not exhibit horizontal structures. Rather, Standing²⁷⁵ states that these associations reveal elements of distrust amongst the members. The hierarchical element attributed to organised crime groups does therefore not suffice and the issues regarding this view are discussed in more detail below.²⁷⁶ Finckenauer²⁷⁷ maintains that formalised structures within organised criminal groups are today the exception rather than the rule. “What we more commonly see are loosely affiliated networks of criminals who coalesce around certain criminal opportunities.”²⁷⁸ This is confirmed by research conducted by Zhang and Chin,²⁷⁹ which indicates that organised criminal groups operating Chinese human smuggling rackets have limited hierarchical

²⁷² Paoli 2002 *CLSC* 73.

²⁷³ Abadinsky *Organised Crime* 3.

²⁷⁴ Standing 2003 *African Security Review* 103.

²⁷⁵ Standing 2003 *African Security Review* 104.

²⁷⁶ See para 2.4.1 below.

²⁷⁷ Finckenauer 2005 *Trends in Organised Crime* 65.

²⁷⁸ Finckenauer 2005 *Trends in Organised Crime* 65-66.

²⁷⁹ Zhang and Chin 2002 *Criminology* 759.

structures, instead resembling the structures of legitimate corporations. Zhang and Chin²⁸⁰ conclude that the organisational structure of the organised criminal group is determined by the illicit activities which it performs.

2.3.2.3 Limited or exclusive membership

Organised crime groups are perceived to be exclusive and aspirant members may be submitted to qualifications such as ethnic background, criminality, language or similar common features.²⁸¹ Abidinsky²⁸² himself concedes that some organisations (such as the Russian organised criminal groups) have a more loosely structured membership than others (such as the Hell's Angels).²⁸³ He maintains that some form of membership still exists by way of objective factors (such as initiation rites and/or insignia), or subjective factors (the person sees himself as part of the organised crime group). It seems that the international community does not agree with Abadinsky on this characteristic, for article 2 of the Palermo Convention,²⁸⁴ which defines a "structured group" for purposes of organised crime, states that the group "does not need to have formally defined roles for its members, continuity of its membership or a developed structure." Article 2 of the Palermo Convention²⁸⁵ does, however, require the group to not have been "randomly formed." By formulating the definition like this, the drafters included the more fluid groups as opposed to rigid groups, like the Mafia (who would display the characteristic that Abadinsky²⁸⁶ mentions here).²⁸⁷ Using limited or exclusive membership as an essential characteristic of organised crime is therefore flawed. Furthermore, limited or exclusive membership will stifle economic growth

²⁸⁰ Zhang and Chin 2002 *Criminology* 760.

²⁸¹ Abidinsky *Organised Crime* 3; Finckenauer 2005 *Trends in Organised Crime* 66.

²⁸² Abidinsky *Organised Crime* 3.

²⁸³ See also Enck 2003 *SJILC* 383.

²⁸⁴ Article 2 of the Palermo Convention.

²⁸⁵ Article 2 of the Palermo Convention.

²⁸⁶ Abadinsky *Organised Crime* 3.

²⁸⁷ McClean *Transnational Organised Crime* 43.

of the criminal group as recruitment of new members with the necessary expertise will be difficult and cumbersome.

2.3.2.4 A unique subculture

Abadinsky²⁸⁸ maintains that organised crime members “frequently view themselves as distinct from society” and that it is unclear whether the criminal subculture develops around a specific market (like bootlegging during the American Prohibition) or whether an existing criminal subculture enters a new market (like drug trafficking after the American Prohibition). Again this does not hold true for all criminal groups, because members of Far Eastern organised crime (like the Japanese Yakuza and Chinese Triad organised crime groups) and Russian organised crime adopt the culture of legitimate businessmen, in many instances holding Master-degrees and Doctorates.²⁸⁹

2.3.2.5 Self-perpetuating

This characteristic of Abadinsky²⁹⁰ ties in with one of the early definitions of “organised transnational crime”²⁹¹ considered during the negotiation process of the Palermo Convention, which spoke of an organised group which “*in a continuous or permanent manner ... plan or commit in more than one State any of the following offences...*”²⁹² In the final text, however, the words “existing for a period of time” was preferred to the abovementioned italicised words. It seems that perpetuity was not considered a characteristic of an organised criminal group by the negotiators of the Palermo Convention. Finckenauer²⁹³ sees the continuity of an organised criminal group as similar to non-criminal organisations,

²⁸⁸ Abadinsky *Organised Crime* 4.

²⁸⁹ Gastrow 2001 <http://www.issafrica.org/publications/papers/triad-societies-and-chinese-organised-crime-in-south-africa>; Manning *Financial Investigation* 194.

²⁹⁰ Abadinsky *Organised Crime* 4.

²⁹¹ Interestingly the word-order was later changed to transnational organised crime in an early draft of the working group of the Commission on Crime Prevention and Criminal Justice – see McClean *Transnational Organised Crime* 9.

²⁹² McClean *Transnational Organised Crime* 39 (emphasis added).

²⁹³ Finckenauer 2005 *Trends in Organised Crime* 66.

where the enterprise continues “beyond the life or participation of any particular individual”. Zhan and Chin²⁹⁴ however maintain that Chinese human smuggling enterprises show no form of continuity and “were formed as quickly as they were dissolved once an operation was completed”. Instead, the organisational feature of these enterprises is evidenced by the reliance members place on one another. If one link in the organisation falls away, the whole system crumbles.²⁹⁵

2.3.2.6 Use of illegal violence

While it is true that members of organised crime would in all probability be willing to use violence when necessary, as Abadinsky²⁹⁶ states, his insistence that “instrumental violence” forms part of two necessary variables in the definition of organised crime (the other being “non-ideological”) cannot be supported.²⁹⁷ Abadinsky²⁹⁸ believes that these characteristics are necessary for the organised crime group to attain its primary objectives, i.e. money and power. As already stated earlier, certain organised crime groups (e.g. the Nigerian groups) shun violence and often attain their objective without resorting to or relying on violence.²⁹⁹ Furthermore, violence is a characteristic “that can describe many other criminals as well”.³⁰⁰ In their studies on Chinese human smuggling, Zhang and Chin³⁰¹ found that violence in these criminal enterprises was extremely rare, stating as follows: “None of our subjects had ever resorted to violence or intimidation as a measure to guard against unscrupulous fellow smugglers”.

²⁹⁴ Zhang and Chin 2002 *Criminology* 758.

²⁹⁵ Zhang and Chin 2002 *Criminology* 758-759.

²⁹⁶ Abadinsky *Organised Crime* 4.

²⁹⁷ See Abadinsky *Organised Crime* 5, where he states: “Were one is forced to limit a definition of organised crime to only *two* variables, they would be: *non-ideological* and *instrumental violence*” (emphasis original).

²⁹⁸ Abadinsky *Organised Crime* 5.

²⁹⁹ UNODC *West Africa* 22.

³⁰⁰ Finckenauer 2005 *Trends in Organised Crime* 74.

³⁰¹ Zhang and Chin 2002 *Criminology* 755.

2.3.2.7 Monopolistic

According to Abadinsky,³⁰² organised crime groups disdain competition (because it affects profits negatively) and set out to monopolise either a certain geographical area or a certain illicit market – in some instances a combination of the two. This, however, does not tie in with the findings of Hübschle,³⁰³ who states that organised crime in South Africa developed around a network of foreign nationals and local criminals who saw illicit business opportunities.

2.3.2.8 Governed by rules and regulations

The final characteristic that Abadinsky³⁰⁴ poses for organised crime, is that there are internal rules and regulations which members of the group must obey, failure of which is punishable by some form of violence. Hübschle,³⁰⁵ however, paints a picture of horizontal links among members of organised crime rather than a vertical hierarchy which demands obedience.

The above discussion highlights the conflicting views held by scholars on what exactly the internal characteristics of organised crime should be. In an attempt to streamline such differing views, Albanese³⁰⁶ analyses various definitions “offered by a wide variety of authors and researchers over the years” and lists the eleven characteristics of organised crime, which the authors identified in their definitions, as illustrated in Table 1 below.³⁰⁷

³⁰² Abadinsky *Organised Crime* 5.

³⁰³ Hübschle 2010 www.iss.co.za/uploads/OrgCrimeReviewDec2010.pdf 4.

³⁰⁴ Abadinsky *Organised Crime* 5.

³⁰⁵ Hübschle 2010 www.iss.co.za/uploads/OrgCrimeReviewDec2010.pdf 4.

³⁰⁶ Albanese 2008 *JCCJ* 263-264.

³⁰⁷ Source: Albanese 2008 *JCCJ* 263-264

Table 1

Characteristic	No of authors
Organised hierarchy continuing	16
Rational profit through crime	13
Use of force or threat	12
Corruption of public officials to maintain immunity	11
Public demand for services	7
Monopoly over particular market	6
Restricted membership	4
Non-ideological	4
Specialisation	3
Code of secrecy	3
Extensive planning	2

Accordingly, Albanese³⁰⁸ concludes that the following five characteristics are the most typical characteristics of organised crime: a hierarchical structure exists within the group; the group obtains profit through crime; the group makes use of violence to further its objectives; the group corrupts public officials; and there is a public demand for the services

³⁰⁸ Albanese 2008 *JCCJ* 263.

offered by the group. There is “less consensus” regarding the remaining six characteristics.³⁰⁹

Maltz,³¹⁰ on the other hand, identifies ten general characteristics of organised crime as follows: “Corruption, violence, sophistication, continuity, structure, discipline, ideology, multiple enterprises, legitimate business, and bonding.” As mentioned earlier, Maltz³¹¹ then limits the *essential* characteristics to the following four: corruption, violence, continuity, and involvement in multiple enterprises. Finckenauer³¹² however warns Maltz’s work is somewhat tainted by the sources he uses in his analysis, which have “a definite U.S. bias – both in terms of what is being described and who is describing it” and also focuses “on a particular brand of organised crime, namely the LCN or La Cosa Nostra”.

Clearly, identifying the internal characteristics of organised crime is as problematic as defining the concept, and as Standing³¹³ argues:

One of the core aspects of the mainstream definition of organised crime is a belief that organised crime should be defined by its organisational characteristics... many definitions include traits that provide further information on the internal organisation of organised crime... The implied notion behind these descriptive definitions is that certain criminal organisations are more organised and sophisticated than others.

The preceding analysis of the so-called characteristics of organised crime shows, as Standing³¹⁴ suggests, that using the characteristics of specific organised crime groups to formulate a general definition of organised crime is a “flawed methodology”. The problem has been that scholars have tended to base these characteristics on the perceived concept of organised crime, which, as previously shown, developed from a muddled understanding of the whole phenomenon. This led to what Standing³¹⁵

³⁰⁹ Albanese 2008 *JCCJ* 263.

³¹⁰ Maltz “Defining organised crime” 34-35.

³¹¹ Maltz “Defining organised crime” 35.

³¹² Finckenauer 2005 *Trends in Organised Crime* 64.

³¹³ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 49.

³¹⁴ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 49.

³¹⁵ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 50.

terms “circular reasoning” where “a bureaucratic outlook will find bureaucratic organisations.”

While the characteristics of organised crime are valuable at an operational level, where criminal groups can be measured against such characteristics to determine whether it is engaged in organised crime, models for the study of organised crime are important from a policy perspective, where policy debate requires a broader framework to understand this complex phenomenon.³¹⁶ The perceived characteristics of organised crime will however influence the model upon which the perceiver studies the phenomenon. Various models for the study of organised crime have been developed, largely influenced by the perceived characteristics of organised crime upon which the model was built. An analysis of the most popular models for the study of organised crime will help in understanding why defining the concept remains so difficult.

2.4 Models for the study of organised crime

Definitions provide conclusiveness and certainty to concepts by giving special “technical” meanings to specific terms,³¹⁷ whereas models or theory-building studies aim to develop new models and theories to explain a particular phenomenon.³¹⁸ Albanese³¹⁹ defines a model as “an effort to make a picture of a piece of reality in order to understand it better” and states that most of the models for the study of organised crime have been developed in the last three decades.³²⁰ The reason for this, according to Albanese,³²¹ is because organised crime is difficult to observe and these models attempt to capture its “essence”, thereby assisting the scholar to

³¹⁶ Morrison 2002 *AIC* 2.

³¹⁷ Botha *Statutory Interpretation* 87.

³¹⁸ Mouton *How to Succeed* 176.

³¹⁹ Albanese “Models of organised crime” 77.

³²⁰ Albanese “Models of organised crime” 78.

³²¹ Albanese “Models of organised crime” 78.

understand this particular phenomenon. For Morrison³²² such models for organised crime are valuable in the following sense:

These models would articulate the different sets of initiating circumstances, the range of characteristics and actions of organised crime groups and, perhaps most important of all, the various impacts experienced by communities, such as local crime.

Because of this, Morrison³²³ proposes that a larger framework – environmental influences on the criminal groups and their processes, as well as the social, political, economic and environmental impact that such groups and their activities have – must be formulated to assist in the development of models.

Models also help with understanding the scale of organised crime, as well as conditions that favour it and the activities and strategies that are used by organised criminal groups.³²⁴ According to Von Lampe,³²⁵ the large focus on describing organised crime has led to past neglect in the use of theory-building and development of models for the study thereof. Models and theories, however, lead to progress in scientific studies, because a model of organised crime, for instance, would consist of a set of statements aimed to represent it as closely as possible, while a theory would be aimed at explaining organised crime in reality.³²⁶ Von Lampe³²⁷ cautions that the meaning and value of models are debatable, but agrees with scholars like Albanese³²⁸ that they carry the advantage of representing reality in a simplified manner.³²⁹ Various models have been developed to explain the phenomenon of organised crime³³⁰ and these

³²² Morrison 2002 *A/C* 2.

³²³ Morrison 2002 *A/C* 2.

³²⁴ Williams and Godson 2002 *CLSC* 322.

³²⁵ Von Lampe “The use of models” 291.

³²⁶ Mouton *How to Succeed* 177.

³²⁷ Von Lampe “The use of models” 291.

³²⁸ Albanese “Models of organised crime” 77.

³²⁹ Mouton *How to Succeed* 177.

³³⁰ Leong *The Disruption of International Organised Crime* 7; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 3.

models need further analyses to understand their various roles in formulating a definition of organised crime.

2.4.1 Hierarchical models

Scholars like Cressey,³³¹ who advocate a hierarchical model of organised crime, state that these criminals “work for someone who works for someone who works for someone”. Although various names are suggested for this model (e.g. the “bureaucratic”, “national conspiracy” or “corporate” model)³³² the underlying principle remains the same: some form of organisational structure exists within the group, where superiors approve the conduct of their subjects and determine policy and procedure.³³³

Cressey’s model of organised crime became both a definitional and a normative model, providing not only the criteria necessary for an organisation to be regarded as organised crime but also the description for the most successful form of organised crime organisation.³³⁴ This hierarchical model is firmly based on the organised crime group known as “Cosa Nostra”,³³⁵ which first came to light in 1963 when one of its insiders, Joseph Valachi,³³⁶ testified to its existence and organisational structure before the McClellan Committee.³³⁷ Smith³³⁸ describes how the “labelling” of this phenomenon in America grew from “gangster” to “racketeer” to “Mafia” to “organised crime”, largely because of the gradual increase of

³³¹ Cressey *Theft of the Nation* 2.

³³² Albanese “Models of organised crime” 79.

³³³ Albanese “Models of organised crime” 79.

³³⁴ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 4.

³³⁵ “Cosa Nostra” meaning “our thing”, was first used by Joseph Valachi during his testimony as an insider of the underworld before the McClellan Committee hearings of 1963. After this, the term “Cosa Nostra” became the official name of the Mafia. Confer Albin *The American Mafia* 223-224.

³³⁶ Hobbs and Antonopoulos 2013 *Global Crime* 35 maintain that Valachi understood as much of La Cosa Nostra as a petrol attendant understands the “inner workings of corporate decision making in a major oil corporation”.

³³⁷ Albanese “Models of organised crime” 79; Cressey *Theft of the Nation* 120; Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 30. The McClellan Committee hearings are discussed in para 2.2.1.2 above.

³³⁸ Smith *The Mafia Mystique* 63-80.

law enforcement's understanding of the underworld, although some feel that this development of understanding was heavily influenced by Valachi's testimony.³³⁹

According to this model, the crime bosses supposedly also have "strong interests" in government, where they are well represented.³⁴⁰ Hence organised crime is viewed as a nationwide conspiracy, set to undermine the legitimate administration and control the national society.³⁴¹ Subscribers of this model advocate aggressive prosecution of the criminal leaders, thus cutting off the head of the snake, as the best strategy to combat organised crime.³⁴² In order to follow this strategy, vast powers are legislated for law enforcement and prosecuting authorities to use as tools in combating of the phenomenon.³⁴³

These powers and accompanying aggressive prosecution of organised crime figure-heads is necessary because scholars like Cressey³⁴⁴ believe the crime bosses will force out legitimate businessmen and politicians, thereby obtaining a monopoly on business and a dictatorial hold on government. Furthermore, Cressey³⁴⁵ believes that the criminal organisation, like any legitimate public or private organisation, exists separate from its current personnel and will therefore continue despite any large-scale staff-turnover. Hence the structural characteristics, and not people, are seen as the reason for the criminal organisation's perpetual existence.³⁴⁶

According to scholars who subscribe to the hierarchical model, organised crime organisations are run by a body similar to a legitimate company's

³³⁹ See Hobbs and Antonopoulos 2013 *Global Crime* 35.

³⁴⁰ Cressey *Theft of the Nation* 3.

³⁴¹ Leong *The Disruption of International Organised Crime* 9.

³⁴² Leong *The Disruption of International Organised Crime* 9.

³⁴³ Leong *The Disruption of International Organised Crime* 9.

³⁴⁴ Cressey *Theft of the Nation* 3.

³⁴⁵ Cressey *Theft of the Nation* 110.

³⁴⁶ Cressey *Theft of the Nation* 110.

board of directors.³⁴⁷ This body, which is also commonly referred to as the “Commission”; “High Commission”; “Grand Council”; “Administration”; “*Consiglio d’Aministrazione*”; “Roundtable”; or “Inner Circle”, serves a variety of functions, although it is perceived as being mainly judicial in nature.³⁴⁸ It is also presumed that there exists an authority structure within the “Commission”,³⁴⁹ although Cressey³⁵⁰ states that “the exact pecking order, if there is one, has not been determined”. It is this kind of vagueness and lack of proper understanding on which proponents of other models base their criticism of the hierarchical model. While proponents of the hierarchical model believe that a sophisticated organisational structure exists within the organisation, with each member carrying a specific title according to his position,³⁵¹ Paoli³⁵² argues that the modern-day understanding of these traditional “mafia” groups reveals that they comprise many independent families rather than a single bureaucratic organisation.

Albanese³⁵³ submits that the hierarchical model, while helpful in describing some elements of organised crime, fails to encompass all aspects of the phenomenon. Similarly, Paoli³⁵⁴ maintains that Cressey’s model gives a distorted view of the modern understanding of organised crime. Hobbs and Antonopoulos³⁵⁵ on the other hand criticise Cressey’s model because it fails to take the social relationships underlying such criminal grouping into account, which entail personal rather than bureaucratic characteristics. Moreover, the model does not take into account that many of the hierarchical groups analysed were formed to perform other functions

³⁴⁷ Hobbs and Antonopoulos 2013 *Global Crime* 36.

³⁴⁸ Albanese “Models of organised crime” 81; Cressey *Theft of the Nation* 111.

³⁴⁹ Cressey *Theft of the Nation* 111.

³⁵⁰ Cressey *Theft of the Nation* 111.

³⁵¹ Cressey *Theft of the Nation* 114.

³⁵² Paoli 2002 *CLSC* 75.

³⁵³ Albanese “Models of organised crime” 80.

³⁵⁴ Paoli 2002 *CLSC* 71.

³⁵⁵ Hobbs and Antonopoulos 2013 *Global Crime* 37.

than crime, such as providing economic opportunities for members of the various ethnic groups.³⁵⁶

The model also fails to assist in the combating of organised crime, as subscribers to this model are of the view that prosecuting those at the top of the organisational structure would significantly reduce organised crime; which has been proven wrong over time.³⁵⁷ The removal of a crime boss simply allows for the promotion of someone waiting in the ranks. Furthermore, research shows that organised criminal groups which are loosely or less-formally structured often operate in the same markets as organised criminal groups which are highly structured.³⁵⁸ Also, organised criminal groups with very formal structures are rare in smuggling and trafficking markets.³⁵⁹ Thus, for instance, those involved in the smuggling of Chinese nationals come from a wide range of backgrounds and do not have any formal structures in place.³⁶⁰ It seems that the only connecting factor is the aim of making money.³⁶¹ In their research on Chinese human smuggling enterprises, for instance, Zhang and Chin³⁶² state that they could not find “any clear hierarchical order resembling that of a formal social organisation”.

2.4.2 Network models

Juxtaposed to the hierarchy model is the network model, which, unlike the vertical organisational structure of the hierarchy model, views organised crime as horizontal links among criminal elements of the underworld.³⁶³ Albin,³⁶⁴ who prefers the term “syndicated crime”, describes organised crime as a system of power relationships, referred to as the “patron-client”

³⁵⁶ Paoli 2002 *CLSC* 72.

³⁵⁷ Albanese “Models of organised crime” 83; Bequai *Organised Crime* 2.

³⁵⁸ David 2012 *AIC* 8.

³⁵⁹ David 2012 *AIC* 8.

³⁶⁰ Zhang and Chin 2002 *Criminology* 745.

³⁶¹ Zhang and Chin 2002 *Criminology* 737.

³⁶² Zhang and Chin 2002 *Criminology* 750.

³⁶³ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 7.

³⁶⁴ Albin *The American Mafia* 263.

model by some.³⁶⁵ According to Albin,³⁶⁶ this model is preferable to the hierarchical model because of the informal nature of syndicated crime, which makes the hierarchical model obsolete in its requirement of formally regulated structures. In using the network model, the relationships are instead viewed as patron-client relationships which may range anywhere from business-like to family-type (or emotional) relationships.³⁶⁷ Also, rather than using titles, the focus is on each individual's power position, which may of course vary, depending on the specific relationship.

Falling under this model is the view that organised crime groups are established on the basis of ethnicity.³⁶⁸ The important role that ethnicity plays in conceptualising organised crime under this model is seen in the labelling of the various organised criminal groups, for example: Italian Mafia, Chinese Triads, Japanese Yakuza and the Russian Mafiya.³⁶⁹ Often ethnicity is used as the basis for explaining organised crime.³⁷⁰ Albanese³⁷¹. However, cautions that this leads to what he terms the "ethnicity trap" and he argue that ethnicity is simply one of the causal factors of organised crime.³⁷² To this end, David³⁷³ illustrates how Diasporas facilitate organised crime, especially trafficking crimes, due to ties maintained with countries of origin and links built in countries of settlement. David³⁷⁴, however, also warns against basing organised crime

³⁶⁵ Von Lampe "The use of models" 292.

³⁶⁶ Albin *The American Mafia* 263.

³⁶⁷ Confer Zhang and Chin 2002 *Criminology* 754-759, where the authors describe the characteristics of Chinese human smuggling enterprises as extremely informal and based on familial relationships among those involved.

³⁶⁸ Leong *The Disruption of International Organised Crime* 10.

³⁶⁹ Using "mafiya" instead of "mafia" to describe Russian organised criminal groups is preferred in certain circles, because as Galeotti 2004 *Global Crime* 67 explains, "the transliteration of the Russian loan-word mafiya has real advantages, underlining both the similarities and also the distinctiveness of this form of organised crime".

³⁷⁰ Soudijn and Kleemans 2009 *CLSC* 457.

³⁷¹ Albanese 2000 *JCCJ* 413.

³⁷² See also Soudijn and Kleemans 2009 *CLSC* 472, who maintain that ethnicity could be misleading and the focus should rather be on social relations, thus reducing ethnicity simply to a binding factor.

³⁷³ David 2012 *AIC* 4.

³⁷⁴ David 2012 *AIC* 4.

simply on the ethnicity-factor. One of the dangers of this approach is that it causes a so-called “lock-in effect”, causing preconceptions³⁷⁵ on the phenomenon which are then difficult to alter.³⁷⁶ Research by Zhang and Chin³⁷⁷ furthermore suggests that the reason why ethnicity is such a prevalent characteristic of organised criminal groups, is self-preservation. In order to defend themselves against detection, members of organised criminal groups tend to trust persons from their own culture, language and ancestry more than foreigners.³⁷⁸ Furthermore, research shows that perpetrators of varying ethnic origin often conspire together in rackets, especially where cross-border enterprises are carried out.³⁷⁹

Scholars like Albin³⁸⁰ also do not subscribe to an overseeing entity, such as Cressey’s “Commission”. Instead, subscribers to the network models believe that the persons at the top are those who obtained power positions due to their ability to “serve as patrons to a syndicate criminal clientele” and these positions are therefore not limited to a certain number of people, as this would limit the flexibility of the phenomenon.³⁸¹ Albin³⁸² therefore prefers to see the powerful individuals within the syndicates as “patrons to their functionaries” in some instances, “clients to others more powerful than they” in other instances, or even exchanging “mutual services” when they are on equal footing due to their large client bases.

The whole system therefore consists of a network of power relationships between patrons and clients. Any behaviour which is not congruent to a patron-client relationship may exist due to extenuating circumstances,

³⁷⁵ Such as the idea of ethnic “closure” of the particular group and that certain ethnic groups only specialise in certain crimes. See Soudijn and Kleemans 2009 *CLSC* 457. Also the role played by women in organised crime is sometimes overlooked due to preconceived ideas. Women often play pivotal roles in organised crime rackets. See Soudijn and Kleemans 2009 *CLSC* 465, 469-470.

³⁷⁶ Soudijn and Kleemans 2009 *CLSC* 458.

³⁷⁷ Zhang and Chin 2002 *Criminology* 756.

³⁷⁸ Paoli 2002 *CLSC* 81; Soudijn and Kleemans 2009 *CLSC* 459; Zhang and Chin 2002 *Criminology* 756.

³⁷⁹ See Soudijn and Kleemans 2009 *CLSC* 464.

³⁸⁰ Albin *The American Mafia* 265.

³⁸¹ Albin *The American Mafia* 265.

³⁸² Albin *The American Mafia* 265.

such as the stronger family or friendship ties. A powerful patron may thus excuse uncommon behaviour because the “offender” is a relative or close friend.³⁸³ Finckenauer³⁸⁴ believes that not every criminal network is necessarily “organised crime” *per se*. Crime carried out by a group is not enough, for him the following is required:

What is important, however, is that unless the members ... actually organise themselves to continue to commit crimes; unless they actually view themselves as a criminal organisation; unless they have or develop durability and reputation; and unless they have continuity both over time and over crimes, they are not true criminal organisations.

Viewing organised crime in this way negates the need to place individuals on some level within the organisational structure and removes the obligatory rigid bureaucracy imposed on the organisation by scholars of the hierarchical model.³⁸⁵ Instead, it is seen as a continual system of relationships in which those with the necessary financial means receive protection and loyalty from those who benefit from their patronage.³⁸⁶

Critics of the network models, like Albanese,³⁸⁷ contend that there is not such a big difference between the network and hierarchical models as scholars like Albinì maintain. According to Albanese,³⁸⁸ the only difference between the hierarchical and network models is the focus on how the relationships are structured, rather than on the criminal activity itself. The network models highlight the political landscape within which organised criminal groups function.³⁸⁹ Research by Zhang and Chin³⁹⁰ on Chinese human smuggling enterprises also found no evidence of some or other “godfather” whose commands are carried out as the head of the organisation. Instead, the organisation functions as a business arrangement where the participants contribute their own unique skills, with

³⁸³ Albinì *The American Mafia* 266.

³⁸⁴ Finckenauer 2005 *Trends in Organised Crime* 75.

³⁸⁵ Albinì *The American Mafia* 266.

³⁸⁶ Albinì *The American Mafia* 266.

³⁸⁷ Albanese “Models of organised crime” 84.

³⁸⁸ Albanese “Models of organised crime” 84.

³⁸⁹ Williams and Godson 2002 *CLSC* 322.

³⁹⁰ Zhang and Chin 2002 *Criminology* 750.

the overarching goal of making money.³⁹¹ This leads to a discussion of the business models used for the study of organised crime.

2.4.3 Enterprise models

Enterprise models, also called “market models” by Williams and Godson,³⁹² focus on the element of profit and economic factors associated with organised crime. During the 1970s, the basis for a new model for the study of organised crime was laid by Smith,³⁹³ who felt that the members of organised crime were more like businessmen than outlaws, which prompted him to develop his “spectrum-based theory of enterprise,”³⁹⁴ where organised crime is simply seen as illicit enterprise (by dealing in illegal products) at one end of a wide spectrum of business activity.³⁹⁵

Smith found that Cressey’s work had created a mythical Mafia³⁹⁶ and as Leong³⁹⁷ states: “Organised crime simply functions like legitimate businesses, but only in illicit areas, so it can be viewed primarily as an economic problem”. This model of organised crime analyses how economic factors lead to the formation and support of organised criminal groups.³⁹⁸ The view is that these groups simply react to market demands and operate according to supply and demand, much like any other licit business, with the only difference being the level of secrecy required in their deals³⁹⁹ because the products that they deal in are seen as threatening the good morals of society.⁴⁰⁰

³⁹¹ Soudijn and Kleemans 2009 *CLSC* 468; Zhang and Chin 2002 *Criminology* 750.

³⁹² Williams and Godson 2002 *CLSC* 322.

³⁹³ Finckenhauer 2005 *Trends in Organised Crime* 71; Smith *The Mafia Mystique* 89.

³⁹⁴ Smith 1980 *Crime & Delinquency* 358-386.

³⁹⁵ Smith 1971 *UFLR* 11.

³⁹⁶ Finckenhauer 2005 *Trends in Organised Crime* 71.

³⁹⁷ Leong *The Disruption of International Organised Crime* 15-16. See also Albanese “Models of organised crime” 85.

³⁹⁸ Albanese “Models of organised crime” 85.

³⁹⁹ Leong *The Disruption of International Organised Crime* 15.

⁴⁰⁰ Williams and Godson 2002 *CLSC* 322.

Smith⁴⁰¹ therefore prefers the term “illicit enterprise” to “organised crime” because firstly, the “phenomena in question have objectives that are entrepreneurial in nature” and secondly, “it can be distinguished in an economic sense from ‘licit’”. Smith⁴⁰² furthermore argues that conventional descriptions of organised crime (such as Cressey’s⁴⁰³ model) fail to appreciate that there is no clear distinction between illicit and licit business practices, instead believing that illicit activities differ in both character and operation from legitimate activities. In the enterprise model, organised crime exists to meet demands for particular goods or services that are “illegal, regulated or in short supply”.⁴⁰⁴

This also ties in with Block and Chambliss’⁴⁰⁵ critique that the study of organised crime is “a misnomer” as it ignores the role of “corruption, bureaucracy, and power”, which is the role that political-legal organisations play in protecting the crime network. Leong⁴⁰⁶ refers to “state-organised crime”, with the focus shifting from criminal activities or group structure to “the relationship between organised crime, professionals and the state”, where strong ties exist between politicians and criminals and the criminals advance the careers of politicians in exchange for protection. Leong⁴⁰⁷ therefore concludes that three types of relationships exist between the government of a country and organised crime within its borders: (i) hostile, of which Sweden is an example; (ii) symbiotic, of which the United States of America is an example; or (iii) integrated, of which Nigeria and Zambia are examples.

In order to accommodate such varying degrees of public official involvement in organised crime, Smith⁴⁰⁸ proposes a model where the

⁴⁰¹ Smith 1971 *UFLR* 10.

⁴⁰² Smith 1971 *UFLR* 10.

⁴⁰³ See Cressey *Theft of the Nation*.

⁴⁰⁴ Finckenauer 2005 *Trends in Organised Crime* 67.

⁴⁰⁵ Block and Chambliss *Organising Crime* 113.

⁴⁰⁶ Leong *The Disruption of International Organised Crime* 12.

⁴⁰⁷ Leong *The Disruption of International Organised Crime* 13.

⁴⁰⁸ Smith 1971 *UFLR* 11.

illicit enterprise is viewed simply as one end of a spectrum of business activity, making it clear that “more is involved than the events and persons conventionally identified as organised crime”. Smith’s⁴⁰⁹ model, however, is not without its own problems, for he states as follows:

To make sense of this larger category, a typology, accompanied by a *list of distinguishing characteristics*,⁴¹⁰ would be required... It may well be that within a correct typology of illicit enterprise, conventional organised crime activities remain clustered and, in the final analysis, they may be the largest single group within the larger category. However, other and perhaps unexpected companies will also emerge, and an understanding of the category as a whole may provide a clearer and more convincing explanation of the origins and significance of any of its subjects.

The problem with the above is the required “list of distinguishing characteristics”. As discussed in the previous section,⁴¹¹ drafting lists of characteristics with which organised crime (or illicit enterprise in this case) must adhere, is problematic in itself. Also, rather than clarifying the concept, Smith muddles the understanding more by broadening it, conceding that the “conventional” understanding of the concept could ultimately form a sub-cluster within his own model. Martin⁴¹² applauds Smith for “debunking” the previous framework on organised crime – which according to him was useless and misleading because it viewed illegal activity as totally separate from illegal activity – and for taking “giant leaps” toward a better framework, namely the spectrum-based theory of organised crime. Martin,⁴¹³ however, cautions as follows:

Our framework needs to be not only more accurate but more fundamental. Also, at this early stage of theoretical development, only the major dimensions should be built into such a framework. All too often at the beginning of theory building, *long laundry lists of characteristics and deviant cases muddle the main issues* (emphasis added).

Martin⁴¹⁴ proposes that the way to avoid these concerns is to analyse the spectrum (in other words from illegal to legal business) in terms of the

⁴⁰⁹ Smith 1971 *UFLR* 11-12.

⁴¹⁰ Emphasis added.

⁴¹¹ See para 2.3 above.

⁴¹² Martin 1981 *CJR* 54.

⁴¹³ Martin 1981 *CJR* 54.

⁴¹⁴ Martin 1981 *CJR* 57.

“market structure and organisational structure” by which these businesses operate. Market structure refers to the number of sellers operating in a specific market, while organisational structure refers to the formal structure within the relevant firm. The market structure could range from monopolies to open markets, while organisational structure could range from the small single-entrepreneur firm (which has no formal structure) to the large bureaucratically organised firm. Other scholars have also tried to create more flexible models for the study of organised crime by integrating the existing models into models that cater for differing forms of organised crime. The next section deals with such attempts at synthesising the models.

2.4.4 *Synthesis of models*

Hagan⁴¹⁵ attempts to integrate the abovementioned models in his “Organised Crime Continuum” model, where the mafia is viewed as a prototype (or ideal type) of organised crime and other groups “fall at various points along the continuum with some being designated as ‘semi-organised crime’”. Hagan⁴¹⁶ believes that instead of asking whether a specific group is an example of organised crime, a better question would be to what degree a certain group represents organised crime. How this model would be useful in combating organised crime is not clear, because classifying criminal groups as “semi-organised crime” would hardly be helpful in providing clear strategies to combat organised crime. Leong⁴¹⁷ puts it as follows: “We need to know what it is we are fighting against before any useful discussion or appropriate instruments can be derived.” Finckenauer⁴¹⁸ warns that, as in the case of Maltz,⁴¹⁹ Hagan’s work is somewhat tainted by the sources he uses in his analysis, which have “a definite U.S. bias – both in terms of what is being described and who is

⁴¹⁵ Hagan 1983 *CJR* 55.

⁴¹⁶ Hagan 1983 *CJR* 54.

⁴¹⁷ Leong *The Disruption of International Organised Crime* 7.

⁴¹⁸ Finckenauer 2005 *Trends in Organised Crime* 64.

⁴¹⁹ Discussed earlier.

describing it” and also focuses “on a particular brand of organised crime, namely the LCN or La Cosa Nostra”.

An analysis of the models discussed above as founded respectively by Cressey, Albin and Smith, reveals that they are simply overlapping models which focus on different aspects of organised crime.⁴²⁰ Also, as Standing⁴²¹ shows, these models represent the reality at the point in time when the research was conducted. While the hierarchical model focuses on the internal structure of one of the manifestations of organised crime, i.e. the Mafia, the network model focuses on the interrelationships or links established by such a group and the enterprise model focuses on the organisation of the activities of organised crime. That is why there is no conflict between these models and Standing⁴²² maintains that all these models need to be considered in order to fully understand the “elusive criminal organisations or systems”.

Modern organised crime groups are fluid and, as opposed to being in competition with one another, often work together and provide services to one another according to their relevant areas of expertise in order to gain maximum profits.⁴²³ Leong⁴²⁴ thus suggests that the most effective way of combating organised crime is the implementation of policies which aim at controlling illicit markets through “disruption and regulation”, especially in light of the global reach of organised crime. Morrison⁴²⁵ calls for the development of a broader framework to deal with such a “complex phenomenon” an organised crime, which will help to break down organised crime into its “constituent parts” and identify shortcoming in the existing knowledge of the phenomenon.

⁴²⁰ Albanese “Models of organised crime” 87.

⁴²¹ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 19.

⁴²² Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 19.

⁴²³ Leong *The Disruption of International Organised Crime* 16.

⁴²⁴ Leong *The Disruption of International Organised Crime* 16.

⁴²⁵ Morrison 2002 *AIC* 2.

The continuum model approach is reflected in the United Nations' approach to combating organised crime in the Palermo Convention.⁴²⁶ According to David⁴²⁷ the continuum model "is arguably most suited to capturing a wide range of modern, transnational type crimes". Zhang and Chin⁴²⁸ also subscribe to this model as the most appropriate to describe organised crime, because they feel it is the most flexible and accommodates the various modes of organised criminal behaviour. They also maintain that their findings on the Chinese human smuggling operations, provides a perfect example of organised criminal groups that fall somewhere in the middle of the continuum.⁴²⁹

The various models discussed above therefore simply depict different ways of analysing organised crime and no single model should be used when formulating a definition of organised crime.⁴³⁰ Before analysing various definitions of organised crime, it is prudent, for sake of completeness, to discuss the analytical models which moved away from studying actual manifestations of organised crime toward more risk-orientated analyses.

2.4.5 *Analytical models*

The various models discussed above differ in their focus or "competing visions" of the concept.⁴³¹ Von Lampe⁴³² claims that all of these "causal models" are derived from the study of actual manifestations of the phenomenon and suggests that a better model for the study of organised crime is the "analytical model",⁴³³ which he maintains can account for all the dimensions of organised crime and can be applied to every historical

⁴²⁶ David 2012 *A/C* 3.

⁴²⁷ David 2012 *A/C* 3.

⁴²⁸ Zhang and Chin 2002 *Criminology* 759.

⁴²⁹ Zhang and Chin 2002 *Criminology* 759.

⁴³⁰ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 19.

⁴³¹ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 1; Von Lampe "The use of models" 291.

⁴³² Von Lampe "The use of models" 293.

⁴³³ Von Lampe "The use of models" 291.

and/or geographical setting.⁴³⁴ This past focus on the actual manifestations may have been necessitated by the difficulty in finding reliable empirical data on a phenomenon which is, by its very nature, secretive.⁴³⁵ Nonetheless, Von Lampe⁴³⁶ offers the following two advantages to using analytical models for the study of organised crime:

(1) they correspond much more to the complexity and multi-dimensionality of the structures, events and processes that are lumped together under the term “organised crime”, and (2) they better fulfil the present needs of organised crime research, which is really in its infant stage, by helping to tentatively order data and to formulate research questions.

To achieve this, Von Lampe⁴³⁷ proposes an analytical model, termed the “model of the contextuality of organised crime,” and which consists of four elements: “‘criminal networks’ and their ‘task environment’ as well as ‘social context’ and the ‘institutional context’”. Other scholars who have utilised an analytical approach to the study of organised crime, include Gilligan⁴³⁸ and Albanese,⁴³⁹ who use risk analysis to determine the contexts within which organised crime operates. Whilst helpful, these models do not assist in defining organised crime, as they assume some prior understanding of the concept in order to analyse the phenomenon. An in-depth discussion of these analytical models therefore falls outside the scope of this study.

Finding a workable definition for organised crime is, however, essential for this study, as the effective combating of organised crime depends on specifying exactly what it is.⁴⁴⁰ Maltz⁴⁴¹ thus lists the following four reasons for finding a suitable definition of organised crime:

⁴³⁴ Von Lampe “The use of models” 302.

⁴³⁵ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 24.

⁴³⁶ Von Lampe “The use of models” 297.

⁴³⁷ Von Lampe “The use of models” 297.

⁴³⁸ Gilligan 2007 *JFC* 101.

⁴³⁹ Albanese 2008 *JCCJ* 263.

⁴⁴⁰ Maltz “Defining organised crime” 22.

⁴⁴¹ Maltz “Defining organised crime” 22.

- (i) to determine what resources to expend in combating organised crime as to measure their effectiveness;
- (ii) to understand organised crime from a legal perspective, especially in terms of criminal law and procedure;
- (iii) to determine which respective agencies should investigate organised crime; and
- (iv) to understand the phenomenon better.

The remainder of this chapter analyses the various attempts at defining organised crime against the backdrop of the characteristics and models of organised crime explored above, in order to select a suitable definition for the remainder of this study.

2.5 International definitions of organised crime

The problem with defining organised crime is that, rather than being a specific crime, it is a category into which certain crimes fall by virtue of certain factors.⁴⁴² Describing precisely what those factors are, lies at the heart of the problem. Levi⁴⁴³ thus simplifies matters by defining organised crime as “a set of people whom the police and other agencies of the State, regard or wish to regard as ‘really dangerous’ to its essential integrity.” In the end, any definition should reflect the danger associated with the phenomenon and should not be so wide that it brings into the fold conduct such as street-gang activities, which in reality is unrelated to organised crime.⁴⁴⁴

Many definitions of organised crime are based upon the lists of internal characteristics of specific organised crime groups,⁴⁴⁵ while others focus on the activities committed by the group.⁴⁴⁶ Lists of crimes are however not

⁴⁴² Maltz “Defining organised crime” 21.

⁴⁴³ Levi 1998 *Howard Law Journal* 335.

⁴⁴⁴ Symeonidou-Kastanidou 2007 *EJC* 98.

⁴⁴⁵ Longo “Discoursing organised crime” 20; Standing 2003 *African Security Review* 103.

⁴⁴⁶ Leong *The Disruption of International Organised Crime* 8.

helpful in defining organised crime.⁴⁴⁷ As Block and Chambliss⁴⁴⁸ state, both a too wide and a too narrow definition would be unworkable, as such definitions would not isolate the phenomenon of organised crime from other related yet different occurrences. Morrison⁴⁴⁹ states that definitions mostly contain the following:

- (i) criminal activities are performed with profit in mind;
- (ii) they encompass serious offences; and
- (iii) they are committed by groups which have an element of continuity.

As mentioned above, one of the earliest attempts at defining organised crime came from Donald Cressey and reads as follows:⁴⁵⁰

An organised crime is any crime committed by a person occupying, in an established division of labour, a position designed for the commission of crime, providing that such division of labour also includes at least one position for a corruptor, one position for a corruptee, and one position for an enforcer.

This definition obviously influenced the definition of organised crime which the United States of America's Federal Bureau of Investigations (FBI) used for decades and which required "at least one position for a corruptor, one position for a corruptee, and one position for an enforcer".⁴⁵¹ Cressey⁴⁵² felt that his definition would lead drafters of legislation to similar clarity found in definitions of the more general crimes. However, the scholarly discourse since this early definition shows that such clarity never materialised.

Scholars who move away from the group-based approach, tend to focus on the criminal activities or "economies" perpetrated by those involved.⁴⁵³

⁴⁴⁷ Finckenauer 2005 *Trends in Organised Crime* 64.

⁴⁴⁸ Block and Chambliss *Organising Crime* 13.

⁴⁴⁹ Morrison 2002 *AIC* 1.

⁴⁵⁰ Cressey *Theft of the Nation* 319.

⁴⁵¹ Abadinsky *Organised Crime* 2.

⁴⁵² Cressey *Theft of the Nation* 319.

⁴⁵³ Longo "Discoursing organised crime" 20; Standing 2003 *African Security Review* 104.

Albini,⁴⁵⁴ for instance, maintains that a broader definition would allow for a wider continuum against which the individual groups can be defined, based on their specific peculiarities rather than a rigid classification of very specific characteristics. Albini⁴⁵⁵ therefore proposes the following definition of organised crime:

[A]ny criminal activity involving two or more individuals, specialised or non-specialised, encompassing some form of social structure, with some form of leadership, utilising certain modes of operation, in which the ultimate purpose of the organisation is found in the enterprises of the particular groups.

The problem with the above definition is that the meaning of the phrase: “certain modes of operation”, remains unclear and any attempt to clarify the concept may lead to yet another list being compiled. Block and Chambliss⁴⁵⁶ applaud this questioning of the traditional view of organised crime, especially the view that organised crime is a criminal conspiracy by those of foreign ethnicity, but limit their definition to “those illegal activities connected with the management and coordination of racketeering (organised extortion) and the vices”.⁴⁵⁷ The particular vices are then listed as “illegal drugs, illegal gambling, usury, and prostitution”.⁴⁵⁸ This list is regrettable, for criminal enterprises adapt to whatever illegal activities are profitable at the time. Lists such as these are therefore as helpful to defining organised crime as listing methods of killing a person are to defining murder.

Although Interpol⁴⁵⁹ does not define organised crime – admitting that definitions of organised crime “vary widely from country to country” – it states that organised crime networks “are typically involved in many

⁴⁵⁴ Albini *The American Mafia* 38.

⁴⁵⁵ Albini *The American Mafia* 37.

⁴⁵⁶ Block and Chambliss *Organising Crime* 12.

⁴⁵⁷ Block and Chambliss *Organising Crime* 12.

⁴⁵⁸ Block and Chambliss *Organising Crime* 12.

⁴⁵⁹ INTERPOL 2014 <http://www.interpol.int/Crime-areas/Organized-crime/Organized-crime>.

different types of criminal activity spanning several countries". Interpol⁴⁶⁰ gives the following list of examples of such criminal activities: trafficking in humans, illicit goods, weapons and drugs, armed robbery, counterfeiting and money laundering. Furthermore, almost all the crime areas tackled by Interpol have what it calls "an organised aspect", although what is meant by "organised" is not clarified. The three projects listed by Interpol,⁴⁶¹ were all "set up in response to very particular types of criminal network". However, the projects themselves refer to organised crime groups (whether referring to them as a group, syndicate or organisation). It seems therefore that Interpol regards the terms "organised crime group" and "organised crime network" as synonymous.

According to Maltz⁴⁶² an important factor which sets aside organised crime from tradition criminal activity is "connectivity". Connectivity links individual crimes and perpetrators to one another to form a web much more dangerous than the individual crimes. It is this connectivity which increases opportunities for organised crime⁴⁶³ and it is the focus on this connectivity factor rather than the individual crimes that leads to the effective combating of organised crime. Defining organised crime by simply focusing on the group is therefore not sufficient, and equally, focusing on the acts alone would ignore the group which ties the acts together.⁴⁶⁴ An acceptable definition for organised crime must therefore focus on both the illegal acts and the group of people who commit them, without the limitation set by a "laundry list" of specific acts, which does not help in understanding or defining organised crime.⁴⁶⁵

⁴⁶⁰ INTERPOL 2014 <http://www.interpol.int/Crime-areas/Organized-crime/Organized-crime>.

⁴⁶¹ See INTERPOL 2014 <http://www.interpol.int/Crime-areas/Organized-crime/Organized-crime>, where the three projects focused upon are: Pink Panthers – armed jewellery robberies; AOC – Asian organised crime; and Millennium – Eurasian criminal organisations.

⁴⁶² Maltz "Defining organised crime" 25.

⁴⁶³ Maltz "Defining organised crime" 25.

⁴⁶⁴ Maltz "Defining organised crime" 35.

⁴⁶⁵ Finckenauer 2005 *Trends in Organised Crime* 75.

Albanese's⁴⁶⁶ analysis of the characteristics found in various definitions of organised crime (see figure 1 above), leads him to define organised crime as follows:

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

According to Albanese⁴⁶⁷ this definition contains all the characteristics of organised crime that scholars agree on. This definition is also in line with the current definition used by the FBI, which reads as follows:⁴⁶⁸

The FBI defines organised crime as any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region, or the country as a whole.

Compared to the previous definition used by the FBI,⁴⁶⁹ the emphasis has shifted from purely focusing on the internal structure of the group to also include the acts performed by the group without the limitations of a list of illegal activities.

What becomes clear from the preceding discussion on the characteristics and models of organised crime, is that scholars agree that organised crime involves a number of individuals working together⁴⁷⁰ to perform illegal activities. These aspects of organised crime are conceptualised in the Palermo Convention.

⁴⁶⁶ Albanese *Organised Crime* 4.

⁴⁶⁷ Albanese 2008 *JCCJ* 263.

⁴⁶⁸ FBI 2014 <http://www.fbi.gov/about-us/investigate/organizedcrime/glossary>.

⁴⁶⁹ See para 2.5 above.

⁴⁷⁰ Whether linked together by a formalised hierarchical structure or a loose network of relationships.

2.5.1 *The Palermo Convention definitions*

While the Palermo Convention does not define organised crime *per se*, it does define “organised criminal group”, which according to McClean,⁴⁷¹ is central to the concept of organised crime. Finckenauer⁴⁷² seems to support this view, stating that organised crime is simply the crime committed by organised criminal groups. It seems more prudent in any event to define the perpetrators of organised crime, rather than the activity, for as previously stated, criminal activity or transaction based crimes is the order of conventional crime control, while organised crime must be something else, which is the activities of an organised criminal group. The convention⁴⁷³ states as follows:

“Organised criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established by the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

This definition is further elaborated upon by defining a “structured group” as a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure, while a “serious crime” is defined as conduct constituting an offence punishable by maximum deprivation of liberty of at least four years or a more serious penalty.⁴⁷⁴ Hence, the Convention does not provide a list of such serious offences, but tries to encapsulate the phenomenon regardless of the type of activities performed by the criminal group.⁴⁷⁵ This allows for fluency in combating organised crime, as the definition remains relevant to emerging forms of organised crime activity.

⁴⁷¹ McClean *Transnational Organised Crime* 38.

⁴⁷² Finckenauer 2005 *Trends in Organised Crime* 76.

⁴⁷³ Article 2 of the Palermo Convention.

⁴⁷⁴ Article 2 of the Palermo Convention.

⁴⁷⁵ Morrison 2002 *AIC* 2.

The lack of clarity of the term “structured” has however been severely criticised.⁴⁷⁶ Many jurisdictions still require some form of entrepreneurial structure where elements of role-allocation and hierarchy are visible.⁴⁷⁷ But, as David⁴⁷⁸ states, the concept of a structured group must be understood broadly. It does not necessarily embody Cressey’s formal hierarchically structured group, but includes less formal groups where the role that each member plays is less clear.

The fact that the group must not be immediately formed, goes some way to prevent that the combative measures are applied to random group criminal activity, but still leaves it open to apply to gangs of a permanent nature.⁴⁷⁹ Paragraph 28 of the Legislative Guides⁴⁸⁰ therefore states that the term does not apply to groups formed on an *ad hoc* basis, but must apply to “all instances of crimes that involve any element of organised preparation”. Furthermore, no reference is made to ethnicity of the criminal group, which departs from early definitions that were based on ethnicity.⁴⁸¹ Symeonidou-Kastanidou⁴⁸², however, argues that there should be more to the group in the form of independence from others, thus allowing the group continuity and autonomy and setting such groups apart from, for example, the local street-gang. Such requirements have already been introduced in some jurisdictions by requiring that the group *inter alia* displays some form of entrepreneurship, high levels of secrecy and professionalism.⁴⁸³

Interestingly, the first submissions for a possible convention contained a definition of organised crime very similar to the definition used by the FBI, which required a group with hierarchical links or personal relationships,

⁴⁷⁶ See, for instance, Symeonidou-Kastanidou 2007 *EJC* 95.

⁴⁷⁷ Confer Symeonidou-Kastanidou 2007 *EJC* 101.

⁴⁷⁸ David 2012 *AIC* 2.

⁴⁷⁹ Symeonidou-Kastanidou 2007 *EJC* 97.

⁴⁸⁰ UNODC *Legislative Guides* 14.

⁴⁸¹ David 2012 *AIC* 4 highlights the dangers of describing organised crime based on ethnicity.

⁴⁸² Symeonidou-Kastanidou 2007 *EJC* 98.

⁴⁸³ Symeonidou-Kastanidou 2007 *EJC* 99.

earning profits or controlling territories or markets by means of violence, intimidation and committing a listed variety of crimes.⁴⁸⁴ Throughout the negotiation process, the term “financial or other material benefit”, however, remained controversial.⁴⁸⁵ Many delegations felt that this was not the sole motivation for crime. As a compromise, it was agreed that the *travaux préparatoires* would indicate that this phrase is to be given a broad meaning.⁴⁸⁶

Some elements of the definition are still questionable. The Azerbaijan delegation, for instance, objected to the requirement of three or more people, submitting that small-time crooks may fall within the scope of the definition, while two professional assassins travelling the globe would fall short.⁴⁸⁷ This objection is justified, for one could hardly perceive how an infamous criminal pairing like Bonnie and Clyde⁴⁸⁸ would not be considered part of organised crime.

The requirement that the group must have been in existence for “a period of time” and, as required by the definition for “structured group”, not “randomly formed for the immediate commission of an offence”, is also ambiguous. Read together, these definitions imply that “there must be some degree of continued existence” within the group and the group must “act in concert”.⁴⁸⁹ It is randomness of formation of the group that must be absent, whereas formally defined roles, continuity of membership and internal structure are not required.

The question would then be: how long must the group exist to meet the required “degree” of existence? Would a situation as depicted in the

⁴⁸⁴ McClean *Transnational Organised Crime* 38.

⁴⁸⁵ McClean *Transnational Organised Crime* 40.

⁴⁸⁶ McClean *Transnational Organised Crime* 40.

⁴⁸⁷ McClean *Transnational Organised Crime* 41.

⁴⁸⁸ Bonnie Parker and Clyde Champion Barrow went on a two year crime spree during the Depression years of 1932-1934. This infamous pairing was eventually shot to death by law enforcement officers “after one of the most colourful and spectacular manhunts the nation had seen up to that time” – confer FBI 2004 <http://www.fbi.gov/about-us/history/famous-cases/bonnie-and-clyde>.

⁴⁸⁹ McClean *Transnational Organised Crime* 41.

*Ocean's Eleven*⁴⁹⁰ movie, where individual criminals band together on *ad hoc* basis to commit one act of robbery and then disperse with their spoils, meet these definitions? Granted, the movie is fictional, but as Standing⁴⁹¹ maintains, fictional works have greatly influenced views on organised crime (especially the Mafia) in the past. Furthermore, it is the *participation* in such an organised criminal group which is criminalised,⁴⁹² a point which Lebeya⁴⁹³ seems to miss when he contends as follows:

This writer would ardently argue in contrast that organised crime must be defined as to what an organised criminal group do rather than how the group is constituted. This writer holds the view that we need to resist the temptation of deceiving our understanding of organised crime. Organised crime should therefore be understood to mean a conglomeration of serious crimes perpetrated by an organised criminal group over time with the intention of generating some income.

The above view ignores the manner in which organised crime functions in practice, as depicted by Madondo J in *Savoi v National Director of Public Prosecutions*:⁴⁹⁴

Those who orchestrate organised crime as the heads of crime syndicates use sophisticated methods to hide their involvement in the criminal conduct of subordinates and take elaborate measures to disguise the proceeds derived from their crime. *It is the nature of the organised crime that those who are responsible for planning and orchestrating criminal activities are not the persons who carry out the activities.* One of the intractable features of organised crime is that it utilises modern business organisation methods so to make it very difficult to trace those who are in leadership positions and ultimately benefit from the greater part of the spoils of crime.⁴⁹⁵

If the focus were to be on the crimes committed by the groups rather than the “membership” of the criminal group, surely the common law and statutory crimes of incitement and conspiracy would have sufficed in dealing with these issues. The transaction-based approach to general

⁴⁹⁰ Warner Bros. 2001 *Ocean's Eleven*.

⁴⁹¹ Standing 2003 <http://www.issafrica.org.za/uploads/Mono77.pdf> 32.

⁴⁹² Article 5 of the Palermo Convention.

⁴⁹³ Lebeya *Defining Organised Crime* 68.

⁴⁹⁴ *Savoi v National Director of Public Prosecutions* 2013 JDR 1021 (KZP) para 46.

⁴⁹⁵ Emphasis added.

crimes, however, does not effectively combat organised crime, as stated by Madondo J in *Savoi v National Director of Public Prosecutions*:⁴⁹⁶

Prior to the enactment of POCA the government considered the common law of conspiracy and common purpose to be inadequate to deal with the sophisticated methods used by modern crime syndicates, organised crime in particular, as organised crime has a number of features that make successful prosecutions difficult at common law.

The preceding discussion explores the international attempts at defining organised crime. In order to select an appropriate definition for combating organised crime in South Africa, the influence of these international definitions on South African definitions needs to be explored in order to understand similarities and differences among the concepts.

2.6 Local definitions relating to organised crime

Kemp⁴⁹⁷ raises two issues with the formulation of the definition for “organised criminal group” found in the Palermo Convention.⁴⁹⁸ Firstly, it may violate the principle of legality due to vagueness; and secondly, culpability in the form of intention would require the accused to be aware of and willing to further the criminal conduct of the group. These issues form the backdrop against which the local definitions of organised crime are discussed.

According to Standing,⁴⁹⁹ the study of organised crime in South Africa in the past centred on the “internal characteristics of specific groups”, while Gastrow⁵⁰⁰ maintains that South African attempts at defining organised crime were unrealistic because of the fixation with capturing specific structural requirements before a criminal organisation would be regarded as part of organised crime. Gastrow⁵⁰¹ argues that, because organised crime in South Africa consists mainly of loose and shifting coalitions rather

⁴⁹⁶ *Savoi v National Director of Public Prosecutions* 2013 JDR 1021 (KZP) para 46.

⁴⁹⁷ Kemp 2001 SACJ 156.

⁴⁹⁸ Article 2 of the Palermo Convention.

⁴⁹⁹ Standing 2003 *African Security Review* 103.

⁵⁰⁰ Gastrow 1998 <http://www.issafrica.org/uploads/Mono28.pdf>.

⁵⁰¹ Gastrow 1998 <http://www.issafrica.org/uploads/Mono28.pdf>.

than formally structured groups, the focus should be on the nature of the activities of these criminal organisations, rather than the group itself. According to him, South African organised crime operates as informal associations, which fluctuate because of their changing criminal objectives. Gastrow⁵⁰² thus formulates the following definition for organised crime in South Africa:

Organised crime consists of those serious criminal offences committed by a criminal organisation which is based on a structured association of more than two persons acting in concert over a prolonged period of time in pursuit of both their criminal objectives and profits.

Compare this definition with the definition for “organised criminal group” found in the Palermo Convention⁵⁰³ and it becomes clear that the same elements are present, simply in a different order, with the only difference being the number of people required for a “group.”⁵⁰⁴ However, whereas the Palermo Convention definition focusses on the group, Gastrow’s definition focuses on the activity, namely the offences.

While South African legislation does not define the concept “organised crime”, the *SAPS Act* stipulates circumstances under which crime will be labelled as “organised crime”. Hence, the relevant provisions of the *SAPS Act* are discussed next.

2.6.1 The SAPS Act

The *SAPS Act*⁵⁰⁵ stipulates that criminal conduct shall be regarded as organised crime under the following circumstances:

- (i) where the crime is committed by a person, group of persons or syndicate acting in an organised fashion; or a manner which could

⁵⁰² Gastrow 1998 <http://www.issafrica.org/uploads/Mono28.pdf>.

⁵⁰³ Article 2 of the Palermo Convention.

⁵⁰⁴ Gastrow 1998 <http://www.issafrica.org/uploads/Mono28.pdf>.

⁵⁰⁵ Section 16(1) of the *SAPS Act*.

result in substantial financial gain for the person, group of persons or syndicate involved;⁵⁰⁶

- (ii) where the crime is committed by a person or persons in positions of trust and making use of specialised or exclusive knowledge; or in respect of the revenue or expenditure of the national government; or in respect of the national economy or the integrity of currencies;⁵⁰⁷
- (iii) where the crime takes on such proportions or is of such a nature that the prevention or investigation thereof at national level would be in the national interest;⁵⁰⁸
- (iv) where the crime is committed in respect of unwrought precious metals or unpolished diamonds;⁵⁰⁹
- (v) where the crime is committed in respect of the hunting, importation, exportation, possession, buying and selling of endangered species or any products thereof as may be prescribed;⁵¹⁰
- (vi) where crimes are committed in more than one province or outside the borders of the Republic by the same perpetrator or perpetrators, and in respect of which the prevention or investigation at national level would be in the national interest;⁵¹¹
- (vii) where crime is committed in respect of which the prevention or investigation requires the application of specialised skills and where expedience requires that it be prevented or investigated at national level;⁵¹²
- (viii) where a Provincial Commissioner requests the National Commissioner to prevent or investigate crime by employing

⁵⁰⁶ Section 16(2)(a) of the *SAPS Act*.

⁵⁰⁷ Section 16(2)(b) of the *SAPS Act*.

⁵⁰⁸ Section 16(2)(c) of the *SAPS Act*.

⁵⁰⁹ Section 16(2)(d) of the *SAPS Act*.

⁵¹⁰ Section 16(2)(e) of the *SAPS Act*.

⁵¹¹ Section 16(2)(f) of the *SAPS Act*.

⁵¹² Section 16(2)(g) of the *SAPS Act*.

- expertise and making resources available at national level and to which request the National Commissioner accedes;⁵¹³
- (ix) crime in respect of which the investigation in the RSA by the SAPS is requested by an international police agency or the police of a foreign country;⁵¹⁴ and
 - (x) where the alleged offence is mentioned in the Schedule of the *SAPS Act*; or where the prevention or investigation of the crime by members under the command of a Provincial Commissioner will detrimentally affect or hamper the prevention or investigation of crime under the circumstances referred to in the *SAPS Act*.⁵¹⁵

The ambiguity of the abovementioned lies in the lack of differentiation among, firstly, organised crime, secondly, crime which requires national prevention or investigation, and thirdly, crime which requires specialised skills in the prevention and investigation thereof. These three categories of crime are simply lumped together under the list of constituting circumstances. The only attempt at clarity is found in the definition of “organised fashion” as follows: ⁵¹⁶

“Organised fashion” includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics.

The *POCA* also does not help to clarify the concept, for as the court states in *Mohunran v National Director of Public Prosecutions*,⁵¹⁷ this piece of legislation “is not a model of legislative clarity and coherence”. While the short title refers to the prevention of organised crime, and the first two phrases of the long title state that the *POCA* is “to introduce measures to combat organised crime, money laundering and criminal gang activities”

⁵¹³ Section 16(2)(h) of the *SAPS Act*.

⁵¹⁴ Section 16(2)(i) of the *SAPS Act*.

⁵¹⁵ Section 16(2)(iA) of the *SAPS Act*.

⁵¹⁶ Section 2(A) of the *SAPS Act*.

⁵¹⁷ See *Mohunram v National Director of Public Prosecutions* 2007 2 SACR 145 (CC) 158C.

and “to prohibit certain activities relating to racketeering activities”, the court held that the wording of the *POCA* makes it clear that it is not limited to organised crime offences only. While the South African legislative tools in combating organised crime are discussed in more detail in chapter 5, it remains clear for purposes of this chapter that there is no clarity regarding the meaning of organised crime on South Africa. What remains to be done in this chapter is to select the appropriate definition for organised crime as a basis for this study, with cognisance of the preceding discussion on the models, characteristics and definitions of organised crime.

2.7 Summary and conclusion

The purpose of this chapter was not to formulate yet another definition of the concept of organised crime, but rather to select an appropriate definition to use as the basis of this study. The preceding discussion serves to highlight the fact that selecting such a definition is no easy task, given the discourse and differing views on the subject. Such a definition should provide clarity and certainty regarding the meaning and must neither be too narrow, nor too broad.

What is clear, however, is that organised crime involves a number of individuals,⁵¹⁸ working together⁵¹⁹ to perform unlawful activity⁵²⁰ for profit.⁵²¹ Each criminal group has some sort of history,⁵²² with the origins of these groups preceding the rise of modern forms of business.⁵²³ It is inevitable that as organised criminal groups become larger in size, some

⁵¹⁸ Scholars, however, disagree on what the minimum number should be.

⁵¹⁹ Whether linked together by a formalised hierarchical structure or a loose network of relationships.

⁵²⁰ Defined in s 1 of the *POCA* as conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of the *POCA* and whether such conduct occurred in the Republic of South Africa or elsewhere.

⁵²¹ The financial element of organised crime seems to be one of the few elements which is not controversial. See David 2012 *AIC* 4.

⁵²² See for instance David 2012 *AIC* 7, where the emergence of the Bulgarian and Albanian trafficking syndicates is attributed to the fall of communism in these countries.

⁵²³ Paoli 2002 *CLSC* 84.

form of hierarchical structure is necessary to ensure efficiency, much like is required in any legitimate commercial business. Paoli's⁵²⁴ criticism on viewing organised crime as analogous with multi-national corporations as too simplistic is unwarranted. Not all legitimate commercial businesses are multi-national corporations. Legitimate businesses operate according to the business form most suitable to their needs, be it a partnership, private company or large public corporation. Similarly, organised criminal groups may operate in a manner which best suits their operational needs, adapting⁵²⁵ as their illicit enterprise grows until it reaches the stage of being a large-scale international operation requiring formal structures.⁵²⁶ And while licit corporations have to structure their finances to protect themselves from being overexposed to government taxes, illicit enterprises have to structure their finances to protect themselves from detection and confiscation by governments.⁵²⁷ One of the main differences between such illicit enterprises and legitimate corporations is that illicit corporations are veiled in secrecy,⁵²⁸ while corporate law is founded upon disclosure and transparency.⁵²⁹

In the remainder of this study, the definitions formulated in the Palermo Convention will be applied. While these definitions have certain shortcomings, as pointed out in the discussion above,⁵³⁰ it seems prudent to use them because they have international application and using them in this study will facilitate comparisons with other jurisdictions. Also, these definitions focus on the criminal group, rather than the criminal activities, which is a better approach to combating organised crime. Criminal activity is, after all, what is defined under so-called "conventional crime" and the

⁵²⁴ Paoli 2002 *CLSC* 57.

⁵²⁵ Williams and Godson 2002 *CLSC* 311 explain how organised criminal groups are both flexible and adaptable in modern times.

⁵²⁶ See also Williams and Godson 2002 *CLSC* 325.

⁵²⁷ Williams and Godson 2002 *GLSC* 326.

⁵²⁸ See Paoli 2002 *CLSC* 78-80 for an in-depth discussion of secrecy and its links to kinship and violence within the group.

⁵²⁹ See Cassim *et al Contemporary Company Law* 13, where the authors state that these elements are crucial to ensuring accountability in the corporate environment.

⁵³⁰ See para 2.5.1 above.

combating of organised crime requires a new approach, focusing on the criminal groups who maintain extravagant life-styles from criminal activity. Hence, for purposes of this study, an “organised criminal group” will mean:

[A] structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established by the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.⁵³¹

For purposes of this definition, a “structured group” will mean:

[A] group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.⁵³²

The term “serious crime” used in the above definition will mean:

[C]onduct constituting an offence punishable by maximum deprivation of liberty of at least four years or a more serious penalty.⁵³³

These definitions will clarify the concept of organised crime used in the remainder of this study, especially as far as the challenges facing South Africa in meeting its obligations in terms of combating organised crime is concerned. Hence, South Africa’s local and international organised crime challenges and obligations are analysed next.

⁵³¹ Article 2 of the Palermo Convention.

⁵³² Article 2 of the Palermo Convention.

⁵³³ Article 2 of the Palermo Convention.

Chapter 3

South Africa's local and international organised crime challenges and obligations

3.1 Introduction

In 1994, the United Nations hosted the World Ministerial Conference on Organised Transnational Crime.⁵³⁴ In its report, the conference expressed deep concern regarding the growth of organised crime over the previous decade as well as its global reach.⁵³⁵ In his introductory statement, the Director-General of the United Nations office in Vienna stated that anti-racketeering legislation by states based on a common point of reference could be an effective weapon.⁵³⁶ Some of the delegates proposed using the United States *RICO Act* and its organised crime control strategies as the common point of reference, but there is an argument to be made that this would be too simplistic an approach, as it would ignore local factors contributing to the phenomenon.⁵³⁷

Hence, countries looking at drafting legislation to combat organised crime within their borders should not simply copy existing legislation from other jurisdictions, like America, but should assess their own unique local and international organised crime challenges.⁵³⁸ The Naples conference also suggested that each country must understand the types of organised crime, structures and underlying factors within its borders in order to effectively combat organised crime.⁵³⁹ The underlying aspect is that criminal markets differ and South Africa must not blindly follow the example of other jurisdictions in dealing with its own specific organised crime

⁵³⁴ United Nations General Assembly 1994 <https://www.imolin.org/imolin/naples.html>.

⁵³⁵ United Nations General Assembly 1994 <https://www.imolin.org/imolin/naples.html>.

⁵³⁶ United Nations General Assembly 1994 <https://www.imolin.org/imolin/naples.html>.

⁵³⁷ Woodiwiss "Transnational organised crime" 22.

⁵³⁸ Woodiwiss "Transnational organised crime" 22.

⁵³⁹ United Nations General Assembly 1994 <https://www.imolin.org/imolin/naples.html>.

challenges. Leong⁵⁴⁰ confirms this when she maintains that “much of the confusion over organised crime has taken place in the United States”⁵⁴¹ and the understanding of organised crime in Europe differs vastly from the American approach.

This does not, however, mean that guidance cannot be sought from other jurisdictions, because no country operates in a vacuum and while organised crime is localised within a country’s borders, it does have a transnational component.⁵⁴² To this end, academic research in the social sciences can be valuable in assisting the public and the private sectors in combating organised crime both at policy as well as operational levels.⁵⁴³ Hence the Naples Conference stated that law reform and law enforcement must be based on data analysis and scientific research.⁵⁴⁴

While crime in general threatens the public order, organised crime is seen to threaten “the very foundations of democracy as well”.⁵⁴⁵ Furthermore, the rule of law, the justice system and the administration are also undermined through penetration by organised crime into legitimate businesses, especially through money laundering.⁵⁴⁶ Furthermore, organised crime removes the government’s sole mandate to control its borders and infringes on the government’s right to taxation on economic activities within those borders.⁵⁴⁷

There seems to be acceptance that combating organised crime requires – and justifies – measures that are more restrictive to fundamental freedoms, such as the reporting of financial transactions and asset forfeiture.⁵⁴⁸ Some

⁵⁴⁰ Leong *The Disruption of International Organised Crime* 17.

⁵⁴¹ As highlighted in para 2.2.1.2 above.

⁵⁴² Standing *Transnational Organised Crime* 12.

⁵⁴³ Williams and Godson 2002 *CLSC* 312.

⁵⁴⁴ United Nations General Assembly 1994 <https://www.imolin.org/imolin/naples.html>.

⁵⁴⁵ Symeonidou-Kastanidou 2007 *EJC* 92.

⁵⁴⁶ Symeonidou-Kastanidou 2007 *EJC* 92.

⁵⁴⁷ Guymon 2000 *BJIL* 61.

⁵⁴⁸ Symeonidou-Kastanidou 2007 *EJC* 94.

scholars, however, feel that such measures infringe human dignity by reducing people to mere objects of anti-criminal policies.⁵⁴⁹

To this end, this chapter focuses on locating South Africa's specific organised crime challenges, yet bearing the international context in which it operates in mind. The following aspects are considered:

- (i) the international threat of organised crime;
- (ii) international action against organised crime; and
- (iii) organised crime in South Africa.

3.2 The international threat of organised crime

3.2.1 The effect of globalisation on organised crime

The advent of the Industrial Revolution brought with it increasing competition among the various states for available markets.⁵⁵⁰ In parallel, criminal groups that responded to the growing markets evolved into transnational organised criminal groups, and globalisation thus allowed organised criminal groups to prosper at an international level.⁵⁵¹ The international threat of organised crime increased after the Cold War when the illegal markets increased significantly because more international opportunities opened up with the fall of communism.⁵⁵² Some scholars maintain that part of the blame for this growth in illegal markets rests with the international community for failing to reinforce and support the former communist states that suffered when the support of their Cold War patrons had ceased.⁵⁵³

The accompanying expansion of the European Union also contributed to the broadening of illegal markets, because goods and services could be

⁵⁴⁹ See for instance Symeonidou-Kastanidou 2007 *EJC* 94.

⁵⁵⁰ Mittelman and Johnston 1999 *Global Governance* 105.

⁵⁵¹ Guymon 2000 *BJIL* 53; Mittelman and Johnston 1999 *Global Governance* 105.

⁵⁵² Guymon 2000 *BJIL* 53; Leong *The Disruption of International Organised Crime* 17; Torkelson 2011 www.issafrica.org/iss-today/the-challenge-of-organised-crime-and-urbanisation; Warchol, Zupan and Clack 2003 *ICJR* 2.

⁵⁵³ Shaw 2012 *ISS Policy Brief* 2.

moved more freely across borders.⁵⁵⁴ Eastern Europe and Russia, previously confined by the Iron Curtain, suddenly opened up to capitalism and travel and trade with these countries became freer, which opened up possibilities for organised crime as well.⁵⁵⁵

The globalisation of markets at the turn of the century started “the New Criminality”⁵⁵⁶ which, using China as an example, Mittelman and Johnston⁵⁵⁷ explain as the transformation of organised crime by globalisation. In China, the booming economy which “has been likened to a runaway train,” led to major disparities between those living in the inland rural areas and those living in the urban and coastal areas. The result has been the so-called “boat people”, whom smuggling groups with links to the Chinese Triads⁵⁵⁸ exploit by shipping them as illegal immigrants to the United States. These smuggling operations, however, require wealthy criminal groups with ties to corrupt government officials.⁵⁵⁹

Combating such transnational organised crime is constrained by the unpredictability of how this “new criminality” reacts to localised events. One example is the effects that the drop in oil prices in the 1980s and consequential budget-cuts by the Nigerian government had on the rest of the world. Many Nigerian students were left stranded overseas and turned to fraudulent activities when their funding ceased, which eventually culminated in Nigerian organised criminal groups penetrating sub-Saharan

⁵⁵⁴ Leong *The Disruption of International Organised Crime* 17; Warchol, Zupan and Clack 2003 *ICJR* 2.

⁵⁵⁵ Finckenauer 2005 *Trends in Organised Crime* 79; Kruger *Organised Crime* 1.

⁵⁵⁶ Mittelman and Johnston 1999 *Global Governance* 108.

⁵⁵⁷ Mittelman and Johnston 1999 *Global Governance* 108.

⁵⁵⁸ Triads is the term for Chinese criminal networks. See Gastrow 2001 <http://www.issafrica.org/publications/papers/triad-societies-and-chinese-organised-crime-in-south-africa>, who explains that the term “triad” was coined by British authorities in Hong Kong and is based on the triangular symbol, representing heaven, earth and man, found on flags and banners of the early secret societies.

⁵⁵⁹ Mittelman and Johnston 1999 *Global Governance* 109.

Africa to establish new criminal hubs, with Cape Town and Johannesburg “emerging as regional centres”.⁵⁶⁰

The adverse effects led US officials to refuse training assistance to Nigerian bank and police officials, because such training was deemed to cause increased sophistication of the Nigerian fraudsters.⁵⁶¹ This example also illustrates the effect of criminal activity in a local territory and highlights the need for localised analysis and intervention.⁵⁶² In South Africa, for example, criminals have entered into so-called “new crime” like the “smuggling of counterfeit pharmaceuticals and cosmetics, illegal fishing and illegal logging”.⁵⁶³

The globalisation of organised crime has also been facilitated by the ease of global travel and communication, as well as developments in cellular and cyber technology.⁵⁶⁴ The advances in cellular technology, the internet and transport facilities provided organised criminal groups with international opportunities that were not possible before.⁵⁶⁵ Globalisation and the continued advances in technology also increase the harmful effects of organised crime.⁵⁶⁶ Such advances have for instance allowed organised criminal groups to latch onto the world of cybercrime, which offers these groups the advantage of anonymity, because the “assault” can be launched from anywhere in the world.⁵⁶⁷ In this manner cybercrime has had a direct influence on ordinary citizens, who were previously somewhat removed from the “underworld” of organised crime. Technology has now brought such citizens into direct contact with the organised criminal world

⁵⁶⁰ Mittelman and Johnston 1999 *Global Governance* 112.

⁵⁶¹ Mittelman and Johnston 1999 *Global Governance* 112.

⁵⁶² Morrison 2002 *AIC* 1.

⁵⁶³ Hübschle 2010 <http://www.issafrica.org/iss-today/dispelling-popular-organised-crime-myths>.

⁵⁶⁴ Finckenauer 2005 *Trends in Organised Crime* 80.

⁵⁶⁵ Paoli 2002 *CLSC* 70.

⁵⁶⁶ Leong *The Disruption of International Organised Crime* 17; McCusker 2006 *CLSC* 257.

⁵⁶⁷ Mittelman and Johnston 1999 *Global Governance* 112.

through cybercrime.⁵⁶⁸ This is especially true in the area of advance fee fraud scams,⁵⁶⁹ where victims are conned into depositing funds into false bank accounts.⁵⁷⁰

Organised criminal groups have even started using advances in technology to spy on law enforcement officials, thus compromising their efforts to combat the phenomenon.⁵⁷¹ Coupled with these opportunities that technological advances provide criminals, is the adverse effect that globalisation has had on the combating of organised crime by the police, because global cities house large and diverse populations, allowing organised criminal groups to “blend into legitimate institutions.”⁵⁷² Hence, along with globalisation, urbanisation also contributes to the increase of organised crime, especially in so-called “grey areas”, where the state has failed to provide protection to the community.⁵⁷³

Power vacuums are thus created where governments are inefficient or corrupt.⁵⁷⁴ Organised criminal groups target these areas where a “power vacuum” exists and gain the support of the local community by investing money and exerting power.⁵⁷⁵ Matheza⁵⁷⁶ warns that increased urbanisation will worsen the problem and preventing this from happening requires good governance to keep pace with urbanisation. This is because

⁵⁶⁸ Standing *Transnational Organised Crime* 2.

⁵⁶⁹ Commonly known as 419 scams, named after the Nigerian legislation criminalising such schemes.

⁵⁷⁰ See Egmont Group *Egmont Cases* 73-82 for an example of such an international advance fee fraud scam. See also FIC date unknown https://www.fic.gov.za/Documents/FIC_Typologies_report_FINAL.pdf 6-9, where it is stated that such advance fee scams are “the world’s most prevalent” scams when measured in terms of monetary losses suffered by victims.

⁵⁷¹ Jamieson 2001 *SCT* 383-384.

⁵⁷² Mittelman and Johnston 1999 *Global Governance* 112.

⁵⁷³ Finckenauer 2005 *Trends in Organised Crime* 74; Torkelson 2011 www.issafrica.org/iss-today/the-challenge-of-organised-crime-and-urbanisation.

⁵⁷⁴ Finckenauer 2005 *Trends in Organised Crime* 74.

⁵⁷⁵ Torkelson 2011 www.issafrica.org/iss-today/the-challenge-of-organised-crime-and-urbanisation.

⁵⁷⁶ Matheza 2009 <http://www.issafrica.org/iss-today/security-threat-posed-by-organized-crime-money-laundering-a-formidable-challenge-in-east-and-south>.

organised criminal groups are less effective in “countries that are strong, stable democracies with robust institutions and a vibrant civil society”.⁵⁷⁷

While globalisation has therefore provided new business opportunities for legitimate businesses, it has had the same effect on illicit enterprises, allowing them to expand their illicit markets well beyond their local territories.⁵⁷⁸ South Africa has not escaped this effect, as Williams and Godson⁵⁷⁹ explain:

The search for new markets also explains why since the end of Apartheid, South Africa, with its open borders, weak criminal justice system, well-developed infrastructure and – by African standards at least – high levels of wealth – has become a major target for African criminal organisations as well as those from elsewhere.

Research on organised crime in Southern Africa that organised criminal groups also respond to market demands in the region.⁵⁸⁰ Thus, much like commercial companies, organised criminal groups expand their markets globally and prey on people who have been marginalised in the globalisation process,⁵⁸¹ a local example being residents of Mozambique crossing the border to poach rhino horn in South Africa for organised criminal groups, who in turn smuggle the poached rhino horn to the Far East.⁵⁸²

Mittelman and Johnston⁵⁸³ state that the early challenges to South Africa in combating the rise of organised crime were exacerbated by the following:

Amid the antiapartheid campaigns, a culture of violence was created to disable state structures. But today it is the parallel economy throughout the subcontinent and its rampant flow of illicit goods – including an enormous

⁵⁷⁷ Finckenauer 2005 *Trends in Organised Crime* 74.

⁵⁷⁸ Leong *The Disruption of International Organised Crime* 17; Williams and Godson 2002 *CLSC* 325.

⁵⁷⁹ Williams and Godson 2002 *CLSC* 325.

⁵⁸⁰ Hübschle 2010 <http://www.issafrica.org/iss-today/dispelling-popular-organised-crime-myths>.

⁵⁸¹ Mittelman and Johnston 1999 *Global Governance* 110; Warchol, Zupan and Clack 2003 *ICJR* 2.

⁵⁸² Herbig and Warchol 2011 *Acta Criminologica* 9; Warchol, Zupan and Clack 2003 *ICJR* 7. For a detailed exposé on the illegal rhino horn trade, see Rademeyer *Killing for Profit*.

⁵⁸³ Mittelman and Johnston 1999 *Global Governance* 116.

supply of weapons at low cost from demobilized soldiers in adjacent, post-civil war Mozambique – and the movement of criminals across borders that escalate the challenge, this time to an African National Congress (ANC)-led state that is widely regarded as democratic and to neighbouring regimes.

Globalisation thus led to the majority of states, including South Africa, playing a “courtesan”⁵⁸⁴ role in the “globalisation matrix”.⁵⁸⁵ The role of such a courtesan state is explained as follows:⁵⁸⁶

Broadly, a state in its capacity as a courtesan is beholden to more powerful interests in the global political economy, submissive in its policies if not in rhetorical flourishes because choice is constrained, and engaged in illicit relationships (though the line between licit and illicit is increasingly faint).

Many of these courtesan states, like South Africa, become safe havens for global organised criminal groups because of the increased lawlessness experienced within the country. In many instances the transfer of criminal operations to such a country is based on simple business principles, because outsourcing criminal activities to transitional countries is more viable than executing them in developed countries.⁵⁸⁷ The effect is that international criminal groups target local gangs to conduct business.⁵⁸⁸ Thus, for instance, the Chinese Triads entered into business dealings with the Cape Town gangs known as “The Americans” and “The Firm” to provide abalone to the Triads in exchange for raw materials to make amphetamines.⁵⁸⁹ Such business relationships, coupled with the booming crystal methamphetamine market,⁵⁹⁰ have led to an increase in the profitability of gangsterism and makes confrontation between gangs and government inevitable.⁵⁹¹

⁵⁸⁴ “Courtesan” is defined in Schwartz *Chambers Concise Dictionary* 236 as: “a mistress or prostitute, especially to a man of status or wealth”.

⁵⁸⁵ Mittelman and Johnston 1999 *Global Governance* 116.

⁵⁸⁶ Mittelman and Johnston 1999 *Global Governance* 117.

⁵⁸⁷ Standing *Transnational Organised Crime* 4.

⁵⁸⁸ Ashton 2012 <http://sacsis.org.za/site/article/1281>; Torkelson 2011 www.issafrica.org/iss-today/the-challenge-of-organised-crime-and-urbanisation.

⁵⁸⁹ Torkelson 2011 www.issafrica.org/iss-today/the-challenge-of-organised-crime-and-urbanisation.

⁵⁹⁰ Commonly known as “Tik”.

⁵⁹¹ Henda 2010 <http://www.issafrica.org/iss-today/drug-related-crime-in-cape-town>; Torkelson 2011 www.issafrica.org/iss-today/the-challenge-of-organised-crime-and-urbanisation.

It is this relationship between international organised criminal groups and local gangs which Ashton⁵⁹² feels is one of the foremost issues that must be addressed in the fight against organised crime in South Africa; the alternative being that South Africa simply becomes another “corrupt narco-state”. These links between organised crime and what Warchol, Zupan and Clack⁵⁹³ term “street crime”, show that the distinction between organised crime and individual criminal wrongdoing is sometimes superficial.⁵⁹⁴

Some of the abovementioned “courtesan” countries eventually become “crime-exporting states”, which in turn causes countries whose security is threatened to become “law enforcement-exporting states”, offering “training, financial aid, and technical assistance” to the law enforcement structures.⁵⁹⁵ Meanwhile, the most powerful states, like the United States of America, “attempt to steer the globalisation process.”

The preceding discussion highlights the effect that globalisation has had on the development of organised crime as well as some of the challenges posed by this growing phenomenon, especially to developing countries such as South Africa. The anticipation of organised crime is essential to successfully combat the phenomenon, but history indicates that law enforcement has mostly followed a reactive approach to the phenomenon, whereas a proactive approach is vital to the successful combating of organised criminal groups.⁵⁹⁶ Hence, this internationalisation of organised crime has led to global initiatives to combat the phenomenon.⁵⁹⁷ One of the initial responses to the effect that globalisation had on organised crime, was the combating of drug related crime at an international level with the adoption of the Vienna Convention. The Vienna Convention was one of the first truly global efforts at combating transnational organised crime and

⁵⁹² Ashton 2012 <http://sacsis.org.za/site/article/1281>.

⁵⁹³ Warchol, Zupan and Clack 2003 *ICJR* 2.

⁵⁹⁴ Warchol, Zupan and Clack 2003 *ICJR* 2.

⁵⁹⁵ Mittelman and Johnston 1999 *Global Governance* 118.

⁵⁹⁶ Williams and Godson 2002 *SLCS* 314.

⁵⁹⁷ Shaw 2012 *ISS Policy Brief* 4.

required member states to criminalise money laundering of the proceeds of drug related crimes.⁵⁹⁸ The underlying reason for the adoption of the Vienna Convention is explained by Stewart⁵⁹⁹ as follows:

Existing domestic laws in many countries, and the international enforcement regime established under prior multilateral treaty arrangements, have proven unequal to the task of controlling, much less suppressing, this vicious trade.

It is therefore prudent to examine the link between organised crime and drug trafficking in the next section.

3.2.2 *Drug trafficking and organised crime*

According to Warchol, Zupan and Clack,⁶⁰⁰ the perception that organised crime predominantly involves drug related crimes, has led to a lot of research being focused on drug trafficking and money laundering, with human trafficking “now also receiving attention from researchers”. Yet wildlife trafficking is estimated as the “second largest form of black market commerce, behind drug smuggling and just ahead of illegal arms trade”.⁶⁰¹

The rationale behind the Vienna Convention was the internationalisation of the drug trade, with cartels smuggling drugs across borders, for instance into America, and transferring the proceeds into bank accounts held in other countries, especially off-shore facilities offering banking secrecy.⁶⁰² The Vienna Convention aimed “towards bringing effective law enforcement measures to bear against international narcotics traffickers”⁶⁰³ and created a “new international legal regime for combating international drug trafficking.”⁶⁰⁴ The ambit of the Vienna Convention is discussed in more detail later in this chapter.⁶⁰⁵

⁵⁹⁸ Stewart 1989 *DJILP* 387. Also see a 3 of the Vienna Convention.

⁵⁹⁹ Stewart 1989 *DJILP* 387.

⁶⁰⁰ Warchol, Zupan and Clack 2003 *ICJR* 2.

⁶⁰¹ Warchol, Zupan and Clack 2003 *ICJR* 3.

⁶⁰² Gurulé 1998 *FILJ* 75.

⁶⁰³ Stewart 1989 *DJILP* 387.

⁶⁰⁴ Stewart 1989 *DJILP* 387.

⁶⁰⁵ See para 3.3 below.

Of concern for South Africa is that as other countries tighten the screws on organised crime, the organised criminal groups relocate to Africa from where they can regroup and revive their activities, because “weak governments cannot control organised crime.”⁶⁰⁶ Organised criminal groups target developing countries as safe havens from which to launch their international criminal activities.⁶⁰⁷ This has for instance resulted in a growing drug trade in western Africa and counterfeit goods and maritime piracy in eastern Africa, with South Africa forming the business hub for such criminal activities.⁶⁰⁸

The drug trafficking trade in West Africa grew to such an extent that it was viewed as an international threat, because it spawned “a series of near ‘narco-states’”⁶⁰⁹ and led to countries like Mali and Guinea Bissau being subjected to military coups, which were funded by drug money.⁶¹⁰ This serves to illustrate how failing to take steps against such drug trafficking activities can strengthen the hold of such actors over a region, making them bolder and more aggressive in widening their control over a larger geographical area.⁶¹¹ Similarly, South Africa has not escaped the attention of “shady characters from around the world.”⁶¹² According to Ashton,⁶¹³ the attempted statutory reform to deal with organised crime⁶¹⁴ has still left gaps for criminals to explore, because “increasingly savvy and sophisticated criminal networks are extremely adaptable.”

The power struggles of political role players in some African countries have also led to unhealthy relationships with organised criminal groups, who are

⁶⁰⁶ Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

⁶⁰⁷ Standing *Transnational Organised Crime* 4.

⁶⁰⁸ Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

⁶⁰⁹ According to Shaw 2012 *ISS Policy Brief* 1, narco-states are countries whose economies, politics and social structures are infiltrated and distorted by the drug trade.

⁶¹⁰ Shaw 2012 *ISS Policy Brief* 1-2.

⁶¹¹ Shaw 2012 *ISS Policy Brief* 2.

⁶¹² Ashton 2012 <http://sacsis.org.za/site/article/1281>.

⁶¹³ Ashton 2012 <http://sacsis.org.za/site/article/1281>.

⁶¹⁴ Discussed in chapter 5 of this study.

seen to “stifle political rivalry”.⁶¹⁵ Evidence of this is also found in Russia, Japan and South Africa, especially in the Western Cape, which is the province most affected by drug-related crimes.⁶¹⁶ A political storm erupted in 2012 after alleged meetings between politicians and known gangsters in the Western Cape. Allegations were brought against high ranking officials of the ANC leadership for meeting with gang bosses in Cape Town and having discussions about destabilising the region for political gain.”⁶¹⁷ Coupled with this were concerns regarding perceptions created by discussions of “peace” between government officials and known gangsters, which Goga and Goredema⁶¹⁸ maintain sends out signals of a weak government needing the support of powerful member of organised criminal groups to govern. Such perceptions may be strengthened by the ineffective combating of drug peddling across borders to the Western Cape, with Cape Town as primary destination.⁶¹⁹

Henda⁶²⁰ therefore laments police corruption as the “most perverse of all shortcomings regarding the Western Cape’s efforts against drugs”. Police members even go so far as to transport drugs for drug traffickers.⁶²¹ Furthermore News24⁶²² reports instances where “police and crime intelligence were conspiring with politicians and gangsters in an ongoing attempt to derail critical investigations”. In order to combat drug trafficking effectively, strategies would have to include eradicating police corruption and focussing on “the more complex international drug networks.”⁶²³ Police involvement in organised crime carries the additional effect of crimes not

⁶¹⁵ Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

⁶¹⁶ Confer Henda 2010 <http://www.issafrica.org/iss-today/drug-related-crime-in-cape-town>.

⁶¹⁷ Goga and Goredema 2012 <http://www.issafrica.org/iss-today/cape-towns-balancing-act-between-political-power-and-organised-crime>.

⁶¹⁸ Goga and Goredema 2012 <http://www.issafrica.org/iss-today/cape-towns-balancing-act-between-political-power-and-organised-crime>.

⁶¹⁹ Henda 2010 <http://www.issafrica.org/iss-today/drug-related-crime-in-cape-town>.

⁶²⁰ Henda 2010 <http://www.issafrica.org/iss-today/drug-related-crime-in-cape-town>.

⁶²¹ Henda 2010 <http://www.issafrica.org/iss-today/drug-related-crime-in-cape-town>.

⁶²² News24 2017 <http://showcase.news24.com/cape-town-underworld/>.

⁶²³ Henda 2010 <http://www.issafrica.org/iss-today/drug-related-crime-in-cape-town>.

being reported and refusal of witnesses to testify, due to fears of victimisation.⁶²⁴

Even though drugs “are still the most profitable element”⁶²⁵ of organised crime, the criminals behind such illegal drug activity have expanded their illegal activities to other forms of organised crime.⁶²⁶ This expansion of organised criminal activity is facilitated by the corruption of government officials.⁶²⁷ The link between organised crime and corruption thus strains the effective combating of the phenomenon and is therefore be explored in the next section.

3.2.3 *Organised crime and corruption*

Corruption holds a variety of serious negative effects for any state power, which Snyman⁶²⁸ lists as follows:

Corruption erodes moral values as well as the credibility of public authorities and its organs, undermines legal certainty and faith in the rule of law, leads to a dysfunctional public and private sector, endangers the free market economy, creates a breeding ground for organised crime, results in some people becoming rich at the expense of others, increases levels of poverty, impedes economic development, destroys the pillars of democracy, creates a culture of dishonesty and leads to lack of faith in a country's leaders.

Failure to effectively combat corruption can eventually lead to a nation's economic bankruptcy.⁶²⁹ Beside these generally negative effects of corruption, countries with high levels of corruption face the more specific effect of organised crime. Zang and Chin⁶³⁰ for instance found that corruption is essential to the success of Chinese human smuggling enterprises. Organised crime groups use corruption when necessary to achieve immunity.⁶³¹ By infiltrating law enforcement and the political sphere through corruption, they thwart the effective combating of

⁶²⁴ Hough and Du Plessis *Organised Crime* 61.

⁶²⁵ Standing *Transnational Organised Crime* 2.

⁶²⁶ Shaw 2012 *ISS Policy Brief* 3.

⁶²⁷ Ram 2001 *FCS* 135.

⁶²⁸ Snyman *Criminal Law* 401.

⁶²⁹ McClean *Transnational Organised Crime* 110.

⁶³⁰ Zhang and Chin 2002 *Criminology* 757.

⁶³¹ Finckenauer 2005 *Trends in Organised Crime* 67.

organised crime.⁶³² According to Madzima,⁶³³ the relationship between organised crime and corruption facilitated the rise of organised crime during the Prohibition in America, when bootleggers took advantage of weak government structures to secure lucrative markets. Since then, many countries⁶³⁴ have failed to effectively deal with combating organised crime linked corruption early on and have suffered the consequences of internal conflict.⁶³⁵

More importantly, the political will to combat organised crime remains essential to successfully deal with the phenomenon and corruption is therefore critical to the success of organised criminal groups.⁶³⁶ Hence, organised criminal groups avoid countries that show low tolerance towards corruption, realising that they cannot simply bribe their way to freedom when arrested.⁶³⁷ For this reason international efforts at combating organised crime have included cooperation in the fight against corruption as well.⁶³⁸

Developing countries where high-level officials and political figures are subject to corruption are most vulnerable to organised crime,⁶³⁹ and Africa furthermore faces its own unique issues in combating organised crime effectively, which Madzima⁶⁴⁰ puts as follows:

In Africa, it is contended that the lack of sufficient resources, specifically skills and funding makes it unlikely that organised crime and grand corruption can ever be brought under control. Some researchers believe that

⁶³² Hough and Du Plessis *Organised Crime* 36.

⁶³³ Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

⁶³⁴ For instance Colombia and Mexico. See Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

⁶³⁵ Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

⁶³⁶ Hübschle 2010 <http://www.issafrica.org/iss-today/dispelling-popular-organised-crime-myths>; Guymon 2000 *BJIL* 72; Standing *Transnational Organised Crime* 6.

⁶³⁷ Gurulé 1998 *FILJ* 75; Standing *Transnational Organised Crime* 6.

⁶³⁸ Guymon 2000 *BJIL* 72.

⁶³⁹ Finckenauer 2005 *Trends in Organised Crime* 67.

⁶⁴⁰ Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

the most powerful tool in fighting organised crime is the political will to fight it. This is something that many African governments lack.

Besides this lack of skill and expertise in the investigation of organised crime experienced in Africa, corruption also constrains the effective combating of organised crime by thwarting the efforts of law enforcement agencies from developed countries to form effective alliances with local police.⁶⁴¹

Coupled with the problematic link between organised crime and corruption, is the failure to deal effectively with the proceeds of crime due to links between organised crime and political elites, referred to as “politically exposed persons” (PEPs),⁶⁴² where fear of exposure causes the cover-up of such ties.⁶⁴³ This situation leads Madzima⁶⁴⁴ to conclude as follows:

It is this sad concoction of factors that feeds the belief that, for as long as African politics fail to evolve from its self-distracting predisposition of patronage, the extermination of organised crime and corruption is a pipe dream.

Furthermore, the corruption of officials at border posts creates porous national borders, which allows organised crime to flourish because transnational organised crime elements enter such countries at will and

⁶⁴¹ Standing *Transnational Organised Crime* 11.

⁶⁴² The glossary of the 2012 FATF Recommendations defines *Foreign PEPs* as “individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials,” while *Domestic PEPs* are defined as “individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.” *Persons who are or have been entrusted with a prominent function by an international organisation* furthermore “refers to members of senior management, i.e. directors, deputy directors and members of the board or equivalent functions.” The glossary then proceeds to state that the “definition of PEPs is not intended to cover middle ranking or more junior individuals in the foregoing categories.” See FATF 2003 <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF>.

⁶⁴³ Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

⁶⁴⁴ Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

undermine the jurisdiction and sovereignty of the ruling government.⁶⁴⁵ This situation seems ironic, because developing countries resist forming strategic alliances with the law enforcement agencies of other countries because they fear the loss of their sovereignty.⁶⁴⁶ Mittelman and Johnston⁶⁴⁷ put the danger which organised criminal groups pose to effective governance as follows:

These groups constitute an alternative system by offering commerce and banking in black and grey markets that operate outside the regulatory framework of the state; buying, selling, and distributing controlled or prohibited commodities such as narcotics; providing swift and usually discreet dispute resolution and debt collection without reference to the courts; creating and maintaining cartels when state laws proscribe them; and arranging security for the so-called protection of businesses and sheltering them from competitors, the state, and rival criminals.

Besides the penetration of organised criminal groups in a failing state, the crippling of the government may also lead to the corruption of civil society. To illustrate this phenomenon, Mittelman and Johnston⁶⁴⁸ raise the example of “unprecedented crime and violence since 1990 in South Africa”. Factors such as the change in regime from an authoritarian to a democratic state, social disintegration, rapid urbanisation, unemployment, housing shortages and an inadequate welfare system raise concerns regarding “a culture of crime disembedded from the structures of society and resistant to attempts of eradication.”⁶⁴⁹

Links between organised crime and South African politics, however, stretch back into the apartheid regime. As an example, National Party MP Peet de Pontes was convicted of fraud for securing convicted Mafiosi Vito Palozzolo’s passport upon entering South Africa.⁶⁵⁰ According to Smith,⁶⁵¹ such links are the reason why organised criminals “have targeted Southern

⁶⁴⁵ Burchell *Principles of Criminal Law* 868; Mittelman and Johnston 1999 *Global Governance* 115.

⁶⁴⁶ Standing *Transnational Organised Crime* 11.

⁶⁴⁷ Mittelman and Johnston 1999 *Global Governance* 114-115.

⁶⁴⁸ Mittelman and Johnston 1999 *Global Governance* 116.

⁶⁴⁹ Mittelman and Johnston 1999 *Global Governance* 116.

⁶⁵⁰ Ashton 2012 <http://sacsis.org.za/site/article/1281>.

⁶⁵¹ Smith 1999 <http://mg.co.za/article/1999-02-05-nats-were-in-bed-with-mafia-boss>.

Africa for drug trafficking, money laundering and car theft since the late 1980s” and why Italian police officials maintain that the Mafia enjoys South Africa’s infrastructure “well away from prying policemen”.

In such situations, citizens may move towards self-help when the State fails to maintain law and order.⁶⁵² The response is to form groups, because individuals feel safer in a group, and so the wealthy engage private security companies, while vigilante justice is the answer of the deprived communities to poor policing.⁶⁵³ The danger is that such groupings create the environment for gangs to form under the auspices of “protection”, often leading to criminal behaviour from such gangs,⁶⁵⁴ which the authorities find difficult to control.⁶⁵⁵

These conditions have, for instance, allowed vigilante groups like *Mapogo* or *Mathamaga* to grow, from its inception in 25 August 1996, to a national organisation “boasting 70,000 members and 72 branches in at least five provinces by 2002”.⁶⁵⁶ On the other side of the spectrum, the wealthy are serviced by 445,000 registered security guards, with foreign ownership of such security firms deemed to be a threat to national security by government officials.⁶⁵⁷ Some scholars argue that the business of providing private security where states fail to do so is one of the main reasons why mafia-type enterprises come into existence.⁶⁵⁸ To this end,

⁶⁵² Van der Mescht 1995 SACJ 272-273 states that as society develops, the authorities are trusted more and more to maintain law and order and self-help gradually decreases until, as in South Africa’s legal system, self-help is no longer tolerated.

⁶⁵³ Dempster 2002 <http://news.bbc.co.uk/1/hi/world/africa/1924142.stm>.

⁶⁵⁴ Van der Mescht 1995 SACR 273.

⁶⁵⁵ Van der Mescht 1995 SACR 273.

⁶⁵⁶ Oomen 2004 *African Studies* 157.

⁶⁵⁷ Burger and Newham 2014 <http://www.issafrica.org/iss-today/are-foreign-owned-private-security-companies-a-threat-to-south-africas-national-security>. Note the authors’ criticism of the minister’s views, stating that “elites in weak states more readily view various threats as ‘national security threats’ – especially when they seem to have negative implications for the power of those elites.”

⁶⁵⁸ See Williams and Godson 2002 CLSC 316.

News24⁶⁵⁹ exposed a police probe into the sale of police firearms to gangsters the stockpiling of weapons “for use against the state”.

The above effects of corruption, coupled with the collapse of good leadership in the SAPS over the past decade leading to low morale of police members, severely hamper the state’s ability to effectively combat organised crime.⁶⁶⁰ This situation affects investment, as fears of possible extortion and lack of efficiency due to fraud and theft has an adverse effect on the confidence of would-be investors.⁶⁶¹ A lack of leadership in the police⁶⁶² also places huge strain on the entire police and intelligence system.⁶⁶³ In the Western Cape, for example, police action has a minimum effect on the flow of drugs into the province simply because they are focused on closing drug dens, which are easily relocated, and arresting drug peddlers, who are easily replaced.⁶⁶⁴

Under such conditions of weak leadership, Mittelman and Johnston⁶⁶⁵ question the legitimacy of a state that is unable to control its social and natural environment while itself being implicated in corrupt activities, stating the following:

Hence, in South Africa, notwithstanding the aura surrounding the post-apartheid state, the capability and legitimacy of its institutions, including a police force trained to repress popularly based initiatives, is being increasingly contested. At bottom a form of self-protection, vigilantism has emerged as an acute response to transnational organised crime.

Ashton⁶⁶⁶ in turn summarises the dangers of links between government and organised crime as follows:

⁶⁵⁹ News24 2017 <http://showcase.news24.com/cape-town-underworld/>

⁶⁶⁰ Burger 2012 <http://www.issafrica.org/iss-today/how-poor-leadership-undermines-the-work-of-the-south-african-police-service>; Mittelman and Johnston *Global Governance* 116.

⁶⁶¹ Mittelman and Johnston 1999 *Global Governance* 121.

⁶⁶² See para 6.3.3 for a detailed analysis of the lack of leadership in the SAPS.

⁶⁶³ Ashton 2012 <http://sacsis.org.za/site/article/1281>.

⁶⁶⁴ Henda 2010 <http://www.issafrica.org/iss-today/drug-related-crime-in-cape-town>.

⁶⁶⁵ Mittelman and Johnston 1999 *Global Governance* 121.

⁶⁶⁶ Ashton 2012 <http://sacsis.org.za/site/article/1281>.

Networks of gangs, nightclubs, drugs, bouncers, smuggling, property transactions, politicians, diamond trading reach deep into the heart of our wonky state intelligence agencies, which have become intimately associated with the present nexus of political power. These are precisely the risks that can undermine our teenage democracy.

Mittelman and Johnston⁶⁶⁷, however, argue that even the will to combat organised crime can lead to problems, for the lines between legal and illegal become blurred when intelligence services have to start cooperating with members of the underworld in order to obtain information to secure arrests and convictions. They highlight the issue as follows:⁶⁶⁸

This process often means turning a blind eye to the activities, past and present, of individuals who may have broken laws but are the only ones with first-hand experience and insight into the opaque world of terrorists groups, organised crime gangs, and other illicit groups with which they are associated.

The example of the testimony of Joseph Valsechi as discussed in the previous chapter serves as an example of this point.⁶⁶⁹ According to McCusker,⁶⁷⁰ transnational crime “will continue to grow in volume and impact”, having an adverse effect on all spheres of society, more especially on its financial stability. This negative effect on financial stability is mainly caused by the laundering of the proceeds of crime, which goes hand-in-hand with tax evasion.⁶⁷¹ Also, as technology advances, so the opportunities for money laundering by organised criminal groups also increases.⁶⁷² In the next section, the adverse effects of money laundering by organised criminal groups is explored.

3.2.4 *Organised crime and money laundering*

The accumulating wealth of organised criminal groups has necessitated their expansion into the world of economic crime, most notably through money laundering and the investment of their criminal proceeds into the

⁶⁶⁷ Mittelman and Johnston 1999 *Global Governance* 106.

⁶⁶⁸ Mittelman and Johnston 1999 *Global Governance* 106.

⁶⁶⁹ See para 2.4.1 above.

⁶⁷⁰ McCusker “Organised cyber crime” 107.

⁶⁷¹ Leong *The Disruption of International Organised Crime* 40.

⁶⁷² McClean *Transnational Organised Crime* 76.

legitimate financial sector.⁶⁷³ In this manner, organised criminal groups penetrate the legal business sector and even dominate the market.⁶⁷⁴ The adverse effects of money laundering are listed by Leong⁶⁷⁵ as follows:

It might erode a nation's economy by changing the demand for cash, making interest and exchange rates volatile, thus causing high inflation. In addition, money laundering might deter foreign direct investment.

African countries also face the unique challenge of a lack of skills and funding to combat these effects of organised crime effectively.⁶⁷⁶ Furthermore, a culture exists in sub-Saharan Africa where those who hold public office treat public funds as their personal property.⁶⁷⁷ Public funds are then often depleted when corrupt state officials undermine the state by diverting public funds to organised criminal groups.⁶⁷⁸ Thus corruption is given as the main reason why Southern African countries have failed to implement measures to combat money laundering.⁶⁷⁹

Furthermore, risky investments and lack of tax contributions by organised criminal groups exacerbate the adverse effects on a country's economy.⁶⁸⁰ In order to combat this, the state has to use funds which could rather have been used for development. Such tax evasion activities, coupled with extensive poverty, leads to a very narrow tax base from which government must obtain the necessary funds for economic growth and development.⁶⁸¹ Furthermore, the extortion of so-called "protection money" by organised criminal groups robs the legitimate government of its authority as more credence is given to the rule of organised criminal groups than the

⁶⁷³ Warchol, Zupan and Clack 2003 *ICJR* 2.

⁶⁷⁴ Leong *The Disruption of International Organised Crime* 40.

⁶⁷⁵ Leong *The Disruption of International Organised Crime* 40.

⁶⁷⁶ Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

⁶⁷⁷ McLennan 2012 www.issafrica.org/iss-today/effective-taxation-critical-to-nation-building.

⁶⁷⁸ Mittelman and Johnston 1999 *Global Governance* 116; Standing *Transnational Organised Crime* 6.

⁶⁷⁹ Madzima 2009 <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa>.

⁶⁸⁰ Mittelman and Johnston 1999 *Global Governance* 115-116.

⁶⁸¹ McLennan 2012 www.issafrica.org/iss-today/effective-taxation-critical-to-nation-building.

government.⁶⁸² Sophisticated banking systems are also attractive to organised criminal groups, who need a stable financial system for money laundering purposes.⁶⁸³

Adding to the challenge of combating money laundering, is the tax haven countries, which allow criminals to hide their illegal profits from tax authorities.⁶⁸⁴ While the term “tax haven” often conjures up thoughts of Switzerland or Monaco as the major tax havens of the globe, Mauritius has become known as the “Switzerland of Africa” with many tax evaders and avoiders using it as their “preferred island getaway”.⁶⁸⁵ The illicit outflow of funds from Africa through money laundering activities and tax havens, coupled with decreasing foreign aid from developed countries, have the effect of further worsening poverty in Africa.⁶⁸⁶

Because money laundering allows criminals to expand their enterprises, any strategy aimed at combating organised crime must include the criminalisation of money laundering and deprive the criminals of the proceeds of their crimes, and must do so at an international level.⁶⁸⁷

The last aspect to be touched in before examining the international action taken to combat organised crime, is the link with terrorism.

3.2.5 *Organised crime and terrorism*

Initial views of the organised crime/terrorism nexus are summed up by Finckenauer⁶⁸⁸ as follows:

[D]espite the fact that they may engage in killings, bombings, or kidnappings and despite the fact that they may exist within political groups, international terrorist organisations would not be classified as a form of organised crime.

⁶⁸² Guymon 2000 *BJIL* 65.

⁶⁸³ Cowling 1998 *SACJ* 352.

⁶⁸⁴ Matheza 2011 www.issafrica.org/iss-today/why-taxation-matters.

⁶⁸⁵ Matheza 2011 www.issafrica.org/iss-today/why-taxation-matters.

⁶⁸⁶ Goredema 2012 <http://www.issafrica.org/iss-today/the-challenges-of-curbing-illicit-financial-flows-from-africa>.

⁶⁸⁷ Gurulé 1998 *FILJ* 77.

⁶⁸⁸ Finckenauer 2005 *Trends in Organised Crime* 65.

The reason for the initial exclusion of terrorist groups from discussions on organised crime, is that their motives were perceived not to be economic in nature.⁶⁸⁹ Williams and Godson⁶⁹⁰, however, made the following prediction in 2002:

One possibility for the future – and this is speculative – is that some terrorist groups will transform themselves into criminal organisations primarily focusing their activities on illegal profit-making activities.

More than a decade later, the distinction between organised crime and terrorism has in fact become blurred, mainly because of two reasons: firstly, organised crime groups and terrorist groups working together to achieve their respective goals, and secondly, terrorist groups engaging in organised criminal activities to fund their terrorism.⁶⁹¹ Many terrorist groups engage in drug trafficking to fund their ideological goals, which has led to the term “narco-terrorism”.⁶⁹²

One of the main differences between organised crime and terrorism remains the ideology (or lack thereof) of the group. Organised crime's main purpose, is profit, while with terrorist groups the profits are seen as a means to an end, rather than the end itself.⁶⁹³ There are however many similarities between organised crime and terrorist groups. Mainly the secretive nature of their activities as well as an overlap in their organisational structures.⁶⁹⁴ Also, they have the same “enemy”, which is the state and its authorities, and hence their *modus operandi* to weaken the state is similar.⁶⁹⁵ When it comes to their finances, both organised crime and terrorism have to put processes in place to hide the sources of

⁶⁸⁹ Paoli 2002 CLSC 82.

⁶⁹⁰ Williams and Godson 2002 CLSC 320.

⁶⁹¹ Albanese *Organised Crime* 7; Finckenauer 2005 *Trends in Organised Crime* 65; Paoli 2002 CLSC 82.

⁶⁹² Leong *The Disruption of International Organised Crime* 23.

⁶⁹³ Finckenauer 2005 *Trends in Organised Crime* 65. See Paoli 2002 CLSC 82 for examples of insurgent groups that use criminal activities to finance their ideological goals.

⁶⁹⁴ Paoli 2002 CLSC 82.

⁶⁹⁵ Leong *The Disruption of International Organised Crime* 22-23.

their funds, which is why similar controls are put in place by authorities to combat money laundering and the financing of terrorism.⁶⁹⁶

3.2.6 Summary

The preceding discussion of the international threat of organised crime explores how globalisation has allowed organised crime to expand, first as a drug based criminal phenomenon into other illegal markets, even having close ties with terrorism in some instances. The flourishing of organised crime at an international level has necessitated its penetration into the global economy for money laundering purposes. As other jurisdictions clamp down on the threat of organised crime, Africa, including South Africa, is becoming a target destination to which organised criminal groups are turning for a new base from which to run their operations. The worst effect that this could have for a country is “decertification”, where the United States of America cuts off aid to a country (as has happened with Nigeria in the past) because it does not meet “U.S. standards for bilateral cooperation in stamping out criminal activities, especially in the areas of narcotics and money laundering”.⁶⁹⁷ The next section focuses on the steps taken at international level to ward off this global threat of organised crime.

3.3 *International action against organised crime*

One aspect that may be advantageous in the combating of organised crime is that the organised criminal groups often “remain at odds with one another because of ethnic differences, mistrust, and different business styles”⁶⁹⁸ although, according to Mittelman and Johnston,⁶⁹⁹ such conflict “usually takes place within a country or between an organised crime group and the state (as in Colombia)”. The most organised criminal groups

⁶⁹⁶ De Koker *South African Money Laundering* Com 2-3.

⁶⁹⁷ Mittelman and Johnston 1999 *Global Governance* 116.

⁶⁹⁸ Mittelman and Johnston 1999 *Global Governance* 106.

⁶⁹⁹ Mittelman and Johnston 1999 *Global Governance* 106.

therefore tend to have regular summits to discuss their operations and enter into cooperative agreements to avoid conflict.⁷⁰⁰

One of the results of these collaborative efforts, for instance, has been the establishment of the “Silk Route”, which is a heroin smuggling route through the Central Asian commonwealth republics to Russia and the Ukraine.⁷⁰¹ Some organised criminal groups also arrange among themselves the smuggling of other illegal commodities, as well as prostitution and extortion.⁷⁰² For this reason, the international community deems it extremely important to tackle the combating of organised crime on a global scale. One of the first steps taken by the international community against transnational organised crime was the Vienna Convention, which is analysed in the next section.

3.3.1 *The Vienna Convention*

The Vienna Convention was adopted during an international conference attended by representatives from 106 states in December 1988.⁷⁰³ South Africa’s accession to the Vienna Convention was concluded on 14 December 1998 with the following declaration: “In keeping with paragraph 4 of article 32,⁷⁰⁴ the Republic of South Africa does not consider itself bound by the provisions of paragraphs 2 and 3 of Article 32 of the Convention.”⁷⁰⁵

The main purpose of the Vienna Convention is to “promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances

⁷⁰⁰ Enck 2003 *SJILC* 375, Guymon 2000 *BJIL* 67; Jamieson 2001 *SCT* 381.

⁷⁰¹ Jamieson 2001 *SCT* 384.

⁷⁰² Enck 2003 *SJILC* 375.

⁷⁰³ Stewart 1989 *DJILP* 387.

⁷⁰⁴ Article 32 of the Vienna Convention deals with the settlement of disputes among Parties, where para 4 gives each state the option to declare that it does not consider itself bound by paras 2 and 3 of a 32. These paras in turn provide that parties to a dispute may refer the matter to the International Court of Justice.

⁷⁰⁵ UNODC unknown date https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en.

having an international dimension.”⁷⁰⁶ Hence, the Vienna Convention requires contracting member states to implement criminal offences relating to drug trafficking as well as offences relating to the laundering of drug money.⁷⁰⁷ This was the first United Nations convention requiring member states to implement measures for the control of money laundering activities.⁷⁰⁸ At the time of the adoption of the Vienna Convention, Stewart⁷⁰⁹ praised the international effort at combating drug trafficking as follows:

The Convention is one of the most detailed and far-reaching instruments ever adopted in the field of international criminal law, and if widely adopted and effectively implemented, will be a major force in harmonising national laws and enforcement actions around the world.

Other scholars are, however, not as complimentary towards the Vienna Convention. Fazey⁷¹⁰ claims that meetings of the United Nations Commission on Narcotic Drugs⁷¹¹ are “manipulated in the interests of 17 developed countries that largely fund UNDCP.”⁷¹² This view is supported by Bewley-Taylor,⁷¹³ who maintains that “the UN drug control system procedures and politics are inextricably entwined”. Fazey⁷¹⁴ furthermore maintains that claimed successes of the drug control programme mostly consist of countries reporting their processes rather than their progress, while Gurulé⁷¹⁵ claims that many countries “have been reluctant, or simply unwilling, to comply with the obligations imposed under the Convention”. Equally, Bewley-Taylor⁷¹⁶ argues that many states are moving away from the prohibition based system of drug control to more “tolerant drug policies

⁷⁰⁶ Article 2(1) of the Vienna Convention.

⁷⁰⁷ Leong *The Disruption of International Organised Crime* 103; Stewart 1989 *DJILP* 389.

⁷⁰⁸ De Koker *South African Money Laundering Com* 1-11.

⁷⁰⁹ Stewart 1989 *DJILP* 388.

⁷¹⁰ Fazey 2003 *IJDP* 155.

⁷¹¹ The UN Commission on Narcotic Drugs was responsible for the drafting process of the Vienna Convention. See Stewart 1989 *DJILP* 388-391 for a brief background of the Vienna Convention.

⁷¹² The United Nations International Drug Control Programme.

⁷¹³ Bewley-Taylor 2003 *IJDP* 171.

⁷¹⁴ Fazey 2003 *IJDP* 155.

⁷¹⁵ Gurulé 1998 *FILJ* 77.

⁷¹⁶ Bewley-Taylor 2003 *IJDP* 171.

that exploit the latitude existing within the legal framework of the global drug control regime.”

Many countries, like the Netherlands, Italy, Luxembourg, Portugal and Spain, have moved toward leniency when it comes to the possession of marijuana.⁷¹⁷ Even in America, many states have moved towards the legalising of marijuana for private use.⁷¹⁸ In other instances, countries have adopted more lenient approaches towards addressing the use of drugs, such as risk-reduction strategies.⁷¹⁹ Switzerland, for instance, relies on the vagueness of the “medical and scientific” use of drugs to permanently prescribe heroin to heroin addicts.⁷²⁰

Leniency towards personal use should, however, not affect the seriousness with which trafficking in drugs must be considered. During a conference on the implications of organised crime for South and Southern Africa hosted by the Institute of Strategic Studies of the University of Pretoria in 1998, the then Executive Director of the United Nations Office for Drug Control and Crime Prevention, professor Pino Arlacchi, warned that those who believed the legalising drugs would lead to a reduction in demand, were naïve and failed to consider the developments of the drug market and the links between drug traffickers and ordinary street criminals.⁷²¹

Important for the purpose of this study, the preamble of the Vienna Convention recognises the links between illicit drug trafficking and other forms of organised crime, which are seen to undermine the legitimate economies and threaten the stability, security and sovereignty of States. The preamble also recognises illicit drug trafficking as an international

⁷¹⁷ Fazey 2003 *IJDP* 161.

⁷¹⁸ Bewley-Taylor 2003 *IJDP* 171.

⁷¹⁹ According to Bewley-Taylor 2003 *IJDP* 173, such strategies include “the exchange and distribution of needles and syringes, the prescription of heroin, injecting rooms and even on the spot testing of drugs like ecstasy.”

⁷²⁰ Fazey 2003 *IJDP* 161.

⁷²¹ Hough and Du Plessis *Organised Crime* 8.

criminal activity, the suppression of which demands urgent attention and the highest priority. Therefore member states are obliged in terms of the convention to implement measures to combat the illicit drug trafficking across their national borders and “to enact and enforce specific domestic laws aimed at suppressing the drug trade”.⁷²² To this end, the convention *inter alia* provides for the enactment of drug-related offences and sanctions under domestic laws,⁷²³ the confiscation of illicit drugs and materials as well as the confiscation of the proceeds of drug related offences,⁷²⁴ the extradition between party states of offenders who are charged with the offences created by the convention,⁷²⁵ and mutual legal assistance between party states in the investigation, prosecution and judicial proceedings relating to the criminal offences created by the convention.⁷²⁶

3.3.1.1 Offences and sanctions

America was the main negotiating force behind the Vienna Convention and thus “many of its provisions reflect legal approaches and devices already found in U.S. law”.⁷²⁷ Therefore the provisions relating to criminal offences are largely based on offences created in U.S. law but which were not criminalised by other jurisdictions.⁷²⁸

The specific offences which party states are required to enact include:

- (i) the production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the *Single Convention on*

⁷²² Stewart 1989 *DJILP* 388.

⁷²³ Article 3 of the Vienna Convention.

⁷²⁴ Article 5 of the Vienna Convention.

⁷²⁵ Article 6 of the Vienna Convention.

⁷²⁶ Article 7 of the Vienna Convention.

⁷²⁷ Stewart 1989 *DJILP* 388.

⁷²⁸ Stewart 1989 *DJILP* 392.

Narcotic Drugs, 1961, or the *Convention on Psychotropic Substances*, 1971;⁷²⁹

- (ii) the cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the *Single Convention on Narcotic Drugs*, 1961, or the *Convention on Psychotropic Substances*, 1971;⁷³⁰
- (iii) the possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities mentioned in paragraph (i) above;⁷³¹
- (iv) the manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II of the Vienna Convention, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;⁷³² and
- (v) the organisation, management or financing of any of the offences mentioned in paragraphs (i), (ii), (iii) or (iv) above.⁷³³

The money laundering offences created by the Vienna Convention follow the language used in U.S. anti-money laundering legislation.⁷³⁴ These provisions criminalise the following:

- (i) the conversion or transfer of property, knowing that such property is derived from any drug related offences, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;⁷³⁵ and

⁷²⁹ Article 3(1)(a)(i) of the Vienna Convention.

⁷³⁰ Article 3(1)(a)(ii) of the Vienna Convention.

⁷³¹ Article 3(1)(a)(iii) of the Vienna Convention.

⁷³² Article 3(1)(a)(iv) of the Vienna Convention.

⁷³³ Article 3(1)(a)(v) of the Vienna Convention.

⁷³⁴ Stewart 1989 *DJILP* 392.

⁷³⁵ Article 3(1)(b)(i) of the Vienna Convention.

- (ii) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from drug related offences or from an act of participation in such an offence or offences.⁷³⁶

The seriousness in combating money laundering is evident in that failure to enact legislation combating money laundering is deemed as non-compliance.⁷³⁷

The other offences created by the Vienna Convention are as follows:

- (i) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from drug related offences or from an act of participation in such offence or offences;⁷³⁸
- (ii) the possession of equipment or materials or substances listed in Table I and Table II of the Vienna Convention, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;⁷³⁹
- (iii) publicly inciting or inducing others, by any means, to commit to use narcotic drugs or psychotropic substances illicitly;⁷⁴⁰ and
- (iv) participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the related offences.⁷⁴¹

These offences are to be created subject to the constitutional principles and basic concepts of each member state.⁷⁴² The main reason behind the leeway granted to member states in this provision is the differing legal

⁷³⁶ Article 3(1)(b)(ii) of the Vienna Convention.

⁷³⁷ Gurulé 1998 *FILJ* 81.

⁷³⁸ Article 3(1)(c)(i) of the Vienna Convention.

⁷³⁹ Article 3(1)(c)(ii) of the Vienna Convention.

⁷⁴⁰ Article 3(1)(c)(iii) of the Vienna Convention.

⁷⁴¹ Article 3(1)(c)(iv) of the Vienna Convention.

⁷⁴² Article 3(1)(c) of the Vienna Convention.

systems of such party states, where constitutional challenges and lack of discretion held by prosecutors may cause problems in some of these jurisdictions.⁷⁴³ The leeway granted by this provision may also create a loophole for countries that wish to be less prohibition-based in their domestic laws. If a country's highest court were to rule that prohibiting possession of cannabis, for instance, was unconstitutional, that country would no longer be bound by the strict provisions of the Vienna Convention and would still be in compliance with its obligations set by the convention.⁷⁴⁴ This situation is not entirely impossible in light of current international debates surrounding drug prohibition as a form of human rights violation.⁷⁴⁵

The Vienna Convention differentiates between trafficking and personal use offences, thereby allowing member states to make alternative provisions, such as rehabilitation, in cases of possession, purchase or cultivation of narcotic drugs or psychotropic substances.⁷⁴⁶ These provisions also limit obligations regarding extradition and mutual legal assistance to the more serious offences linked to international trafficking.⁷⁴⁷ The provisions for personal use offences⁷⁴⁸ in the Vienna Convention deviate from the main focus of the convention, which is combating the illicit supply of drugs, and have caused the abovementioned disputes regarding the leniency which some countries have towards the personal use of drugs.⁷⁴⁹ Had the convention simply legislated against the international trafficking and supply of drugs, such disputes would have been avoided.

Of particular interest in the combating of organised crime, is that the convention stipulates that involvement in the offence of an organised criminal group to which the offender belongs, or the involvement of the

⁷⁴³ Stewart 1989 *DJILP* 393.

⁷⁴⁴ Bewley-Taylor 2003 *IJDP* 177.

⁷⁴⁵ Bewley-Taylor 2003 *IJDP* 177.

⁷⁴⁶ Article 3(4)(d) read with a 3(2) of the Vienna Convention.

⁷⁴⁷ Stewart 1989 *DJILP* 393.

⁷⁴⁸ Article 3(2) of the Vienna Convention.

⁷⁴⁹ Bewley-Taylor 2003 *IJDP* 173.

offender in “other international organised criminal activities” will make the offence “particularly serious” and is a factor which must be taken into account by the courts or other competent authorities having jurisdiction.⁷⁵⁰ Interestingly, a factor which has an exacerbating effect on the commission of the offence, is the offender holding a public office and the offence being connected with the office in question.⁷⁵¹ The involvement of government officials in such crimes is thus viewed as an aggravating circumstance.

3.3.1.2 Money laundering and confiscation

Gurulé⁷⁵² maintains that an effective combating strategy must, on an international scale, firstly criminalise money laundering and secondly deprive criminals of the profits which they generate through their illegal activities. To this end, the Vienna Convention marked the first steps at international level in dealing with the proceeds of crime, albeit that the Convention limited the provisions to the proceeds of drug related crimes.⁷⁵³ As part of new initiatives in the approach to combating the international drug trade, it became apparent that simply targeting the offenders was not sufficient and that strategies aimed at the profits generated by the international criminals was also necessary.⁷⁵⁴ This started in America under the *RICO Act*.

The Convention defines proceeds as any property that is derived through the commission of any of the drug related crimes established in the Convention.⁷⁵⁵ Property is given a wide meaning to include all forms of assets or interests in such assets.⁷⁵⁶ The Convention requires member states to adopt legislation that provides for the confiscation,⁷⁵⁷ which

⁷⁵⁰ Article 3(5)(a) and (b) of the Vienna Convention.

⁷⁵¹ Article 3(5)(e) of the Vienna Convention.

⁷⁵² Gurulé 1998 *FILJ* 77.

⁷⁵³ De Koker *South African Money Laundering* Com 1-11; Guymon 2000 *BJIL* 70.

⁷⁵⁴ Gurulé 1998 *FILJ* 76.

⁷⁵⁵ Article 1(p) of the Vienna Convention.

⁷⁵⁶ Article 1(q) of the Vienna Convention.

⁷⁵⁷ Article 1(f) of the Vienna Convention defines confiscation as the permanent deprivation of property by order of a court or other competent authority.

includes forfeiture,⁷⁵⁸ of the proceeds of drug related crimes or property of corresponding value.⁷⁵⁹ In order to achieve this objective, member states are required to adopt the necessary measures enabling law enforcement authorities to identify and trace such proceeds with the aim of freezing and seizing⁷⁶⁰ the assets for eventual confiscation.

Furthermore, the member states must empower their courts to order that bank, financial or commercial records be made available or seized and may not decline to act on grounds of bank secrecy.⁷⁶¹ Stewart⁷⁶² views the provisions against banking secrecy as “among the most important in terms of the prosecution of trafficking offences”.

3.3.1.3 Enforcement

Kemp⁷⁶³ lists the following six measures as necessary to ensure the enforcement of crimes created by international convention:

- (i) extradition;
- (ii) mutual legal assistance in criminal matters;
- (iii) transfer of prisoners;
- (iv) seizure and forfeiture of illicit proceeds of crime; and
- (v) transfer of criminal proceedings.

In order to combat the cross-border nature of hiding the proceeds of drug crimes, the Vienna Convention facilitates cooperation among various jurisdictions by requiring party states to assist one another, upon request,

⁷⁵⁸ Article 1(f) of the Vienna Convention.

⁷⁵⁹ Article 5(1)(a) of the Vienna Convention.

⁷⁶⁰ Article 1(f) of the Vienna Convention defines freezing or seizure as temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or a competent authority.

⁷⁶¹ Article 5(3) of the Vienna Convention.

⁷⁶² Stewart 1989 *DJILP* 395.

⁷⁶³ Kemp 2001 *SACJ* 162.

in identifying, tracing, freezing and seizing such proceeds for the purposes of confiscation.⁷⁶⁴

Also, the Vienna Convention facilitates extradition among party states by automatically updating existing extradition treaties to include the drug trafficking offences established by the convention.⁷⁶⁵ The convention furthermore established drug-related money laundering, a new offence in many jurisdictions,⁷⁶⁶ as an extraditable offence.⁷⁶⁷

The adoption of the Vienna Convention had an effect on the existing mutual legal assistance treaties among party states, specifically as far as money laundering offences were concerned, by bringing such offences into the fold of existing mutual legal assistance treaties.⁷⁶⁸ The Convention also acts against banking secrecy by providing that mutual legal assistance cannot be declined on the basis of bank secrecy and providing only limited grounds for refusal of mutual legal assistance.⁷⁶⁹

3.3.1.4 Compliance

The adoption of the Vienna Convention by member states was slow, while compliance was “sporadic and inconsistent”.⁷⁷⁰ Many parties to the Convention failed to enact legislation criminalising money laundering while those who did failed to enforce it, leading to few successful prosecutions on money laundering charges.⁷⁷¹ This was because the provisions of the Convention were not enforceable by the International Narcotics Control Board, which was the body responsible for overseeing the operation of the Convention.⁷⁷²

⁷⁶⁴ Article 5(4) of the Vienna Convention.

⁷⁶⁵ Stewart 1989 *DJILP* 397. See also a 6(2) of the Vienna Convention.

⁷⁶⁶ Stewart 1989 *DJILP* 397.

⁷⁶⁷ Article 6(1) of the Vienna Convention.

⁷⁶⁸ Article 7 of the Vienna Convention. See also Stewart 1989 *DJILP* 399.

⁷⁶⁹ Article 7(5) and (15) of the Vienna Convention.

⁷⁷⁰ Gurulé 1998 *FILJ* 85.

⁷⁷¹ Gurulé 1998 *FILJ* 85-86.

⁷⁷² Bewley-Taylor 2003 *IJDP* 173.

Most of the countries that failed to comply with the Vienna Convention were the very countries targeted by the drug trafficking cartels for either producing or transiting illicit narcotics. This state of affairs led to scholars calling “into question the efficacy of the Convention.”⁷⁷³ Furthermore, the mutual legal assistance treaties entered into by party states fell short of what the Convention required, often “formulated in loose terms with easy escape clauses” and failing to impose “firm duties and obligations.”⁷⁷⁴ This situation caused Gurulé⁷⁷⁵ to state as follows:

The laudable goals enumerated in the Preamble to the Convention will never be realised if parties are free to ignore, at will, their obligations under the Convention. At the same time, there is little incentive for parties to comply if enforcement of the 1988 U.N. Drug Convention is never sought.

International compliance with the Vienna Convention was incentivised by international asset sharing provisions,⁷⁷⁶ in terms of which Parties could on a regular or case-by-case basis, share the proceeds of or property derived from drug related crimes, or funds derived from the sale of such proceeds or property, in accordance with their domestic laws, administrative procedures or bilateral or multilateral agreements entered into for this purpose.⁷⁷⁷ According to Gurulé⁷⁷⁸ the United States shared US\$35.7 million with twenty foreign states over the period July 1990 to July 1995, which was shortly after the adoption of the Vienna Convention.

Even with the abovementioned lack of urgency in complying with the Vienna Convention, Sheptycki⁷⁷⁹ maintains the following regarding the international policing of specifically drug trafficking:

This category of criminality is ... second to none in terms of the amount of energy (in terms of money, personnel, time and rhetorical justification) devoted by the transnational law enforcement enterprise. As such, it can be considered the paradigmatic example of policing in this sphere.

⁷⁷³ Gurulé 1998 *FILJ* 86.

⁷⁷⁴ Gurulé 1998 *FILJ* 93.

⁷⁷⁵ Gurulé 1998 *FILJ* 112.

⁷⁷⁶ Article 5(5)(b)(ii) of the Vienna Convention.

⁷⁷⁷ Article 5(5)(b)(ii) of the Vienna Convention.

⁷⁷⁸ Gurulé 1998 *FILJ* 119.

⁷⁷⁹ Sheptycki 1996 *IJSL* 65.

Although various international drug agencies exist, the one international law enforcement agency that is well-known and has acquired an “almost mythical status” is the International Criminal Police Organisation, better known as Interpol, mainly because it resorts under the umbrella of the United Nations.⁷⁸⁰ Interpol focuses mainly on the combating of drug-related crimes, but is also largely ineffective due to its limited jurisdiction and lack of authority.⁷⁸¹

The ineffectiveness of the Vienna Convention is evident in Sheptycki's⁷⁸² lamentation regarding the system as follows:

In the field of law enforcement and drugs trafficking we can see that legal standards, such as they are, are being established in the wake of law enforcement action, rather than law enforcement standards being set by pre-established legal criteria. I would want to argue that this is akin to what the young Habermas (1969) once referred to as “the scientization of politics”, whereby an issue, in this case drug trafficking, becomes a technical problem to be managed by restricted groups of bureaucrats and designated “experts”.

Unhappiness with the international anti-drug trafficking regime manifested as early as 1988, the year in which the Vienna Convention was adopted, when the group of 77,⁷⁸³ led by Mexico, expressed the need for talks on a demand reduction convention, insisting that if the countries which had high drug consumption levels, such as the United States of America, reduced the demand for drugs, drug producing countries, like the South American countries, would be under less pressure to take measures to reduce illicit production.⁷⁸⁴ The efforts of the group of 77 were, however, resisted, mainly by the United States of America with support from the United Kingdom, by arguing that demand reduction was a domestic issue, while trafficking was an international issue.⁷⁸⁵

⁷⁸⁰ Sheptycki 1996 *IJSL* 66.

⁷⁸¹ Guymon 2000 *BJIL* 73.

⁷⁸² Sheptycki 1996 *IJSL* 70.

⁷⁸³ The group of 77 was a grouping of developing countries which was formed at the time to resist the stronger G7 countries. Confer Fazey 2003 *IJDP* 157.

⁷⁸⁴ Fazey 2003 *IJDP* 157.

⁷⁸⁵ Fazey 2003 *IJDP* 157.

Changes to the Vienna Convention were made difficult due to an overly bureaucratic administration.⁷⁸⁶ Hence, the Vienna Convention proved ineffective in combating illicit trafficking in narcotics. Fazey⁷⁸⁷ puts it as follows:

All evidence suggests that illicit drug markets remain strong and that international control of the supply of drugs have been ineffective. The international community, however, persistently finds ways to mask this failure, such as by stating at its meetings that what has been achieved thus far is a success.

This failure has led many countries to go their own way in combating their drug problems, sometimes under strong protest from the International Narcotics Control Board. The Netherlands has separated Marijuana users from other hard drug users by establishing special cafés where Marijuana can be used. The thinking behind this is that such users are prevented from buying Marijuana from drug dealers who may convince them to try hard drugs.⁷⁸⁸ Australia has opted for special injecting rooms where illicitly obtained heroin is injected under supervision.⁷⁸⁹

As discussed in chapter 5, South Africa adopted the *Drugs and Drug Trafficking Act*⁷⁹⁰ (hereafter the *Drug Trafficking Act*) in order to comply with the Vienna Convention, but much like the Vienna Convention, the *Drug Trafficking Act* has been significantly watered down over time.⁷⁹¹

While the international community has been ineffective in stemming the operations of international organised criminal groups, these groups have developed into sophisticated enterprises who cooperate with one another while utilising advanced technology.⁷⁹² While the Vienna Convention was aimed specifically at drug related crimes, international organised criminal

⁷⁸⁶ See Fazey 2003 *IJDP* for a detailed discussion of the author's own experiences with the UN administration and the internal politics associated with it.

⁷⁸⁷ Fazey 2003 *IJDP* 166.

⁷⁸⁸ Fazey 2003 *IJDP* 167.

⁷⁸⁹ Fazey 2003 *IJDP* 167.

⁷⁹⁰ *Drugs and Drug Trafficking Act* 140 of 1992.

⁷⁹¹ See para 5.9.2 for a detailed analysis and discussion of the *Drug Trafficking Act*.

⁷⁹² Guymon 2000 *BJIL* 53.

groups expanded their operations into other illegal activities not dealt with adequately by the Vienna Convention.⁷⁹³ Guymon⁷⁹⁴ thus calls for better cooperation, sophistication and comprehensiveness in the tactics employed by the international community in the combating of organised crime, saying that international organised crime is no longer a matter of purely domestic concern. Shortly before the Palermo Convention, Guymon⁷⁹⁵ stated the following:

An international convention clearly codifying the illegality of the major activities of international organised crime under international law and providing for multilateral legal assistance in apprehending and prosecuting leading international organised criminals, would go further toward matching and surpassing the sophistication and cooperation of today's criminal enterprises than any of the current national, bilateral, multilateral, regional, or piece-meal international approaches.

This was attained with the adoption of the Palermo Convention. During the drafting process of the Palermo Convention, Guymon⁷⁹⁶ warned that the Vienna Convention served both as “both a model and a warning for drafters of the proposed convention against transnational organised crime”. The “warning” comprised the failure of many countries, including America, to comprehensively implement the Vienna Convention and the inability to enforce this international instrument. Whether the warning was heeded is discussed in the next section, which entails an analysis of the Palermo Convention, mainly to ascertain South Africa's organised crime challenges as posed by the Palermo Convention.

3.3.2 *The Palermo Convention*

The need for a “broad-based international agreement” for combating organised crime is supported by the fact that organised criminal groups operate across borders, which means that no state can effectively combat organised crime on its own.⁷⁹⁷ Another advantage that such an agreement

⁷⁹³ Guymon 2000 *BJIL* 86.

⁷⁹⁴ Guymon 2000 *BJIL* 54.

⁷⁹⁵ Guymon 2000 *BJIL* 55.

⁷⁹⁶ Guymon 2000 *BJIL* 70.

⁷⁹⁷ Guymon 2000 *BJIL* 87.

brings, lies in the facilitation of the tracking and prosecution of crime bosses rather than the mere foot soldiers.⁷⁹⁸ International cooperation is therefore essential to the combating of organised crime.⁷⁹⁹ Shortly before the Palermo Convention was adopted, the then Executive Director of the United Nations Office for Drug Control and Crime Prevention, Professor Pino Arlacchi, addressed a conference hosted by the University of Pretoria's Institute for Strategic Studies on the topic of organised crime and its implications for South and Southern Africa.⁸⁰⁰ He stressed the importance of the proposed convention to "transcend the traditional problems of international co-operation and mutual assistance".⁸⁰¹ It was hoped that the Palermo Convention would bring about harmony in the legislation of member States.⁸⁰²

Ram⁸⁰³ explains the background to the Palermo Convention as follows:

The increase in the quantity and scope of transnational organised crime, the commodities in which organised crime groups deal and the underlying corruption that inevitably accompanies their activities is seen increasingly not only as a problem of crime control, but in many regions of the world as a problem of domestic and regional security as well.

The international community thus realised that the threat of organised crime cannot be combatted on the domestic front alone, but requires an international effort.⁸⁰⁴ The result was the negotiation of the Palermo Convention.⁸⁰⁵ The success of the Palermo Convention, however, rests on a concerted effort by all Parties, as involvement by only some jurisdictions would simply encourage criminals to move their operations to countries that are less serious about the combating of organised crime.⁸⁰⁶

⁷⁹⁸ Guymon 2000 *BJIL* 87.

⁷⁹⁹ Kemp 2001 *SACJ* 153.

⁸⁰⁰ Hough and Du Plessis *Organised Crime* 6.

⁸⁰¹ Hough and Du Plessis *Organised Crime* 9.

⁸⁰² Hough and Du Plessis *Organised Crime* 9.

⁸⁰³ Ram 2001 *FCS* 136.

⁸⁰⁴ Standing *Transnational Organised Crime* 1.

⁸⁰⁵ Ram 2001 *FCS* 136.

⁸⁰⁶ Guymon 2000 *BJIL* 88.

Guymon⁸⁰⁷ thus maintains that the effective combating of organised crime requires the “gradual harmonization in criminal justice systems, elimination of safe-haven states, and coordination among existing law enforcement and policy-making bodies” as well as other measures such as “technical assistance, joint training programs, and centralised repositories for information about organised crime.” Developing countries such as South Africa will thus need the technical assistance and training to develop its laws and law enforcement to the level of developed countries.⁸⁰⁸ Failure to take steps due to lack of political will (as opposed to lack of resources) could result in such a country losing its standing within the international economic community.⁸⁰⁹

South Africa played an important part in the negotiation process of the Palermo Convention, with the then Minister of Justice of South Africa, Penuell Mpapa Maduna, acting as Rapporteur of the High-level Signing Conference for the Palermo Convention.⁸¹⁰ South Africa signed the Palermo Convention on 15 December 2000.⁸¹¹

3.3.2.1 Purpose and scope of application

The purpose of the Palermo Convention is to promote cooperation in the effective prevention and combating of transnational organised crime.⁸¹² Guymon⁸¹³ thus states that “[d]omestic legislation is a prerequisite to harmonization and cooperation in the fight against international organised crime” and to this end, the Palermo Convention requires States Parties to adopt legislative and other measures to criminalise specific organised

⁸⁰⁷ Guymon 2000 *BJIL* 99.

⁸⁰⁸ Guymon 2000 *BJIL* 99-100.

⁸⁰⁹ Guymon 2000 *BJIL* 101.

⁸¹⁰ UN 2000 <http://www.un.org/News/Press/docs/2000/20001215.lt4359.doc.html>.

⁸¹¹ UN 2000 <http://www.un.org/News/Press/docs/2000/20001215.lt4359.doc.html>.

⁸¹² Article 1 of the Palermo Convention.

⁸¹³ Guymon 2000 *BJIL* 85.

crime offences created in articles 5, 6, 8, and 23.⁸¹⁴ Such countries, however, still face the challenges pertaining to limitations on jurisdiction.⁸¹⁵

Beyond the abovementioned specific offences, the Palermo Convention also applies to the prevention, investigation and prosecution of serious crimes,⁸¹⁶ which are transnational in nature and involves an organised criminal group.⁸¹⁷ Such an offence will be regarded as transnational in nature if:

- (i) it is committed in more than one state;⁸¹⁸
- (ii) it is committed in one state, but a substantial part of its preparation, planning, direction or control takes place in another state;⁸¹⁹
- (iii) it is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state;⁸²⁰ or
- (iv) it is committed in one state but has substantial effects in another state.⁸²¹

3.3.2.2 The sovereignty of Member Parties

For the Palermo Convention to be effective, Member Parties must accept an integrated approach to law enforcement and discard previous views on sovereignty.⁸²² This would be easier to accomplish if governments realise that their sovereignty is being undermined by organised criminal groups in any event.⁸²³ Furthermore, because cooperation in the investigation and prosecution of organised crime as well as asset forfeiture proceedings is vital,⁸²⁴ the Palermo Convention protects the sovereignty of States/Parties by providing that the parties must carry out their obligations in a manner

⁸¹⁴ Kemp 2001 *SACJ* 154.

⁸¹⁵ Guymon 2000 *BJIL* 85.

⁸¹⁶ The definition of “serious crime” is discussed under para 2.5.1 above.

⁸¹⁷ Article 3 of the Palermo Convention; Kemp 2001 *SACJ* 154.

⁸¹⁸ Article 3(2)(a) of the Palermo Convention.

⁸¹⁹ Article 3(2)(b) of the Palermo Convention.

⁸²⁰ Article 3(2)(c) of the Palermo Convention.

⁸²¹ Article 3(2)(d) of the Palermo Convention.

⁸²² Guymon 2000 *BJIL* 89; Kemp 2001 *SACJ* 154.

⁸²³ Guymon 2000 *BJIL* 89.

⁸²⁴ Guymon 2000 *BJIL* 100.

which is consistent with the principles of sovereign equality and territorial integrity of other states and without interfering in the domestic affairs of such other states.⁸²⁵

The Convention stipulates that nothing entitles any State Party to, in the territory of another State, exercise jurisdiction or perform functions which are reserved exclusively to that other State and its authorities.⁸²⁶ The principle of state sovereignty is well established in public international law and while the South African courts ignored this principle during the apartheid regime, the Appellate Division subsequently held in *Ebrahim*⁸²⁷ “that under Roman-Dutch law a South African court has no competence to try a person abducted from another state by agents of the prosecuting authority”.⁸²⁸

Of concern is the disregard of the principle of state sovereignty by the American court in *United States v Alvarez-Machain*⁸²⁹ where a majority decision ruled that the abduction of a Mexican citizen from Mexico by US authorities did not affect the court’s jurisdiction over the matter. As Sheptycki⁸³⁰ puts it:

In the case of *Alvarez-Machain* . . . what is evident is that law enforcement agents operating at the middle level of their respective agencies are putting together criminal cases which test the limits of the law and, indeed, extend those limits. In *Alvarez-Machain*, police officials encountered a Bench that was open to an interpretation of the law that was quite sympathetic to the law enforcement point of view . . . In the field of law enforcement and drugs trafficking we can see that legal standards, such as they are, are being established in the wake of law enforcement action, rather than law enforcement standards being set by pre-established legal criteria.

⁸²⁵ Article 4(1) of the Palermo Convention.

⁸²⁶ Article 4(2) of the Palermo Convention.

⁸²⁷ *S v Ebrahim* 1991 2 SA 553 (A).

⁸²⁸ Dugard *International Law* 174 (emphasis original). In this instance the court relied on Roman-Dutch law (and referred to international law) as opposed to the English law previously relied upon by the South African courts to try abductees.

⁸²⁹ *United States v Alvarez-Machain* 1992 31 ILM 900.

⁸³⁰ Sheptycki 1996 *IJSL* 70.

In his dissenting judgment, Justice Stevens, with whom Justices Blackmun and O'Connor concurred, referred to the South African Appellate Division judgment in *Ebrahim*⁸³¹ stating as follows:⁸³²

The Court of Appeal in South Africa – indeed, I suspect most courts throughout the civilized world – will be deeply disturbed by the “monstrous” decision the Court announces today. For every Nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character.

America showed complete disregard for the state sovereignty of Mexico and disrespect for the principles of international law in the above case.⁸³³ Adherence to the protection of sovereignty afforded by the Palermo Convention is therefore vital to the Rule of Law and preventing law enforcement officials from acting like gangsters themselves.

3.3.2.3 Criminalisation of specific offences

The Palermo Convention criminalises:

- (i) participation in an organised criminal group;⁸³⁴
- (ii) the laundering of proceeds of crime;⁸³⁵
- (iii) corruption;⁸³⁶ and
- (iv) the obstruction of justice.⁸³⁷

Each of these crimes must be analysed to determine what South Africa's challenges are in criminalising organised crime.

⁸³¹ *S v Ebrahim* 1991 2 SA 553 (A). The main reason for the reference to the South African decision was because the Appellate Division had referred to its understanding of previous American decisions, including *Ker v Illinois* 119 U.S. 436 (1886), to reach its decision.

⁸³² *United States v Alvarez-Machain* 1992 31 ILM 918.

⁸³³ Kemp 2001 SACJ 155; McClean *Transnational Organised Crime* 58.

⁸³⁴ Article 5 of the Palermo Convention.

⁸³⁵ Article 6 of the Palermo Convention.

⁸³⁶ Article 8 of the Palermo Convention.

⁸³⁷ Article 23 of the Palermo Convention.

3.3.2.3.1 Criminalisation of participation in an organised criminal group

Many lessons learned during the negotiations of the Vienna Convention were implemented during the negotiations of the Palermo Convention. For instance, the wording of the opening line of the criminalisation of participation in an organised criminal group is similar to Article 3 of the Vienna Convention and the wording used in the formulation of the various crimes is also found in the Vienna Convention.⁸³⁸

Also, proposals by delegates that “subject to its constitutional limitations” must form part of the wording were unsuccessful largely because during previous negotiations of the Vienna Convention it was believed that no instance would exist wherein a State Party’s constitution would limit the implementation of the crimes formulated in the Vienna Convention.⁸³⁹ While the Palermo Convention requires State Parties to establish criminal offences under domestic law,⁸⁴⁰ it does leave State Parties with some discretion in that they may implement one of two offences, or both if they so wish.⁸⁴¹ These offences are:

- (i) agreeing with someone to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, if required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organised criminal group;⁸⁴² and/or
- (ii) conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, takes an active part in the criminal activities of the organised criminal group, or in other

⁸³⁸ McClean *Transnational Organised Crime* 61, 64-65. See a 5(1)(b) of the Palermo Convention.

⁸³⁹ McClean *Transnational Organised Crime* 61.

⁸⁴⁰ Article 3(1) of the Palermo Convention.

⁸⁴¹ Article 3(1)(a) of the Palermo Convention. See also McClean *Transnational Organised Crime* 62.

⁸⁴² Article 5(1)(a)(i) of the Palermo Convention.

activities of the organised criminal group with the knowledge that such participation will contribute to the achievement of the criminal aim of the group.⁸⁴³

The *mens rea* requirement for these offences is intention, thus excluding negligence as a form of fault.⁸⁴⁴ The wording of the above offences was used specifically to cater for the various legal systems used by State Parties.⁸⁴⁵ The word “conspiracy” was for instance avoided in order to cater for jurisdictions other than those using Anglo-American common law, where conspiracy is a well-defined offence.⁸⁴⁶

What seems strange is that the conspiracy-based offence⁸⁴⁷ only provides for an optional requirement of the involvement of an organised criminal group and places much more emphasis on the purpose of the conspirators to obtain a financial or other material benefit.⁸⁴⁸ Thus Sutherland’s⁸⁴⁹ lines between so-called “white-collar crime” and organised crime become blurred.

The participation-offence⁸⁵⁰ requires the active participation of the perpetrator and McClean⁸⁵¹ poses the following:

It will essentially be a question of fact whether a relatively passive role (a look-out man at a burglary, or a more sophisticated but essentially similar role in monitoring certain money-laundering activities to see if there are signs that the suspicions of the authorities have been awakened) amount to such an “active” part.

In South African domestic law, the Doctrine of Common Purpose would negate such difficulties because the doctrine imputes the conduct of the individual perpetrators to one another when they conspire to commit an

⁸⁴³ Article 5(1)(a)(ii) of the Palermo Convention.

⁸⁴⁴ McClean *Transnational Organised Crime* 62.

⁸⁴⁵ Clark 2004 *WLR* 170.

⁸⁴⁶ Clark 2004 *WLR* 170.

⁸⁴⁷ Article 1(a)(i) of the Palermo Convention.

⁸⁴⁸ Article 1(a)(i) of the Palermo Convention. See also McClean *Transnational Organised Crime* 63.

⁸⁴⁹ See para 2.2.1 above for a discussion on Edwin Sutherland’s work.

⁸⁵⁰ Article 1(a)(ii) of the Palermo Convention.

⁸⁵¹ McClean *Transnational Organised Crime* 64.

offence. Thus, in *Del Ré*⁸⁵² for instance, the case centred on a request for extradition of the appellant in the case to face fraud charges in the Republic of Bophuthatswana. The appellant's defence was that he had never performed any conduct in Bophuthatswana and that the Republic of Bophuthatswana therefore held no jurisdiction to prosecute him. Van Dyk J held that the acts committed in Bophuthatswana by the other two perpetrators, i.e. Messrs Mogotsi and Kantane, in the execution of the conspiracy between them and the applicant, could be imputed to the applicant himself.⁸⁵³

Persons who escape the active participation criteria of the specific crime will in all probability not escape the clauses which criminalise "aiding, abetting, facilitating or counselling the commission of serious crime involving an organised criminal group."⁸⁵⁴ This includes encouraging or financing the commission of such specific crimes or providing technical advice to the actual perpetrators.⁸⁵⁵

3.3.2.3.2 Criminalisation of laundering the proceeds of crime

While the Vienna Convention criminalised the laundering of the proceeds of drug offences, the Palermo Convention extends money laundering offences to the proceeds of any crime.⁸⁵⁶ The American "fingerprint" found in the wording of this section stems from the influence that American legislation had on the Vienna Convention, which in turn influenced the wording followed in the Palermo Convention.⁸⁵⁷ The wording used in the Palermo Convention to criminalise money laundering is largely based on the wording used in the Vienna Convention.⁸⁵⁸

⁸⁵² *S v Del Ré* 1990 1 SACR 392 (W).

⁸⁵³ *S v Del Ré* 1990 1 SACR 392 (W) 398G.

⁸⁵⁴ Article 5(1)(b) of the Palermo Convention.

⁸⁵⁵ McClean *Transnational Organised Crime* 65.

⁸⁵⁶ Article 2(e) read with a 6 of the Palermo Convention.

⁸⁵⁷ McClean *Transnational Organised Crime* 69.

⁸⁵⁸ Kemp 2001 SACJ 157.

Even though some of the delegates in the negotiation process of the Palermo Convention requested a formal definition of money laundering, the Palermo Convention contains no definition of the concept, perhaps because “money laundering is easier to describe than define.”⁸⁵⁹ The use of the term “laundering of proceeds of crime” was preferred over “money laundering” because of issues with translation of the latter term into other languages.⁸⁶⁰

Although a similar wording of the Vienna Convention⁸⁶¹ was followed, the term “subject to its constitutional limitations”, which is used in the Vienna Convention,⁸⁶² was left out of the Palermo Convention because there is no foreseeable situation where a State Party would be prevented by its constitution from establishing these crimes.⁸⁶³ Instead, the phrase “in accordance with fundamental principles of its domestic laws”⁸⁶⁴ is used, which does not subject the establishment of these crimes to the domestic legislation, but implies that the crimes must be established in parallel with domestic legislation.⁸⁶⁵ Later in the text, it is stated that conspiracy-based crimes relating to money laundering must be established by a State Party “subject to the concepts of its legal system”.⁸⁶⁶ This is because some jurisdictions require more than a mere agreement to constitute the crime of conspiracy, while in other jurisdictions, mere agreement is enough.⁸⁶⁷

While Article 6(1) of the Palermo Convention establishes offences relating to money laundering, Article 6(2) provides for the manner in which these offences must be implemented and applied by State Parties.⁸⁶⁸ Firstly, State Parties must apply the money laundering offences to the widest

⁸⁵⁹ McClean *Transnational Organised Crime* 74.

⁸⁶⁰ McClean *Transnational Organised Crime* 76.

⁸⁶¹ See a 3(1) of the Palermo Convention.

⁸⁶² See discussion under para 3.3.1.1 above.

⁸⁶³ McClean *Transnational Organised Crime* 77.

⁸⁶⁴ Article 6(1) of the Palermo Convention.

⁸⁶⁵ McClean *Transnational Organised Crime* 77.

⁸⁶⁶ Article 6(1)(b) of the Palermo Convention.

⁸⁶⁷ McClean *Transnational Organised Crime* 80.

⁸⁶⁸ Kemp 2001 SACJ 2001.

range of predicate offences,⁸⁶⁹ which must include all serious crime as defined by the Palermo Convention,⁸⁷⁰ as well as participation in an organised criminal group,⁸⁷¹ corruption,⁸⁷² and obstruction of justice.⁸⁷³ Also, if a State Party lists predicate offences for money laundering in its legislation, the Palermo Convention requires such a list to include a “comprehensive range of offences associated with organised criminal groups.”⁸⁷⁴ The Palermo Convention extends the jurisdiction of a State Party in terms of money laundering by providing that predicated offences shall include offences committed in another jurisdiction, provided that the offence in question constitutes a crime under both jurisdictions.⁸⁷⁵

3.3.2.3.3 Criminalisation of corruption

Corruption is the foundation upon which organised crime is constructed.⁸⁷⁶ Hence, one of the crimes established by the Palermo Convention is corruption.⁸⁷⁷ Unfortunately, the Palermo Convention only requires State Parties to establish corruption relating to public officials,⁸⁷⁸ whereas corruption relating to private sector individuals as well as foreign public officials and international civil servants are left to the discretion of each State Party.⁸⁷⁹ At least the Palermo Convention criminalises both active⁸⁸⁰

⁸⁶⁹ Article 6(2)(a) of the Palermo Convention.

⁸⁷⁰ Article 6(2)(b) of the Palermo Convention. See also para 2.5.1 above regarding the definition of “serious crime”.

⁸⁷¹ In terms of a 5 of the Palermo Convention.

⁸⁷² In terms of a 8 of the Palermo Convention.

⁸⁷³ In terms of a 23 of the Palermo Convention.

⁸⁷⁴ Article 6(2)(b) of the Palermo Convention. The exact meaning of which offences fall within the scope of this provision is unclear. See McClean *Transnational Organised Crime* 83-83. South Africa chose not to compile such a list of predicate offences in its legislation – see Kemp 2001 SACJ 158.

⁸⁷⁵ Article 6(2)(c) of the Palermo Convention.

⁸⁷⁶ Ram 2001 FCS 135.

⁸⁷⁷ Article 8 of the Palermo Convention.

⁸⁷⁸ Article 8(1) of the Palermo Convention. “Public official” is defined by a 8(4) of the Palermo Convention as a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person involved performs that function.

⁸⁷⁹ Article 8(2) of the Palermo Convention.

⁸⁸⁰ See Snyman *Criminal Law* 403 regarding corruption by the giver.

and passive⁸⁸¹ corruption, which is a wider application of corruption than found in other international instruments.⁸⁸²

Initial drafts of the Palermo Convention required the corruption offence to involve an organised criminal group, but this requirement was removed from the final version ensuring wider application of the provision.⁸⁸³

3.3.2.3.4 Criminalisation of the obstruction of justice

The rationale behind the criminalisation of the obstruction of justice is firstly to protect victims and witnesses,⁸⁸⁴ and secondly to protect law enforcement officials and members of the judiciary.⁸⁸⁵ This is necessary because, in order to protect themselves, organised criminal groups often resort to the obstruction of justice by intimidating witnesses, blocking true evidence and procuring false evidence or by intimidating members of the criminal justice system.⁸⁸⁶

3.3.2.4 Enforcement

The Palermo Convention goes a long way towards facilitating the international enforcement of the crimes established by it. The following specific measures to effect international enforcement are dealt with in the convention:

- (i) confiscation and seizure;⁸⁸⁷
- (ii) international cooperation for purposes of confiscation;⁸⁸⁸
- (iii) disposal of confiscated proceeds of crime or property;⁸⁸⁹

⁸⁸¹ See Snyman *Criminal Law* 403 regarding corruption by the recipient.

⁸⁸² Kemp 2001 SACJ 159.

⁸⁸³ McClean *Transnational Organised Crime* 118.

⁸⁸⁴ Article 23(a) of the Palermo Convention. See also McClean *Transnational Organised Crime* 253.

⁸⁸⁵ Article 23(b) of the Palermo Convention. See also McClean *Transnational Organised Crime* 253.

⁸⁸⁶ McClean *Transnational Organised Crime* 256-258.

⁸⁸⁷ Article 12 of the Palermo Convention.

⁸⁸⁸ Article 13 of the Palermo Convention.

⁸⁸⁹ Article 14 of the Palermo Convention.

- (iv) jurisdiction;⁸⁹⁰
- (v) extradition;⁸⁹¹
- (vi) transfer of sentenced prisoners;⁸⁹²
- (vii) mutual legal assistance;⁸⁹³ and
- (viii) transfer of criminal proceedings.⁸⁹⁴

The articles dealing with the confiscation of the proceeds of crime are based on the similar provisions found in the Vienna Convention,⁸⁹⁵ while the article dealing with jurisdiction is also largely based on similar provisions in the Vienna Convention,⁸⁹⁶ with the addition of an offence committed against a national of a State Party.⁸⁹⁷ McClean⁸⁹⁸ states the following about this addition:

There is no provision corresponding to paragraph (2)(a) in the Vienna Convention of 1988, an indication of the development of ideas as to jurisdiction in the intervening years.

The influence of the Vienna Convention on the drafting of the Palermo Convention is evident in the provisions relating to extradition and mutual assistance. In the case of extradition,⁸⁹⁹ the Palermo Convention follows the wording of the Vienna Convention⁹⁰⁰ rather than the wording of the *United Nations Model Treaty on Extradition*.⁹⁰¹ Similarly, in the case of mutual legal assistance, the Palermo Convention follows the wording used in the Vienna Convention⁹⁰² rather than the wording of the *Model Treaty on*

⁸⁹⁰ Article 15 of the Palermo Convention.

⁸⁹¹ Article 16 of the Palermo Convention.

⁸⁹² Article 17 of the Palermo Convention.

⁸⁹³ Article 18 of the Palermo Convention.

⁸⁹⁴ Article 21 of the Palermo Convention.

⁸⁹⁵ McClean *Transnational Organised Crime* 137. Compare aa 12, 13 and 14 of the Palermo Convention with a 5 of the Vienna Convention.

⁸⁹⁶ Article 15 of the Palermo Convention and a 4 of the Vienna Convention.

⁸⁹⁷ Article 2(a) of the Palermo Convention.

⁸⁹⁸ McClean *Transnational Organised Crime* 168.

⁸⁹⁹ Article 16 of the Palermo Convention.

⁹⁰⁰ Article 6 of the Vienna Convention.

⁹⁰¹ *Model Treaty on Extradition* UN Doc A/RES/45/116 (1990). See also McClean *Transnational Organised Crime* 175.

⁹⁰² Compare a 18 of the Palermo Convention with a 7 of the Vienna Convention.

Mutual Assistance in Criminal Matters.⁹⁰³ The articles dealing with the transfer of sentenced persons⁹⁰⁴ and the transfer of criminal proceedings⁹⁰⁵ place no obligation on State Parties to enter into such agreements but merely require State Parties to “consider” such possibilities.

Thus, in the twelve years between the Vienna Convention of 1988 and the Palermo Convention of 2000, very little has changed with regards to the enforcement of international offences established to combat organised crime even though, in the same space of time, organised criminal groups developed to become more transnationally organised and have “de-regulated and de-localised”.⁹⁰⁶ Instead of direct enforcement through, for instance, an international criminal court which has jurisdiction to prosecute offenders in terms of the Palermo Convention, the enforcement of the Palermo Convention, and the Vienna Convention for that matter, relies on indirect enforcement by means of “inter-state co-operation”.⁹⁰⁷ Thus, at the time when the Palermo Convention came into force, Kemp⁹⁰⁸ concluded as follows:

The ultimate success of the Convention will depend on the way in which States Parties are going to implement it and co-operate with each other. If States Parties are not going to co-operate in an effective way and indirect enforcement . . . proves to be ineffective, the purpose of the Convention will not be satisfied.

Similarly, Standing⁹⁰⁹ states as follows:

[T]he issue of organised crime is too often tackled by national governments acting in their own self-interest, and overlooking the fact that the threats of transnational organised crime interconnect across national borders. Governments need to embrace fighting organised crime as a truly global threat – a collective response to a shared problem.

⁹⁰³ *Model Treaty on Mutual Assistance in Criminal Matters* (1990).

⁹⁰⁴ Article 17 of the Palermo Convention.

⁹⁰⁵ Article 21 of the Palermo Convention.

⁹⁰⁶ Jamieson 2001 SCT 378.

⁹⁰⁷ Kemp 2001 SACJ 162.

⁹⁰⁸ Kemp 2001 SACJ 166-167.

⁹⁰⁹ Standing *Transnational Organised Crime* 12.

Kemp⁹¹⁰ maintains that it may be time to acknowledge that transnational organised crime has become so serious that it must be considered a “core international crime” to be prosecuted under the jurisdiction of the International Criminal Court. This suggestion makes sense, because unlike law enforcement, which is inhibited by state boundaries and jurisdictions, organised criminal groups use them to their advantage and centre their operations in countries with low risks while providing illicit goods and services in countries with markets offering high returns. Jamieson⁹¹¹ summarises the global operation of organised criminal groups as follows:

Like a legitimate business, a criminal organisation wishing to compete in the international market of illicit goods and services must have a network of marketing, sales, and distribution agents; transportation facilities; and financial services in locations around the world where elements of different nationalities contribute specific skills to the efficiency of the global operation.

It is these differences between nationalities which cause Enck⁹¹² to believe that the Palermo Convention will be unsuccessful, because such differences will prevent countries from participating and thus compromise the international effort to combat organised crime. Enck,⁹¹³ like Kemp,⁹¹⁴ calls for “an international system of punishment.”

No formal evaluation of the success of the Palermo Convention has yet been conducted and many feel that it may be time for this.⁹¹⁵ Also on the front of anti-money laundering measures as a tool to combat organised crime Standing⁹¹⁶ states:

There has been a great deal of new banking legislation and the establishment of thousands of Financial Investigation Units, but overall the impact in terms of making it harder for criminals to launder money has been minimal. Ultimately, anti-money-laundering tools, which were designed to combat organised crime, have been ineffective.

⁹¹⁰ Kemp 2001 SACJ 167.

⁹¹¹ Jamieson 2001 SCT 378.

⁹¹² Enck 2003 SJILC 371.

⁹¹³ Enck 2003 SJILC 371.

⁹¹⁴ Kemp 2001 SACJ 166-167.

⁹¹⁵ See Standing *Transnational Organised Crime* 9 for the feedback report of a panel discussion regarding the need for a formal evaluation of the Palermo Convention.

⁹¹⁶ Standing *Transnational Organised Crime* 10.

Evaluating the success of the Palermo Convention may be difficult and Standing⁹¹⁷ offers three reasons for this:

- (i) the purpose of the Palermo Convention was not aimed at directing crime-fighting techniques to combat organised crime, but rather to streamline international legislation and cooperation;
- (ii) there is no governing body in place to oversee the implementation of the Palermo Convention and evaluate progress and successes; and
- (iii) State Parties would be loathe to submit data regarding performance for “critique”.

Furthermore, as is seen in chapter 2 of this study, organised crime keeps evolving in terms of its nature and activities and unfortunately scholarly research and more importantly, the international conventions, have been slow to respond.⁹¹⁸ The United Nations has not evolved in the same manner as organised crime and is still structured in similar fashion as the erstwhile Mafia, with Standing⁹¹⁹ describing the United Nations systems as “hierarchical, slow to adapt, and cumbersome” and even going so far as to state that many of the United Nations agencies have the “psychological problem” of seeing the combating of crime as “unattractive”. Morrison⁹²⁰ maintains that the initial hype created with the signing of the Convention “will be replaced with a degree of political procrastination or loss of will once leaders are out of the global spotlight”. This is exacerbated by the lack of timeframes for compliance.⁹²¹

Even though the Palermo Convention deals with the criminalisation of corruption, the General Assembly of the United Nations adopted Resolution 55/61 on 4 December 2000, in which it noted “the corrosive

⁹¹⁷ Standing *Transnational Organised Crime* 10.

⁹¹⁸ Standing *Transnational Organised Crime* 10.

⁹¹⁹ Standing *Transnational Organised Crime* 11.

⁹²⁰ Morrison 2002 AIC 5.

⁹²¹ Morrison 2002 AIC 5.

effect that corruption has on democracy, development, the rule of law and economic activity”⁹²² and recognised “that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organised Crime, is desirable”.⁹²³ The decision was therefore taken immediately to establish an *ad hoc* committee to negotiate such an instrument.⁹²⁴ This negotiation process started as soon as the Palermo Convention was finalised⁹²⁵ and culminated in the adoption of the *United Nations Convention against Corruption* (hereafter the Corruption Convention) by the General Assembly on 31 October 2003.⁹²⁶ Standing⁹²⁷ laments this as it “had the effect of downgrading the importance” of the Palermo Convention. While the Corruption Convention is not aimed specifically at controlling corruption only in the sphere of organised crime, it still has some bearing on combating organised crime and is therefore analysed briefly in the next section.⁹²⁸

3.3.3 *The Corruption Convention*

Corruption has overtaken violence and intimidation as the “primary resource” to ensure longevity of an organised criminal group.⁹²⁹ In the Preamble to the Corruption Convention, for instance, concern regarding the links between corruption and other forms of crime, particularly organised crime and economic crime, which includes money-laundering, is expressed. The Corruption Convention furthermore states that corruption is no longer a domestic matter but rather a transnational phenomenon affecting all societies and economies, thus making international

⁹²² United Nations General Assembly unknown date http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/55/61.

⁹²³ United Nations General Assembly unknown date http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/55/61.

⁹²⁴ United Nations General Assembly unknown date http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/55/61.

⁹²⁵ McClean *Transnational Organised Crime* 118.

⁹²⁶ United Nations General Assembly unknown date http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/58/4.

⁹²⁷ Standing *Transnational Organised Crime* 10.

⁹²⁸ McClean *Transnational Organised Crime* 118.

⁹²⁹ Jamieson 2001 *SCT* 380.

cooperation essential to control it.⁹³⁰ The recent growth in corruption is explained by Jamieson⁹³¹ as follows:

Among the reasons given for its recent growth are “criminogenic asymmetries” – inequalities or dysfunctions that occur in politics, culture, the economy, and the law, and which have been aggravated by widespread privatisation and the globalisation of the economy. Other observers link its growth to the crisis of ideologically inspired mass parties and the concomitant rise of a new class of “business politicians” for whom the moral costs of corruption are low.

The Corruption Convention uses the exact wording of the Palermo Convention in creating offences for both active and passive corruption of a public official.⁹³² The Corruption Convention, however, takes a stronger stance against corruption involving foreign public officials than the Palermo Convention, because the Corruption Convention requires State Parties to criminalise active corruption involving a foreign public official.⁹³³ It regrettably leaves State Parties with the discretion to criminalise passive corruption of a foreign public official.⁹³⁴ Also, the Corruption Convention takes a somewhat stronger stance against “other forms of corruption” than the Palermo Convention, requiring State Parties to criminalise embezzlement, misappropriation or other diversion of property by a public official,⁹³⁵ but once again leaving the criminalisation of all other forms of corruption in the discretion of State Parties.⁹³⁶

[F]orms of bribery are common to both organised crime groups and many businesses: until a recent Organisation of Economic Cooperation and Development (OECD) treaty went into force, so-called side payment were tax deductible in several European countries.⁹³⁷

⁹³⁰ Preamble of the Corruption Convention.

⁹³¹ Jamieson 2001 *SCT* 380.

⁹³² McClean *Transnational Organised Crime* 119. Compare a 8(1)(a) and (b) of the Palermo Convention with a 15(a) and (b) of the Corruption Convention. The definition of a “public official” is much more detailed in a 2(a) of the Corruption Convention than the definition contained in a 8(4) of the Palermo Convention, discussed under para 3.3.2.3 above.

⁹³³ Article 16(1) of the Corruption Convention.

⁹³⁴ Article 16(2) of the Corruption Convention.

⁹³⁵ Article 17 of the Corruption Convention.

⁹³⁶ Article 18-22 of the Corruption Convention.

⁹³⁷ Mittelman and Johnston 1999 *Global Governance* 113.

Despite some tweaks to corruption offences, the Corruption Convention has not had a large impact on the combating of organised crime. The changes in money laundering control has, however, had a large impact on combating organised crime, mainly due to the work of the Financial Action Task Force (FATF), which is explored next.

3.3.4 *The role of the Financial Action Task Force*

The FATF was formed in Paris during a meeting of the G-7 in 1989 “initially to examine and develop measures to combat money laundering”.⁹³⁸ To this end, the FATF issued a set of recommendations in 1990, which have subsequently been revised in 1996, 2001, 2003 and, most recently, in 2012.⁹³⁹ The FATF Recommendations have since “attained the status of soft law internationally”.⁹⁴⁰

The rationale for forming the FATF at the time was the distressing magnitude of the drug problem.⁹⁴¹ Established initially as a short-term exercise, the FATF’s mandate has been extended on several occasions so that it has become a “semi-permanent organisation.”⁹⁴² The FATF initiative has led to the establishment of several regional bodies that conduct similar aims and methodologies as the FATF. To this end, the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) was founded and South Africa forms part of this regional body.⁹⁴³

The problem, however, remains that money launderers will target countries who do not act seriously against money laundering.⁹⁴⁴ Furthermore, there are over 40 off-shore centres located across the globe that are exempt from “the regulations normally imposed on financial institutions” and such

⁹³⁸ Guymon 2000 *BJIL* 71.

⁹³⁹ FATF unknown date <http://www.fatf-gafi.org/pages/aboutus/whoweare/>.

⁹⁴⁰ Guymon 2000 *BJIL* 71.

⁹⁴¹ McClean *Transnational Organised Crime* 73.

⁹⁴² McClean *Transnational Organised Crime* 73.

⁹⁴³ ESAAMLG unknown date <http://www.esaamlg.org/mcp/index.php>.

⁹⁴⁴ McClean *Transnational Organised Crime* 74.

institutions are attractive to organised criminal groups for money laundering purposes.⁹⁴⁵

The preceding discussion of the international action taken against organised crimes serves to highlight the international challenges that South Africa, as a developing country, faces in dealing with organised crime within its borders. The international community expects South Africa to fulfil its obligations as signatory to the conventions adopted by the United Nations in the combating of organised crime. As mentioned above however,⁹⁴⁶ South Africa will be prudent to analyse its own unique organised crime situation when implementing measures to comply with the international expectations in combating organised crime. To this end, the next section analyses the local challenges that South Africa faces in organised crime.

3.4 Local threats of organised crime

3.4.1 The challenges of democratic change

South Africa's transition from the Apartheid regime to a new democracy brought with it an increase in organised crime.⁹⁴⁷ One of the reasons was that South Africa's borders became more porous because of weakened control mechanisms.⁹⁴⁸ This opening up of South Africa to the rest of the world coincided with the expansion of the former communist countries after the fall of communism.⁹⁴⁹ "Like Russia ... the growth of organised crime has been a feature of the political transition to a democratic order".⁹⁵⁰ The

⁹⁴⁵ Jamieson 2001 *SCT* 379-380.

⁹⁴⁶ See para 3.2 above.

⁹⁴⁷ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

⁹⁴⁸ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

⁹⁴⁹ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

⁹⁵⁰ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

result has been that human smuggling⁹⁵¹ has evolved into a profitable criminal enterprise in Southern Africa.⁹⁵² Links between organised crime, the transport industry and tourism can also not be ignored,⁹⁵³ as is evident from recent convictions in South Africa of Chinese and South African nationals on drug trafficking charges.⁹⁵⁴

Burchell⁹⁵⁵ states that organised crime flourishes under the following circumstances:

- (i) existing trade and communication barriers are removed;
- (ii) borders between countries become porous;
- (iii) corruption is rife; and
- (iv) there is a decline in law enforcement.

Juxtaposed with these conditions, are those purported by Williams and Godson⁹⁵⁶ as “inhospitable” to organised crime:

- (i) a well-functioning democracy, which also encumbers political legitimacy;
- (ii) founded upon the principle of legality;
- (iii) the rule of law;
- (iv) structures for accountability and oversight; and
- (v) a high level of transparency.

⁹⁵¹ The difference between human smuggling and human trafficking lies in the motive of the smuggler. In the case of human smuggling migration laws are contravened, whereas in the case of human trafficking, the person smuggled is exploited. See Torkelson 2011 <http://www.issafrica.org/iss-today/too-many-loopholes-smuggling-human-beings-in-southern-africa>.

⁹⁵² Torkelson 2011 <http://www.issafrica.org/iss-today/too-many-loopholes-smuggling-human-beings-in-southern-africa>.

⁹⁵³ Ram 2001 *FCS* 135.

⁹⁵⁴ Goredema 2012 <http://www.issafrica.org/iss-today/transnational-crime-in-our-time-exposed-areas-and-red-flags> – in this case, a Chinese organised crime group rented a holiday home in Knysna from where they orchestrated the smuggling of drugs aboard a vessel rented from a transport company.

⁹⁵⁵ Burchell *Principles of Criminal Law* 868. See also Kruger *Organised Crime* 3-4.

⁹⁵⁶ Williams and Godson 2002 *CLSC* 320.

Hence, one of the challenges facing a developing country like South Africa, is that organised crime flourishes under weak states.⁹⁵⁷ In Columbia, for instance, drug cartels gained global dominance because they flourished more than their competition in Bolivia and Peru.⁹⁵⁸ These cartels later cemented themselves when they gained access to political figureheads through financial contributions to political campaigns.⁹⁵⁹ Using Russia as an example, Williams and Godson⁹⁶⁰ find that organised crime flourishes even more when states undergo transitions from authoritarian to more democratically orientated governments because of “a weakening in state structures that seems to be an inevitable accompaniment to the transition process”, which in turn allowed the organised criminal groups to gain a larger degree of dominance in their previously established corrupt relationships with government officials.

A further challenge facing the government in such a transition is the possibility of excluding the minority to such an extent that members of the minority groups eventually turn to organised crime, as has happened in the past in other countries (e.g. the Basques of Spain) have led to terror campaigns,⁹⁶¹ funded through the link between terrorism and organised crime, which is explored in the previous chapter.⁹⁶² Accordingly, Jamieson⁹⁶³ maintains that effective policing and good governance is extremely important in a post-conflict situation, especially because in South Africa “it is unarguable that organised crime syndicates are not only pervasive but are highly sophisticated and advanced and command huge financial resources”.⁹⁶⁴

⁹⁵⁷ Williams and Godson 2002 *CLSC* 315.

⁹⁵⁸ Williams and Godson 2002 *CLSC* 315.

⁹⁵⁹ Williams and Godson 2002 *CLSC* 316.

⁹⁶⁰ Williams and Godson 2002 *CLSC* 317.

⁹⁶¹ Williams and Godson 2002 *CLSC* 320.

⁹⁶² See para 2.7 above.

⁹⁶³ Jamieson 2001 *SCT* 385.

⁹⁶⁴ Khampepe *Final Report* 39.

Thus, after the conflict in South Africa with the liberation struggle – led by the African National Congress against the Apartheid regime of the National Party – policing and good governance should have received a high priority since the first democratic elections in 1994, because failing to combat organised crime in South Africa has potentially disastrous effects.

3.4.2 Advantages to combating organised crime

It is to South Africa's advantage to combat organised crime, because organised crime poses the following threats to the government, as listed by Redpath:⁹⁶⁵

- (i) organised crime creates an economy outside of official markets;
- (ii) organised crime creates an authority outside of the state which can effectively control communities;
- (iii) the line between organised crime and terrorism (and treason) is a thin one; and
- (iv) South Africa is no longer a lone player who can look only to its own national interests or those of its citizens when deciding on national priorities.

Furthermore, the Constitutional Court expressed the local threat of organised crime as follows: "When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk."⁹⁶⁶ The Khampepe Commission also concluded that organised crime threatens the hard-fought democratic order, maintaining that effective strategies remain vital to combating the phenomenon:⁹⁶⁷

The threat that organised crime presents to the democratic institutions and economic integrity of the country poses a formidable challenge that will continually require creative and determined strategies to address. These

⁹⁶⁵ Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

⁹⁶⁶ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 397I.

⁹⁶⁷ Khampepe *Final Report* 112.

strategies will include, by definition, enhanced co-operation among the various law enforcement structures whose primary constitutional responsibility is to secure the country and its people.

Hence South Africa presents lucrative opportunities for organised crime, causing Kruger⁹⁶⁸ to maintain that “new means of fighting crime are needed” because criminals adapt more easily to changing conditions than law enforcement. This new way of combating organised crime entails a paradigm shift from the prosecution of the individual and individual criminal event to the entity or enterprise, “with the objective of eliminating the organisation rather than the traditional objective of stopping the individual from committing additional offences.”⁹⁶⁹ South Africa has indeed taken steps to implement such a paradigm shift.

3.4.3 *The paradigm shift*

Burchell⁹⁷⁰ describes organised crime as “a relatively new phenomenon” in a South African context, with Gastrow⁹⁷¹ stating that “the words ‘organised crime’ did not become part of policing vocabulary in South Africa until 1991. South Africa, however, moved towards the new approach to combating organised crime with the adoption of the *POCA*,⁹⁷² which is also aimed at complying with South Africa’s international commitments to combat organised crime in terms of the Palermo Convention, because the *POCA inter alia* has the following objectives:⁹⁷³

- (i) to introduce measures to combat organised crime, money laundering and criminal gang activities;
- (ii) to prohibit certain activities relating to racketeering activities;
- (iii) to provide for the prohibition of money laundering and for an obligation to report certain information;

⁹⁶⁸ Kruger *Organised Crime* 1.

⁹⁶⁹ Kruger *Organised Crime* 1.

⁹⁷⁰ Burchell *Principles of Criminal Law* 864.

⁹⁷¹ Gastrow 1998 <http://www.issafrica.org/uploads/Mono28.pdf>.

⁹⁷² See para 5.4 below for a more detailed analysis of the *POCA*.

⁹⁷³ Long title of the *POCA*.

- (iv) to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activity;
- (v) for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and related activities; and
- (vi) to provide for the establishment of a Criminal Assets Recovery Account.

The money laundering provisions of the *POCA* have been further strengthened by the provisions of the *FICA*, which was adopted “after pressure from the international community and from the South African business community”.⁹⁷⁴ One of the main purposes of the *FICA* is to combat money laundering activities.⁹⁷⁵

The objectives of the *POCA* overlap significantly with the requirements set for Member Parties of the Palermo Convention and the *POCA* aims to deal with the growing phenomenon of organised crime and also to bring South Africa in pace with the rest of the world, as confirmed by Ackermann J in *National Director of Public Prosecutions v Mohamed*⁹⁷⁶ as follows:

The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act.

⁹⁷⁴ De Koker *South African Money Laundering* Com 2-8.

⁹⁷⁵ Long title of the *FICA*.

⁹⁷⁶ *National Director of Public Prosecutions v Mohamed* 2002 4 SA 843 (CC) para 14.

Sachs J also took this view in *Mohunram v National Director of Public Prosecutions*,⁹⁷⁷ stating that:

The adoption of POCA was a legislative response to the conjunction of two phenomena. In the first place, the rapid growth of organised crime, money laundering, criminal gang activities and racketeering had become a serious international problem and security threat from which South Africa had not been immune. It was often impossible to bring the leaders of organised crime to book because they were able to ensure that they were far removed from the overt criminal activity involved. Secondly, both South Africa's common and statute law had failed to keep pace with international measures aimed at dealing effectively with these problems.

Also in *Savoi v National Director of Public Prosecutions*,⁹⁷⁸ Madondo J stated the following:

It is undeniable fact that prior to the promulgation of POCA the principles of common law could not deal effectively with organised crime in the form of corruption, money laundering and racketeering due to the fact that common law was limited in scope and impact and consequently difficulties in detection and successful prosecution of organised crime were encountered.

Symeonidou-Kastanidou⁹⁷⁹, however, laments the lack of distinction between proper organised criminal groups and mere local gangs. Symeondinou-Kastandinou⁹⁸⁰ differentiates between local gangs and organised criminal groups as follows:

[U]nlike common gangs, organised crime does not merely use its infrastructure to commit crimes in order to obtain material benefits, but it also uses the proceeds of its criminal activities in order to strengthen its infrastructure – investing huge amounts of money and using state-of-the-art technological means – so as to achieve power at a political level and (or) to intervene in the licit market.

Therefore, Symeondinou-Kastandinou⁹⁸¹ argues that the term “structured” is insufficient and should be replaced with “entrepreneurial” and money laundering should be defined accordingly, aiming anti-money laundering measures at the combating of organised criminal groups of an entrepreneurial type who are set on enlarging their unlawful activities. The

⁹⁷⁷ *Mohunram v National Director of Public Prosecutions* 2007 2 SACR 145 (CC) para 144.

⁹⁷⁸ *Savoi v National Director of Public Prosecutions* 2013 JDR 1021 (KZP) para 61.

⁹⁷⁹ Symeonidou-Kastanidou 2007 *EJC* 96.

⁹⁸⁰ Symeonidou-Kastanidou 2007 *EJC* 102.

⁹⁸¹ Symeonidou-Kastanidou 2007 *EJC* 96.

preamble of the *POCA*, however, makes it clear that such a narrow view of the purpose of the legislation is not correct.⁹⁸² The Preamble makes it clear that there is a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally and maintains that organised crime, money laundering and criminal gang activities infringe on the rights of the people as enshrined in the Bill of Rights and that every person has the right to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals. Hence the view is taken that organised crime not only threatens the country's democracy or state's financial well-being, but also threaten the well-being of the citizenry by presenting a danger to public order and safety and economic stability, as well as the potential to inflict social damage. Note that the *POCA* therefore does not place a large distinction between organised criminal groups and local gangs as Symeonidou-Kastandinou⁹⁸³ does, which makes sense, because there is enough evidence of collaboration between organised criminal groups and local gangs to support the notion that an effective strategy in the combatting of organised crime should include measures against local gang activities.⁹⁸⁴

This is also the view of the South African courts, for in *Savoi v National Director of Public Prosecutions*⁹⁸⁵ the court stated as follows:

It is the very nature of organised crime that those who are responsible for planning and orchestrating criminal activities are not persons who carry out the activities and it is very difficult to trace those who are in leadership positions and ultimately benefit from the greater part of the spoils of crime. It is also a feature of organised crime that its organisational reach is wide and tentacles of the organisation stretch into many areas of commercial and governmental activity. The concept of "pattern of racketeering activity" seeks to prohibit connections between conducts that might otherwise seem disparate but are in fact connected through the orchestrated activities of an organised criminal organisation.

⁹⁸² See Symeonidou-Kastanidou 2007 *EJC* 96.

⁹⁸³ Symeonidou-Kastanidou 2007 *EJC* 96.

⁹⁸⁴ *S v Eyssen* 2009 1 SACR 406 (SCA), discussed below, furthermore shows that the lines between the two can be maintained.

⁹⁸⁵ *Savoi v National Director of Public Prosecutions* 2013 JDR 1021 (KZP) para 60.

However, Symeondinou-Kastandinou⁹⁸⁶ raises the following concerns:

[T]he requirement that a group should be comprised of at least three persons, and be characterised by the allocation of roles to commit serious crimes (whether these crimes are listed or not), stops short of conveying the particular properties of organised crime; indeed, these elements can be traced even in a gang established to commit robberies during an extended period of time.

This is precisely what happened in *Eyssen*,⁹⁸⁷ where the accused appealed against his conviction by the Cape High Court on two counts of racketeering activities in terms of the POCA. The basis of the case against the accused was that he was the leader of the Fancy Boys gang, operating from Salt River, and mainly conducting housebreaking and robbery offences in the Cape Peninsula over the period 2001-2003.⁹⁸⁸ Even though the accused's convictions on racketeering offences were set aside, it was not because of the concerns raised by Symeondinou-Kastandinou⁹⁸⁹ above, but rather due to lack of evidence, Cloete JA states that there was "not a sufficient basis to find that the appellant managed the operation or activities of the gang".⁹⁹⁰ Eyssen was shot dead in Bishop Lavis on 1 April 2017, reportedly because he was "a leader of the Fancy Boys gang (who was) owed money in a major cigarette deal and was killed so that this payment would not have to be made".⁹⁹¹

3.4.4 Challenges facing South Africa

As stated above, the political will to combat organised crime is vital to success. South Africa is, however, in the position where the African National Congress holds the majority rule by almost 40%.⁹⁹² Such

⁹⁸⁶ Symeonidou-Kastanidou 2007 *EJC* 96.

⁹⁸⁷ *S v Eyssen* 2009 1 SACR 406 (SCA).

⁹⁸⁸ *S v Eyssen* 2009 1 SACR 406 (SCA) para 1.

⁹⁸⁹ Symeonidou-Kastanidou 2007 *EJC* 96.

⁹⁹⁰ *S v Eyssen* 2009 1 SACR 406 (SCA) para 18.

⁹⁹¹ News24 2017 <http://showcase.news24.com/cape-town-underworld/>.

⁹⁹² See IEC 2014 <http://www.elections.org.za/resultsnpe2014/>, where the official election results of 2014 show that the African National Congress won the elections with 62.15% of the 18,402,497 valid votes, while the second place party, the Democratic Alliance, received 22.23% of the valid votes. None of the remaining political parties managed to achieve double figures in the voting percentages.

situations, classified by Williams and Godson⁹⁹³ as “strong authoritarian regimes”, also help organised crime to flourish. The danger lies in a lack of checks and balances by other political parties against the strong majority ruling party.⁹⁹⁴ This facilitates the network (or “patron-client”) model⁹⁹⁵ of organised crime by creating an environment where corruption is difficult to curb and often extends into the organised crime environment. In fact, Williams and Godson,⁹⁹⁶ using Mexico and the former Soviet Union as examples, maintain that this situation (where there is a strong ruling party) “encourages the development of organised crime”, albeit within the limits created by the government, because the organised criminal groups “tend to be at the service of the political establishment rather than a threat to it”.

Although the former DSO or “Scorpions” is discussed in detail in chapter 6,⁹⁹⁷ it is prudent to highlight the minority judgment in *Helen Suzman Foundation v The President of the Republic of South Africa*⁹⁹⁸ here. In his minority judgment, Froneman J (with Cameron J concurring), stated:⁹⁹⁹

It is an unfortunate fact that the decision taken at the 2007 ANC national conference to replace the DSO was followed by a controversial decision not to proceed with corruption charges against the current President of the country, a decision that was, until very recently, still subject to litigation in the courts. So too is the fact that a former national commissioner of SAPS has been found guilty of corruption.

The lack of focus on effective policing and good governance in the new democratic South Africa thus culminated in the conviction of Jackie Selebi, the national commissioner of the SAPS and president of Interpol, on charges of corruption due to links with members of organised crime.¹⁰⁰⁰ Thus combating the rise of organised crime in South Africa is constrained

⁹⁹³ Williams and Godson 2002 CLSC 316.

⁹⁹⁴ The issues are addressed in more detail in chapter 6 where the law enforcement structures are analysed.

⁹⁹⁵ See discussion under para 2.4.2 in chapter 2.

⁹⁹⁶ Williams and Godson 2002 CLSC 316.

⁹⁹⁷ See para 6.2.4.

⁹⁹⁸ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 51E-52D.

⁹⁹⁹ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 51E-52D.

¹⁰⁰⁰ See *S v Selebi* 2010 JDR 0820 (GSJ) para 428.

by criminal police officials who “are important factors in organised crime in South Africa.”¹⁰⁰¹ The charges stemmed from the gratification which Selebi had received from Glenn Agliotti – whom the press referred to as a self-confessed “hustler”¹⁰⁰² called “The Landlord”¹⁰⁰³ – over a period of time in order to “develop a relationship that would benefit him (Selebi)”.¹⁰⁰⁴ Prior to this matter, Glen Agliotti had pleaded guilty to dealing in drugs on 5 December 2007¹⁰⁰⁵ in the Germiston sitting of the Alberton Regional Court.¹⁰⁰⁶ The drug charges related to “a huge consignment of drugs (Hashish) in excess of two tons and street value of more than R200 million”.¹⁰⁰⁷ Agliotti entered a plea agreement with the state and was sentenced to ten years imprisonment, which was suspended for five years on condition that he was not found guilty of the same offence during the suspension period; a fine of R300 000 or five year imprisonment; and a fine of R200 000, which was to be paid into the Criminal Assets Recovery Account.¹⁰⁰⁸ A further condition of the plea agreement was that Agliotti had to “testify frankly and honestly in the matter: *S v Paparas*”.¹⁰⁰⁹ This Selebi saga hence illustrates the link between organised crime and corruption.

Another factor which hampers the political will to combat organised crime, is the allegation which commenced in the latter part of 2014 regarding Russia’s Rosatom State Atomic Energy Corporation, which announced the

¹⁰⁰¹ Gastrow 1998 <http://www.issafrica.org/uploads/Mono28.pdf>.

¹⁰⁰² Piegler and Newman *Glen Agliotti* xi.

¹⁰⁰³ Piegler and Newman *Glen Agliotti* 62.

¹⁰⁰⁴ *S v Selebi* 2010 JDR 0894 (GSJ) para 22.

¹⁰⁰⁵ The date is contentious as the NPA communiqué dates the event as 5 December 2007 while Agliotti’s biographers list the date as 5 December 2008. Confer NPA 2007 <http://www.npa.gov.za/UploadedFiles/Glen%20Agliotti%20Pleads%20Guilty.pdf> and Piegler and Newman *Glen Agliotti* 64.

¹⁰⁰⁶ NPA 2007 <http://www.npa.gov.za/UploadedFiles/Glen%20Agliotti%20Pleads%20Guilty.pdf>.

¹⁰⁰⁷ NPA 2007 <http://www.npa.gov.za/UploadedFiles/Glen%20Agliotti%20Pleads%20Guilty.pdf>.

¹⁰⁰⁸ NPA 2007 <http://www.npa.gov.za/UploadedFiles/Glen%20Agliotti%20Pleads%20Guilty.pdf>.

¹⁰⁰⁹ NPA 2007 <http://www.npa.gov.za/UploadedFiles/Glen%20Agliotti%20Pleads%20Guilty.pdf>. The three accused were subsequently acquitted in the Paparas drug trial. See EWN 2011 <http://ewn.co.za/2011/04/05/Three-accused-in-Paparas-drug-trial-acquitted>.

supply of eight nuclear reactors to South Africa by 2023.¹⁰¹⁰ The controversial \$50-billion deal was apparently signed between the two countries during the International Atomic Energy Agency conference in Vienna.¹⁰¹¹ Critics raised concerns that “South Africa was giving itself over to long-term debt with Russia” and also “overexposing (it)self to problems in eastern Europe”.¹⁰¹² The history between the ruling ANC and Russia reaches back into the era of the Apartheid regime, with the current Department of International Relations and Cooperation putting it as follows:

The historical links between South Africa and the Russian Federation are strong. Direct contacts between the former USSR and the ANC were established on a regular basis during 1963. In the era of the USSR, the latter was one of the key supporters of the struggle for liberation in South Africa. With the dissolution of the USSR, South Africa became the first African state to recognise the independence of the Russian Federation. Full diplomatic relations were established between South Africa and the Russian Federation on 28 February 1992.

The challenge for South Africa is that Russian organised criminal groups hijacked the process of change in Russia from communism to capitalism.¹⁰¹³ Jamieson¹⁰¹⁴ describes the problem as follows:

At the end of 1999, it was reported by the FSB, the Russian security service, that Russian organised crime was composed of around 70,000 members and controls an estimated fifty percent of the economy, including one third of the country's 1,800 banks, 1,500 state-owned companies, and 4,000 companies quoted on the stock exchange. Around 110 transnational criminal groups are based in Russia but operate in 40 different countries. One of the principal means of criminal enrichment has been the privatisation of former state-owned resources and assets.

The Russian Mafia also controls a large part of the government, thus stunting legislative and law enforcement efforts to combat organised crime in terms of the Palermo Convention.¹⁰¹⁵ Thus, Russia's nuclear resources combined with its “extensive criminality threatens international security”,

¹⁰¹⁰ Mail & Guardian 2014 <http://mg.co.za/article/2014-09-23-sa-russia-agree-to-50-billion-nuclear-deal>.

¹⁰¹¹ Mail & Guardian 2014 <http://mg.co.za/article/2014-09-23-sa-russia-agree-to-50-billion-nuclear-deal>.

¹⁰¹² Ginindza & Faku 2014 http://www.iol.co.za/business/markets/south-africa/russia-nuclear-deal-scares-critics-1.1754798#.VJF_eyvoQfQ.

¹⁰¹³ Jamieson 2001 *SCT* 381.

¹⁰¹⁴ Jamieson 2001 *SCT* 381. See also Enck 2003 *SJILC* 384.

¹⁰¹⁵ Enck 2003 *SJILC* 384-387.

more so for a country that would be in its debt.¹⁰¹⁶ Just in the area of human trafficking Russia is the largest source and this illegal activity contributes large amounts to its economic revenue.¹⁰¹⁷ Russia is therefore labelled as probably the largest stumbling block to the effective combating of organised crime.¹⁰¹⁸ Russia's lack of good governance, corrupt officials and weak economy contribute to its organised crime problems, consisting of an estimated 5,700 organised criminal groups, comprising over three million members and stretching into fifty other countries.¹⁰¹⁹

Thus, defeating organised crime in a country like Russia is an almost impossible task, simply because organised crime is so entrenched in all spheres of the country.¹⁰²⁰ And while Russia's President Putin speaks out against corruption, his actions show that corruption is not taken seriously.¹⁰²¹ This is not dissimilar to criticism against South Africa's President Jacob Zuma, whose acts against corruption do not measure up to his talk. Similarly, if South Africa does not face its local and international organised challenges effectively, the task may become too difficult as organised criminal groups entrench themselves into the various spheres of South Africa, because it is well publicised that South Africa and Russia are two prime examples of "the expansion of organised crime in transitional states".¹⁰²² Finally, the allegations of a "state capture" by the Gupta brothers and the accompanying scandals show how vulnerable South-Africa is politically.¹⁰²³

¹⁰¹⁶ Jamieson 2001 *SCT* 381.

¹⁰¹⁷ Enck 2003 *SJILC* 382.

¹⁰¹⁸ Enck 2003 *SJILC* 383.

¹⁰¹⁹ Enck 2003 *SJILC* 383.

¹⁰²⁰ Enck 2003 *SJILC* 390.

¹⁰²¹ See Jamieson 2001 *SCT* 381 regarding Putin's soft approach to allegations of corruption against the Yeltsin clique.

¹⁰²² Standing *Transnational Organised Crime* 4.

¹⁰²³ See for instance Munusamy 2016 <http://www.dailymaverick.co.za/article/2016-06-01-captura-continua-guptas-triumph-as-anc-shuts-down-state-capture-probe/#.V06ZTvl97IU>; Quintal 2016 <http://www.news24.com/SouthAfrica/News/gupta-report-to-be-tabled-at-anc-nec-20160525>; Singh 2016 <http://www.news24.com/SouthAfrica/News/state-capture-by-guptas-is-nothing-new-sacp>; Winkler 2016

3.5 Summary and conclusion

South Africa has a significant role to play in “one of the greatest challenges facing the world in the twenty-first century”, which is to combat organised crime.¹⁰²⁴ Complete failure by any country to fulfil its role in this challenge may lead to excommunication from the international community. Furthermore, failure to combat organised crime within South Africa’s borders may lead to organised criminal groups targeting South Africa as their home base for their operations and robbing the government of its sovereignty and its authority. South Africa’s challenges in the combating of organised crime is to ensure that it fulfils its role in the international combating of organised crime by complying with its responsibilities set by the UN conventions, more especially the Palermo Convention. Locally, South Africa must ensure that the paradigm shift in combating organised crime by focusing on the criminal group rather than the individual in terms of the *POCA* is implemented effectively. To achieve this, the most important steps are as follows:

- (i) to enforce proper border control to ensure that South Africa does not become “a sunny place for shady characters”,¹⁰²⁵ especially for members of the illicit drug trade;
- (ii) to eradicate corruption in the public service, with special emphasis on police officials;
- (iii) to effectively deal with the laundering of the proceeds of crime in terms of the *FICA*, with special focus on PEPs; and
- (iv) to focus law enforcement efforts in terms of the *POCA* on organised criminal groups operating within its borders, rather than on individual criminals.

<http://www.fin24.com/Opinion/how-the-state-capture-controversy-has-influenced-south-africas-nuclear-build-20160527>.

¹⁰²⁴ Jamieson 2001 *SCT* 385.

¹⁰²⁵ Ashton 2012 <http://sacsis.org.za/site/article/1281>.

The importance of the American *RICO Act* cannot therefore be over-estimated, because South Africa's *POCA* was largely based on the *RICO Act*, which is why it is explored next.

Chapter 4

The United States of America's *Racketeer Influenced and Corrupt Organisations Act*

4.1 Introduction

After the Katzenbach Commission¹⁰²⁶ made its recommendations on the combating of organised crime,¹⁰²⁷ the United States Congress adopted the *RICO Act*.¹⁰²⁸ As indicated in chapter 3 above, the *RICO Act* had a significant influence on the drafting of the United Nations Palermo Convention.¹⁰²⁹ South Africa's *POCA* was also largely influenced by the *RICO Act*; either directly as in the case of the racketeering offences;¹⁰³⁰ or indirectly through the Palermo Convention, as in the case of the money laundering crimes.¹⁰³¹ the *RICO Act* also continues to influence South African case law as the South African courts turn to American judgments on the *RICO Act* for guidance when interpreting the *POCA*.¹⁰³² Boister¹⁰³³ raises the following concerns regarding "transnational penal norm transfer":

We have moved from the maxim *extra territorium jus dicenti impune non paretur* – effectively that all crime is local – to an acceptance that transnational crime presents tangible threats to which all states must respond in the same way. But we have spent little time in analysing how this change has occurred or what implications it has for the way in which criminal law is propagated and controlled . . . it becomes a subject of concern when the norm crosses from a developed state to a developing state – a state that may have a fairly unsophisticated and/or dysfunctional criminal justice system – because of the inherent inequalities in such a relationship.

¹⁰²⁶ The 1967 President's Commission on Law Enforcement and Administration of Justice discussed in para 2.2.1.2 above.

¹⁰²⁷ Baumgartel 2006 JCLC 3.

¹⁰²⁸ *Organised Crime Control Act* 1970, Public Law No. 91-452, 84 Stat 922, 941.

¹⁰²⁹ See paras 3.1 and 3.3.2 above.

¹⁰³⁰ Kruger *Organised Crime* 12.

¹⁰³¹ McClean *Transnational Organised Crime* 69.

¹⁰³² Kruger *Organised Crime* 8.

¹⁰³³ Boister 2003 SACJ 272.

Woodiwiss¹⁰³⁴ raises similar concerns, stating that simply following the American view of organised crime, where it is perceived as threatening a healthy society, leads to governments drafting and implementing policies without analysing the involvement of their own public officials and/or professional persons in the phenomenon.

South Africa's organised crime policy obligations were examined in the previous chapter. The purpose of this chapter is to analyse the *RICO Act* in order to determine what contribution this American law has made to the current legal position in South Africa, and what further contributions can be made to assist in meeting South Africa's organised crime challenges and obligations, as identified in the chapter 3 above. With an almost three decades longer history than the *POCA*, the *RICO Act* has allowed the USA to develop organised crime combating strategies which can assist South Africa to accelerate its own progress. To this end, the following issues are considered:

- (i) the historical development of the *RICO Act*;
- (ii) prohibited activities under the *RICO Act*;
- (iii) basic elements of the *RICO Act* offences;
- (iv) statute of limitations;
- (v) criminal penalties under the *RICO Act*; and
- (vi) civil remedies under the *RICO Act*.

4.2 Historical development of the RICO Act

The United States *Organised Crime Control Act*¹⁰³⁵ of 1970, which the *RICO Act* forms part of, was greatly influenced by Cressey's¹⁰³⁶ view of organised crime as a highly structured and bureaucratic criminal group.¹⁰³⁷ Cressey's model and characteristics of organised crime are, however,

¹⁰³⁴ Woodiwiss "Transnational organised crime" 25.

¹⁰³⁵ *Organised Crime Control Act* of 1970, Public Law No. 91-452, 84 Stat. 922-923.

¹⁰³⁶ See para 2.4.1 above.

¹⁰³⁷ Hobbs and Antanopoulos 2013 *Global Crime* 37.

questionable, as is shown in chapter 2 above.¹⁰³⁸ the *RICO Act* furthermore introduced a vast array of powers to law enforcement for the combating of organised crime.¹⁰³⁹ In *Sedima, S.P.R.L. v Imrex Co.*,¹⁰⁴⁰ for instance, the American Supreme Court highlighted the *RICO Act* as an aggressive initiative to supplement traditional approaches to fighting crime by developing new methods for combating especially organised crime.

The rationale behind the adoption of the *RICO Act* was concerns about the illegal activities of organised criminal groups, more specifically La Cosa Nostra (the Mafia), and especially the penetration of such organised criminal groups into legitimate business and the resultant corruption of a vast array of professions.¹⁰⁴¹

This perceived threat was based on the findings on organised crime by the United States Congress at the time of the *RICO Act's* enactment, which were as follows:¹⁰⁴²

- (i) it was a “highly sophisticated, diversified and widespread activity” which drained the economy through illegal activities;
- (ii) it obtained most of its power through the proceeds of illegal activities;
- (iii) it was founded upon corruption;
- (iv) it was harmful to the economy and the free-market based capital system; and
- (v) the current legal system was inadequate to combat organised crime effectively.

The adoption of the *RICO Act* was called for by the American Bar Association as well as the President’s Commission on Law Enforcement and the Administration of Justice, also called the Katzenbach

¹⁰³⁸ See para 2.4.1 above.

¹⁰³⁹ Hobbs and Antanopoulos 2013 *Global Crime* 37.

¹⁰⁴⁰ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 483.

¹⁰⁴¹ Baumgartel 2006 *JCLC* 4; Lynch 1987 *CLR* 662.

¹⁰⁴² *Organised Crime Control Act* of 1970, Public Law No. 91-452, 84 Stat. 922-923.

Commission.¹⁰⁴³ The *RICO Act* was therefore adopted with the purpose of combating organised crime in the United States in the following ways:¹⁰⁴⁴

- (i) by strengthening the legal tools in the evidence-gathering process;
- (ii) by establishing new penal prohibitions; and
- (iii) by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organised crime.

Ironically, the *RICO Act* was enacted to combat organised crime, but was drafted without limiting it specifically to this specific target.¹⁰⁴⁵ Hence, Blakey and Gerardi¹⁰⁴⁶ maintain that while the *RICO Act* is aimed at a “specific target”, namely organised criminal groups, it is not limited to that “specific target”. Although the district courts initially tried to limit the application of the *RICO Act*, especially in civil matters, by “reading into it an ‘organised crime’ limitation”, the circuit courts rejected such a narrow approach by the lower courts, because they found that the text did not support such a limiting interpretation of the act.¹⁰⁴⁷ Furthermore, section 904(a)¹⁰⁴⁸ of the *RICO Act* states that its provisions must be liberally construed to effectuate its remedial purposes. The Supreme Court has used this section to continually apply a broad interpretation to the *RICO Act*, despite the repeated efforts by the lower courts to limit its application.¹⁰⁴⁹ Therefore the interpretation of the *RICO Act* remains controversial¹⁰⁵⁰ and has been described as “a tug-of-war ... between the lower courts and the Supreme Court over the reach of the statute”.¹⁰⁵¹ In

¹⁰⁴³ Blakey “RICO” 451. Donald Cressey’s influence on the President’s Commission on Law Enforcement and the Administration of Justice is discussed under para 2.2.1.2 above.

¹⁰⁴⁴ *Organised Crime Control Act* of 1970, Public Law No. 91-452, 84 Stat. 923.

¹⁰⁴⁵ Blakey “RICO” 456. See also *H.J., Inc. v Northwestern Bell Telephone Co.* 472 U.S. 229 (1989) 244-248, where the court held that Congress enacted the *RICO Act* to go beyond organised crime.

¹⁰⁴⁶ Blakey and Gerardi 2014 *Notre Dame* 443.

¹⁰⁴⁷ Blakey “RICO” 457.

¹⁰⁴⁸ Sec 904(a) of the *RICO Act*.

¹⁰⁴⁹ Baumgartel 2006 *JCLC* 5.

¹⁰⁵⁰ De Koker *South African Money Laundering Com* 3-17.

¹⁰⁵¹ Plevin 1992 *AJTA* 448.

*Reves v Ernst & Young*¹⁰⁵² the Supreme Court did, however, state that the liberal construction clause of the *RICO Act* was simply inserted to ensure that Congress' aims with the statute were not undermined by a too narrow interpretation, "but it is not an invitation to apply the *RICO Act* to new purposes that Congress never intended", which was to prevent the penetration of organised crime into legitimate business.

However, over time the *RICO Act* evolved into more than was originally intended by the enacting Congress;¹⁰⁵³ reaching beyond the combating of organised crime and encompassing "what might otherwise be categorised as everyday business fraud, securities violations, political corruption, and various other white collar crimes",¹⁰⁵⁴ which covers "virtually any violation of federal securities laws including insider trading".¹⁰⁵⁵ So, within a few years of its adoption, Atkinson¹⁰⁵⁶ referred to the *RICO Act* as "the most sweeping criminal statute ever passed by Congress". The American Supreme Court, however, maintains that the fault lies with the broad manner in which the *RICO Act* was drafted and the defect "is inherent in the statute as written, and its correction must lie with Congress".¹⁰⁵⁷

Lynch¹⁰⁵⁸ maintains that very few of the *RICO Act* prosecutions have dealt with the actual prosecution of organised criminal groups, but have instead focussed on numerous other types of prosecutions, while essentially ignoring the offences relating to the penetration of legitimate business by organised criminal groups. The *RICO Act* has even been applied to legitimate businesses and non-profit organisations.¹⁰⁵⁹ Thus critics of the *RICO Act* have averred that rather than targeting so-called "traditional"

¹⁰⁵² *Reves v Ernst & Young* 507 U.S. 170 (1993) 184.

¹⁰⁵³ See *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 500.

¹⁰⁵⁴ Baumgartel 2006 *JCLC* 5. See also Blakey "RICO" 456; Coppola and DeMarco 2012 *New England* 254.

¹⁰⁵⁵ Hemraj 2002 *JFC* 163. See also Coppola and DeMarco 2012 *New England* 254.

¹⁰⁵⁶ Atkinson *JCLC* 1.

¹⁰⁵⁷ *Sedima, S.P.R.L. v Imrex Co., Inc.* 473 U.S. 479, 105 S. Ct. 3275 (1985) 3286-3287.

¹⁰⁵⁸ Lynch 1987 *CLR* 662.

¹⁰⁵⁹ McCarrick 2014 *ACLR* 1602.

organised criminal groups, the *RICO Act* provides “too easy a weapon against ‘innocent businessmen’”.¹⁰⁶⁰ This criticism is unfounded, because it seems to be based on an artificial view where racketeers must be kept away from legitimate business, while those already in legitimate business must be exempt, whereas Congress intended to reach both legitimate and illegitimate enterprises.¹⁰⁶¹ Hence the Supreme Court in *Sedima, S.P.R.L v Imrex Co.*¹⁰⁶² stated that legitimate enterprises “enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences”.

Interestingly, Lynch¹⁰⁶³ avers that the *RICO Act* prosecutions have been aimed at accused persons who have engaged with others in “series of crime having looser connections than have traditionally been permitted even in conspiracy prosecutions”. Lynch¹⁰⁶⁴, however, fails to consider how the traditional views on organised crime have changed and developed over time. As discussed in chapter 2, many organised criminal groups are not bureaucratically structured enterprises, but instead operate as loosely connected criminal networks.¹⁰⁶⁵

So-called “outsiders”, who are third parties not involved with the everyday running of the operation and which include professionals such as lawyers and accountants, have often been pulled into the *RICO Act* cases by a Supreme Court which has employed the *RICO Act*’s “broad terms and so-called liberal construction clause to continually knock down limiting constructions that lower courts have sought to impose on the statute”.¹⁰⁶⁶ This situation leads Hemraj¹⁰⁶⁷ to conclude that the *RICO Act* is applied to professionals “who have nothing to do with the organised crime”, calling

¹⁰⁶⁰ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 498.

¹⁰⁶¹ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 499.

¹⁰⁶² *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 499.

¹⁰⁶³ Lynch 1987 *CLR* 662-663.

¹⁰⁶⁴ See the discussion in chapter 2.

¹⁰⁶⁵ See para 2.4.2

¹⁰⁶⁶ Baumgartel 2006 *JCLC* 2.

¹⁰⁶⁷ Hemraj 2002 *JFC* 163-164.

the situation undesirable as it places an unnecessary burden on the professions.

This process of expanding the reach of the *RICO Act* to outsiders was somewhat halted by the decision in *Reves v Ernst & Young*,¹⁰⁶⁸ where the Supreme Court applied the “operation or management test”, which requires individuals to control or manage the enterprise¹⁰⁶⁹ in order to be liable under the *RICO Act*.¹⁰⁷⁰ The court did, however, say that the operation or management of an enterprise is not limited to the top management, but extends down the ranks to those who are “under the direction of upper management”.¹⁰⁷¹ Exactly how far down the ranks the operation and management test extends remains unclear.¹⁰⁷² The court did, however, make it clear that outsiders controlling the enterprise through corruption will pass the operation and management test.¹⁰⁷³

The *RICO Act* has therefore been interpreted in ways not originally intended by Congress,¹⁰⁷⁴ which is what initial fears were when the provisions of the *RICO Act* were discussed before enactment. In *Reves v Ernst & Young*¹⁰⁷⁵ the court said the following:

[C]ritics of the bill raised concerns that racketeering activity was defined so broadly that RICO would reach many crimes not necessarily typical of organised crime ... Senator McClellan reassured the bill's critics that the critical limitation was not to be found in § 1961(1)'s list of predicate crimes but in the statute's other requirements, including those of § 1962.

The broadening of the *RICO Act* has led to much controversy surrounding the act, mainly because of the harsh treble damages plus attorney's fees that can be claimed in a civil lawsuit under the *RICO Act*.¹⁰⁷⁶ This can also

¹⁰⁶⁸ *Reves v Ernst & Young* 507 U.S. 170 (1993).

¹⁰⁶⁹ The concept “enterprise” is discussed in para 4.4.2 below.

¹⁰⁷⁰ Confer Baumgartel 2006 *JCLC* 2.

¹⁰⁷¹ *Reves v Ernst & Young* 507 U.S. 170 (1993) 185.

¹⁰⁷² McCarrick 2014 *ACLR* 1624.

¹⁰⁷³ *Reves v Ernst & Young* 507 U.S. 170 (1993) 185.

¹⁰⁷⁴ De Koker *South African Money Laundering Com* 3-17.

¹⁰⁷⁵ *Reves v Ernst & Young* 507 U.S. 170 (1993) 183.

¹⁰⁷⁶ Trabeau 1990 *LLR* 1223. The civil remedies are discussed more fully under para 4.7 below.

be ascribed to the fact that the “prohibited activities”¹⁰⁷⁷ created under section 1962 of Title 18¹⁰⁷⁸ are referred to as “unlawful” and not expressly “criminal”. Because the word “criminal” is not used, Blakey¹⁰⁷⁹ holds the view that the *RICO Act* is not a primarily criminal statute as believed by some. This was confirmed by the Supreme Court in *Sedima, S.P.R.L. v Imrex Co.*¹⁰⁸⁰ where the court found that the *RICO Act* not only applied to organised crime, but to legitimate business as well, rendering it an Act that can be applied to conduct which is unlawful in a delictual context and not necessarily in a criminal context. Furthermore, Blakey¹⁰⁸¹ argues that because the *RICO Act*’s civil remedies are broader than its criminal sanctions, the *RICO Act* is in actual fact primarily “civil and remedial” rather than “criminal and punitive”.

The civil remedies offered by the *RICO Act* are available to the state as well as private parties.¹⁰⁸² This civil application of the *RICO Act* is also evidenced in the U.S. Congress’ directive “that RICO be liberally construed to effectuate its remedial purpose”, which implies that the “language of the statute is to be read in the same fashion”.¹⁰⁸³ Even though many therefore maintain that the *RICO Act* has been applied to civil cases primarily, it still offers valuable guidance for South African courts, even though the civil remedies offered by the *RICO Act* were not transferred to the *POCA*.¹⁰⁸⁴ In *Dos Santos*,¹⁰⁸⁵ for instance, the Supreme Court of Appeal considered the *RICO Act* and several American court decisions¹⁰⁸⁶ to determine whether there was a splitting of charges when

¹⁰⁷⁷ Prohibited activities refer to the racketeering offences, which are discussed in more detail in the next section under para 4.3.

¹⁰⁷⁸ *Organised Crime Control Act* of 1970, Public Law No. 91-452, 84 Stat. 942-943.

¹⁰⁷⁹ Blakey “RICO” 452.

¹⁰⁸⁰ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 499.

¹⁰⁸¹ Blakey “RICO” 452.

¹⁰⁸² Blakey “RICO” 452.

¹⁰⁸³ Blakey “RICO” 452.

¹⁰⁸⁴ Kruger *Organised Crime* 12.

¹⁰⁸⁵ *S v Dos Santos* 2010 2 SACR 382 (SCA).

¹⁰⁸⁶ *United States v Brooklier* 685 F2d 1208 (1982); *United States v Dotterweich* 320 US 277 (1943); *United States v Hartley* 678 F2d 961 (1982); *United States v Martino* 648 F2d 367 (1981); *United States v Peacock* 654 F2d 339 (1981).

prosecuting an accused for predicate offences and racketeering under the *POCA*. Ponnann JA stated that there was no conceivable reason why the approach of the South African courts in interpreting the *POCA* should differ in any way from the approach adopted by the American courts in interpreting the *RICO Act*.¹⁰⁸⁷ De Koker,¹⁰⁸⁸ however, cautions as follows:

There are important differences between the South African and American law in this regard. Civil liability and treble damages are important elements of the American *RICO* law and many judgments were handed down in the civil context rather than the criminal context.

The South African courts are also faced with the controversial differences in interpretation between the American lower courts and the American Supreme Court, which are “driven by factors that are relevant to the American legal system but not to the South African system”.¹⁰⁸⁹ Furthermore, South African courts will by implication have to lean towards a narrower interpretation of the *POCA* because of the “harshness of the *POCA* provisions and penalties”,¹⁰⁹⁰ rather than following the more liberal interpretation followed by American courts.

Much can, however, still be learned from the American approach to the combating of organised crime, especially because the *RICO Act* has been in force since 1970 and has therefore had a much longer history than the *POCA*, which was enacted almost 30 years later. To this end, the following section deals with the prohibited activities created by the *RICO Act* under section 1962 of Title 18.¹⁰⁹¹ Because the *RICO Act* creates criminal and civil sanctions for these “prohibited activities”, for sake of convenience the criminal sanctions are analysed first, after the civil sanctions have been covered.

¹⁰⁸⁷ *S v Dos Santos* 2010 2 SACR 382 (SCA) 403G.

¹⁰⁸⁸ De Koker *South African Money Laundering* Com 3-17.

¹⁰⁸⁹ De Koker *South African Money Laundering* Com 3-17.

¹⁰⁹⁰ De Koker *South African Money Laundering* Com 3-17.

¹⁰⁹¹ *Organised Crime Control Act* of 1970, Public Law No. 91-452, 84 Stat. 942-943.

4.3 Prohibited activities under the RICO Act

As already mentioned above, the prohibited activities created by the *RICO Act* are labelled as “unlawful” and not as “criminal”.¹⁰⁹² Hence contravening these prohibited activities may incur criminal penalties¹⁰⁹³ and also render the offender liable for civil remedy.¹⁰⁹⁴ The prohibited activities are set out in section 1963 of Title 18¹⁰⁹⁵ and constitute the following activities by a person:¹⁰⁹⁶

- (i) using or investing income derived from a pattern of racketeering activity or through collection of an unlawful debt to acquire any interest in an enterprise engaged in or affecting interstate or foreign commerce;¹⁰⁹⁷
- (ii) acquiring or maintaining through a pattern of racketeering activity or through collection of an unlawful debt any interest in or control over any enterprise engaged in or affecting interstate or foreign commerce;¹⁰⁹⁸
- (iii) conducting or participating, directly or indirectly, in the conduct of enterprises through a pattern of racketeering activity or collection of an unlawful debt;¹⁰⁹⁹ and
- (iv) conspiring to violate any of the abovementioned provisions.¹¹⁰⁰

Bourgeois *et al*¹¹⁰¹ summarise what the state must prove for an offence in terms of the *RICO Act* as follows:

[T]he defendant, through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly invested in, maintained

¹⁰⁹² Blakey “RICO” 425.

¹⁰⁹³ In terms of s 1963 of the *RICO Act*.

¹⁰⁹⁴ In terms of s 1964 of the *RICO Act*.

¹⁰⁹⁵ *Organised Crime Control Act* of 1970, Public Law No. 91-452, 84 Stat. 943.

¹⁰⁹⁶ In terms of s 1962(3) of the *RICO Act* a “person” includes any individual or entity capable of holding a legal or beneficial interest in property. Thus legal persons may also face liability under the *RICO Act*.

¹⁰⁹⁷ Section 1962(a) of the *RICO Act*.

¹⁰⁹⁸ Section 1962(b) of the *RICO Act*.

¹⁰⁹⁹ Section 1962(c) of the *RICO Act*.

¹¹⁰⁰ Section 1962(d) of the *RICO Act*.

¹¹⁰¹ Bourgeois *et al* 2001 *ACLR* 1215.

an interest in, or participated in, an enterprise, the activities of which affected interstate or foreign commerce.

The respective prohibited activities need to be analysed individually to gain an understanding of the nature and contents of each of them.

4.3.1 Investing activities

The elements of the investment activities created by the *RICO Act* are as follows.¹¹⁰²

- (i) the use or investment of income in the acquisition, establishment, or operation;
- (ii) of an enterprise engaged or affecting interstate commerce; and
- (iii) where the income was derived from a pattern of racketeering activity.

This provision¹¹⁰³ targets the original perceived threat of organised crime, which at the time was the infiltration of legitimate business by the Mafia through the investment of ill-gotten gains.¹¹⁰⁴ The application of this section was, however, soon broadened when the Supreme Court in *United States v Turkette*¹¹⁰⁵ overturned a lower court decision, stating as follows:

On appeal, the respondent argued that RICO was intended solely to protect legitimate business enterprises for infiltration by racketeers and that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise. The Court of Appeals agreed. We reverse.

The Supreme Court held that the the *RICO Act's* definition of an enterprise does not restrict the type of association and therefore any group of individuals associated factually would suffice, whether they formed a legitimate or illegitimate enterprise.¹¹⁰⁶ Consequently, this decision initiated the move away from Cressey's erstwhile hierarchical model,

¹¹⁰² Blakey "RICO" 452.

¹¹⁰³ Section 1962(a) of the *RICO Act*.

¹¹⁰⁴ McCarrick 2014 *ACLR* 1622.

¹¹⁰⁵ *United States v Turkette* 452 US 576 (1981) 579-580.

¹¹⁰⁶ *United States v Turkette* 452 US 576 (1981) 580-581.

which was the main view on organised crime at the time when the *RICO Act* was drafted.¹¹⁰⁷

According to McCarrick,¹¹⁰⁸ very few criminal prosecutions are instituted under this section, with civil cases instituted either by the Attorney-General or an injured private party with standing for a civil cause of action being more common. McCarrick¹¹⁰⁹ states the following regarding prosecutions under this section:

Section 1962(a) requires that the government prove that defendant both committed the alleged predicate activities and invested the income from those activities in the targeted enterprise. The limited case law on § 1962(a) suggests that courts either ignore this tracing requirement or do not strictly enforce it. Courts usually infer the tracing of income as well as the defendant's knowledge of the income source.

One of the issues faced with prosecutions under this section may be the difficulty in proving the flow of funds. As the crux of the provision is the combating of the investment of the proceeds of crime, evidence will have to show that such funds are the proceeds of crime and were channelled into some form of enterprise.¹¹¹⁰ However, criminals rely on money laundering schemes to hide the proceeds of crime, at times resorting to the use of shell companies or complex international transactions,¹¹¹¹ thus proving the source and flow of funds becomes challenging.

4.3.2 *Acquiring activities*

The elements of the offence created by section 1962(b) are as follows:¹¹¹²

- (i) the acquisition or maintenance of interest in or control over;
- (ii) an enterprise engaged in or affecting state commerce;
- (iii) through a pattern of racketeering activity.

¹¹⁰⁷ See para 4.2 above.

¹¹⁰⁸ McCarrick 2014 *ACLR* 1622.

¹¹⁰⁹ McCarrick 2014 *ACLR* 1620.

¹¹¹⁰ Kruger *Organised Crime* 52.

¹¹¹¹ De Koker *South African Money Laundering Com* 1-5.

¹¹¹² Blakey "RICO" 452.

Section 1962(b)¹¹¹³ targets the gaining of control over legitimate business through racketeering activity.¹¹¹⁴ Thus, unlike the previous section, it does not mention the proceeds of crime. According to McCarrick,¹¹¹⁵ very few *RICO Act* cases are initiated under this section as well. It requires organised criminals to gain control over an enterprise by conducting racketeering activities.

4.3.3 Conducting activities

The elements of the offence created by section 1962(c) are as follows:¹¹¹⁶

- (i) employment by or association with;
- (ii) an enterprise engaged in or affecting interstate commerce;
- (iii) of which the affairs are conducted or participated in through a pattern of racketeering activity.

Section 1962(c)¹¹¹⁷ requires a link between the enterprise and the racketeering activity¹¹¹⁸ and is the *RICO Act*'s "most used provision".¹¹¹⁹ Some form of relationship between the enterprise and the racketeering activities is required.¹¹²⁰ In *Reves v Ernst & Young*¹¹²¹ the court intimated that such a link would exist if the defendant participated in the operation or management of the enterprise, stating that the required link between the enterprise and the racketeering activity is only established if the accused forms part of the management or operation of the said enterprise. Low-ranking employees who do not operate the enterprise under direction of upper-management or are not involved in high-level decision-making will

¹¹¹³ Section 1962(b) of the *RICO Act*.

¹¹¹⁴ McCarrick 2014 *ACLR* 1623.

¹¹¹⁵ McCarrick 2014 *ACLR* 1623.

¹¹¹⁶ Blakey "RICO" 452.

¹¹¹⁷ Section 1962(c) of the *RICO Act*.

¹¹¹⁸ McCarrick 2014 *ACLR* 1623.

¹¹¹⁹ Thomas 2012 *NYULR* 284.

¹¹²⁰ McCarrick 2014 *ACLR* 1623.

¹¹²¹ *Reves v Ernst & Young* 507 U.S. 170 (1993) 170.

therefore not comply.¹¹²² Employees who do, however, carry out such instruction do fall under the ambit of the *RICO Act*.¹¹²³

The court based its decision on the word “conduct” being used twice in the subsection, requiring that the accused had some involvement in the direction in the affairs of the enterprise.¹¹²⁴ Similarly, the use of the word “participate” requires that the accused had “some part in directing those affairs”, whether directly or indirectly, which in turn “makes it clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise’s affairs is required”.¹¹²⁵

The court, however, did not want to elaborate on exactly how far down the corporate ladder this test must be applied, which again this led to confusion among the circuit courts on how to apply the “ill-defined management and operation test”.¹¹²⁶ Some circuit courts applied the test strictly, while others applied it more widely.¹¹²⁷ However, they all consistently focus on the position that the defendant occupies in the enterprise, rather than on his or her conduct.¹¹²⁸

In *United States v Viola*,¹¹²⁹ for instance, the Court of Appeals for the Second Circuit held that an employee who “performed odd jobs ... mostly consisting of light clean-up and maintenance work” could not be liable under the *RICO Act* because the facts of the case showed no evidence to suggest that he knew he was part of a “larger enterprise” and that even though he committed “discrete stolen property crimes” there was no evidence that he had “direct knowledge of additional transactions”.

¹¹²² McCarrick 2014 *ACLR* 1624.

¹¹²³ McCarrick 2014 *ACLR* 1625.

¹¹²⁴ *Reves v Ernst & Young* 507 U.S. 170 (1993) 179.

¹¹²⁵ *Reves v Ernst & Young* 507 U.S. 170 (1993) 179.

¹¹²⁶ Thomas 2012 *NYULR* 284-285.

¹¹²⁷ Compare for instance *United States v Viola* 35 F.3d 37 (2nd Cir. 1994) with *United States v Oreto* 37 F.3d 739 (1st Cir. 1994).

¹¹²⁸ Thomas 2012 *NYULR* 294.

¹¹²⁹ *United States v Viola* 35 F.3d 37 (2nd Cir. 1994) paras 39, 44-45.

In *United States v Oreto*,¹¹³⁰ on the other hand, the court ruled that someone who collected debts in a loan sharking racket was liable under the *RICO Act* because their actions were “plainly integral to carrying out the collection process”. Hence the court held that Congress had “intended to reach all who participate in the conduct of that enterprise, whether they are generals or foot soldiers”.¹¹³¹

The Harvard Law Review Association (hereafter HLRA)¹¹³² views the above-mentioned two court decisions as contradictory, stating as follows:

The *Viola* court took *Reve*’s operation or management standard literally; the *Oreto* court, by contrast, redefined the standard in order to allow *RICO* prosecution of non-managerial employees who are within the enterprise.

Hence the HLRA,¹¹³³ finding the *Oreto* decision an “implausible reading” of the *RICO Act* and “an indeterminate double standard”, argues that the *Viola* decision should be followed by requiring that all defendants should “have some part in the direction of the enterprise”. The HLRA¹¹³⁴ furthermore finds the *Oreto* decision to be problematic on the grounds that the *RICO Act*’s language does not support it and it creates different conduct for insiders and outsiders of the enterprise, which are not always easily distinguished because modern organised criminal groups do not necessarily have an identifiable hierarchy. Hence the HLRA¹¹³⁵ maintains that “these constructs¹¹³⁶ can be easily manipulated to achieve the desired outcome”.

Why the decisions of *Viola* and *Oreto* should be seen as contradictory, as suggested by the HLRA, is unclear, because these decisions do not appear to apply the *Reves* operation or management test differently. Simply because the outcome was different, namely conviction against

¹¹³⁰ *United States v Oreto* 37 F.3d 739 (1st Cir. 1994) 750.

¹¹³¹ *United States v Oreto* 37 F.3d 739 (1st Cir. 1994) 751.

¹¹³² HLRA 1995 *HLR* 1408.

¹¹³³ HLRA 1995 *HLR* 1408, 1410.

¹¹³⁴ HLRA 1995 *HLR* 1409-1410.

¹¹³⁵ HLRA 1995 *HLR* 1410.

¹¹³⁶ That is differentiating between insiders and outsiders.

acquittal, does not mean that the test was different. In fact, it is submitted that the courts applied the operation or management test exactly as they should have in these two cases. In *Viola*, the accused was acquitted because of lack of evidence to indicate that he was sufficiently involved in the operation or management of the enterprise, while in *Oreto*, the accused's conduct was found to be vital to the operation or management of the enterprise, leading to conviction, which it is submitted is exactly what the HLRA¹¹³⁷ asks for when stating that a defendant must have "some part in the direction of the enterprise".

The lack of identifiable hierarchies in modern organised criminal groups is discussed in detail under chapter 2,¹¹³⁸ hence every case must be judged on its own merits to determine whether an accused's conduct, whether a so-called "insider" or "outsider", forms part of the operation or management test formulated in *Reves*. Guilt cannot be simply attributed according to the title which the person carries in the organisation.

4.3.4 Conspiracy activities

Section 1962(d)¹¹³⁹ allows the state to prosecute someone who has not yet conducted any act towards committing any of the racketeering offences, but has entered into some form of agreement or "meeting of the minds" with someone else to enter into criminal activity that would comply with the elements of these offences once completed.¹¹⁴⁰ Such conspiracies are prosecuted because they are evil in themselves and constitute a danger to society.¹¹⁴¹

Baumgartel¹¹⁴² maintains that the American courts have long grappled with the implementation of the conspiracy offence, and believes that the *Reves*

¹¹³⁷ HLRA 1995 *HLR* 1410.

¹¹³⁸ See for example para 2.4.1 above.

¹¹³⁹ Section 1962(d) of the *RICO Act*.

¹¹⁴⁰ McCarrick 2014 *ACLR* 1625.

¹¹⁴¹ *Salinas v United States* 522 U.S. 52 (1997) 65.

¹¹⁴² Baumgartel 2006 *JCLC* 2, 20.

operation or management test must also be applied to the conspiracy crime to ensure that outsiders, who cannot be prosecuted under the other sections of the *RICO Act*, are not subsequently brought back under the statute by allowing a wide interpretation of the conspiracy offence. According to Baumgartel,¹¹⁴³ the courts ignore “the rationale and intent” of the *Reves* operation or management test when it comes to conspiracy cases and in so doing, fail to take the elements of the substantive crime into consideration when taking a decision on conspiracy to commit the said crime. As seen above, however, the *Reves* test applies to the prohibited *RICO Act* activities of section 1962(c), whereas the conspiracy offence relates to all of the prohibited *RICO Act* activities. Hence the court will take note of the elements of each *RICO Act* offence, which are discussed later.

The judgment in *Gebardi v United States*¹¹⁴⁴ can be analysed as an example of conspiracy law. In this case the Supreme Court considered an appeal on the conviction of a man and woman for conspiring to contravene section 2 of the *Mann Act*,¹¹⁴⁵ which makes it illegal for any person to transport a woman across state lines for purposes of forbidden sexual intercourse. The facts were that the couple, who later married, travelled across borders by train to have sexual intercourse. They were convicted for conspiring to contravene the *Mann Act*¹¹⁴⁶ and the evidence against them was the following:¹¹⁴⁷

[T]he petitioners had engaged in illicit sexual relations in the course of each of the journeys alleged; that the man purchased the railway tickets for both petitioners for at least one journey; and that in each instance the woman, in advance of the purchase of the tickets, consented to go on the journey and did go on it voluntarily for the specified immoral purpose.

Relying on Congress’ formulation of the criminal offence, the court found that the woman’s consent to the transportation was not sufficient for conviction of the substantive crime, because “the act does not punish the

¹¹⁴³ Baumgartel 2006 *JCLC* 29.

¹¹⁴⁴ *Gebardi v United States* 287 U.S. 112 (1932).

¹¹⁴⁵ *Mann Act* 1910, 36 Stat. 825, 18 U.S.C. § 2421.

¹¹⁴⁶ *Mann Act* 1910, 36 Stat. 825, 18 U.S.C.

¹¹⁴⁷ *Gebardi v United States* 287 U.S. 112 (1932) 116.

woman for transporting herself”.¹¹⁴⁸ The state contended that the woman could still be convicted of conspiracy even though she could not be held liable for the substantive offence.¹¹⁴⁹ The court confirmed that a woman could be found guilty of conspiracy, but in such a case “exceptional circumstances” would be required which went beyond mere acquiescence to her transportation and at least aided or assisted someone in her transportation.¹¹⁵⁰

The court therefore set aside the conviction in this case because the wording of the *Mann Act* afforded the woman immunity from prosecution and conspiracy liability would withdraw that immunity.¹¹⁵¹ By extension, a person cannot be convicted of conspiracy in cases where the relevant substantive offence specifically exempts that person from liability for the said substantive crime.¹¹⁵² In the light of this judgement, Baumgartel¹¹⁵³ says the following regarding the application of the *Reves* operation or management test in a *RICO Act* conspiracy judgment:

With *Reves*, it likely does the specific work that Congress intended – allowing RICO to reach leaders of organised crime groups or other enterprises, especially those that infiltrate legitimate business, while leaving less severe traditional law enforcement remedies to deal with subordinate, less culpable associates.

While, in *Gebardi v United States*¹¹⁵⁴ the court held the following:

[A]n agreement to commit an offence may be criminal, though its purpose is to do what some of the conspirators may be free to do alone. Incapacity of one to commit the substantive offense does not necessarily imply that he may with impunity conspire with others who are able to commit it.

The collective planning of criminal conduct is precisely what conspiracy offences aim to punish, for it is the plan itself which is criminalised as soon

¹¹⁴⁸ *Gebardi v United States* 287 U.S. 112 (1932) 118.

¹¹⁴⁹ *Gebardi v United States* 287 U.S. 112 (1932) 119.

¹¹⁵⁰ *Gebardi v United States* 287 U.S. 112 (1932) 117-118.

¹¹⁵¹ *Gebardi v United States* 287 U.S. 112 (1932) 123.

¹¹⁵² Baumgartel 2006 *JCLC* 35.

¹¹⁵³ Baumgartel 2006 *JCLC* 33.

¹¹⁵⁴ *Gebardi v United States* 287 U.S. 112 (1932) 120-121.

as any act is taken to effect its purpose.¹¹⁵⁵ Baumgartel's¹¹⁵⁶ assertion that "the prosecution or moving party should have to show ... that the defendant initially agreed to the operation or management test of an enterprise through such a racketeering pattern" therefore does not make sense in the light of conspiracy law, because such a conspirator has not been specifically excluded from prosecution by Congress as in the case of the *Mann Act*. Furthermore, the effective combating of organised crime requires every member of the organised criminal group to be prosecuted for his or her role in organised crime. Applying traditional approaches to crime prevention in the combating of organised crime was clearly unsuccessful, hence the need for interventions aimed specifically at organised criminal groups and their members.¹¹⁵⁷

Regarding conspiracy under the *RICO Act*, the Supreme Court in *Smith v United States*¹¹⁵⁸ held that "the essence of conspiracy is the combination of minds in an unlawful purpose". The court stated that conspiracy was a continuous offence and while the accused is part of the conspiracy, he or she continues to contravene the act and withdrawal therefore presupposes that the accused committed the offence and does not challenge the elements of the crime.¹¹⁵⁹ Hence, when the Supreme Court in *Salinas v United States*¹¹⁶⁰ had to decide whether the *RICO Act* conspiracy offence only applies to cases where the accused agreed to commit the two predicated offences of the *RICO Act*, it found that no overt or specific act is required for a conspiracy charge and such a charge may occur in the following circumstances:¹¹⁶¹

A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense ... The partners in the criminal plan must agree to pursue the same criminal objective and may

¹¹⁵⁵ See *Gebardi v United States* 287 U.S. (1932) 121.

¹¹⁵⁶ Baumgartel 2006 *JCLC* 36.

¹¹⁵⁷ Hough and Du Plessis *Organised Crime* 52.

¹¹⁵⁸ *Smith v United States* 133 S.Ct. 714 (2013) 719.

¹¹⁵⁹ *Smith v United States* 133 S.Ct. 714 (2013) 719.

¹¹⁶⁰ *Salinas v United States* 522 U.S. 52 (1997) 54.

¹¹⁶¹ *Salinas v United States* 522 U.S. 52 (1997) 63-64.

divide up the work, yet each is responsible for the acts of each other... If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.

Baumgartel¹¹⁶² states that the decision in *Salinas* both confused and clarified the understanding of what a conspiracy under the *RICO Act* entails, because the exact amount of proof required for each accused is still uncertain. The main finding of the court was, however, that offenders are liable for the actions of co-conspirators “so long as they share a common purpose”.¹¹⁶³ Again, Baumgartel¹¹⁶⁴ maintains that the decision in *Salinas* does not impede the *Reves* operation or management test to be extended to conspiracy offences, arguing that the *Salinas* judgment was simply an “expansive interpretation of the reach of RICO conspiracy”. In *Salinas*, the court held that any other ruling would erode the common law principles of common purpose.¹¹⁶⁵ Baumgartel¹¹⁶⁶ argues that the court mistakenly applied common law principles of conspiracy to the the *RICO Act* conspiracy, which was not intended by Congress. Furthermore, Baumgartel’s¹¹⁶⁷ assertion is that a consequence of *Salinas* was that defendants run the risk of being guilty by association.

As stated above, however, conspiracy offences are based on a meeting of the minds of the accused and therefore an accused who is acquitted of any of the other *RICO Act* offences, may still be convicted of the conspiracy offence if it can be shown that he or she was part of an agreement to commit such other offences,¹¹⁶⁸ as long as the conspirator’s intention was to further the endeavour, which if completed, would satisfy all the elements of one of the substantive crimes.¹¹⁶⁹

¹¹⁶² Baumgartel 2006 *JCLC* 22.

¹¹⁶³ *Salinas v United States* 522 U.S. 52 (1997) 63.

¹¹⁶⁴ Baumgartel 2006 *JCLC* 40.

¹¹⁶⁵ *Salinas v United States* 522 U.S. 52 (1997) 63.

¹¹⁶⁶ Baumgartel 2006 *JCLC* 40.

¹¹⁶⁷ Baumgartel 2006 *JCLC* 42.

¹¹⁶⁸ McCarrick 2014 *ACLR* 1626.

¹¹⁶⁹ *Salinas v United States* 522 U.S. 52 (1997) 65.

An accused may furthermore raise a defence of withdrawal from the conspiracy, but mere resignation from the enterprise is not sufficient; the accused must show that he or she took concrete steps to show his or her withdrawal from the objectives of the conspiracy.¹¹⁷⁰ In order to successfully raise this defence, the accused must show that he or she either communicated his or her withdrawal to fellow conspirators or reported the conspiracy to the relevant authorities.¹¹⁷¹

In *Smith v United States*¹¹⁷² the Supreme Court held that the burden of proof regarding proper withdrawal lies with the accused and that this is not against the Due Process Clause. While the burden of proof is not shifted to the accused where the defence raised by the accused negates an element of the relevant crime, the “withdrawal from conspiracy” defence does not negate an element of the *RICO Act* and thus the state has “no constitutional duty to overcome the defence beyond a reasonable doubt”.¹¹⁷³

The effect of withdrawal is, firstly, that the accused remains liable for the conspiracy, but not for any acts of his or her co-conspirators after such withdrawal, and secondly, that the statute-of-limitations period starts running the moment of the accused’s withdrawal.¹¹⁷⁴ In the end, what must be proven, is that all the basic elements of the *RICO Act* are present, which are the accused person, an enterprise affecting interstate commerce and a pattern of racketeering activities (which at least includes an *agreement* to commit two predicate offences).¹¹⁷⁵

An analysis of the above elements reveals that the only difference between the various racketeering offences are the ways in which three core elements, namely (i) the defendant; (ii) an enterprise engaged in or

¹¹⁷⁰ McCarrick 2014 *ACLR* 1627.

¹¹⁷¹ McCarrick 2014 *ACLR* 1627.

¹¹⁷² *Smith v United States* 133 S.Ct. 714 (2013) 719.

¹¹⁷³ *Smith v United States* 133 S.Ct. 714 (2013) 719.

¹¹⁷⁴ *Smith v United States* 133 S.Ct. 714 (2013) 719.

¹¹⁷⁵ Baumgartel 2006 *JCLC* 21.

affecting interstate commerce; and (iii) a pattern of racketeering activity are connected with one another. Hence, in the racketeering offences, the accused's conduct entails that he or she invested in, maintained an interest in, or participated in the enterprise.¹¹⁷⁶ These basic elements that constitute the *RICO Act* offences are analysed under the next section.

4.4 Basic elements of prohibited activities under the RICO Act

The following concepts are discussed in this section on order to clarify how the American courts have approached and interpreted them:

- (i) the defendant;
- (ii) an enterprise affecting interstate commerce; and
- (iii) a pattern of racketeering activity.

4.4.1 The defendant

An accused "person" is defined widely under the *RICO Act*¹¹⁷⁷ to include individuals as well as entities capable of holding legal or beneficial interests in property. Hence, an employee of a corporation can be prosecuted separate from the entity under the *RICO Act*, even if they acted under control of their supervisors.¹¹⁷⁸

In *Cedric Kushner, Ltd. v King*¹¹⁷⁹ the court held that the accused person must be separate from the enterprise and must not simply be "the same 'person' referred to by a different name". Thus the offence is conducting the enterprise's affairs and not the person's own affairs.¹¹⁸⁰ The separateness between the accused and the enterprise does not require

¹¹⁷⁶ McCarrick 2014 *ACLR* 1604.

¹¹⁷⁷ Section 1961(3) of the *RICO Act*.

¹¹⁷⁸ McCarrick 2014 *ACLR* 1605. See also *Reves v Ernst & Young*, 507 U.S. 170, 184 (1993).

¹¹⁷⁹ *Cedric Kushner Promotions, Ltd. v King*, 533 U.S. 158 (2001) 161.

¹¹⁸⁰ *Cedric Kushner Promotions, Ltd. v King*, 533 U.S. 158 (2001) 163.

more than ordinarily required in legal corporations. The court said the following in *Cedric Kushner, Ltd. v King*:¹¹⁸¹

The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more “separateness” than that.

Coppola and DeMarco¹¹⁸² bemoan the Supreme Court “again broadening its interpretation of RICO language” in *Cedric Kushner Promotions, Ltd. v King*¹¹⁸³ when the court held that the owner of a corporation is distinct from the corporation itself. The Court of Appeals for the Second Circuit had held that a much clearer separation of accused and enterprise was needed for the *RICO Act*.¹¹⁸⁴

The *RICO Act* therefore applies to situations where a person conducts the affairs of a legitimate corporation illegally, also when that person is the sole owner of such a corporation.¹¹⁸⁵ In such circumstances, the court said, an employee is using the corporation as a vehicle to conduct his pattern of racketeering and the fact that he is the sole owner of the corporation is irrelevant.¹¹⁸⁶

Thomas¹¹⁸⁷ makes the point that it would be untenable for a low-ranking member of the Mafia to escape prosecution simply because of his low position in an extremely structured hierarchical enterprise, especially in the light of Congress’ original purpose with the *RICO Act*, which was to specifically combat the Mafia. Thomas¹¹⁸⁸ therefore proposes that the phrase “directing the affairs” be understood as “knowingly making decisions as to an enterprise’s affairs or knowingly carrying out those affairs”, even if the individual’s contribution is minimal. As discussed under

¹¹⁸¹ *Cedric Kushner Promotions, Ltd. v King*, 533 U.S. 158 (2001) 163.

¹¹⁸² Coppola and DeMarco 2012 *New England* 252.

¹¹⁸³ *Cedric Kushner Promotions, Ltd. v King*, 533 U.S. 158 (2001).

¹¹⁸⁴ Coppola and DeMarco 2012 *New England* 252.

¹¹⁸⁵ *Cedric Kushner Promotions, Ltd. v King*, 533 U.S. 158 (2001) 163.

¹¹⁸⁶ *Cedric Kushner Promotions, Ltd. v King*, 533 U.S. 158 (2001) 165.

¹¹⁸⁷ Thomas 2012 *NYULR* 319.

¹¹⁸⁸ Thomas 2012 *NYULR* 320.

the conspiracy activity above, the elements of the prohibited activities will be sufficient to determine whether such a low-ranking official can be held liable under the *RICO Act*, especially in light of the decision in *United States v Viola*¹¹⁸⁹ discussed under paragraph 4.3.3 above.

4.4.2 *An enterprise affecting interstate commerce*

“Enterprise”¹¹⁹⁰ is given a wide meaning to include any individual, partnership, corporation, association, or other legal entity, as well as any union or group of individuals associated in fact. Basically, the accused does not have to hold any interest in the enterprise, but may just as well be an outsider who assists in furthering the objectives of the enterprise.¹¹⁹¹ However, the “enterprise” cannot simply be the accused charged under a different name, as there must be some separateness between the individual and the enterprise.¹¹⁹² The distinction between a natural person as the accused and a legal person as the enterprise, is sufficient for this purpose.¹¹⁹³

The American courts seem to differ on the types of enterprises which fall under the *RICO Act* and how the existence of such *RICO Act* enterprises is determined.¹¹⁹⁴ In *United States v Turkette*¹¹⁹⁵ the court held that the enterprise requirement of the *RICO Act* is satisfied not only by a legitimate business, but also by “a criminal enterprise that has no legitimate dimension of has yet to acquire one”.

Furthermore, it is not necessary to have a formal association of persons for purposes of a *RICO Act* enterprise and so-called “association-in-fact” relationships, whether legal or illegal, are sufficient for purposes of the

¹¹⁸⁹ *United States v Viola* 35 F.3d 37 (2nd Cir. 1994).

¹¹⁹⁰ Section 1961(4) of the *RICO Act*.

¹¹⁹¹ McCarrick 2014 *ACLR* 1612.

¹¹⁹² McCarrick 2014 *ACLR* 1613. See also *Cedric Kushner Promotions, Ltd. v King*, 533 U.S. 158, 161 (2001).

¹¹⁹³ McCarrick 2014 *ACLR* 1613. See also *Cedric Kushner Promotions, Ltd. v King*, 533 U.S. 163 (2001).

¹¹⁹⁴ McCarrick 2014 *ACLR* 1613.

¹¹⁹⁵ *United States v Turkette* 452 U.S. 574 (1981) 591.

RICO Act.¹¹⁹⁶ More than a mere grouping together of people is, however, required, and as McCarrick¹¹⁹⁷ states: “in order to be- an association-in-fact, the grouping must have a shared purpose, continuity, and unity”.

In *Boyle v United States*¹¹⁹⁸ the Supreme Court had to decide whether an association-in-fact enterprise under the *RICO Act* should have “an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages”. The group in question had no leader or hierarchy and appeared to be loosely and informally organised as the members had no formal plan or agreement. The court held that three structural features are required by the *RICO Act* for an association-in-fact enterprise:¹¹⁹⁹

- (i) a purpose;
- (ii) relationships among its members; and
- (iii) longevity which allows the members to pursue the abovementioned purpose.

Relying on the court’s findings in *Boyle v United States*,¹²⁰⁰ McCarrick¹²⁰¹ argues that “structural features such as hierarchy, fixed member roles, chain of command, rules and regulations, or sophisticated and diverse crimes are not necessary under RICO”.

Coppola and DeMarco¹²⁰² support this view, stating that an enterprise need not have any “business-like attributes” and its existence can simply be derived from its racketeering pattern. Thus Congress’ premise of Cressey’s hierarchical model and its accompanying characteristics of organised crime, which was followed at the time of enacting the *RICO Act*, is no longer applied in the interpretation thereof.

¹¹⁹⁶ McCarrick 2014 *ACLR* 1615.

¹¹⁹⁷ McCarrick 2014 *ACLR* 1615.

¹¹⁹⁸ *Boyle v United States* 129 S.Ct. 2237 (2009).

¹¹⁹⁹ *Boyle v United States* 129 S.Ct. 2237 (2009) 2244.

¹²⁰⁰ *Boyle v United States* 129 S.Ct. 2237 (2009).

¹²⁰¹ McCarrick 2014 *ACLR* 1615 fn 109.

¹²⁰² Coppola and DeMarco 2012 *New England* 243.

Proving the existence of an enterprise may be more difficult when there is no legal entity involved and the prosecution has to rely on the association-in-fact principle.¹²⁰³ In such a case, courts rely on some form of structure in the enterprise which is separate from the pattern of racketeering activity, even though evidence to prove these elements may overlap.¹²⁰⁴ In *United States v Turkette*¹²⁰⁵ the court held that an enterprise “is proved by an ongoing organisation, formal or informal, and by evidence that the various associates function as a continuing unit”. This guidance offered in *Turkette*¹²⁰⁶ has, however, not led to great legal certainty, because the circuit courts have once again applied this structure-requirement in a different manner, because they were unsure how much structure was required for a group of persons to be factually associated with one another.¹²⁰⁷

The Supreme Court tried to clarify the concept in the more recent decision of *Boyle v United States*¹²⁰⁸ when the court, referring to the *Turkette*-decision stated the following regarding the structure of association-in-fact enterprises:

Such a group need not have a hierarchical structure or a “chain of command”; decisions may be made on an ad hoc basis and by any number of methods – by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies.

Therefore the Supreme Court agreed with the District Court judge that an association-in-fact enterprise is often proved by focusing on what it does, rather than its internal structure.¹²⁰⁹ In their dissenting judgment, Justices Stevens and Breyer disagreed with the majority regarding the structural

¹²⁰³ McCarrick 2014 *ACLR* 1616.

¹²⁰⁴ See *United States v Turkette* 452 US 576 (1981) 583.

¹²⁰⁵ *United States v Turkette* 452 US 576 (1981) 583.

¹²⁰⁶ *United States v Turkette* 452 US 576 (1981).

¹²⁰⁷ McCarrick 2014 *ACLR* 1617.

¹²⁰⁸ *Boyle v United States* 129 S.Ct. 2237 (2009) 2245.

¹²⁰⁹ *Boyle v United States* 129 S.Ct. 2237 (2009) 2247.

requirement of the enterprise, stating that the reference to an association-in-fact enterprise simply means “structured without the aid of legally defined structural forms such as the business corporations”.¹²¹⁰

Referring to the earlier judgment of *Reves v Ernst & Young*,¹²¹¹ Justice Stevens, who delivered the minority judgment, stated that the operation and management test of *Reves* required some form of “business-like organisation”; in other words something that can be “directed”. The majority judges disagreed with this, however, stating that the *Reves* judgment centred on the court’s interpretation of “participation” and not the definition of “enterprise”.¹²¹²

Furthermore, the dissenting minority held that proving a separate enterprise that is ongoing by means of the pattern of racketeering activity would only be possible when the racketeering activity is “so complex that it could not be performed in the absence of structures ... beyond those inherent in performing the predicate acts”. Hence the dissenting judges felt that in most cases proof of the enterprise as a separate organisation will “require different evidence from that used to establish the pattern of predicate acts”.¹²¹³

The dissenting judges could, however, not state what such evidence would entail, but suggested that evidence of “rules, routines, or processes” used to conceal such an association-in fact enterprise’s unlawful activities and operations would be required to establish the separateness of the enterprise.¹²¹⁴ Furthermore, a structure is required, which is proved by any of the following aspects:¹²¹⁵

- (i) a decision-making framework;

¹²¹⁰ *Boyle v United States* 129 S.Ct. 2237 (2009) 2248.

¹²¹¹ *Reves v Ernst & Young* 507 U.S. 170 (1993).

¹²¹² *Boyle v United States* 129 S.Ct. 2237 (2009) 2243-2244 fn 3.

¹²¹³ *Boyle v United States* 129 S.Ct. 2237 (2009) 2249.

¹²¹⁴ *Boyle v United States* 129 S.Ct. 2237 (2009) 2250.

¹²¹⁵ *Boyle v United States* 129 S.Ct. 2237 (2009) 2250.

- (ii) a mechanism for sustaining internal discipline;
- (iii) regular internal meetings;
- (iv) reinvesting the proceeds of crime to ensure growth; or
- (v) providing goods and services to outsiders (as this requires organisational features).

The minority hence felt that failure to require structure within an association-in-fact enterprise would allow juries to “infer the existence of an enterprise in every case involving a pattern of racketeering activity undertaken by two or more associates” and would leave the enterprise requirement meaningless when association-in fact organisations were involved.¹²¹⁶ This situation, they felt, would be inconsistent with the Supreme Court’s “operation and management” test formulated in *Reves v Ernst & Young*.¹²¹⁷

Thus, the judgments of *Reves v Ernst & Young*¹²¹⁸ and *Boyle v United States*¹²¹⁹ seem to be in conflict with each other, with the first requiring an accused to be in a position to influence the direction of the enterprise, and the latter finding that an accused is liable even in an organisation where there is no decision-making structure.¹²²⁰ In fact, Thomas¹²²¹ finds three areas in which these two cases clash with each other:

- (i) the interpretive approaches followed in the two cases (restrictive vs. broad);
- (ii) the earlier *Reves* operation or management test presupposes an internal structure element; and
- (iii) the broader understanding of “enterprise” in *Boyle* conflicts with a stricter understanding of the *Reves* operation or management test.

¹²¹⁶ *Boyle v United States* 129 S.Ct. 2237 (2009) 2250.

¹²¹⁷ *Reves v Ernst & Young* 507 U.S. 170 (1993).

¹²¹⁸ *Reves v Ernst & Young* 507 U.S. 170 (1993).

¹²¹⁹ *Boyle v United States* 129 S.Ct. 2237 (2009).

¹²²⁰ Thomas 2012 *NYULR* 288.

¹²²¹ Thomas 2012 *NYULR* 303.

The Supreme Court found the following in *Boyle*¹²²² regarding longevity of the enterprise:

Section 1962(c) reinforces this conclusion and also shows that an “enterprise” must have some longevity, since the offense proscribed by that provision demands proof that the enterprise had “affairs” of sufficient duration to permit an associate to “participate” in those affairs through “a pattern of racketeering activity.”

Thomas¹²²³ maintains that this finding ignores the court’s previous judgment in *Reves v Ernst & Young*,¹²²⁴ where it stated as follows:

In sum, we hold that “to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs,” § 1962(c), one must participate in the operation or management of the enterprise itself.

Thomas¹²²⁵ argues as follows:

This reasoning by the *Boyle* Court – that § 1962(c) requires that an enterprise have longevity but no greater structure – makes sense only if the operation or management test no longer applies to § 1962(c) or if the test is not as restrictive as it first seemed when *Reves* was handed down. The Court did not state that it was overruling *Reves*; it simply ignored it or conceived of the operation or management test in a less restrictive light than one would expect after reading the opinion and viewing the lower courts’ applications of it.

The question that therefore arises is whether some form of structure is necessary for a person to be measured against the operation or management test. In other words, can the judgments of *Reves* and *Boyle* only be married if an enterprise has a structure which allows someone to “participate in the operation or management of the enterprise”, as Thomas¹²²⁶ maintains? It is submitted that for South Africa’s purposes, this is not the case. The evidence for this is found in one of South Africa’s oldest business forms,¹²²⁷ namely the partnership.

¹²²² *Boyle v United States* 129 S.Ct. 2237 (2009) 2244.

¹²²³ Thomas 2012 *NYULR* 313.

¹²²⁴ *Reves v Ernst & Young* 507 U.S. 170 (1993) 185.

¹²²⁵ Thomas 2012 *NYULR* 313.

¹²²⁶ Thomas 2012 *NYULR* 313.

¹²²⁷ *Cilliers et al Entrepreneurial Law* 11.

The associative element dictates that partners essentially work together on an equal footing, thus not requiring some form of hierarchy.¹²²⁸ Furthermore, the partnership can be formed tacitly, in other words by the conduct of the partners indicating that a partnership has been formed.¹²²⁹ In *Bester v Van Niekerk*,¹²³⁰ the Appellate Division found that a tacit partnership was formed when three *essentialia* are present:

- (i) each partner must contribute something, whether money, labour or skill;
- (ii) the business must be conducted for the benefit of all the partners; and
- (iii) the business must have a profit motive.

Again no formal structure is required. As long as these three requirements are present and there is nothing to indicate that the agreement is *not* a partnership, the court will find that it is in fact a partnership, no matter what the parties choose to call it.¹²³¹ Of course it is a basic requirement for any contract that it must be legal.¹²³² From this brief discussion it is clear that any partner can be involved in directing the affairs of the said partnership without there being a formal structure in place. The same applies to an illegal association-in-fact enterprise.

Hence, in a scenario like the one found in *Boyle v United States*¹²³³ the members of the enterprise were associated factually in a loose network, which had no clear leader. They mostly committed a series of bank thefts, stealing cash from night deposit boxes. The group consisted of core members, with others recruited on an *ad hoc* basis. They would meet beforehand to plan each theft, assign roles and source equipment. Afterwards they would split the profits.

¹²²⁸ Cilliers *et al Entrepreneurial Law* 11.

¹²²⁹ Cilliers *et al Entrepreneurial Law* 11.

¹²³⁰ *Bester v Van Niekerk* 1960 2 SA 779 (A) 783H-784A.

¹²³¹ See *Bester v Van Niekerk* 1960 2 SA 779 (A) 783H.

¹²³² See *Bester v Van Niekerk* 1960 2 SA 779 (A) 784A.

¹²³³ *Boyle v United States* 129 S.Ct. 2237 (2009) 2241.

Clearly, even though no definitive structure was ascertainable, there was direction in the enterprise, because the group successfully committed their crimes for a decade during the 1990s.¹²³⁴ It is submitted that if this were the case in South Africa, where the enterprise had been involved in legal activities, the three *essentialia* for a legally binding partnership would be present. Thus, Thomas'¹²³⁵ argument that an ascertainable structure is required before the operation or management test can be applied, should not trouble South African law courts, especially when it is borne in mind that the purpose of *Reves v Ernst & Young*¹²³⁶ was to determine when an outside party (like an auditor) can be considered to participate in the enterprise's affairs. Thomas¹²³⁷ states the following regarding this:

[L]iability should turn on whether a person "directed the affairs," as understood to mean knowingly made decisions as to an enterprise's affairs or knowingly carried out those affairs. And in the context of outside professionals who commit crimes on behalf of an enterprise, the same test should apply. Despite some courts' tendencies to do so, exonerating professionals simply because they are professionals has no basis in RICO and produces unequal application of the statute.

McCarrick¹²³⁸ agrees that the *Reves* judgement does not mean that professionals cannot be liable in terms of the *RICO Act*, but states that more is required than simply reporting to the *RICO Act* enterprise.

The court in *Reves* specifically did not want to make a ruling on how far the operation or management test "extends down the ladder of operation" because the auditor in the case was not acting under any form of direction.¹²³⁹ Moreover, the definition of "enterprise" includes an individual;¹²⁴⁰ and in *Salinas v United States*¹²⁴¹ the court held that an enterprise "can exist with only one actor to conduct it". It is therefore hard to imagine how an enterprise consisting of an individual would have an

¹²³⁴ *Boyle v United States* 129 S.Ct. 2237 (2009) 2241.

¹²³⁵ Thomas 2012 *NYULR* 313.

¹²³⁶ *Reves v Ernst & Young* 507 U.S. 170 (1993) 186.

¹²³⁷ Thomas 2012 *NYULR* 321.

¹²³⁸ McCarrick 2014 *ACLR* 1624.

¹²³⁹ *Reves v Ernst & Young* 507 U.S. 170 (1993) 184 fn 9.

¹²⁴⁰ Section 1961(4) of the *RICO Act*.

¹²⁴¹ *Salinas v United States* 522 U.S. 52 (1997) 65.

ascertainable structure, even though proving that an individual complied with the operation or management test would still be possible.

Lastly, the enterprise must effect interstate commerce, but this requirement does not seem to impede the courts at all. In *United States v Johnson*,¹²⁴² for instance, the court held that minimal impact on commerce would be sufficient, while in *United States v Juvenile Male*¹²⁴³ the court deemed potential effect on interstate commerce to be sufficient. The state only has to prove that the *RICO Act* activities affected interstate commerce, not that any of the predicate acts had such an effect.¹²⁴⁴

4.4.3 A pattern of racketeering activity

While the *RICO Act* ¹²⁴⁵ defines “racketeering activity” by way of an extensive laundry list of state and federal offences,¹²⁴⁶ a “pattern of racketeering activity”¹²⁴⁷ is defined as two acts of racketeering activity committed within ten years of each other (excluding any period of imprisonment) where at least one of the two acts occurred after the effective date of the *RICO Act*.

There seems to be agreement that when multiple predicate acts are invalidated, a *RICO Act* conviction can still stand as long as at least two predicate acts remain.¹²⁴⁸ As McCarrick,¹²⁴⁹ however, states:

Courts face a more difficult issue when no substantive convictions remain to serve as the two predicate acts required for a *RICO* conviction. Without any indication as to which predicate acts served as the basis for the *RICO* conviction, there is a risk that the jury may have relied on legally insufficient acts.

¹²⁴² *United States v Johnson*, 440 F.3d 832, 841 (6th Cir. 2006).

¹²⁴³ *United States v Juvenile Male*, 118 F3d 1344, 1349 (9th Cir. 1997).

¹²⁴⁴ McCarrick 2014 *ACLR* 1636.

¹²⁴⁵ Section 1961(1) of the *RICO Act*.

¹²⁴⁶ *Bourgeois et al* 2001 *ACLR* 1216-1217.

¹²⁴⁷ Section 1961(5) of the *RICO Act*.

¹²⁴⁸ McCarrick 2014 *ACLR* 1626.

¹²⁴⁹ McCarrick 2014 *ACLR* 1626.

Proving the two predicate acts of racketeering activity is, however, not the greatest challenge of the *RICO Act*, as it is not necessary to prove the involvement of the accused charged with a *RICO Act* offence in any of the two predicate racketeering activity offences.¹²⁵⁰ Even an offence of which the accused was acquitted may be used as a predicate racketeering activity offence when proving a pattern.¹²⁵¹

The challenge lies in proving such a “pattern”, because simply proving the two acts of racketeering activity is not enough to establish a “pattern”.¹²⁵² The aim of the *RICO Act* is not to combat sporadic crime, and therefore a “pattern” for purposes of the *RICO Act* requires continuity and interrelatedness between the predicate offences.¹²⁵³ Hence, the Supreme Court said the following in *H.J., Inc. v Northwestern Bell Telephone Co.*¹²⁵⁴

RICO’s legislative history reveals Congress’ intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and*¹²⁵⁵ that they amount to or pose a threat of continued criminal activity.

In the court’s opinion, “continuity plus relationship” combines to “produce a pattern”.¹²⁵⁶ This pattern requirement is therefore what distinguishes organised crime from traditional crime. The court said the following regarding the establishment of a pattern:¹²⁵⁷

Congress defined Title X’s¹²⁵⁸ pattern requirement solely in terms of the *relationship* of the defendant’s criminal acts one to another: “[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or

¹²⁵⁰ *Bourgeois et al* 2001 *ACLR* 1216.

¹²⁵¹ McCarrick 2014 *ACLR* 1606. See *United States v Farmer* 924 F.2D 647, 649 (7th Cir. 1991).

¹²⁵² *Bourgeois et al* 2001 *ACLR* 1217; McCarrick 2014 *ACLR* 1608.

¹²⁵³ *Bourgeois et al* 2001 *ACLR* 1218; McCarrick 2014 *ACLR* 1608.

¹²⁵⁴ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 239.

¹²⁵⁵ Original emphasis.

¹²⁵⁶ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 239 (original emphasis).

¹²⁵⁷ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 240.

¹²⁵⁸ The court is here referring to Title X of the *Organised Crime Control Act*, 1970, which is the *Dangerous Special Offender Sentencing Act*, 18 U.S.C., and specifically to s 3575(e), which defines a pattern for purposes of increased sentences for dangerous special offenders.

otherwise are interrelated by distinguishing characteristics and are not isolated events.” We have no reason to suppose that Congress had in mind for RICO's pattern of racketeering component any more constrained a notion of the relationships between predicates that would suffice.

The above judgment in *H.J., Inc. v Northwestern Bell Telephone Co.*¹²⁵⁹ was based on the “continuity plus relationship” test originally formulated by the court in *Sedima, S.P.R.L. v Imrex Co., Inc.*,¹²⁶⁰ albeit in a footnote.¹²⁶¹ This case did not centre on the definition of “pattern of racketeering activity”, but on whether a defendant in a civil *RICO Act* action must have been convicted of one of the required predicate racketeering activity-offences before he or she may be sued.¹²⁶² The court in *Sedima, S.P.R.L. v Imrex Co., Inc.* 473 U.S. 479, 105 S. Ct. 3275 (1985) relied on the wording of the Senate Report¹²⁶³ on the *RICO Act*, which states that the *RICO Act* does not target “sporadic activity”, but requires a “factor of continuity plus relationship which combines to produce a pattern”. Therefore the concept of organised criminal activity being evidenced by some form of pattern was identified early on in the attempts to combat organised crime.

While “many have argued for the limitation of the statute by narrowly construing the pattern element to require proof of a link to organised crime”,¹²⁶⁴ the court in *H.J., Inc. v Northwestern Bell Telephone Co.*¹²⁶⁵ refused to limit the *RICO Act* only to organised crime, citing Congress’ wish for a broad interpretation as follows:¹²⁶⁶

The occasion for Congress' action was the perceived need to combat organised crime. But Congress for cogent reasons chose to enact a more

¹²⁵⁹ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 239.

¹²⁶⁰ *Sedima, S.P.R.L. v Imrex Co., Inc.* 473 U.S. 479, 105 S. Ct. 3275 (1985).

¹²⁶¹ See footnote 14 of *Sedima, S.P.R.L. v Imrex Co., Inc.* 473 U.S. 479, 105 S. Ct. 3275 (1985).

¹²⁶² Trabeau 1990 *LLR* 1222. The court ruled that it was not necessary to for a defendant to have been convicted of one of the predicate offences. See *Sedima, S.P.R.L. v Imrex Co., Inc.* 473 U.S. 479, 105 S. Ct. 3275 (1985).

¹²⁶³ Senate Report No 617, 91st Congress, 1st Session, at 158 (1969).

¹²⁶⁴ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 239.

¹²⁶⁵ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 239.

¹²⁶⁶ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 248.

general statute, one which, although it had organised crime as its focus, was not limited in application to organised crime.

The inconsistency with which the lower courts and the Supreme Court have interpreted the *RICO Act* was touched on above,¹²⁶⁷ but the confusion among the courts is particularly evident when it comes to interpreting a “pattern of racketeering activity”, with some courts giving the concept a wide meaning in order to combat all possible forms of organised crime, while others give the term a narrow meaning to prevent the abuse of the *RICO Act*, especially when it pertains to civil claims.¹²⁶⁸ Also, the various circuit courts have applied the “continuity plus relationship test” in different ways, with some still relying on multiple factor tests, where a number of factors like “the number, variety, and time span of the predicate acts, the number of victims, the presence of separate schemes, and the occurrence of distinct injuries”¹²⁶⁹ are considered, leading to further confusion. In one of the judgments of the Eighth Circuit, the court gave a very narrow meaning of the concept when it determined that the *RICO Act* required multiple schemes to show a pattern, while a couple of acts of racketeering activity would only evidence one such scheme.¹²⁷⁰

To resolve this issue, the Supreme Court turned to the *Dangerous Special Offender Sentencing* provisions of the *Organised Crime Control Act*,¹²⁷¹ stating the following regarding the interpretation of the term “continuity plus relationship”:¹²⁷²

The element of relatedness is the easier to define, for we may take guidance from a provision elsewhere in the Organised Crime Control Act of 1970 (OCCA), Pub. L. 91-452, 84 Stat. 922, of which RICO formed Title IX. OCCA included as Title X the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575 *et seq.* (now partially repealed).

¹²⁶⁷ See discussion under para 4.2.

¹²⁶⁸ Trabeau 1990 *LLR* 1224-1225.

¹²⁶⁹ McCarrick 2014 *ACLR* 1611 fn 73. See also McCarrick 2014 *ACLR* 1610-1612 for a discussion on how the various circuit courts apply the continuity plus relationship test.

¹²⁷⁰ See *Superior Oil Co. v Fulmer* 785 F.2d 252 (1986).

¹²⁷¹ *Organised Crime Control Act* of 1970, Public Law No. 91-452, 84 Stat. 948.

¹²⁷² *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 239.

The *Dangerous Special Offender Sentencing* provisions of the *Organised Crime Control Act*¹²⁷³ deals with the heavier sentencing of so-called “dangerous special offenders”, where a prosecutor may submit reasons to the court about why he or she believes the accused to be a dangerous special offender.¹²⁷⁴ Upon finding that the accused is a dangerous special offender, the court shall sentence such accused to imprisonment for an appropriate term not exceeding 25 years and not disproportionate in severity to the maximum term otherwise authorised by law for such an offence.¹²⁷⁵ S 3575(e)¹²⁷⁶ stipulates when an accused will be deemed a “special offender” and includes circumstances where the accused committed the offence as part of a “pattern”,¹²⁷⁷ or committed the offence in the furtherance of a conspiracy with three or more other persons to engage in a “pattern” of criminal conduct.¹²⁷⁸

According to the Act,¹²⁷⁹ such a “pattern” is formed when criminal acts have the same:

- (i) purposes;
- (ii) results;
- (iii) participants;
- (iv) victims; or
- (v) *modus operandi*.

A “pattern” will also be formed if criminal acts are interrelated by distinguishing characteristics and are not isolated events.¹²⁸⁰

Referring to the above provisions, the court in *H.J. Inc. v Northwestern Bell Telephone Co.*¹²⁸¹ held that Congress’ “pattern” requirement in the

¹²⁷³ *Organised Crime Control Act* of 1970, Public Law No. 91-452, 84 Stat. 948.

¹²⁷⁴ Section 3575(a) of the *RICO Act*.

¹²⁷⁵ Section 3575(b) of the *RICO Act*.

¹²⁷⁶ Section 3575(e) of the *RICO Act*.

¹²⁷⁷ Section 3575(e)(2) of the *RICO Act*.

¹²⁷⁸ Section 3575(e)(3) of the *RICO Act*.

¹²⁷⁹ Section 3575(e) of the *RICO Act*.

¹²⁸⁰ Section 3575(e) of the *RICO Act*.

Dangerous Special Offender Sentencing provisions was based solely on the relationship of the accused's criminal acts to one another and therefore no reason existed why "Congress had in mind for RICO's pattern of racketeering component any more constrained a notion of the relationships between predicates" than what was necessary. The court did, however, say that proving this relationship between the criminal acts is not enough and that it must also be proven that the criminal acts "amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity."¹²⁸²

The court also held that the abovementioned "multiple-scheme test" of the circuit courts was not what Congress had in mind and that continuity can be proven in a variety of ways, which makes it "difficult to formulate in the abstract any general test for continuity."¹²⁸³ Continuity however does not rely on proof of past conduct only; the prosecutor can also show that the nature of the criminal conduct poses a threat of future repetition.¹²⁸⁴ The court shied away from clarifying the "relationship and continuity" concepts by stating the following:¹²⁸⁵

The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

Regarding the continuity requirement, the court¹²⁸⁶ held that a "common sense everyday" interpretation of the *RICO Act's* language was sufficient and stated as follows:

¹²⁸¹ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 240.

¹²⁸² *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 240 (emphasis original).

¹²⁸³ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 241.

¹²⁸⁴ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 241.

¹²⁸⁵ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 242.

¹²⁸⁶ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 241.

“Continuity” is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.

Hence, the court said it could not provide an abstract or general test, but felt that each case should be judged on its own merits to determine whether there was continuity.¹²⁸⁷ Trabeau¹²⁸⁸ maintains that this was the perfect opportunity for the court to bring clarity in “an area of the law which has plagued the entire judicial system with confusion and inconsistency”, which is the precise meaning of “pattern of racketeering activity”. Trabeau¹²⁸⁹ states that it has always been clear that “something more” than two mere acts of racketeering activity is needed to establish a pattern, but that it has never been clear “what those additional requirements might be.” Trabeau¹²⁹⁰ laments the failed opportunity, stating that the judgment in *H.J. Inc. v Northwestern Bell Telephone Co.*¹²⁹¹ “does not clearly express what will constitute a pattern under RICO” and “adds nothing more to the understanding of a pattern”.

The difficulty in determining whether continuity exists in organised criminal activity therefore remains, and if the relatedness among the activates is established by means of the abovementioned factors, each case must be judged on its own merits to determine whether continuity exists. The criminal and civil application of the prohibited actives must therefore be analysed. But, before this is done, the statute of limitations as it applies to the *RICO Act* must first be analysed so that the criminal and civil application can be understood against this backdrop.

4.5 Statute of limitations

Litigators face the challenge of a statute of limitations on *RICO Act* proceedings. As the *RICO Act* contains no explicit provisions on limitation,

¹²⁸⁷ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 242.

¹²⁸⁸ Trabeau 1990 LLR 1219.

¹²⁸⁹ Trabeau 1990 LLR 1219.

¹²⁹⁰ Trabeau 1990 LLR 1221.

¹²⁹¹ *H.J. Inc. v Northwestern Bell Telephone Co* 492 U.S. 229 (1989) 239.

¹²⁹² the Supreme Court in *Agency Holding Corp. v Malley-Duff & Associates, Inc.*¹²⁹³ placed limitations on both criminal and civil cases. In the case of criminal prosecution, the court relied on Congress' general rule of limitations, deciding on five years.¹²⁹⁴ The court reasoned that given the lack of uniformity among state statutes of limitations, the court had to "borrow" the rule from federal statutes and apply a uniform standard to criminal law.¹²⁹⁵

For civil matters, the court limited actions to four years, relying in the limitations of the Clayton Act¹²⁹⁶ because the court viewed *RICO Act* actions as being similar to private antitrust actions instituted under the Clayton Act. The court also held that the language of the Clayton Act informed the drafting of section 1964 of the *RICO Act*.¹²⁹⁷

The limitation period is calculated from the date of the last predicate act.¹²⁹⁸ What constitutes the last predicate act however differs according to the section under which the action is instituted. If section 1962(a) is used, the courts have held that the last predicate act is the *investment* of the proceeds of crime, rather than the offence for which the proceeds were obtained.¹²⁹⁹ In the case of section 1962(b) and (c) the limitation period runs from the time of the last predicated offence.¹³⁰⁰ Under the conspiracy offence of section 1962(d), the limitation period is less clear, because the court in *United States v Eisen*,¹³⁰¹ held that the limitation period does not begin "until the objectives of the conspiracy have been either achieved or

¹²⁹² McCarrick 2014 *ACLR* 1627.

¹²⁹³ *Agency Holding Corp. v Malley-Duff & Associates, Inc.* 483 U.S. 143 (1987).

¹²⁹⁴ *Agency Holding Corp. v Malley-Duff & Associates, Inc.* 483 U.S. 143 (1987) 146-149.

¹²⁹⁵ *Agency Holding Corp. v Malley-Duff & Associates, Inc.* 483 U.S. 143 (1987) 146-149.

¹²⁹⁶ *Clayton Act*, 38 Stat.731, 15 U.S.C.

¹²⁹⁷ *Agency Holding Corp. v Malley-Duff & Associates, Inc.* 483 U.S. 143 (1987) 150-154.

¹²⁹⁸ McCarrick 2014 *ACLR* 1627.

¹²⁹⁹ McCarrick 2014 *ACLR* 1628.

¹³⁰⁰ McCarrick 2014 *ACLR* 1628.

¹³⁰¹ *United States v Eisen*, 974 F.2d 246, 264 (2d Cir. 1992). See also McCarrick 2014 *ACLR* 1628.

abandoned". The South African position differs vastly from the American position, as the right to institute a prosecution for any offence¹³⁰² shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.¹³⁰³ The South African courts may, however, turn to the American courts for guidance on how to calculate the prescription period. However, the prosecution of an accused may also be subjected to his or her constitutional right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay.¹³⁰⁴ This implies that even though South African law enforcement structures are not bound by a short prescription period like their American counterparts, they cannot drag their feet in instituting prosecution.

What remains, is to analyse the sanctions imposed by the *RICO Act* in order to understand how these have been applied in America, as they may also guide the South African courts in imposing sentence. The criminal penalties are analysed first.

4.6 Criminal penalties under the RICO Act

According to *Bourgeois et al*¹³⁰⁵ American prosecutors use the *RICO Act* for criminal charges for the following "three commonly cited reasons":

- (i) Congress' wish that the *RICO Act* be interpreted liberally;
- (ii) there is no *mens rea* requirement other than what is required for the relevant predicate acts; and
- (iii) the harsh sanctions which the *RICO Act* provides for and which may be applied over and above the sanction received for the predicate offences.

¹³⁰² Note that there are a number of offences, listed in s 18(a)-(j) of the *Criminal Law Procedure Act 51 of 1977* (hereafter the *CPA*), to which the prescription period of 20 years does not apply. The racketeering and money laundering of the *POCA* are, however, not listed and therefore the prescription period applies to these offences.

¹³⁰³ Section 18 of the *CPA*.

¹³⁰⁴ Section 35(3)(d) of the *Constitution*.

¹³⁰⁵ *Bourgeois et al* 2001 *ACLR* 1214.

Section 1963 (a)¹³⁰⁶ not only provides for imprisonment of up to 25 years¹³⁰⁷ and harsh fines, but also provides for taking the profits out of crime by way of asset forfeiture. Any interest acquired or maintained through the prohibited activities created by section 1962¹³⁰⁸ can be forfeited to the United States.¹³⁰⁹

The wording of the section¹³¹⁰ states that someone who violates the racketeering offences of the *RICO Act* “shall forfeit” such interests and has therefore been interpreted by the courts as mandatory.¹³¹¹ The interests that are forfeitable are defined broadly as any interests acquired or maintained through the prohibited activities under the *RICO Act*,¹³¹² as well as any interests in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which the accused has established, operated, controlled, conducted, or participated in the conduct of by means of the prohibited activities under the *RICO Act*.

The section codifies what is termed the “relation-back doctrine”, whereby the government gains the title to the property at the point when the offence is committed, even though physical possession may remain with the accused or a third party.¹³¹³ The indictment must, however, identify the specific property to be forfeited, after which the jury returns a special verdict on the forfeiture of the property concerned and the court then enters judgment on forfeiture.¹³¹⁴

¹³⁰⁶ Section 1963(a) of the *RICO Act*.

¹³⁰⁷ The section also provides for life imprisonment if the racketeering charge carries life imprisonment. See McCarrick 2014 *ACLR* 1637.

¹³⁰⁸ See para 4.3 above.

¹³⁰⁹ Section 1963(a) of the *RICO Act*.

¹³¹⁰ Section 1963(a) of the *RICO Act*.

¹³¹¹ McCarrick 2014 *ACLR* 1637. See also *United States v Corrado*, 227 F.3d 543 (6th Cir. 2000) 552.

¹³¹² Sections 1963(a)(1) and 1963(a)(2) of the *RICO Act*.

¹³¹³ McCarrick 2014 *ACLR* 1637 fn 268.

¹³¹⁴ Blakey “RICO” 453.

The court shall then authorise the Attorney-General to seize such property under terms and conditions which the court deems to be proper under the circumstances and the Attorney General shall dispose of such property, making provisions for compensation of informers and for the rights of innocent parties.¹³¹⁵ The American courts have also held that defendants are jointly and severally liable for the proceeds of crime obtained under the *RICO Act*'s prohibited activities in cases where there are more than one defendant.¹³¹⁶ As already touched upon, the *RICO Act* has been used much more in civil matters than in criminal matters.¹³¹⁷ The next section will therefore analyse the civil nature of the *RICO Act*.

4.7 Civil remedies under the RICO Act

Coppola and DeMarco¹³¹⁸ state that one of the most fascinating aspects of civil cases instituted under the *RICO Act*, is marked contrast in application between the Supreme Court and the lower courts – the Supreme Court continuously uses an expansive and liberal interpretation of the statute while the lower courts consistently make efforts to narrow down its application.

The civil sanctions for contravening the *RICO Act* are set out in section 1964 of the *RICO Act*¹³¹⁹ and according to Blakey and Gerardi,¹³²⁰ these civil remedies “seek a free market characterised by integrity and freedom” where market players are protected from fraud and violence. The *RICO Act*'s civil sanctions are available to both the Attorney-General as head of the prosecution service, and to private plaintiffs¹³²¹ and the main motive

¹³¹⁵ Section 1963(c) of the *RICO Act*.

¹³¹⁶ McCarrick 2014 *ACLR* 1638.

¹³¹⁷ See para 4.2.

¹³¹⁸ Coppola and DeMarco 2012 *New England* 252.

¹³¹⁹ *Organised Crime Control Act* of 1970, Public Law No. 91-452, 84 Stat. 943-944.

¹³²⁰ Blakey and Gerardi 2014 *Notre Dame* 459.

¹³²¹ McCarrick 2014 *ACLR* 1603.

behind them is to reach an economic rather than a punitive goal.¹³²² The remedies available are:¹³²³

- (i) an order that the defendant divest him- or herself from any interest in an enterprise;
- (ii) the imposition of restrictions in future activities or investment in an enterprise; and
- (iii) an order for dissolution or reorganisation of the enterprise.

Section 1964(c) provides for compensation of threefold the damages sustained by the applicant, as well as the cost of the lawsuit, which includes reasonable attorney's fees. In *Sedima v Imrex*¹³²⁴ the Supreme Court acknowledged "the initial dormancy of this provision and its recent greatly increased utilisation". In this case the Supreme Court rejected the view expressed by the Court of Appeals for the Second Circuit, which held that the *RICO Act* only permitted civil action against "defendants who had been convicted on criminal charges, and only where there had occurred a 'racketeering injury'".¹³²⁵ The Supreme Court held that there was nothing in the the *RICO Act's* language to indicate that a conviction was required before a civil lawsuit could be filed.¹³²⁶ What is required for a *RICO Act* violation is that the plaintiff must allege that there was "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must, of course, allege each of these elements".¹³²⁷

The Supreme Court conceded that the *RICO Act*, and more especially civil cases intsituted under the *RICO Act*, developed into a tool used rather for common cases of fraud than targeting the organised criminal groups as was originally intended.¹³²⁸ In dissenting judgments, both Justices Powell

¹³²² *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 529.

¹³²³ Section 1964 of the *RICO Act*.

¹³²⁴ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 481.

¹³²⁵ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 481.

¹³²⁶ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 488.

¹³²⁷ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 498.

¹³²⁸ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 499.

and Marshall raised concern that the *RICO Act* was being read “in a way that validates uses of the statute that were never intended by Congress”.¹³²⁹ In his dissenting minority judgment, Justice Powell states the following:¹³³⁰

RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organised crime, than against the mobsters who were the clearly intended target of the statute.

Justice Powell then calls for a narrow reading of especially civil provisions of the *RICO Act* in order to reach the goals originally intended by Congress.¹³³¹ Trabeau¹³³² makes the following observation regarding the use of civil provisions of the *RICO Act* in the business environment:

The *Sedima* decision discussed this continuing controversy by noting that since RICO was enacted there has been concern that the statute “provided too easy a weapon against ‘innocent businessmen’ . . . and would be prone to abuse . . .” Despite the fact that private civil actions under RICO are being brought mostly against the everyday businessman instead of the stereotypical gangster, the *Sedima* court did not think that the statute was ambiguous.

Even professionals in the business environment are exposed to the civil provisions of the *RICO Act*, because Hemraj¹³³³ maintains that the *Reves* “operation and management” test did not change the liability of accountants towards third parties in the USA and accountants may still have to pay treble-damages in accordance with the *RICO Act*. The treble damages provisions resulted in private civil *RICO Act* law suits becoming a remedy for many aggrieved plaintiffs in everyday business transactions.¹³³⁴

It may seem like the Supreme Court made an effort to limit¹³³⁵ the civil provisions of the *RICO Act* in *Holmes v Securities Investment Corp* *Holmes v Securities Investor Protection Corp.*¹³³⁶ by applying the legal notion of

¹³²⁹ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 523.

¹³³⁰ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 526.

¹³³¹ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 529.

¹³³² Trabeau 1990 *LLR* 1224.

¹³³³ Hemraj 2002 *JFC* 164.

¹³³⁴ Hemraj 2002 *JFC* 164.

¹³³⁵ Coppola and DeMarco 2012 *New England* 251; Plevin 1992 *AJTA* 447.

¹³³⁶ *Holmes v Securities Investor Protection Corp.* 503 U.S. 258 (1992) 276.

“proximate cause”¹³³⁷ to civil cases instituted under the *RICO Act*. The court based its decisions on the wording “by reason of” used in the *RICO Act*, and maintained that the alleged *RICO Act* conspiracy in that particular case did not cause the claimed injury. Exactly why Plevin¹³³⁸ and Coppola and DeMarco¹³³⁹ view this as an express effort by the Supreme Court to purposely limit the *RICO Act* is unclear and would furthermore be an assumption that the court had this motive in mind. Plevin¹³⁴⁰ for instance remarks as follows regarding the Supreme Court’s interpretation of the *RICO Act* before the *Holmes* decision:

The common thread in these Supreme Court interpretations of RICO has been the Court’s refusal to appropriate restrictions that are not expressly supported by the language of the RICO statute and its recognition that if the statute reaches too far, Congress has the right and responsibility to restrict its application.

It is, however, submitted that the *Holmes* decision is not juxtaposed to the Supreme Court’s approach in the previous cases as outlined by Plevin above, because the so-called “limitation” imposed in the *Holmes* decision was based on trite law applicable to civil litigation, namely the legal notion of proximate cause and not some sort of motive of the court to bring a limitation into civil cases instituted under the *RICO Act*. A better understanding of the limitation is that the *RICO Act* does not operate in a vacuum but in an established legal system and limiting the *RICO Act* in this manner therefore does not indicate a conscious effort by the Supreme Court to curb its application, but rather an application of existing legal principles to the *RICO Act*. In this matter the court held that directly injured parties could sue for treble damages in this case.¹³⁴¹ Plevin¹³⁴² draws the following conclusion from the *Holmes* decision:

¹³³⁷ As per *Holmes v Securities Investor Protection Corp.* 503 U.S. 258 (1992) 268, the notion of proximate cause demands that there must be some form of direct relation between the injury claimed and the alleged injurious conduct.

¹³³⁸ Plevin 1992 AJTA 447.

¹³³⁹ Coppola and DeMarco 2012 *New England* 251.

¹³⁴⁰ Plevin 1992 AJTA 450.

¹³⁴¹ *Holmes v Securities Investor Protection Corp.* 503 U.S. 258 (1992) 273.

¹³⁴² Plevin 1992 AJTA 460.

[C]ivil RICO plaintiffs should take extreme care to expressly state in their complaints how the alleged predicate acts of racketeering caused their injuries. Failure to do so will almost certainly result in dismissal for failure to allege proximate cause.

Very few civil actions brought in terms of the *RICO Act* therefore actually target organised criminal groups and are in fact brought against legitimate businesses in cases of ordinary fraudulent and contractual disputes, wherein plaintiffs use the *RICO Act* to claim treble damages,¹³⁴³ causing Coppola and DeMarco¹³⁴⁴ to remark as follows:

Because of the (Supreme) Court's expanding interpretation of civil RICO, private litigants have been lured by the prospect of treble damages and a federal courtroom, which Justice Marshall fearfully predicted would happen in his *Sedima* dissent. As a result, private litigants have found inventive ways to use RICO's civil action provision ... RICO is rarely used in today's world against the traditional enemy that Congress sought to eradicate by its enactment.

4.8 Summary and conclusion

The above analysis of the history, nature and effect of the *RICO Act* reveals interesting results. While the original intent of Congress was to combat the penetration of legitimate business by organised criminal groups, this goal was not reached in the implementation of the *RICO Act*. Very few criminal prosecutions of the targeted organised criminal groups have been instituted under the *RICO Act*. Furthermore the civil application of the *RICO Act* has been aimed largely at businessmen whose victims had suffered losses due to shady deals, rather than racketeering activities of organised criminal groups. South Africa's *POCA*, which was drafted *inter alia* to introduce measures to combat organised crime,¹³⁴⁵ was therefore based on a piece of American legislation of which the success in combating organised crime in America is debatable. Add to this the influence which the American concepts of combating organised crime had on the United Nations conventions, and the potential success of the *POCA* may be questionable. To this end, the next chapter analyses the South

¹³⁴³ *Sedima, S.P.R.L. v Imrex Co.* 473 U.S. 479 (1985) 529-530.

¹³⁴⁴ Coppola and DeMarco 2012 *New England* 253-254.

¹³⁴⁵ See the preamble to the *POCA*.

African history, legislative framework and structures in combating organised crime.

Chapter 5

The legislative framework for combating organised crime in South Africa

5.1 Introduction

The rise of organised crime introduced a paradigm shift in criminal justice.¹³⁴⁶ Instead of targeting the criminal's personal conduct, the combating of organised crime targets the organisational features of the enterprise as well as the proceeds of unlawful activities.¹³⁴⁷ Hence, harsh measures are introduced to combat this phenomenon and are justified by arguments that they are necessary to keep citizens safe.¹³⁴⁸ The prevailing view is that a strong legal and regulatory framework is essential to the combating of organised crime.¹³⁴⁹ While many law enforcement officials classify academic research on crime as theoretical or abstract,¹³⁵⁰ Williams and Godson¹³⁵¹ argue that scientific research can add value to the practical combating of crime as well. The thinking is that such scientific research can add value to the formulation of policies and development of strategies to combat crime and in this context, organised crime.

The Naples Conference¹³⁵² of 1994 also identified thorough data analysis and scientific research as crucial to the effective combating of organised crime through the drafting of appropriate laws and the subsequent practical implementation of such laws.¹³⁵³ Moreover, organised criminal groups exploit any areas left uncontrolled by a weak government,¹³⁵⁴ which inevitably leads to the infringement of the basic human rights of law-abiding citizens; especially the right to freedom of movement, because the

¹³⁴⁶ Kruger *Organised Crime* 1.

¹³⁴⁷ Kruger *Organised Crime* 1.

¹³⁴⁸ Symeonidou-Kastanidou 2007 *EJC* 92.

¹³⁴⁹ Williams and Godson 2002 *CLSC* 317.

¹³⁵⁰ Williams and Godson 2002 *CLSC* 312.

¹³⁵¹ Williams and Godson 2002 *CLSC* 312.

¹³⁵² See para 3.1 above.

¹³⁵³ United Nations General Assembly 1994 <https://www.imolin.org/imolin/naples.html>.

¹³⁵⁴ Williams and Godson 2002 *CLSC* 317.

result is often that law-abiding citizens have to barricade themselves for fear of violence.¹³⁵⁵ This is evidenced by the preamble of the *POCA*, which states that the act is founded upon the Bill of Rights in the *Constitution*.

The same holds true for South Africa. The effective combating of organised crime is dependent on research, the population of databases and undercover operations.¹³⁵⁶ Furthermore, the Khampepe Commission¹³⁵⁷ found that South Africa needs “to have in place a coherent effective strategy in the fight against organised crime”.¹³⁵⁸ While the South African law enforcement structures are discussed in the next chapter, this chapter focuses on the legislative framework in place to combat organised crime in South Africa by exploring the various pieces a legislation that contribute to combating the phenomenon. First, a historical snapshot is given to provide the backdrop against which the legislative measures are analysed.

5.2 Historical overview of legislative measures

Before analysing the various legislative measures currently in place to combat organised crime in South Africa, it is prudent to mention the so-called “Grim Reaper Conference”, which was a conference hosted in 1998 by the University of Pretoria’s Institute for Strategic Studies in an attempt to address the failure to combat organised crime effectively.¹³⁵⁹ The Grim Reaper Conference furthermore highlighted the implications of organised crime for South and Southern Africa.

The value of mentioning the Grim Reaper Conference lies in the optimism and confidence, shown shortly after the first democratic elections, in the new South Africa’s ability to combat organised crime through effective

¹³⁵⁵ Cowling 1998 SACJ 354.

¹³⁵⁶ Flynn *The Use of Informers* 23.

¹³⁵⁷ As discussed in more detail in para 6.2.4.3 below, the Khampepe Commission was appointed as a commission of inquiry into the mandate and location of the Scorpions.

¹³⁵⁸ Khampepe *Final Report* 100.

¹³⁵⁹ The conference papers were published in Hough and Du Plessis *Organised Crime*.

legislative measures and law enforcement structures. The purpose of this section is therefore not to document a comprehensive historical overview of legislative developments, but rather to provide a historical “snapshot” of the position shortly after the fall of apartheid and the first democratic elections in South Africa, when embargoes were lifted and South Africa rejoined the global community.¹³⁶⁰

In his welcoming address at the Grim Reaper Conference, the then Deputy National Commissioner of the SAPS, Commissioner Zolisa Lavis, warned that organised criminal groups were becoming increasingly more sophisticated and internationally orientated in their activities,¹³⁶¹ leading to a situation where the traditional approaches to combating crime were “meaningless”.¹³⁶² South Africa was also identified as one of the primary places for breeding organised crime, with only Russia being better suited at the time.¹³⁶³

Optimism, however, came from the *POCA* and the *FICA*,¹³⁶⁴ which were in Bill format as proposed pieces of legislation, and it was hoped that both these Bills would significantly enhance the combating of organised crime in South Africa.¹³⁶⁵ The then-National Head of the SAPS Interdepartmental Intelligence, Assistant Commissioner George Govender, stated that South Africa was one of a few countries which still lacked this type of legislation, maintaining that the *RICO Act* ¹³⁶⁶ had been adopted years before as “a purposeful effort in the US to effectively address organised crime”.¹³⁶⁷

At the time of the Grim Reaper Conference, the legislative framework for prosecuting criminals had developed from prosecuting only the perpetrator

¹³⁶⁰ The position of organised crime in South Africa under the previous apartheid regime is discussed in chapter 3.

¹³⁶¹ Hough and Du Plessis *Organised Crime* 2.

¹³⁶² Hough and Du Plessis *Organised Crime* 52.

¹³⁶³ Hough and Du Plessis *Organised Crime* 50.

¹³⁶⁴ Both the *POCA* and the *FICA* are discussed below.

¹³⁶⁵ Hough and Du Plessis *Organised Crime* 60.

¹³⁶⁶ The American *RICO Act*, which is discussed in detail in the previous chapter.

¹³⁶⁷ Hough and Du Plessis *Organised Crime* 59.

of the relevant crime to concepts such as “attempt, conspiracy, incitement, common purpose, vicarious liability and others”.¹³⁶⁸ Also, concepts such as indemnity for accomplices who would testify against the “main” perpetrator had been introduced.¹³⁶⁹ Because the traditional approaches to the combating of crime had failed to combat *organised* crime, much was also made at the conference¹³⁷⁰ of newly-adopted legislative measures to regulate undercover operations and the use of informers,¹³⁷¹ which remain valuable tools in the combating of organised crime.¹³⁷²

To accommodate such operations, amendments were made to the *CPA* and while the whole of the *CPA* is aimed at the prosecution of crime, certain provisions are therefore of special importance to the combating of organised crime in South Africa and are explored next before the other legislative measures are dealt with.

5.3 Capita selecta of the CPA

Section 252A of the *CPA* came into effect on 29 November 1996¹³⁷³ to regulate the use of traps and undercover operations and provide authority for the admissibility of evidence obtained in this manner. In his address at the Grim Reaper Conference, Advocate John Welsch, the then Deputy Attorney-General: Transvaal,¹³⁷⁴ maintained that due to the previous lack of a clear definition and understanding of organised crime, prosecutors were led by the facts of each case and would only deal with a case as organised crime once it became apparent that a number of persons had been involved “in committing serious crime in and organised manner”.¹³⁷⁵ This meant that the Attorney-General¹³⁷⁶ would then get involved in the

¹³⁶⁸ Hough and Du Plessis *Organised Crime* 66.

¹³⁶⁹ Section 204 of the *CPA*, discussed below. See also Kruger *Organised Crime* 2.

¹³⁷⁰ See Hough and Du Plessis *Organised Crime* 65-78.

¹³⁷¹ Section 252A of the *CPA*, discussed below. See also Kruger *Organised Crime* 2.

¹³⁷² Albanese *Organised Crime* 271, 274.

¹³⁷³ Section 1 of the *Criminal Procedure Second Amendment Act* 85 of 1996.

¹³⁷⁴ Later the Deputy Director of Public Prosecutions: Transvaal.

¹³⁷⁵ Hough and Du Plessis *Organised Crime* 68.

¹³⁷⁶ Now referred to as the Director of Public Prosecutions (DPP).

investigation phase, which also required special investigative techniques into organised crime.¹³⁷⁷

Welsch therefore saw the new provision¹³⁷⁸ as a first step towards the acknowledgement of multi-disciplinary investigations, an effective method in the combating of organised crime,¹³⁷⁹ stating as follows:¹³⁸⁰

Despite a lack of authority in any law, experience has taught that one way of effectively addressing organised crime is by way of a joint task team consisting of members of the police service, a prosecutor and, where necessary, an accountant or other forensic expert.

The provision was seen as a “statutory sanctioning” of such an approach by the CPA,¹³⁸¹ because of the involvement of prosecutors in the investigation phase by means of the prior approval from the DPP¹³⁸² for an undercover operation.¹³⁸³ Careful scrutiny of the provision, however, reveals that the consent of a DPP¹³⁸⁴ is not required by the CPA,¹³⁸⁵ but lack of such consent is simply a factor which is considered to determine whether an undercover operation was unfair towards the accused.¹³⁸⁶

Undercover operations are vital to the combating of organised crime, mainly because the infiltration of organised criminal groups by police agents and information obtained through informants,¹³⁸⁷ or through physical surveillance,¹³⁸⁸ or through the interception of communications,¹³⁸⁹ provide the necessary intelligence to gather sufficient

¹³⁷⁷ Hough and Du Plessis *Organised Crime* 68.

¹³⁷⁸ Section 252A of the CPA.

¹³⁷⁹ See for instance the *Troika*-methodology implemented by the Scorpions, discussed under para 6.2.4.1 below.

¹³⁸⁰ See Hough and Du Plessis *Organised Crime* 68.

¹³⁸¹ Hough and Du Plessis *Organised Crime* 68.

¹³⁸² Referred to as an Attorney-General (AG) at the time.

¹³⁸³ Section 252A(2)(a) of the CPA.

¹³⁸⁴ As the former Attorneys-General are now called.

¹³⁸⁵ Section 252A of the CPA.

¹³⁸⁶ *S v Kotzé* 2010 1 SACR 100 (SCA) 114A-B; *S v Dube* 2000 1 SACR 53 (N) 70H-I. See also *S v Makhanya* 2002 3 SA 201 (N) 205A-C.

¹³⁸⁷ Informers are discussed in the next section.

¹³⁸⁸ Surveillance is discussed in para 5.7 below.

¹³⁸⁹ The interception of communication is discussed in para 5.7 below.

evidence for successful prosecution.¹³⁹⁰ These investigation methods are necessitated by the inherent secrecy of organised crime and also because many organised crime offences are so-called “victimless crimes”, meaning there are no complainants to alert the police to the commission of the said offences for investigation.¹³⁹¹ Informers, traps and undercover agents therefore remain valuable in the prevention, detection, investigation and prosecution of crimes committed in secret.¹³⁹² The position of informers is discussed first while the problematic nature of undercover operations by means of traps and/or agents is analysed thereafter.

5.3.1 Informers

While informers are often labelled as criminals working with the police, they may in many instances be law-abiding citizens wishing to curb crime, simply because the informer-system “involves the community in the prevention and combating of crime”.¹³⁹³ The value of informers lies in their knowledge of how organised criminal groups operate, allowing police to effectively strategize and plan the combating of organised criminal activities.¹³⁹⁴ Such information also saves time and costs, because the same information supplied by informers may take months to uncover by means of undercover operations.¹³⁹⁵

Information supplied by informers is usually detrimental to the relevant offenders and informers therefore need to be protected from the enmity of those against whom they inform; in extreme cases by way of a witness protection programme.¹³⁹⁶ Such protection of informers also accounts for so-called “informer privilege”, whereby informers may not be compelled to

¹³⁹⁰ Flynn *The Use of Informers* 29; Hough and Du Plessis *Organised Crime* 69.

¹³⁹¹ Bronstein 1997 SALJ 112; Flynn *The Use of Informers* 29; Van der Mescht 1995 SACJ 274.

¹³⁹² Section 252A(1) of the CPA.

¹³⁹³ Albanese *Organised Crime* 271; Flynn *The Use of Informers* 59.

¹³⁹⁴ Flynn *The Use of Informers* 67-68.

¹³⁹⁵ Albanese *Organised Crime* 271.

¹³⁹⁶ See in this regard *R v Van Schalkwyk* 1938 AD 543 and the Office for Witness Protection at NPA 2017 <https://www.npa.gov.za/node/15>.

testify.¹³⁹⁷ In *Van der Berg*,¹³⁹⁸ for instance, an informer – simply referred to as “Bron Nr 13103”¹³⁹⁹ – did not testify in the proceedings and while the court appreciated that there were “cogent policy reasons” for the informer not testifying, it held that it could not place much reliance on an affidavit which was submitted by an unnamed informer.¹⁴⁰⁰

*Boshoff*¹⁴⁰¹ serves to illustrate this problematic nature of the informer system when a senior police officer with 24 years’ experience abused the system of paying informers for information. His modus operandi was as follows:¹⁴⁰²

[He] registered a person as an informer, stole firearms from the SAPS and had them planted in or near the homes of innocent people. He then claimed to have received information from the informer as to the whereabouts of the firearms. Once the firearms had been recovered, Boshoff made a claim for a reward to be paid to the informer. He would, however, require the informer to pay him the lion's share of the reward.

Despite such possibilities of abuse, informers remain important sources of information, especially on organised criminal groups,¹⁴⁰³ as in *Els v Minister of Safety and Security*.¹⁴⁰⁴

The informer system is one of the cornerstones of the battle against organised crime, and when the identity of one informer is made known, other informers, or would-be informers, will not engage upon an exercise in legal niceties in order to distinguish their positions from that of the informer whose identity has been revealed; they will desist from 'informing' or reconsider their positions as informers, not only to avoid retaliatory action, but also to avoid civil actions being instituted against them.

Importantly, the court held that due to public interest, informer privilege has not been watered down by the constitutional order but the courts have simply been vested with a wider discretion to enforce disclosure when

¹³⁹⁷ Flynn *The Use of Informers* 62.

¹³⁹⁸ *S v Van der Berg* 2009 1 SACR 661 (C) 665C.

¹³⁹⁹ Which translates to: Source Number 13103 (own translation).

¹⁴⁰⁰ *S v Van der Berg* 2009 1 SACR 661 (C) 666B-D.

¹⁴⁰¹ *S v Boshoff* 2014 1 SACR 422 (ECG).

¹⁴⁰² *S v Boshoff* 2014 1 SACR 422 (ECG) 422J-423A.

¹⁴⁰³ Flynn *The Use of Informers* 59.

¹⁴⁰⁴ *Els v Minister of Safety and Security* 1998 2 SACR 93 (N) 101A-B.

such privilege is abused.¹⁴⁰⁵ This wider discretion ties in with previous criticism on the ethics of the informer system, because informers are paid for information¹⁴⁰⁶ and given large rewards in certain instances.¹⁴⁰⁷

Informer-privilege is the main difference between informers and undercover agents,¹⁴⁰⁸ because undercover agents do not enjoy such privileges.¹⁴⁰⁹ While informers who grow in their roles may eventually be used as undercover agents,¹⁴¹⁰ often there is more to be lost than gained when they become undercover agents.¹⁴¹¹ Mainly, under such conditions, they may lose the privilege they enjoyed as informers. Also, not only are undercover operations much more costly¹⁴¹² than the use of informers, they also carry many more problematic issues than the informer system. These issues are explored next.

5.3.2 Undercover operations

As already mentioned, undercover operations are more costly than the use of informers because of the time required for an undercover operative to infiltrate a criminal group and gain their trust, as well as the measures that have to be taken to ensure that his or her true identity is not discovered.¹⁴¹³ The physical and psychological effects of such operations on the undercover operative are also often underestimated and not dealt

¹⁴⁰⁵ *Els v Minister of Safety and Security* 1998 2 SACR 93 (N) 101C.

¹⁴⁰⁶ Flynn *The Use of Informers* 59.

¹⁴⁰⁷ Section 3(1) of the *Finance and Financial Adjustments Acts Consolidation Act* 11 of 1977, for instance, determines that informers upon whose information any precious stone or precious metal, or any money paid in respect of the illicit purchase of any precious stone or precious metal, is seized, may be rewarded from the revenues accruing to the State from the sale of such precious stone or metal, or from the seizure of such money, a monetary reward not exceeding one-third of the amount realized by such sale or of such money seized.

¹⁴⁰⁸ Under s 202 of the CPA. See also Albanese *Organised Crime* 271.

¹⁴⁰⁹ Flynn *The Use of Informers* 62.

¹⁴¹⁰ Flynn *The Use of Informers* 72.

¹⁴¹¹ See Flynn *The Use of Informers* 72-75 for research and conclusions in this issue.

¹⁴¹² Albanese *Organised Crime* 274.

¹⁴¹³ Albanese *Organised Crime* 274.

with satisfactorily.¹⁴¹⁴ The upside is that such operations force organised criminal groups to “invest more time and energy into screening potential accomplices”, thus severely disrupting their expansion.¹⁴¹⁵

Because traditional police methods are insufficient to combat organised crime, one of the “unconventional” tools available to police is the use of traps and undercover agents.¹⁴¹⁶ Flynn¹⁴¹⁷ defines an undercover operation as:

[A] covert investigative method to expose, detect and investigate crimes committed in secrecy by means of agents who ostensibly participate in the identified crime(s) to gather evidence against identified suspects.

Undercover operations are ongoing projects aimed at gathering intelligence and obtaining evidence, while traps are short-term transaction-based operations aimed at arresting the suspect “red-handed”.¹⁴¹⁸ A trap can therefore be defined as “a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein”.¹⁴¹⁹ Hence, while all traps can be classified as undercover operations, not all undercover operations are necessarily traps. In some instances, undercover operations may simply be aimed at generating intelligence so that evidence can be gathered.¹⁴²⁰ Infringement of rights is, however, still possible in such cases, for instance

¹⁴¹⁴ See for instance Albanese *Organised Crime* 275-276 for a discussion of the effects on former FBI agent, Joseph Pistone, who went undercover as Donnie Brasco for six years, infiltrating the Bonanno organised crime group in New York. In Garcia *Making Jack Falcone* 193-198 and 239-252, Joaquin Garcia also explores his own physical and psychological issues after retiring as an undercover FBI agent who, under the alias “Jack Falcone”, infiltrated the Gambino organised crime group in New York.

¹⁴¹⁵ Von Lampe *Organised Crime* 368.

¹⁴¹⁶ Bronstein 1997 *SALJ* 121; Flynn *The Use of Informers* 26.

¹⁴¹⁷ Flynn *The Use of Informers* 27.

¹⁴¹⁸ Flynn *The Use of Informers* 27-28.

¹⁴¹⁹ See *S v Malinga* 1963 1 SA 692 (A) 693F-G, where Holmes JA cites with approval the position of a trap postulated by Gardiner and Lansdown *South African Criminal Law and Procedure* 659-660 as follows: “A person who, for the purpose of attempting to secure the conviction of another for a particular offence, proposes to the latter, and with him takes part in, a transaction which constitutes that offence is not an accomplice”.

¹⁴²⁰ *S v Kotzé* 2010 1 SACR 100 (SCA) 112D-F.

where phones are tapped illegally or listening devices installed unconstitutionally.¹⁴²¹

Of special importance for purposes of this study, is what Bronstein¹⁴²² terms “targeted trapping”, which is of much more use in the combating of organised crime than so-called “untargeted trapping”. Untargeted traps are aimed at the public at large with the view of identifying those who break the law.¹⁴²³ Thus in effect the police cast a net to see what (or who) they catch. Targeted traps, on the other hand, are aimed at a specific person suspected of committing a crime.¹⁴²⁴ Such traps are needed to combat so-called “victimless crimes”, like organised crime, where there is no complainant to lay a charge with the police.¹⁴²⁵ Such an “impenetrable, invisible network of crime” is nevertheless harmful to society and undercover operations are essential in combating it.¹⁴²⁶ The use of traps and undercover operations is, however, a very contentious legal issue.

5.3.2.1 Criticism against the use of traps and undercover operations

The greatest criticism against traps relates to unfairness and the perceived immunity from prosecution of the person acting as a trap.¹⁴²⁷ Also, one of the dangers with traps, and more especially in untargeted traps, is that they can in some instances create crime where the temptation is too great for the targeted person to resist. As Bronstein¹⁴²⁸ states, “It is not the role of the police to test the virtue of random individuals.” Hence, in *R v Clever*; *R v Iso*¹⁴²⁹ the court said as follows:

¹⁴²¹ *S v Kotzé* 2010 1 SACR 100 (SCA) 112D-F and s 14 read with s 36 of the *Constitution*.

¹⁴²² Bronstein 1997 SALJ 121.

¹⁴²³ Bronstein 1997 SALJ 121.

¹⁴²⁴ Bronstein 1997 SALJ 121.

¹⁴²⁵ Bronstein 1997 SALJ 112.

¹⁴²⁶ Bronstein 1997 SALJ 112.

¹⁴²⁷ Louw 1995 SCJa 287, Stegmann 1991 SALJ 701.

¹⁴²⁸ Bronstein 1997 SALJ 120.

¹⁴²⁹ *R v Clever*; *R v Iso* 1967 4 SA 256 (RA) 257F-G.

To spread a net to catch the just and the unjust alike, can only have the effect of destroying public confidence and of bringing disaster upon persons who, but for the existence of the trap, might never have transgressed.

Hence, before the legislature intervened to regulate the use of traps and undercover operations,¹⁴³⁰ much criticism was uttered against these investigative tools. Two factors also contributed to the problematic nature of traps and undercover operations in South Africa specifically. Firstly, because most cases prior to the legislative amendment led to guilty pleas, the evidence of the persons acting as traps was never tested before a court of law.¹⁴³¹ Secondly, because entrapment had never been accepted as a defence like in America, evidence obtained by means of unfair traps was never excluded in terms of the exclusionary rule.¹⁴³²

The concerns regarding the use of traps and undercover agents were summed up by the Supreme Court of Appeal as follows:¹⁴³³

[B]ecause it can be seen as generating the crimes under investigation, it is regarded as controversial as a matter of principle and, even in circumstances where resort to its use may be thought to be acceptable, there is room for concern because the methods adopted by the trap or agent involve deception and can readily be abused. The underlying fear is that people who would not otherwise be guilty of criminal behaviour may be induced by the conduct of the trap or undercover agent to commit crimes and their reluctance to commit crime may be overborne by the conduct and inducements offered by the trap or undercover agent.

Justice Stegmann,¹⁴³⁴ one of the most vocal critics on the use of traps, feels that traps had “broadened into a field of encouraging, and even manufacturing, crime in order to punish it”. In *Ohlenschlager*¹⁴³⁵ Stegmann J considered the historical development of traps – which originated in the combating of gold and diamond smuggling, but spread to the combating of other crimes once its usefulness became evident¹⁴³⁶ – and concluded that the history of traps had led to a number of court decisions and *dicta* which

¹⁴³⁰ By means of s 252A of the CPA.

¹⁴³¹ See Lambrechts 1996 *De Rebus* 761-762 where the author laments this state of affairs.

¹⁴³² Bronstein 1997 *SALJ* 113; Louw 1995 *SCJa* 288.

¹⁴³³ *S v Kotzé* 2010 1 *SACR* 100 (SCA) 104H-I.

¹⁴³⁴ Stegmann 1991 *SALJ* 689.

¹⁴³⁵ *S v Ohlenschlager* 1992 1 *SACR* 695 (T).

¹⁴³⁶ Bronstein 1997 *SALJ* 112; Stegmann 1991 *SALJ* 697.

cannot be reconciled with one another or the existing legal principles of South African law.¹⁴³⁷

One of the issues identified by Stegmann J is that self-appointed undercover operatives often set traps for suspected criminals in order to obtain the rewards paid by the police if the trap is successful.¹⁴³⁸ This has led to comical situations where each of the parties in illegal transactions were traps trying to collect evidence against the other.¹⁴³⁹ Furthermore, some commentators hold the view that South Africa holds the ironic position where the person acting as the trap has over time gained a “foolproof defence to any criminal charge arising from the incident”, as opposed to other jurisdictions where the subject of the trap can raise a valid defence of entrapment.¹⁴⁴⁰

Stegmann J,¹⁴⁴¹ therefore maintains that the fundamental question regarding traps has never before been dealt with satisfactorily, which is whether a trap is above the law and can, as in the case of self-defence, successfully raise trapping as a ground of justification to exclude wrongfulness. The judge also raises the following questions regarding trapping:

- (i) Could anyone appoint himself as a trap?
- (ii) Does the law acknowledge a situation where a trap’s intentional participation in, or promotion of, a crime is free of unlawfulness?

¹⁴³⁷ *S v Ohlenschlager* 1992 (1) SACR 695 (T) 707H.

¹⁴³⁸ *S v Ohlenschlager* 1992 (1) SACR 695 (T) 707C.

¹⁴³⁹ See *R v Salmonson* 1960 4 SA 748 (T). The court held in para 749A that no contract of sale existed because it was a simulated transaction where neither party had intended to either buy or sell the illicit product. Furthermore, the practice of self-appointed traps departs from Gardiner and Lansdown *South African Criminal Law and Procedure* 660, who submit that where civilians act as traps, “it is most desirable that their operation should, as far as is found practicable, be conducted within the sight of responsible officials”. Where this is not possible, Gardiner and Lansdown *South African Criminal Law and Procedure* 660 suggest stringent measures be put in place to “ensure proof of facts”.

¹⁴⁴⁰ Bronstein 1997 SALJ 114 fn 37. See also Louw 1996 SCJb 189.

¹⁴⁴¹ *S v Ohlenschlager* 1992 1 SACR 695 (T) 712F-I.

- (iii) If it exists, what is the legal principle under which a trap (whether as an agent or subject of the government) may commit fraud – by misrepresenting to another that he is entering into an illegal transaction and pretending that he is doing so, while he in fact does not intend entering such transaction at all – without fear of prosecution for such fraud?

These and other issues are dealt with in the following discussion on traps and undercover operations. As a starting point, it is submitted that objections against the use of traps and undercover operations can be mitigated if proper guidelines are available to regulate such operations. This is in line with *Nortjé*,¹⁴⁴² where Foxcroft J stated:

Where the police act improperly, a balance should be struck between protection of the community and the protection of the individual. This balance is struck by the exclusion of evidence which brings the administration of justice into disrepute.

5.3.2.2 The need for traps and undercover operations

The use of traps and undercover operations is essential in the combating of organised crime, and it is pertinent that the trap must be able to perform his or her part in combating organised crime without fear of prosecution.¹⁴⁴³ Because traditional policing practices have failed in the combating of organised crime, intelligence-driven strategies, such as undercover operations, are necessary to “reduce the growth and development of organised crime”,¹⁴⁴⁴ while informers play an important role in intelligence gathering.¹⁴⁴⁵

¹⁴⁴² *S v Nortjé* 1996 2 SA SACR 308 (C) 320A.

¹⁴⁴³ *Van der Mescht* 1995 SACJ 278.

¹⁴⁴⁴ *Flynn The Use of Informers* 29.

¹⁴⁴⁵ *Flynn The Use of Informers* 76-77.

Therefore, despite the severe criticism levelled against the use of traps and undercover operations, it is still viewed as a necessary evil.¹⁴⁴⁶

Hannah J puts it as follows in *De Bruyn*:¹⁴⁴⁷

Police traps and informers have been part of the armoury of police forces throughout the world for a great many years in their battle against crime. The Courts have frequently expressed their distaste for such methods and have been at pains to emphasise the need to treat evidence obtained by such means with all due caution. But the Courts, certainly in South Africa and the United Kingdom, have concluded that the use of traps and informers is a justifiable and necessary means of detecting crime.

It is therefore clear that the State needs a police service that can make use of traps and undercover operations, especially in the combating of organised crime, as long as the conduct of the trap or undercover operative remains reasonable.¹⁴⁴⁸ As is seen in the rest of this discussion, the issue of reasonableness is the main motivation behind the legislative intervention.¹⁴⁴⁹

5.3.2.3 Legislative intervention

Because of the contentious nature of the use of traps and the juxtaposed need for such operations, many critics have called for the legislature to urgently intervene and regulate the use of traps and undercover operations and also to clarify the position of undercover operatives.¹⁴⁵⁰ Hence, section 252A was inserted into the *CPA* by the *Criminal Procedure Second Amendment Act* 85 of 1996 in order to regulate the setting of traps and the engaging in undercover operations, and to determine the circumstances under which evidence so obtained will be admissible as evidence.¹⁴⁵¹ Many of the common law factors developed and applied to

¹⁴⁴⁶ Louw 1996 *SCJb* 188.

¹⁴⁴⁷ *S v De Bruyn* 1992 2 *SACR* 574 (Nm) 579E-F.

¹⁴⁴⁸ Van der Mescht 1995 *SACJ* 279.

¹⁴⁴⁹ Section 252A of the *CPA*.

¹⁴⁵⁰ See Van der Mescht 1995 *SACJ* 285.

¹⁴⁵¹ Long title of the *Criminal Procedure Second Amendment Act* 85 of 1996.

traps and undercover operations by the courts in the past, were encoded in the legislation.¹⁴⁵²

The legislative amendment is in line with the international trend to limit traps.¹⁴⁵³ The wording of the section indicates that traps are fair if they do not go beyond providing an opportunity to commit an offence.¹⁴⁵⁴ Controversially, however, even where traps go further than merely presenting an opportunity to commit crime, the court is given a discretion to admit such evidence subject to thirteen factors which the court may consider.¹⁴⁵⁵

Shortly after its enactment, both Bronstein¹⁴⁵⁶ and Louw¹⁴⁵⁷ maintained that the provision would not survive a constitutional challenge as it infringed on the right to a fair trial¹⁴⁵⁸ and is not aligned with the exclusionary rule of the *Constitution*.¹⁴⁵⁹ Their issue was with the manner in which the section¹⁴⁶⁰ is drafted, which differs in many respects from the wording of the exclusionary rule¹⁴⁶¹. Where the exclusionary rule is written in the imperative, the provision on traps and undercover operations is drafted in a discretionary manner.¹⁴⁶² The issue was however clarified by the court in *Odugo*¹⁴⁶³ as follows:

Section 252A(1) should be interpreted and applied on the basis that s 35(5) of the Constitution would apply, irrespective of the apparent mandatory

¹⁴⁵² Section 252A of the CPA. See also Bronstein 1997 SALJ 123.

¹⁴⁵³ See Hough and Du Plessis *Organised Crime* 72-75 for a discussion of the situation in various jurisdictions.

¹⁴⁵⁴ Section 252A(1) of the CPA.

¹⁴⁵⁵ Section 252A(1) and (2) of the CPA.

¹⁴⁵⁶ Bronstein 1997 SALJ 131.

¹⁴⁵⁷ Louw 1996 SCJb 192.

¹⁴⁵⁸ Guaranteed by s 35(3) of *Constitution*.

¹⁴⁵⁹ Section 35(5) of the *Constitution* states that evidence obtained in a manner that violates any right in the Bill of Rights *must* be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice (emphasis added). Note that the wording is in the imperative and does not allow the court a discretion.

¹⁴⁶⁰ Specifically s 252A(3) of the CPA.

¹⁴⁶¹ Section 35(5) of the *Constitution*.

¹⁴⁶² Section 35(5) of the *Constitution* states a court *must* exclude, whereas s 252A(3) of the CPA states a court *may* admit evidence.

¹⁴⁶³ *S v Odugo* 2001 1 SACR 560 (W) 568A-B.

admission of the evidence. In practical terms, this would entail that s 252A(1) be applied on the basis that the court retains the right to exclude evidence that was obtained in violation of s 35(5) of the Constitution. The issue of the constitutionality of s 252A(1) does not arise once it is accepted, as a constitutional imperative, that courts are duty bound to give effect to and protect the individual rights as enshrined in the Bill of Rights.

Also, in *Singh*¹⁴⁶⁴ the court stated that undercover operations are “acceptable in our constitutional democracy” and that the exclusionary rule¹⁴⁶⁵ does not provide for automatic exclusion of unconstitutionally obtained evidence, but exclusion was a value judgment in instances where allowing the evidence would render the trial unfair or be detrimental to the administration of justice. The value judgement in this instance is also based on several listed factors.¹⁴⁶⁶

A constitutional issue raised successfully in *Kotzé*¹⁴⁶⁷ was the provision that the burden of proof to show that evidence was admissible rested on the prosecution on a *balance of probabilities*.¹⁴⁶⁸ The court held that the onus must remain beyond reasonable doubt, as the lighter burden of proof would infringe on the constitutional right to presumption of innocence and the right to silence.¹⁴⁶⁹ It is submitted that the use of undercover operations in the combating of organised crime in South Africa is mainly aimed at persons already involved in criminal activities, therefore ample time will be available to plan the operation well enough so that fairness and constitutionality will prevail.¹⁴⁷⁰ To this end, the approach followed by the legislation regarding the use of traps and undercover operations is

¹⁴⁶⁴ *S v Singh* 2016 2 SACR 443 (SCA) 451F-H.

¹⁴⁶⁵ Section 35(5) of the *Constitution*.

¹⁴⁶⁶ See *S v Singh* 2016 2 SACR 443 (SCA) 452E-G, where the factors are listed as: “the bona fides of the investigation, the nature and seriousness of the violation of the accused’s rights, considerations of urgency and public safety, the availability of alternative, lawful means of obtaining the evidence in question, the deterrent function of the courts in excluding improperly obtained evidence, the nature of the evidence, and the fact that the evidence would inevitably have been discovered even if improper means had not been employed. All those factors are merely guidelines and the list is not exhaustive. In the end every case depends on its own facts”.

¹⁴⁶⁷ *S v Kotzé* 2010 1 SACR 100 (SCA) 111D-G.

¹⁴⁶⁸ Section 252A(6) of the *CPA* (emphasis added).

¹⁴⁶⁹ *S v Kotzé* 2010 1 SACR 100 (SCA) 111D-G.

¹⁴⁷⁰ As per the definitions discussed under chapter 2.

analysed next in order to highlight the precautions necessary to ensure the admissibility of evidence obtained by means of traps and undercover operations in the combating of organised crime in South Africa.

5.3.2.4 The two-stage approach

The provision allows for a two-stage approach regarding the admissibility of evidence obtained by means of traps and undercover operations. Firstly, where the undercover operative goes no further than providing an opportunity to commit the targeted offence, the evidence is automatically admissible.¹⁴⁷¹ Secondly, when the operative's conduct does go beyond merely providing an opportunity, the court is given a discretion to allow the evidence if it finds that the methods used would not impact negatively on the fairness of the trial or the administration of justice.¹⁴⁷²

Certain factors,¹⁴⁷³ which are based on the common law factors previously used by the courts,¹⁴⁷⁴ need to be considered when the relevant court exercises its discretion.¹⁴⁷⁵ Again this provision does not create a defence of entrapment, like in the USA, but instead creates an evidentiary rule where the courts have a discretion to exclude the evidence of a trap in a situation where the undercover agent went further than merely providing an opportunity to commit a crime.¹⁴⁷⁶ However, in formulating the language of the factual enquiry provision, the legislature "adopted language taken from a leading United States decision¹⁴⁷⁷ on entrapment".¹⁴⁷⁸

¹⁴⁷¹ *S v Kotzé* 2010 1 SACR 100 (SCA) 112G-H.

¹⁴⁷² *S v Kotzé* 2010 1 SACR 100 (SCA) 112G-H.

¹⁴⁷³ Discussed in the next section.

¹⁴⁷⁴ Bronstein 1997 *SALJ* 129.

¹⁴⁷⁵ Section 252A(3) of the *CPA*.

¹⁴⁷⁶ See *S v Hammond* 2008 1 SACR 476 (SCA) 483C-484A.

¹⁴⁷⁷ *Sorrels v United States* 287 US 435 (1932).

¹⁴⁷⁸ *S v Kotzé* 2010 1 SACR 100 (SCA) 114C.

The legislation is not without criticism. Bronstein,¹⁴⁷⁹ for example, argues that the section is unclear and the factors which must be considered by the court “float around aimlessly in the legislation, unrooted in any analysis”. Confusion regarding the application of the section was however removed by the Supreme Court of Appeal in *Kotzé*¹⁴⁸⁰ as follows:

Section 252A(1) does not purport to prescribe the manner in which undercover operations or traps are to be conducted by the police. It merely distinguishes, on the basis of the manner in which the trap is conducted, between instances where the evidence thereby obtained is automatically admissible and instances where a further enquiry is called for before the question of admissibility can be determined. Section 252A (1) prescribes a factual enquiry into whether the conduct of the trap goes beyond providing an opportunity to commit an offence. Section 252A (2) describes a number of features that may indicate to a trial court that the undercover operation or trap went beyond providing an opportunity to commit an offence.

The starting point, which is a factual question, is whether the conduct of the person acting as trap went beyond merely providing an opportunity to commit an offence.¹⁴⁸¹ Several listed factors are available for the relevant court to consider during the question of fact, and, while the list is not a *numerous clausus*,¹⁴⁸² not all the factors will be relevant in every case. Hence the factors “must be viewed holistically and weighed cumulatively as different factors may point towards different answers”.¹⁴⁸³ The overriding question is “whether the conduct of the trap went beyond providing an opportunity to commit an offence”.¹⁴⁸⁴ So the factors must not be seen as a checklist drafted to regulate the execution of traps, but rather as aspects that the court may consider during the factual enquiry into whether the trap went beyond the legislative limits.¹⁴⁸⁵

Once it is established that the conduct went beyond merely providing an opportunity, the admissibility of the evidence is determined by the second stage of the enquiry, namely whether the evidence was obtained

¹⁴⁷⁹ Bronstein 1997 SALJ 127-128.

¹⁴⁸⁰ *S v Kotzé* 2010 1 SACR 100 (SCA) 113C-E.

¹⁴⁸¹ *S v Kotzé* 2010 1 SACR 100 (SCA) 113F-G.

¹⁴⁸² See s 252A(n) of the CPA.

¹⁴⁸³ *S v Kotzé* 2010 1 SACR 100 (SCA) 114D.

¹⁴⁸⁴ *S v Kotzé* 2010 1 SACR 100 (SCA) 114E.

¹⁴⁸⁵ *S v Kotzé* 2010 1 SACR 100 (SCA) 114D-G.

improperly or unfairly and whether the subsequent admission of such evidence would render the trial unfair or be detrimental to the administration of justice.¹⁴⁸⁶ Again several factors are listed which the relevant court can consider when answering these questions.¹⁴⁸⁷ Regarding these factors, the court held in *Kotzé*¹⁴⁸⁸ that “this is not a closed list as the court may take into account any factor that in its opinion ought to be taken into account in that regard”.

However, the court held that while the legislation gives the court a discretion to exclude such evidence, the discretion is a narrow one, because the “power of the court to exclude the evidence where the relevant circumstances are established will ordinarily be coupled with a *duty* to exclude it”.¹⁴⁸⁹ Judged against the background of the exclusionary rule mentioned above, it seems unlikely that courts will admit evidence that was obtained in a situation that went beyond merely providing an opportunity to commit an offence. In the light of this, the next section explores the position of the subject of a trap.

5.3.2.5 The subject of a trap

Before the constitutional order, the evidence against the person who was trapped was at most subject to the cautionary rule and considered in mitigation of sentence.¹⁴⁹⁰ This position changed somewhat when *Nortjé*¹⁴⁹¹ became the first case where an accused’s conviction was set aside due to the unconstitutionality of the trap.¹⁴⁹² Stating that “criminal trials must now be run ... in conformity with those ‘notions of basic fairness and justice’ which have entered the reckoning at last”,¹⁴⁹³ Foxcroft J found that the “police procedures ... were fundamentally unfair and the accused

¹⁴⁸⁶ *S v Kotzé* 2010 1 SACR 100 (SCA) 116E-F and s 252A(3)(a) of the CPA.

¹⁴⁸⁷ Section 252A(3)(b) of the CPA.

¹⁴⁸⁸ *S v Kotzé* 2010 1 SACR 100 (SCA) 116H-I.

¹⁴⁸⁹ *S v Kotzé* 2010 1 SACR 100 (SCA) 116G-H (emphasis added).

¹⁴⁹⁰ Louw 1995 SCJa 288. See also *S v Nortjé* 1996 2 SA SACR 308 (C) 312F-G.

¹⁴⁹¹ *S v Nortjé* 1996 2 SA SACR 308 (C).

¹⁴⁹² Bronstein 1997 SACJ 114.

¹⁴⁹³ *S v Nortjé* 1996 2 SA SACR 308 (C) 321C.

did not have a fair trial”.¹⁴⁹⁴ The court therefore found that the State did not come before the court with “clean hands”,¹⁴⁹⁵ which underlines the principle that the court cannot ignore what happened in the pre-trial phase of a criminal case.¹⁴⁹⁶

Even though the legislative change to the CPA still does not provide the trapped person with a legal defence of “entrapment”, the question remains whether the police went beyond merely creating an opportunity for the suspect to commit the offence.¹⁴⁹⁷ Stegmann’s¹⁴⁹⁸ issue with the “fraudulent behaviour” towards the subject of a trap, was considered inadvertently by the Supreme Court of Appeal in *Zürich*,¹⁴⁹⁹ where an undercover agent, who was in reality a policeman attached to the Bloemfontein SAPS Gold and Diamond Branch, was “arrested” on charges of dealing in uncut diamonds and brought before court for a bail application. This was done with the authority of the relevant DPP in order to give the agent so-called “street credibility” with the appellant.

Bosielo AJA stated that as far as misrepresentation was concerned, the main victims were the presiding officers and prosecutors in the bail application, because the misrepresentation was actually made to them, while the only misrepresentation made towards the appellant¹⁵⁰⁰ was that the agent had been dealing in uncut diamonds. The appellant’s rights were therefore not infringed and he could therefore not claim that he did not have a fair trial or that the admission of the evidence was detrimental to the administration of justice. In fact, the court held that failure to allow such

¹⁴⁹⁴ *S v Nortjé* 1996 2 SA SACR 308 (C) 320E-F.

¹⁴⁹⁵ *S v Nortjé* 1996 2 SA SACR 308 (C) 321I-322A.

¹⁴⁹⁶ See *S v Koekemoer* 1991 1 SACR 427 (Nm) 434G, where O’Linn J held as follows: “As in the case of all other irregularities relating to the dispensing of justice by a Court of law, the test is not only what happens in Courts, but what happens outside the Court, what happens in the course of the police investigation”.

¹⁴⁹⁷ Section 252A(1) of the CPA. See also Bronstein 1997 SALJ 122.

¹⁴⁹⁸ *S v Ohlenschlager* 1992 1 SACR 695 (T) 712F-I.

¹⁴⁹⁹ *S v Zürich* 2010 1 SACR 171 (SCA).

¹⁵⁰⁰ In other words the subject of the trap.

evidence would bring the administration of justice into disrepute.¹⁵⁰¹ Regarding misrepresentations made by traps, the court said the following:¹⁵⁰²

Traps, by their very nature, always involve misrepresentations specifically intended to deceive the suspect. In terms of s 252A the uncovering of an offence by way of such a misrepresentation is not improper and if it goes no further than to create an opportunity to commit an offence does not affect the admissibility of the evidence obtained as a result.

Furthermore, in *Thinta*¹⁵⁰³ the contention was that the undercover agent acted unfairly by allowing the subject of the trap to commit multiple transactions without arresting him. The court held that where the trap did not induce the accused to commit crimes, the accused is responsible for his own actions and it was not the police's duty to save him from himself.

As far as Stegmann's¹⁵⁰⁴ issue with so-called "self-appointed" traps is concerned, the facts of the case would determine whether the case involves a "private trap" or not. In *Dube*,¹⁵⁰⁵ for example, the undercover operation was conducted without any law enforcement officials being involved and the court held that the legislative provision regulating traps did not apply because the provision was intended for traps where law enforcement officers were involved, whether directly or indirectly.¹⁵⁰⁶ In the case of a private trap, the subject of the trap may, however, still rely on the exclusionary rule,¹⁵⁰⁷ but the court should also consider the rights of the victim of the relevant crime.¹⁵⁰⁸ In this case, the court was not dealing with a police trap aimed at inducing innocent victims to commit crimes, but rather an innocent victim of crime trying to determine who was committing large-scale thefts from its plants.¹⁵⁰⁹ Hence the court held that even

¹⁵⁰¹ *S v Zürich* 2010 1 SACR 171 (SCA) 175G.

¹⁵⁰² *S v Zürich* 2010 1 SACR 171 (SCA) 175E-F.

¹⁵⁰³ *S v Thinta* 2006 1 SACR 4 (E) 10B-D.

¹⁵⁰⁴ *S v Ohlenschlager* 1992 1 SACR 695 (T) 712F-I.

¹⁵⁰⁵ *S v Dube* 2000 1 SACR 53 (N).

¹⁵⁰⁶ *S v Dube* 2000 1 SACR 53 (N) 71E. See also *S v Makhanya* 2002 3 SA 201 (N) 206F-G.

¹⁵⁰⁷ Section 35(5) of the *Constitution*.

¹⁵⁰⁸ *S v Dube* 2000 1 SACR 53 (N) 73H.

¹⁵⁰⁹ *S v Dube* 2000 1 SACR 53 (N) 74A.

though the rights of the persons trapped could not be ignored, “they were hardly unwilling participants in the thefts”.¹⁵¹⁰ The court also stated that all traps involved some kind of inducement and in this case there was “nothing particularly abhorrent about the methods used”.¹⁵¹¹ Nothing in the use of the trapping method rendered the trap unfair or would be detrimental to administration of justice.¹⁵¹²

This case makes it clear that although the legislative measures regulating traps and undercover operations do not apply to so-called “private traps”, the test regarding fairness is similar, although it is performed under the exclusionary rule. Overall, therefore, the subject of a trap cannot rely on “entrapment” as a legal defence, but can rely on the unfairness of the trap to have the evidence excluded. Importantly, the accused must furnish the grounds on which the admissibility of the evidence is challenged,¹⁵¹³ after which the issue may be decided during a trial-within-a-trial.¹⁵¹⁴ Next, the position of the person acting as trap is explored.

5.3.2.6 Position of the trap

Before the legislative amendment,¹⁵¹⁵ Stegmann¹⁵¹⁶ maintained that policemen and their traps were seen as above the law and could therefore commit crimes without fear of prosecution, as long as their objective was to prosecute other criminals. This, according to Stegmann,¹⁵¹⁷ did not make sound law and led to the corruption of such policemen, eventually creating dishonest servants of the law. He summed up his concerns as follows:¹⁵¹⁸

¹⁵¹⁰ *S v Dube* 2000 1 SACR 53 (N) 74C.

¹⁵¹¹ *S v Dube* 2000 1 SACR 53 (N) 74G-H.

¹⁵¹² *S v Dube* 2000 1 SACR 53 (N) 74H-I.

¹⁵¹³ Section 252A(6) of the CPA. See also *S v Kotzé* 2010 1 SACR 100 (SCA) 111A-B.

¹⁵¹⁴ Section 252A(7) of the CPA. *S v Kotzé* 2010 1 SACR 100 (SCA) 111A-B.

¹⁵¹⁵ Namely the enactment of s 252A of the CPA.

¹⁵¹⁶ Stegmann 1991 SALJ 701-702.

¹⁵¹⁷ Stegmann 1991 SALJ 701-702.

¹⁵¹⁸ Stegmann 1991 SALJ 704.

I fear that the trapping system, tolerated initially over a hundred years ago as a regrettably necessary means of protecting the economic interests of claimholders in the diamond and gold fields, may insidiously be undermining the morality of the police, their sense of right and wrong, to the point where some of them at least can no longer see that there is anything wrong in manufacturing crime in order to punish it; or in deceiving other people into committing crimes; or in participating in crimes in order to catch and punish other criminals.

However, in *Pule*,¹⁵¹⁹ the court held that acting as a trap does not automatically provide the person acting as the trap with a justification for his or her crime, but that “the general principles applicable to the criminal law will determine in each case whether an accused, acting as a trap, has a defence to the charge or not”. Van der Mescht¹⁵²⁰ furthermore maintains that Stegmann’s criticism ignores the interest of the State in the use of traps and undercover operations, especially with regards to the detrimental effect that organised criminal groups have on a State and its citizens. Traps and undercover operations are therefore justifiable to prosecute known criminals and combat victimless crime, like organised crime in many instances.¹⁵²¹

Van der Mescht¹⁵²² also argues that the DPP’s discretion to prosecute should prevent the prosecution of traps as long as it is in the State’s interest.¹⁵²³ However, such a state of affairs may cause some discomfort, as indemnity from the prosecution for crime is usually given by a court of law after due consideration of the honesty and frankness of the person’s demeanour.¹⁵²⁴ Such indemnity is furthermore only given at the end of the trial, when the court has considered all the evidence before it.¹⁵²⁵ Leaving the “indemnity” of traps and undercover operatives to the discretion of the Director of Public Prosecutions is therefore not an ideal situation, especially in light of the recent criticism of selective prosecution lodged

¹⁵¹⁹ *S v Pule* 1996 2 SACR 604 (O) 607E-F, 608C.

¹⁵²⁰ Van der Mescht 1995 SACJ 277.

¹⁵²¹ Bronstein 1997 SALJ 120.

¹⁵²² Van der Mescht 1995 SACJ 279-280.

¹⁵²³ Van der Mescht 1995 SACJ 280.

¹⁵²⁴ See s 204(2) of the CPA, which is discussed below.

¹⁵²⁵ Kruger *Hiemstra SA Strafproses* 546.

against the current NDPP for instituting criminal charges against Pravin Gordhan, who at the time was the Minister of Finance.¹⁵²⁶

To this end, the Hefer Commission of Inquiry into allegations of spying against a former National Director of Public Prosecutions, Mr BT Ngcuka, advocated the view that because the office of the NDPP is derived from the *Constitution*, it is clear that the public interest demands an office free from anything that may discredit the office or person holding the office, because the person holds “immense power”.¹⁵²⁷ Hence, the non-prosecution of someone who acted as a trap should preferably not lie in the hands of a single person holding the office of DPP. This point is also supported by the arguments for better accountability of the NPA leadership discussed later in this study.¹⁵²⁸

Some confusion also exists regarding the legal position of someone acting as a trap. Van der Mescht¹⁵²⁹ maintains that a trap can raise State authority as a ground of justification against unlawfulness. The court in *Pule*,¹⁵³⁰ however, rejected this viewpoint on the basis that it is “not in accordance with the general principles of our criminal law”. Gardiner and Lansdown,¹⁵³¹ on the other hand, maintain that a trap cannot be prosecuted as an accomplice because “the mental element is fundamentally different in the case of a trap and an accomplice”, where the trap is not *ad idem* with an offender like an accomplice is. Should the trap however identify himself with the offender to such an extent that he

¹⁵²⁶ See for instance Galens 2016 <http://www.news24.com/SouthAfrica/News/abrahams-caused-untold-harm-to-economy-judge-kriegler-20161031> for the criticism of former Constitutional Court judge, Johann Kriegler, against the NDPP, Shaun Abrahams, on the way he exercised his discretionary powers in this instance.

¹⁵²⁷ Hefer 2004 http://www.justice.gov.za/commissions/comm_hefer/2004%2001%2020_hefer_report.pdf 12.

¹⁵²⁸ See para 6.4.3 below.

¹⁵²⁹ Van der Mescht 1995 SACJ 276.

¹⁵³⁰ *S v Pule* 1996 2 SACR 604 (O) 609B.

¹⁵³¹ Gardiner and Lansdown *South African Criminal Law and Procedure* 660.

becomes a “*socius criminus*” of the offender, the trap will not escape prosecution.¹⁵³²

Stegmann J¹⁵³³ disagrees with this view of Gardiner and Lansdown,¹⁵³⁴ stating that where someone intentionally and with knowledge of unlawfulness contravenes a legal prohibition he has the necessary *mens rea* for a conviction. In *Pule*,¹⁵³⁵ however, the court stated that if someone commits the offence believing in immunity from prosecution on the basis of setting a trap, that person lacks the required knowledge of unlawfulness and hence the necessary *mens rea*.

The position of the person acting as a trap has now been clarified by the Legislature. The police trap or someone involved in an undercover operation is not criminally liable for any act which constitutes an offence and relates to the trap or undercover operation, provided that the person acted in good faith.¹⁵³⁶ This provision is more tenable than Van der Mescht’s¹⁵³⁷ proposal of leaving prosecution to the discretion of the relevant DPP, as it provides a clearer measure of when a trap cannot escape prosecution, because “good faith” means honesty and the lack of ulterior motives pertaining to the matter at hand.¹⁵³⁸ It is submitted that this test will entail similar considerations as in the case of indemnity against prosecution granted in terms of section 204.¹⁵³⁹ What remains, is to determine the practical application of traps and undercover operations in the combating of organised crime in South Africa by means of a case study of a recent decision of the Supreme Court of Appeal.

¹⁵³² Gardiner and Lansdown *South African Criminal Law and Procedure* 660.

¹⁵³³ *S v Ohlenschlager* 1992 1 SACR 695 (T) 714C-F.

¹⁵³⁴ Gardiner and Lansdown *South African Criminal Law and Procedure* 660.

¹⁵³⁵ *S v Pule* 1996 2 SACR 604 (O) 609F.

¹⁵³⁶ Section 252A(5) of the CPA.

¹⁵³⁷ Van der Mescht 1995 SACJ 280.

¹⁵³⁸ *S v Gwevera* 1979 2 SA 250 (R).

¹⁵³⁹ Section 204 of the CPA.

5.3.2.7 Practical application of the test

In *Singh*¹⁵⁴⁰ the police infiltrated an organised criminal group, involved in truck hijackings, through an undercover operation called “Operation Texas”. The relevant DPP had been approached for approval of the undercover operation “for a period of three months in accordance with the guidelines issued in terms of the Act in order to infiltrate the syndicate”.¹⁵⁴¹ The application stated that “[c]onventional investigation techniques had thus far failed in detecting the crimes and apprehending the main role players”.¹⁵⁴² This was because the truck hijackings occurred randomly, making such arrests challenging. The police therefore resorted to making use of an “in place informer” and an undercover agent to infiltrate the racket.¹⁵⁴³

Upon approving the operation, the relevant DPP gave pertinent guidelines on how the undercover operation should be conducted.¹⁵⁴⁴ During the trial, the accused challenged the admissibility of the evidence on, amongst others, the grounds that the relevant DPP had been given false information during the application process and that the undercover agent had gone beyond the mere providing of an opportunity to commit an offence; had falsely implicated the accused; and had gone beyond the guidelines set by the relevant DPP.¹⁵⁴⁵ The trial court “dismissed the grounds on which the evidence was challenged, admitted the evidence and convicted the appellants on most of the counts”.¹⁵⁴⁶

On appeal, the appellants conceded that the undercover operation did not go beyond the limits set by the CPA,¹⁵⁴⁷ but challenged the

¹⁵⁴⁰ *S v Singh* 2016 2 SACR 443 (SCA).

¹⁵⁴¹ *S v Singh* 2016 2 SACR 443 (SCA) 446H.

¹⁵⁴² *S v Singh* 2016 2 SACR 443 (SCA) 447B.

¹⁵⁴³ *S v Singh* 2016 2 SACR 443 (SCA) 447C-E.

¹⁵⁴⁴ *S v Singh* 2016 2 SACR 443 (SCA) 447H-448A.

¹⁵⁴⁵ *S v Singh* 2016 2 SACR 443 (SCA) 450C-E.

¹⁵⁴⁶ *S v Singh* 2016 2 SACR 443 (SCA) 450F.

¹⁵⁴⁷ Section 252A of the CPA.

constitutionality of the undercover operation.¹⁵⁴⁸ Instead of indicating how the manner in which the evidence was obtained infringed on their own right to a fair trial, however, the appellants strangely submitted that the evidence infringed on the rights of the public at large, and was therefore detrimental to the administration of justice, in that the state conducted the undercover operation whilst knowing that “the public had already been exposed to serious violence, and that it continued with the operation whilst aware of a real possibility of further exposure to such violence”.¹⁵⁴⁹

The court, however, found the exact opposite, stating that the administration of justice in fact demanded the undercover operation and “thus outweighed the risk to potential victims and the public.”¹⁵⁵⁰ This was because the organised criminal groups would have continued with their criminal activities had it not been infiltrated by the undercover agent and “the public would baulk at the idea that the law-enforcement agencies failed to take *bona fide* measures aimed at effective detection of such an organised-crime syndicate because of the fear that there may be danger to the public”.¹⁵⁵¹ The manner in which the evidence was obtained during the undercover operation thus survived a constitutional challenge under the exclusionary rule. This case serves to illustrate the importance of undercover operations and traps to the combating of organised crime in South Africa, and highlights why the excitement was so high at the Grim Reaper Conference, held shortly after the promulgation of the provision in the CPA.¹⁵⁵²

In summary, although traps and undercover operations are accepted internationally as effective tools in combating organised crime, they must

¹⁵⁴⁸ Relying on s 35(5) of the *Constitution*, which states that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

¹⁵⁴⁹ *S v Singh* 2016 2 SACR 443 (SCA) 451A-D.

¹⁵⁵⁰ *S v Singh* 2016 2 SACR 443 (SCA) 454C.

¹⁵⁵¹ *S v Singh* 2016 2 SACR 443 (SCA) 454B.

¹⁵⁵² Section 252A of the CPA.

be conducted with reasonable fairness as such operations may infringe on an accused's constitutional right to a fair trial.¹⁵⁵³ It is therefore apparent that unfair traps must be distinguished from fair traps in order to decide upon the admissibility of evidence so obtained.¹⁵⁵⁴ Fairness of the undercover operation must therefore be borne in mind throughout the combating of organised crime, because the Constitutional Court held that fairness is a matter which is best decided by the trial judge at the time of the trial, when all the relevant facts can and must be considered.¹⁵⁵⁵ One of the purposes of traps and undercover operations in the combating of organised crime in South Africa, is the identification of members of organised criminal groups that may be used as witnesses against the crime bosses. In the words of the former acting NDPP, Adv. Vusi Pikoli, when testifying in the Selebi-trial:¹⁵⁵⁶ "in dealing with organised crime you would need to use criminals against criminals".¹⁵⁵⁷

5.3.3 Participants

An early development¹⁵⁵⁸ in the prosecution of crime, is the use of participants in the relevant crimes to provide evidence against a targeted "main perpetrator" of the relevant crime(s), in exchange for indemnity from prosecution.¹⁵⁵⁹ Theophilopoulos¹⁵⁶⁰ identifies the following dangers regarding such indemnity:

- a) the inexperienced prosecutor may enter into an arrangement which excessively forgives past crimes or mistakenly indemnifies the wrong co-offender or the wrong crimes; and
- b) the unscrupulous prosecutor may impose unfair obligations on the co-operator or make use of untruthful indemnified testimony against the identified target.

¹⁵⁵³ Bronstein 1997 SACJ 115; Van der Mescht 1995 SACJ 274.

¹⁵⁵⁴ Bronstein 1997 SALJ 118.

¹⁵⁵⁵ *Key v Attorney-General, Cape Provincial Division* 1996 4 SA 187 (CC) 196A-C.

¹⁵⁵⁶ Discussed in chapter 3.

¹⁵⁵⁷ *S v Selebi* 2010 JDR 0820 (GSJ) para 173.

¹⁵⁵⁸ Theophilopoulos 2003 SALJ 374 maintains that the practice of granting immunity to minor offenders in exchange for their testimonies against main offenders developed in the seventeenth and eighteenth centuries.

¹⁵⁵⁹ Kruger *Organised Crime* 2.

¹⁵⁶⁰ Theophilopoulos 2003 SALJ 377-378.

However, much greater risks were identified by the court in *Hlapezula*¹⁵⁶¹ as follows:

It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit.

Therefore, in order to prevent a situation where too much weight is attached to the testimony of an accomplice, a cautionary rule was formulated which requires that the relevant court:¹⁵⁶²

- (i) must recognize the abovementioned risks; and
- (ii) must use certain factors as safeguards against a wrong conviction.

These safeguards include corroboration; the absence of contradictions in the evidence of the accomplice; the absence of dishonesty in the accomplice's testimony; and the fact that the accused is someone who is close to the accomplice.¹⁵⁶³

Because accomplices may be hesitant to testify on the grounds that they may implicate themselves, the practice has evolved to grant them so-called "indemnity"¹⁵⁶⁴ from prosecution in situations where they give self-incriminating evidence in the State's case.¹⁵⁶⁵ Furthermore, Theophilopoulos¹⁵⁶⁶ maintains that the plea-bargaining provision introduced into the *CPA*¹⁵⁶⁷ shows "distinct similarities" with indemnity provision as "[t]heir dominant purpose is to secure some form of procedural co-operation between the state and the private individual".

¹⁵⁶¹ *S v Hlapezula* 1965 4 SA 439 (A) 440D-E.

¹⁵⁶² *S v Hlapezula* 1965 4 SA 439 (A) 440F-G.

¹⁵⁶³ *S v Hlapezula* 1965 4 SA 439 (A) 440F-G.

¹⁵⁶⁴ Note that the term "immunity" is used in America, whereas "indemnity" is used in Commonwealth jurisdictions – see Theophilopoulos 2003 SALJ 378.

¹⁵⁶⁵ Kruger *Organised Crime* 2. Confer s 204 of the *CPA*.

¹⁵⁶⁶ Theophilopoulos 2003 SALJ 377.

¹⁵⁶⁷ Section 105A of the *CPA*, relating to plea and sentence agreements, was inserted by s 2 of the *Criminal Procedure Second Amendment Act* 62 of 2001, which became effective on 14 December 2001.

For the specific purpose of combating organised crime in South Africa, both indemnity and plea-bargaining can be used to persuade accomplices to testify against the main perpetrators of organised crime. The indemnity provision of the *CPA* is discussed first, after which plea-bargaining under the *CPA* is explored.

5.3.3.1 Indemnity

If a prosecutor at criminal proceedings informs the relevant court that a person called as a witness on behalf of the prosecution will be required to answer questions which may incriminate the witness in an offence specified by the prosecutor, the court will inform the witness:¹⁵⁶⁸

- (i) that he or she is obliged to give evidence;
- (ii) that questions may be put to him or her which may incriminate him or her with regard to the specified offence(s);
- (iii) that he or she will be obliged to answer all questions, whether put by the prosecution, the accused or the court, notwithstanding that the answers may incriminate him or her in the specified offence(s), or any offence in respect of which a guilty verdict would be competent; and
- (iv) if he or she answers all the questions frankly and honestly, he or she will be granted indemnity from prosecution with regard to the specified offence(s), as well as any offence in respect of which a guilty verdict would be competent.

Once the case is finalised¹⁵⁶⁹ and the court is of the opinion that the witness answered all the questions frankly and honestly, the court will discharge the witness from prosecution for the specified offence(s) and any offence in respect of which a guilty verdict would be competent.¹⁵⁷⁰ If

¹⁵⁶⁸ Section 204(1)(a) of the *CPA*.

¹⁵⁶⁹ Kruger *Hiemstra SA Strafproses* 546 maintains that “[i]t is irregular to give the indemnity before the end of the case”, because it may “give the accused the impression that the court is prejudiced”.

¹⁵⁷⁰ Section 204(2) of the *CPA*.

the witness is not so discharged, his or her evidence may not be used against him or her at any subsequent trial in respect of the said offence(s), or any offence in respect of which a guilty verdict is competent, except on a charges relating to perjury arising from the giving of the evidence in question.¹⁵⁷¹

Note, however, that if the incriminating evidence relates to another offence than the one in question, the witness may refuse to answer¹⁵⁷² and rely on his or her constitutional right to remain silent¹⁵⁷³ and to not be compelled to give self-incriminating evidence.¹⁵⁷⁴ The same holds true where a prosecutor fails to inform the court regarding the witness' self-incriminating evidence.¹⁵⁷⁵

Theophilopoulos¹⁵⁷⁶ argues that indemnity "is a self-serving arrangement whereby the prosecution undertakes to desist in pursuing a criminal sanction against the witness in exchange for truthful testimony". Because of this, the applicant in *Suliman v National Directorate of Special Operations*¹⁵⁷⁷ sought to have section 204 declared unconstitutional on the basis that "there is no judicial oversight over the manner in which prosecutors are permitted in criminal proceedings to call witnesses on behalf of the prosecution to answer incriminating questions in terms of s 204 of the Act" and this infringed on the accused's constitutional right to a fair trial.¹⁵⁷⁸ He therefore wanted the situation remedied by an order

¹⁵⁷¹ Section 204(4) of the CPA.

¹⁵⁷² See Kruger *Hiemstra SA Strafproses* 547 and *R v Ndabeni* 1959 2 SA 630 (EC) 639E-F.

¹⁵⁷³ Section 35(1)(a) of the *Constitution*.

¹⁵⁷⁴ Section 35(3)(j) of the *Constitution*.

¹⁵⁷⁵ See Kruger *Hiemstra SA Strafproses* 546 and *S v Govender* 1967 (2) SA 121 (N).

¹⁵⁷⁶ Theophilopoulos 2003 SALJ 373.

¹⁵⁷⁷ *Suliman v National Directorate of Special Operations* 2010 2 SACR 324 (C) 333F-G.

¹⁵⁷⁸ *Suliman v National Directorate of Special Operations* 2010 2 SACR 324 (C) 334C, 337C. Section 35(3) of the *Constitution*.

requiring approval from another judicial officer before a prosecutor may call a witness under section 204.¹⁵⁷⁹

The court, however, referred to the following policy considerations, submitted by the respondents, which the prosecution takes into account when deciding whether to call a person as a witness under this provision:¹⁵⁸⁰

- (i) the seriousness of the offence;
- (ii) the importance of the witness's evidence;
- (iii) the reliability of the evidence or information offered;
- (iv) the person's culpability for the offence;
- (v) the person's previous convictions; and
- (vi) the protection of the public.

Relying on these factors, the court found as follows:¹⁵⁸¹

Applicant has not at all provided a sufficient case to explain why the safeguards entertained by respondents and, more importantly, the safeguards contained expressly in s 204, are insufficient to ensure no adverse impact upon an applicant's right to a fair trial.

The importance of the indemnity provision, especially for the combating of organised crime in South Africa, is also evident from the case of *Suliman v National Directorate of Special Operations*.¹⁵⁸² The charges related to the contravening of the *Drug Trafficking Act*,¹⁵⁸³ in that the applicant was one of three persons charged with dealing in 100 000 mandrax tablets.¹⁵⁸⁴ The prosecutor then called the other two accused persons as witnesses

¹⁵⁷⁹ *Suliman v National Directorate of Special Operations* 2010 2 SACR 324 (C) 333G.

¹⁵⁸⁰ *Suliman v National Directorate of Special Operations* 2010 2 SACR 324 (C) 336E.

¹⁵⁸¹ *Suliman v National Directorate of Special Operations* 2010 2 SACR 324 (C) 336H.

¹⁵⁸² *Suliman v National Directorate of Special Operations* 2010 2 SACR 324 (C).

¹⁵⁸³ The *Drug Trafficking Act* is discussed under para 5.9.2 below.

¹⁵⁸⁴ *Suliman v National Directorate of Special Operations* 2010 2 SACR 324 (C) 326H.

against the applicant, invoking the indemnity provision.¹⁵⁸⁵ The court stated as follows:¹⁵⁸⁶

[P]rovisions such as s 204 are essential in the fight against crime in South Africa. To bind the hands of the prosecuting agency in such circumstances would only redound to the benefit of those criminals who have launched an incessant and foundational attack on the very fabric of our constitutional society.

The dangers of using accomplices as witnesses have already been highlighted above. Rather than granting complete indemnity from any prosecution, as in the *Suliman*¹⁵⁸⁷ matter, it may be more prudent to use the plea-bargaining provisions, discussed next, to negotiate a conviction on a lesser charge before using the person as an accomplice witness. As seen in the case study thereafter,¹⁵⁸⁸ a plea and sentence agreement can be a factor to convince the court to attach more weight to the testimony of accomplices.

5.3.3.2 Plea bargaining

Plea bargaining is an internationally accepted concept in the Anglo-American legal systems.¹⁵⁸⁹ Even though plea bargaining formed part of the South African common law before the statutory provisions relating to plea and sentence agreements came into effect on 14 December 2001,¹⁵⁹⁰ it “received little attention by way of judicial scrutiny and/or comment”.¹⁵⁹¹ The reason seems to be that many legal practitioners and presiding

¹⁵⁸⁵ Section 204 of the CPA. This case therefore differs from *S v Dos Santos* 2010 2 SACR 382 (SCA) discussed later, because in this case there was no plea-bargaining arrangement with the accomplices, as was the case in *Dos Santos*.

¹⁵⁸⁶ *Suliman v National Directorate of Special Operations* 2010 2 SACR 324 (C) 337A.

¹⁵⁸⁷ *Suliman v National Directorate of Special Operations* 2010 2 SACR 324 (C).

¹⁵⁸⁸ See para 5.3.3.3.

¹⁵⁸⁹ *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 678B-E. For a detailed historical account of plea bargaining in the Anglo-American legal system, see Fick and Snyman-Van Deventer 2002 *Tydskrif vir Regswetenskap* 102-103.

¹⁵⁹⁰ Section 105A of the CPA.

¹⁵⁹¹ *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 671A.

officers felt that this informal process was not “legal”,¹⁵⁹² probably because it departs from South Africa’s adversarial system.¹⁵⁹³ Academics on the other hand were not shy to comment on the process.¹⁵⁹⁴

Therefore, before section 105A of the CPA came into force, the court in *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)*¹⁵⁹⁵ had to decide whether the informal process of plea bargaining should be recognised as part of South African criminal procedure. In this matter, the court gives a detailed explanation of how this informal process worked before the legislative provision formalised it.¹⁵⁹⁶

The problem with the informal process was that the parties had little control over sentencing and could only rely on placing adequate material before the court to ensure an appropriate sentence.¹⁵⁹⁷ Also, the negotiation process was not always certain because “the permutations of what may be negotiated and ultimately agreed upon are virtually infinite”.¹⁵⁹⁸ Nevertheless, plea bargaining was seen as vital to criminal procedure in South Africa, even before it was formalised legislatively,¹⁵⁹⁹

¹⁵⁹² See *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 674F-H. See Bennun 2007 SACJ 17-21 for a discussion of the legitimacy issues of plea-bargaining.

¹⁵⁹³ Kruger *Hiemstra SA Strafproses* 298. See also Fick & Snyman-Van Deventer 2002 *Tydskrif vir Regswetenskap* 101-113 for a detailed discussion of the inquisitorial and accusatorial elements of plea bargaining, especially with reference to the American system.

¹⁵⁹⁴ *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 674H-J. The court lists several academic articles regarding the process. For purpose of this study, however, the focus is on the process formalised by s 105A of the CPA, and academic articles written on this formalised process.

¹⁵⁹⁵ *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 672H.

¹⁵⁹⁶ That is before the legislative provisions. *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 673A-E.

¹⁵⁹⁷ *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 673F.

¹⁵⁹⁸ *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 673I.

¹⁵⁹⁹ *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 676E-F.

because without plea bargaining, any criminal justice system would break down.¹⁶⁰⁰ Hence it was accepted as a necessary evil.¹⁶⁰¹

The statutory provision at least brought more certainty to the negotiation process, especially in the context of combating organised crime in South Africa. Now, where an accomplice is charged with an offence, an agreement entailing a reduced plea and sentence may be negotiated between a prosecutor authorised thereto in writing by the NDPP and an accused who is legally represented.¹⁶⁰² For purposes of combating organised crime, such negotiations may include the requirement that the convicted person must testify against the main perpetrator.

An example of such a negotiation process is found in the Agliotti matter discussed in chapter 3, where Glenn Agliotti entered into a plea and sentence agreement with the State in terms of which he pleaded guilty to dealing in drugs and receiving a sentence which effectively kept him out of prison.¹⁶⁰³ According to Agliotti's biographers, the plea negotiation went as follows:¹⁶⁰⁴

The deal that the Scorpions put to Agliotti was simple: turn state witness, negotiate a plea bargain, or face arrest. You don't do the plea bargain, you won't see your son being born.¹⁶⁰⁵ You'll be back in jail ... He turned to his legal advisors. Accept the deal, they told him. At least this way you know the outcome. If you leave it to the whims of due process, anything could happen.

¹⁶⁰⁰ These were the sentiments of the court in *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 676F and the same view is held in America – see Fick and Snyman-Van Deventer 2002 *Tydskrif vir Regswetenskap* 101 and *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C) 676G-H.

¹⁶⁰¹ For the disadvantages of plea and sentence agreements, see De Villiers 2004 *De Jure* 251.

¹⁶⁰² Section 105A(1)(a) of the CPA.

¹⁶⁰³ NPA 2007 <https://www.npa.gov.za/sites/default/files/media-releases/Glen-Agliotti-Pleads-Guilty.pdf>.

¹⁶⁰⁴ Piegl and Newman *Glenn Agliotti* 64.

¹⁶⁰⁵ Agliotti's son was born seven days after the plea and sentence agreement was reached – see Piegl and Newman *Glenn Agliotti* 71.

The press statement released by the NPA confirmed the plea and sentence agreement with Agliotti, adding the following:¹⁶⁰⁶

A further condition is that he is expected to testify frankly and honestly in the matter: *S v Paparas and others*... Cooperation from Agliotti in respect of this case has placed the State on an even firmer footing in so far as investigations are concerned. The National Prosecuting Authority (NPA) is satisfied with this sentence as he received the highest penalty a Regional Court can impose.

Such negotiations can be justified by the two philosophical concepts of gratuity and exchange theory¹⁶⁰⁷ and happen before the accused pleads to the original charges brought against him or her.¹⁶⁰⁸ During the negotiations the state and accused waive several of the advantages offered by a trial, in order to gain others as part of the negotiation process.¹⁶⁰⁹

During the plea bargaining process, the relevant prosecutor may negotiate and enter into an agreement in respect of a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge and, if the accused is convicted of the offence to which he or she has agreed to plead guilty, a just sentence to be imposed by the court, which may also be postponed or suspended.¹⁶¹⁰

Before entering into such agreement, however, the prosecutor must, subject to certain exceptions,¹⁶¹¹ first consult the investigating officer of the case, as well as the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant. In such circumstances the complainant is given the opportunity to make representations to the prosecutor regarding the contents of the agreement and the inclusion in the agreement of a condition relating to compensation

¹⁶⁰⁶ NPA 2007 <https://www.npa.gov.za/sites/default/files/media-releases/Glen-Agliotti-Pleads-Guilty.pdf>.

¹⁶⁰⁷ See Theophilopoulos 2003 *SALJ* 378-381 for a discussion of these two theories in an American context.

¹⁶⁰⁸ Section 105A(1)(a) of the *CPA*.

¹⁶⁰⁹ See Kruger *Hiemstra SA Strafproses* 298 for a detailed discussion on this process.

¹⁶¹⁰ In terms of s 297(1) of the *CPA*.

¹⁶¹¹ See s 105A(1)(c) of the *CPA*.

or the rendering to the complainant of some specific benefit or service *in lieu* of compensation for damage or pecuniary loss.¹⁶¹²

Unlike the provision regarding indemnity, the plea-bargaining provision has built-in policy considerations which a prosecutor must take into account when deciding whether to enter such an agreement or not. These are:¹⁶¹³

- (i) the nature of and circumstances relating to the offence;
- (ii) the personal circumstances of the accused;
- (iii) the previous convictions of the accused, if any; and
- (iv) the interests of the community.

The policy considerations are very similar to the policy considerations regarding indemnity that were submitted in *Suliman v National Directorate of Special Operations*, discussed above.¹⁶¹⁴

Detailed formalities are prescribed for the format of the agreement,¹⁶¹⁵ as well as the procedure for acceptance and confirmation of the plea and sentence agreement by the court. Ultimately, if the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, and the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.¹⁶¹⁶

Various options are legislated if the court is not so satisfied, but the main objective for the purpose of combating organised crime would be to reach the end result described above in order to have an accomplice testify

¹⁶¹² Section 105A(1)(b) of the CPA.

¹⁶¹³ Section 105A(1)(b)(ii) of the CPA.

¹⁶¹⁴ *Suliman v National Directorate of Special Operations* 2010 2 SACR 324 (C) 336E.

¹⁶¹⁵ Section 105A(2) of the CPA.

¹⁶¹⁶ For a decision on the role of presiding officers in the judicial scrutiny of plea and sentence agreement, see Watney 2006 TSAR 224-230.

against the main perpetrator. Hence, much like in the case of indemnity, the State compels the person to testify in exchange for leniency.¹⁶¹⁷ This happened in one of the earliest convictions for racketeering under the *POCA*, namely *Dos Santos*.¹⁶¹⁸ In this matter, two brothers who were accomplices of the applicants, indicated upon arrest that they would plead guilty and co-operate with the State. After reaching a plea and sentence agreement, in terms of which they pleaded guilty¹⁶¹⁹ and received two year imprisonment sentences, which were suspended for five years, they were used as accomplice witnesses under section 204¹⁶²⁰ in racketeering¹⁶²¹ and illicit diamond dealing¹⁶²² related charges against the applicants.

In the court *a quo*, the three risks relating to the testimony of accomplices as identified *Hlapezula*,¹⁶²³ were reiterated¹⁶²⁴ and the court then dealt with the plea agreements of the accomplices, stating that these were scrutinised and confirmed by a court of law and there was no evidence to suggest that they were legally flawed.¹⁶²⁵ This, coupled with corroboratory evidence, allowed the court to rely on the accomplice evidence.¹⁶²⁶ This ruling by the court *a quo* was also confirmed by the Supreme Court of Appeal.¹⁶²⁷ The *Dos Santos* matter is also relevant as an early case involving racketeering charges under the *POCA*, which is discussed next.

5.4 The POCA

The *POCA* was promulgated mainly because the South African common and statutory law proved ineffective in the combating of organised crime

¹⁶¹⁷ See Theophilopoulos 2003 *SALJ* 374.

¹⁶¹⁸ *S v Dos Santos* 2010 2 SACR 382 (SCA) 397A-B.

¹⁶¹⁹ The offences to which they pleaded guilty are unfortunately not stated in the case reports, but from the sentences they received, it can be inferred that these were lesser charges than those of the main perpetrators.

¹⁶²⁰ Section 204 of the *CPA*. See *S v Dos Santos* 2010 2 SACR 382 (SCA) 388I.

¹⁶²¹ Contravening s 2(1)(e) of the *POCA*.

¹⁶²² Contravening s 21(a) and (b) of the *Diamonds Act* 56 of 1986.

¹⁶²³ *S v Hlapezula* 1965 4 SA 439 (A) 440D-E. See para 5.3.3 above.

¹⁶²⁴ *S v Dos Santos* 2006 JDR 0604 (C) para 16-17.

¹⁶²⁵ *S v Dos Santos* 2006 JDR 0604 (C) para 17.

¹⁶²⁶ *S v Dos Santos* 2006 JDR 0604 (C) para 17.

¹⁶²⁷ See *S v Dos Santos* 2010 2 SACR 382 (SCA) para 27.

and had failed to keep up to date with international instruments in this regard.¹⁶²⁸ Hence, at the Grim Reaper Conference, Assistant Commissioner George Govender, then national head of the SAPS Interdepartmental Intelligence, stated that the “SAPS is optimistic that the proposed Bill¹⁶²⁹ will significantly contribute towards the prevention and combating of organised crime once it is implemented”.¹⁶³⁰

The prosecution of individuals who are members of organised criminal groups for their individual crimes remains difficult, particularly because their crimes are committed in secret and leave no complainants to alert the police about the commission of the offences, and also because such crimes usually involve many accomplices or accessories after the fact.¹⁶³¹ Hence the substantive law has been broadened to include offences relating to organised criminal activity, also referred to as enterprise-related crimes.¹⁶³²

While the American case law on the racketeering provisions under the *RICO Act* can be helpful when interpreting the racketeering provisions under the *POCA*, and case law of the United Kingdom can be used to interpret the asset forfeiture provisions found in chapters 5 and 6 of the *POCA*, Kruger¹⁶³³ warns that this should be done with caution, as legislation in South Africa must always be interpreted with the “spirit, purport and objects of the Bill of Rights in our Constitution” in mind.¹⁶³⁴

Instead of focusing on the specific criminal transaction (or conduct), the *POCA* focusses on the racketeering events and the proceeds of crime as

¹⁶²⁸ Cowling 1998 SACJ 356; Kruger *Organised Crime* 6. See also the Preamble of the *POCA*.

¹⁶²⁹ Which was the *Prevention of Organised Crime Bill* that came into operation shortly after. See the footnote of Hough and Du Plessis *Organised Crime* 60.

¹⁶³⁰ Hough and Du Plessis *Organised Crime* 60.

¹⁶³¹ Von Lampe *Organised Crime* 368-369.

¹⁶³² Von Lampe *Organised Crime* 369; Kruger *Organised Crime* 1.

¹⁶³³ Kruger *Organised Crime* 9-10.

¹⁶³⁴ See also *S v Shaik* 2008 2 SACR 165 (CC) 188G-189A.

well as how such proceeds can be confiscated and forfeited.¹⁶³⁵ Also, those in the top echelons of organised criminal groups are difficult to prosecute, as they are protected by the layers of members who act on their orders to commit the various crimes. Hence, the forfeiture of the profits that these crime bosses generate is seen as an effective way to separate them from their dishonest gains.¹⁶³⁶

The advantages of criminalising participation in an organised criminal group are summed up by Von Lampe¹⁶³⁷ as follows:

- (i) they encourage law enforcement to focus on group structures rather than individuals;
- (ii) they allow individual criminal wrongdoing to be attributed to the group;
- (iii) they provide for harsher sanctions than individual wrongdoing; and
- (iv) they allow for special investigation methods.

Before the specific offences and asset forfeiture provisions of the *POCA* are discussed, it must be mentioned that the *POCA* does not apply only to the combating of organised crime in South Africa.

5.4.1 *Ambit*

Like the *RICO Act*, the *POCA* is not limited to organised crime only.¹⁶³⁸ In *National Director of Public Prosecutions v Van Staden*,¹⁶³⁹ Nugent JA stated that the *POCA* exists to supplement the “ordinary criminal law” and was not to be used simply for convenience sake. The court held that the ordinary criminal law would be adequate where the detection and prosecution of cases presented no special difficulty and that the use of the

¹⁶³⁵ Kruger *Organised Crime* 1.

¹⁶³⁶ Kruger *Organised Crime* 7. See also *National Director of Public Prosecutions v Mohamed* 2002 2 SACR 196 (CC) paras 15 and 16.

¹⁶³⁷ Von Lampe *Organised Crime* 373.

¹⁶³⁸ Kruger *Organised Crime* 7.

¹⁶³⁹ *National Director of Public Prosecutions v Van Staden* 2007 1 SACR 338 (SCA) para 7.

POCA was justified in cases which presented the “particular difficulties encountered in the detection and successful prosecution of organised crime”. Another aspect which the court might consider is the adequacy of the “penalties prescribed for the particular offence”.¹⁶⁴⁰

To this end, the Supreme Court of Appeal (SCA) did not agree with a narrow interpretation of the *POCA* as applied by the court of first instance in *Cook Properties*.¹⁶⁴¹ The SCA held that a narrow interpretation restricted the ambit of the *POCA* too much and ignored large parts of the long title and preamble, which clearly implied that the *POCA* reached beyond organised crime to cases of individual wrongdoing as well. The Constitutional Court agreed unanimously with the SCA interpretation of the *POCA*, thus upholding the view that it also applied to cases of individual wrongdoing.¹⁶⁴²

For purposes of this study, the focus will be on how the *POCA* contributes specifically to the combating of organised crime in South Africa. The provisions under chapter 4 of the *POCA*, which create offences relating to criminal gang activities, are therefore not covered,¹⁶⁴³ because in *Eyssen*,¹⁶⁴⁴ the Supreme Court of Appeal set aside two convictions on racketeering charges¹⁶⁴⁵ and confirmed a conviction on a criminal gang activity charge,¹⁶⁴⁶ stating that a gang was not necessarily an enterprise for purposes of the *POCA* (and the combating of organised crime for that matter). It is, however, important to point out that gangs provide a

¹⁶⁴⁰ *National Director of Public Prosecutions v Geyser* (160/2007) [2008] ZASCA 15 (25 March 2008) para 20.

¹⁶⁴¹ *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan* 2004 2 SACR 208 (SCA) paras 64 and 65.

¹⁶⁴² *Prophet v National Director of Public Prosecutions* 2006 2 SACR 525 (CC).

¹⁶⁴³ For a detailed discussion on these statutory offences of participating in criminal gangs, see Snyman 1999 SACJ 213-222.

¹⁶⁴⁴ *S v Eyssen* 2009 1 SACR 406 (SCA) 412A.

¹⁶⁴⁵ Namely contravening s 2(1)(e) and (f) of the *POCA*.

¹⁶⁴⁶ Section 9 of the *POCA*.

“stepping-stone” for individuals into the world of organised crime¹⁶⁴⁷ and the successful combating of criminal gang activities therefore also contributes to the combating of organised crime.

5.4.2 Racketeering offences

Although not limited to organised crime, the racketeering offences created by the *POCA*¹⁶⁴⁸ target group activity and are therefore aimed at combating organised criminal groups, as defined in chapter 2 of this study, by criminalising “membership of an organisation (enterprise) which has been shown to have committed at least two particular offences”,¹⁶⁴⁹ of which at least one must have been committed after the *POCA* came into operation¹⁶⁵⁰ and the other within ten years. The racketeering provisions of the *POCA* are based on similar provisions found in the American *RICO Act*, which is discussed in chapter 4 of this study.¹⁶⁵¹ Hence, the racketeering provisions have very similar elements as the *RICO Act*. In *Roberts*,¹⁶⁵² Chetty J sums up the elements which the state must prove as follows:

[I]n order to found a conviction thereanent (sic), the state is required to establish the existence of an enterprise, a pattern of racketeering activity and a link between them and the accused. It must thereafter establish that the accused participated in the enterprise's affairs and that such participation was through a 'pattern of racketeering activity'.

Like the American *RICO Act*, the *POCA* defines an enterprise¹⁶⁵³ and a pattern of racketeering¹⁶⁵⁴ broadly.¹⁶⁵⁵ The link between them and the

¹⁶⁴⁷ Kruger *Organised Crime* 70.

¹⁶⁴⁸ Section 2 of the *POCA*.

¹⁶⁴⁹ Kruger *Organised Crime* 14.

¹⁶⁵⁰ 21 January 1999.

¹⁶⁵¹ De Koker *South African Money Laundering Com* 2-5.

¹⁶⁵² *S v Roberts* 2013 1 SACR 369 (ECP) 377B-C.

¹⁶⁵³ In terms of s 1 of the *POCA*, an enterprise includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity.

¹⁶⁵⁴ In terms of s 1 of the *POCA* a pattern of racketeering activity means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after 21 January 1999 – the

accused is established by way of the racketeering offences created by the *POCA*, which can be divided into two groups, namely those that criminalise conduct of the accused relating to property of a criminal enterprise through a pattern of racketeering activity,¹⁶⁵⁶ and those that criminalise the accused's participation in a criminal enterprise¹⁶⁵⁷ through a pattern of racketeering activity.¹⁶⁵⁸ Therefore, the *POCA* "focuses on events, not perpetrators" and "embodies a paradigm shift in criminal law".¹⁶⁵⁹

One of the most significant cases surrounding the *POCA*, was the constitutional challenge of various aspects of the racketeering offences. Relying on the ambiguity created by the legislative efforts of Parliament, the applicants in *Savoi v National Director of Public Prosecutions*,¹⁶⁶⁰ who were originally charged with *inter alia* racketeering, fraud, corruption and money laundering, sought the following:

- (i) an order declaring the definitions¹⁶⁶¹ of "enterprise" and "pattern of racketeering activity" unconstitutional and invalid, on the grounds that the definition of "enterprise" was overbroad and unconstitutional, while the definition of "pattern of racketeering activity" was unconstitutional and void for vagueness;
- (ii) an order declaring the racketeering offences¹⁶⁶² unconstitutional, invalid and void for vagueness, because they were predicated on the definitions of "enterprise" and "pattern of racketeering activity";

commencement date of the *POCA* – and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of the prior offence.

¹⁶⁵⁵ See the discussion of the *Savoi* cases that follows below.

¹⁶⁵⁶ Section 2(1)(a) to (c) of the *POCA*.

¹⁶⁵⁷ Section 2(1)(d) to (f) of the *POCA*.

¹⁶⁵⁸ Kruger *Organised Crime* 14.

¹⁶⁵⁹ Kruger *Organised Crime* 15. As in the case of the American *RICO Act* discussed in chapter 4, the *POCA* focusses on the relationship among the accused, the criminal enterprise, and the pattern of racketeering activity. Compare Kruger *Organised Crime* 15.

¹⁶⁶⁰ *Savoi v National Director of Public Prosecutions* 2013 JDR 1021 (KZP).

¹⁶⁶¹ In s 1 and chapter 2 of the *POCA*.

¹⁶⁶² Created in s (2)(1)(a)-(g) of the *POCA*.

- (iii) an order declaring Chapter 2 of the *POCA* unconstitutional in its entirety because it operated retrospectively, in violation of section 35(3)(l)¹⁶⁶³ of the *Constitution* and the Rule of Law; and
- (iv) an order declaring Section 2(2) of the *POCA*¹⁶⁶⁴ unconstitutional and invalid because it violated the accused's right to a fair trial.¹⁶⁶⁵

In the court of first instance the applicants contended that the definition of a “pattern of racketeering activity” is unintelligible, vague and meaningless, due to the following reasons:

- (i) it is not clear at what point it can be said that there is a “pattern of racketeering”;
- (ii) it is not clear who may be charged with racketeering under the *POCA*; and
- (iii) it is not objectively ascertainable at what point a racketeering offence is committed.

The applicants relied heavily on the American case of *H.J. Inc. v North-western Bell Tel Co*¹⁶⁶⁶ where the US Supreme Court noted that the lawcourts had been unable to define “pattern” with any meaningful degree of clarity, leading to speculation that the United States *RICO Act* would be vulnerable to a vagueness challenge. The court in *H. J. Inc. v North-western Bell Tel Co*¹⁶⁶⁷ also found that the definition of “pattern of racketeering activity” in the *RICO Act* was elusive and uninformative and had similar concerns regarding the element of “continuity”, which the state

¹⁶⁶³ Section 35(3)(l) of the *Constitution* states that every accused person has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.

¹⁶⁶⁴ Section 2(2) of the *POCA* states that the court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to the racketeering offences, notwithstanding that such evidence might otherwise be inadmissible, *provided that such evidence would not render a trial unfair* (emphasis added).

¹⁶⁶⁵ In terms of s 35 of the *Constitution*.

¹⁶⁶⁶ *H.J Inc. v North-western Bell Tel Co* 49 U.S 229 (1989).

¹⁶⁶⁷ *H.J Inc. v North-western Bell Tel Co* 49 U.S 229 (1989).

must prove under the “pattern of racketeering activity” definition.¹⁶⁶⁸ The applicants in *Savoi*¹⁶⁶⁹ therefore contended that the vagueness of the definitions found in the *POCA* impugned the principle of legality, which demands that legislation must indicate with reasonable certainty what is expected from the subjects of the law. Failure to provide such clarity would also be constitutionally offensive.

In his judgment in the court of first instance, Madondo J, dealing with the element of negligence in the racketeering offences created by the *POCA*,¹⁶⁷⁰ represented in the wording “ought reasonably to have known”, stated as follows:¹⁶⁷¹

A person cannot be convicted on the ground that the circumstances were foreseeable consequences of his conduct. The requirement that the accused ought reasonably to have known that his conduct would constitute an offence of racketeering calls for the application of an objective test in determining whether or not the accused “ought reasonably to have known”; because the fictitious reasonable person would have known that his conduct constituted racketeering activity. However, such a conclusion would constitute negligence and not *dolus* in any form. See also *Jacob Humphreys v The State* (424.12) [2013] ZA SCA 20 (22 March 2013) para 13. This renders the accused exposed to conviction for an offence he had not committed. In the circumstances, the possibility of punishing an unintended, insensible or unconscious conduct cannot be excluded, and that would in the decision in *Humphreys`* case, *supra*, conflate different tests for *dolus* and negligence.

This somewhat lengthy quotation is necessary to show the confusion between intention and negligence in the judgment by the court of first instance. Based on the above, Madondo J declared the racketeering offences¹⁶⁷² “unconstitutional and invalid to the extent only of the words ‘ought reasonably have known’”,¹⁶⁷³ thus removing the element of

¹⁶⁶⁸ The American court cases on the *RICO Act* are discussed in more thoroughly in chapter 4.

¹⁶⁶⁹ *Savoi v National Director of Public Prosecutions* 2013 JDR 1021 (KZP).

¹⁶⁷⁰ Section 2 of the *POCA*.

¹⁶⁷¹ *Savoi v National Director of Public Prosecutions* 2013 JDR 1021 (KZP) para 90.

¹⁶⁷² Created in ss 2(1)(a)(ii); (b)(ii); (c)(ii) and (f)(ii) of the *POCA*.

¹⁶⁷³ *Savoi v National Director of Public Prosecutions* 2013 JDR 1021 (KZP) para 131.

negligence from the racketeering offences. The Constitutional Court correctly criticised the above view, stating:¹⁶⁷⁴

Nothing was placed before the High Court suggesting that the negligence standard was not suited to the offences concerned. Therefore, there are no grounds upon which we can conclude that the negligence standard provided for in section 2(1) is not constitutionally compliant. In fact, the High Court made the order of invalidity of its own motion. Needless to say, no evidence had been proffered by any of the parties on the issue. To put it bluntly, the order of constitutional invalidity was made on a case the respondents were never called upon to meet.

Madlanga J furthermore held that the choice of whether fault in a criminal offence creating a crime must include negligence, was at the discretion of the Legislature and the court could not invalidate such legislation simply because negligence was included for the fault element.¹⁶⁷⁵ The Constitutional Court therefore did not confirm the High Court's order of unconstitutionality.

In their appeal to the Constitutional Court, the applicants also argued that the lists of offences forming the underlying predicate offences were so numerous and varied that the entire concept of a "pattern of racketeering" was rendered vague and thereby made the whole of the *POCA* unconstitutional.¹⁶⁷⁶ The court, however, stated that the Rule of Law requires reasonable certainty, not absolute or perfect lucidity and that there is nothing vague about the list of offences.¹⁶⁷⁷

The sum of this constitutional challenge to the provisions of the *POCA* is that the definitions relating to organised crime found in this piece of legislation are not unconstitutional, thus laying to rest Kemp's¹⁶⁷⁸ initial fears that the provisions of the Palermo Convention¹⁶⁷⁹ firstly infringe on the principle of legality, because of vagueness, and secondly, infringes on

¹⁶⁷⁴ *Savoi v National Director of Public Prosecutions* 2014 1 SACR 545 (CC) para 87.

¹⁶⁷⁵ *Savoi v National Director of Public Prosecutions* 2014 1 SACR 545 (CC) para 91.

¹⁶⁷⁶ *Savoi v National Director of Public Prosecutions* 2014 1 SACR 545 (CC) para 18.

¹⁶⁷⁷ *Savoi v National Director of Public Prosecutions* 2014 1 SACR 545 (CC) paras 18 and 23.

¹⁶⁷⁸ Kemp 2001 SACJ 156.

¹⁶⁷⁹ Discussed under para 2.6 above.

the culpability principle, or principle of personal liability, because “*intention* is required for the crime of participation in an organised criminal group”.¹⁶⁸⁰ De Koker¹⁶⁸¹ also points out the following regarding the *Savoi*-decision¹⁶⁸² and the application in South Africa of the liberal approach followed in America when interpreting the *RICO Act*:

It was thought that a South African Court may be reluctant to follow a similar liberal approach, given the harshness of the *POCA* provisions and penalties, but this was not a point that seems to have had much influence on the judgment.

South African courts may therefore continue to turn to American judgments on the *RICO Act* when interpreting the *POCA* and may be faced with the problem of having to “choose between two different views of two American courts that may be driven by factors that are relevant to the American legal system but not to the South African system”.¹⁶⁸³

As is argued in chapter 2 above, the main aim of organised criminal groups, and especially of transnational groups, is generating illicit profits.¹⁶⁸⁴ Hence the *POCA* does not only create racketeering offences, but also offences relating to money laundering, which is explored next.

5.4.3 Money laundering offences

The criminalisation of money laundering is one of the strategies used to expand the criminal law in order to combat organised crime.¹⁶⁸⁵ Briefly, money laundering entails obscuring the criminal origins of the proceeds of unlawful activities.¹⁶⁸⁶ Except for the criminal offences relating to money laundering, another tool in combating organised crime is the continuous monitoring of financial transactions by means of anti-money laundering

¹⁶⁸⁰ Emphasis added.

¹⁶⁸¹ De Koker *South African Money Laundering* Com 3-17 - Com 3-18.

¹⁶⁸² *Savoi v National Director of Public Prosecutions* 2014 1 SACR 545 (CC).

¹⁶⁸³ De Koker *South African Money Laundering* Com 3-18.

¹⁶⁸⁴ Guymon 2000 *BJIL* 87.

¹⁶⁸⁵ Von Lampe *Organised Crime* 370.

¹⁶⁸⁶ Von Lampe *Organised Crime* 370.

legislative provisions,¹⁶⁸⁷ as created by the *FICA*, which is discussed in the next section. The *POCA* provisions which criminalise money laundering activities are seen as “some of the broadest in force internationally”.¹⁶⁸⁸

The provisions¹⁶⁸⁹ not only criminalise money laundering acts by the members of organised criminal groups and their accomplices,¹⁶⁹⁰ but also the acts of those who assist them to benefit from the proceeds of their unlawful activities,¹⁶⁹¹ as well as persons who acquire, use or possess the proceeds of unlawful activities in any way.¹⁶⁹² The wording of these sections furthermore indicates that the money laundering offences can be committed intentionally or negligently.¹⁶⁹³ Sanctions of a fine not exceeding R100 million, or imprisonment for a period not exceeding 30 years may be imposed.¹⁶⁹⁴

While “proceeds of unlawful activities” and “unlawful activity” are defined widely,¹⁶⁹⁵ the Supreme Court of Appeal held in the *Seevnarayan*¹⁶⁹⁶ matter that even though such broad definitions apply, there must still be some form of “connection” in the form of a “consequential relation”, where the proceeds accrue to the person charged as a consequence of unlawful activity. Therefore, it held that legitimate income hidden away to evade tax was not the proceeds of crime for purposes of the money laundering

¹⁶⁸⁷ Von Lampe *Organised Crime* 370.

¹⁶⁸⁸ De Koker *South African Money Laundering* Com 3-3.

¹⁶⁸⁹ Found in ss 4, 5 and 6 of the *POCA*.

¹⁶⁹⁰ Section 4 of the *POCA*.

¹⁶⁹¹ Section 5 of the *POCA*.

¹⁶⁹² Section 6 of the *POCA*.

¹⁶⁹³ The words “known or ought reasonably to have known” are used in all three the abovementioned criminal provisions. See De Koker *South African Money Laundering* Com 3-3 and Kruger *Organised Crime* 67.

¹⁶⁹⁴ Section 8 of the *POCA*.

¹⁶⁹⁵ Section 1 of the *POCA*. See also *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*; *National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd*; *National Director of Public Prosecutions v Seevnarayan* 2004 2 SACR 208 (SCA) 239G.

¹⁶⁹⁶ See *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*; *National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd*; *National Director of Public Prosecutions v Seevnarayan* 2004 2 SACR 208 (SCA) 241B-E. See also De Koker *South African Money Laundering* Com 3-8 for a detailed discussion on this issue.

offences, as the income was derived from legitimate investments.¹⁶⁹⁷ Conversely, in *De Vries*,¹⁶⁹⁸ the Supreme Court of Appeal showed how the wide definitions can be applied, when it ruled as follows:

By receiving the cigarettes for himself, well knowing they were stolen, the appellant made himself guilty of theft as it is a continuing crime. By proceeding to use the cigarettes as part of his stock in trade as a wholesaler as if they were goods lawfully acquired, and thereby disguising or concealing the source, movement and ownership of the cigarettes and enabling and assisting the robbers to either avoid prosecution or to remove property acquired in the robberies, the appellant clearly made himself guilty of a contravention of s 4.¹⁶⁹⁹ Doing so involved different actions and a different criminal intent to that required for theft.

The money laundering offences in the *POCA* thus contribute to the combating of organised crime in South Africa in a substantial way.¹⁷⁰⁰ Linked to these provisions, are the asset forfeiture provisions found in the *POCA*, because while the money laundering offences criminalise any attempts to legitimise the proceeds of unlawful activity, asset forfeiture deals with the confiscation of such proceeds once they are traced.¹⁷⁰¹

5.4.4 Asset forfeiture

The international community believes that the profits should be taken out of crime by confiscation and forfeiture.¹⁷⁰² Forfeiture is not new to South Africa. The *CPA*, which was enacted long before the *POCA*, for instance provides for the forfeiture of articles that were instrumentalities of crime upon conviction of the relevant accused persons.¹⁷⁰³ The *POCA* allows asset forfeiture to be used as a tool to disrupt the effects of organised crime by allowing the State not only to seize assets used as instruments of crime, but also the proceeds of such unlawful activities.¹⁷⁰⁴ The *POCA*

¹⁶⁹⁷ *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan* 2004 2 SACR 208 (SCA) 241C.

¹⁶⁹⁸ *S v De Vries* 2012 1 SACR 186 (SCA) 208B-C.

¹⁶⁹⁹ Section 4 of the *POCA*.

¹⁷⁰⁰ See also Kruger *Organised Crime* 52.

¹⁷⁰¹ Kruger *Organised Crime* 9.

¹⁷⁰² Kruger *Organised Crime* 6.

¹⁷⁰³ Section 35 of the *CPA*.

¹⁷⁰⁴ Von Lampe *Organised Crime* 370.

distinguishes between civil forfeiture and criminal forfeiture,¹⁷⁰⁵ with a criminal conviction required for the latter, whereas the former is based on - the illegality of the assets themselves.¹⁷⁰⁶

Civil forfeiture is often criticised as being too draconian, as it is seen as a punishment meted out without there having been a criminal conviction.¹⁷⁰⁷ Therefore, in *National Director of Public Prosecutions v Geyser*¹⁷⁰⁸ the Supreme Court of Appeal held as follows:

Although s 50(1) of POCA requires forfeiture where property is an instrumentality of an offence, the courts must ensure that forfeiture does not amount to arbitrary and therefore unconstitutional deprivation of property. They must be satisfied that the consequences of a forfeiture order are proportionate to the purpose for which it is made. They therefore have a discretion to decline forfeiture, despite s 50(1), if the impact of the deprivation would be out of proportion to that purpose.

In a similar vein, the Supreme Court of Appeal in *National Director of Public Prosecutions v Geyser*¹⁷⁰⁹ held that the “primary question, therefore, is not: would forfeiture constitute punishment (whether excessive or at all), but: would forfeiture have more than the necessary remedial effect?” Hence, in *Mohunram v National Director of Public Prosecutions*¹⁷¹⁰ the Constitutional Court held that before the forfeiture of assets which are instrumental in committing crime can be ordered, it must at least be shown that such instrumentality related to the purpose of the POCA to combat organised crime. In this case a premises was used for unlicensed gambling and the court held that “the causal connection between the property and the offences was certainly a direct one”.¹⁷¹¹

¹⁷⁰⁵ See chapter 5 (criminal forfeiture) and chapter 6 (civil forfeiture) of the POCA.

¹⁷⁰⁶ Von Lampe *Organised Crime* 370 gives a good example where smuggled goods are confiscated without necessarily being able to identify the smugglers.

¹⁷⁰⁷ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 21.

¹⁷⁰⁸ *National Director of Public Prosecutions v Geyser* (160/2007) [2008] ZASCA 15 (25 March 2008) para 18.

¹⁷⁰⁹ *National Director of Public Prosecutions v Geyser* (160/2007) [2008] ZASCA 15 (25 March 2008) para 30.

¹⁷¹⁰ *Mohunram v National Director of Public Prosecutions* 2007 2 SACR 145 (CC).

¹⁷¹¹ *Mohunram v National Director of Public Prosecutions* 2007 2 SACR 145 (CC) 167B-C.

Similarly, in *Brooks v NDPP*¹⁷¹² the Supreme Court of Appeal held that the use of a premises for illicit diamond dealing did not make the premises an instrument of the crime, as such deals could occur anywhere else than the said property.

The courts found that the overriding principle in determining whether confiscation should prevail, is proportionality.¹⁷¹³ Hence, “[t]he organised crime element, while significant in assessing whether a forfeiture order should be made in a particular case, is not necessarily decisive”.¹⁷¹⁴ Adding “labels and qualifiers” would only lead to confusion.¹⁷¹⁵

Thus De Koker¹⁷¹⁶ contends that the intended deterrent effect, which confiscating the proceeds of unlawful activities from the leaders of organised criminal groups has in the combating of organised crime, should prevail in asset forfeiture cases. Furthermore the Constitutional Court in *Shaik*¹⁷¹⁷ warned as follows regarding the interpretation of the asset forfeiture provisions of the *POCA*:

Although the provisions of the English legislation are similar to those of our legislation, the constitutional framework is different; and for this reason, I do not think that the interpretation by the English courts of their legislation is directly applicable to the proper interpretation of our legislation in the light of the spirit, purport and objects of our Bill of Rights.

Von Lampe¹⁷¹⁸ challenges the view that asset forfeiture and anti-money laundering provisions take the life blood out of organised crime, arguing that it underestimates the ability of organised criminal groups to obtain illegal goods on credit, which means that the provisions will hardly force

¹⁷¹² *Brooks v National Director of Public Prosecutions* 2017 1 SACR 701 (SCA) 722E-723A.

¹⁷¹³ *Mohunram v National Director of Public Prosecutions* 2007 2 SACR 145 (CC) 174D-F; *Brooks v National Director of Public Prosecutions* 2017 1 SACR 701 (SCA) 735B-D.

¹⁷¹⁴ *Mohunram v National Director of Public Prosecutions* 2007 2 SACR 145 (CC) 174F.

¹⁷¹⁵ *Mohunram v National Director of Public Prosecutions* 2007 2 SACR 145 (CC) 174E.

¹⁷¹⁶ De Koker *South African Money Laundering* Com 3-15 - Com 3-16.

¹⁷¹⁷ *S v Shaik* 2008 2 SACR 165 (CC) 188G-189A.

¹⁷¹⁸ Von Lampe *Organised Crime* 372.

criminal enterprises to shut down. It is, however, submitted that such provisions do disrupt organised crime and therefore contribute immensely to the combating of organised crime, simply because the chosen definition of this study shows that profit is the main motivating factor for organised crime.¹⁷¹⁹ Hence, attacking the main *raison d'être* of such groups will seriously hurt them. Similarly, the anti-money laundering provisions of the *FICA* are also valuable in disrupting the operations of organised criminal groups, and are covered next. Note that the Asset Forfeiture Unit, which is tasked with implementing the provisions of chapter 5 (criminal confiscation) and chapter 6 (civil forfeiture) of the *POCA*, is discussed in the next chapter of this study.

5.5 The FICA

At the Grim Reaper Conference, Assistant Commissioner Govender lamented the fact that “South Africa seems to be one of the few countries lacking legislation regarding money laundering”.¹⁷²⁰ This situation was rectified with the promulgation of the *FICA*. Cowling¹⁷²¹ maintains that one of the most effective measures in the combating of organised crime is through the prevention of money laundering and more especially to safeguard legitimate business from penetration by organised criminal groups. The international community believes that “any global fight against organised crime must attack the criminal’s profit margin”.¹⁷²² Hence Albanese¹⁷²³ maintains that financial analysis is one of the main investigative tools available in the combatting of organised crime.¹⁷²⁴

¹⁷¹⁹ See para 2.8 above.

¹⁷²⁰ Hough and Du Plessis *Organised Crime* 59.

¹⁷²¹ Cowling 1998 SACJ 356.

¹⁷²² Hough and Du Plessis *Organised Crime* 10. These are the words of the then Executive Director of the United Nations Office for Drug Control and Crime Prevention, Professor Pino Arlacchi, during a conference on the implications of organised crime for South and Southern Africa, which was hosted by the University of Pretoria’s Institute for Strategic Studies in 1998.

¹⁷²³ Albanese *Organised Crime* 257.

¹⁷²⁴ The provisions relating to financial analysis are discussed under the *PRECCA* in para 5.6 below.

Laundered money provides criminals with opportunities to expand their criminal enterprises, which have a detrimental effect on society.¹⁷²⁵ These effects are summed up as follows:¹⁷²⁶

- (i) eroding of the integrity of a country's financial system;
- (ii) causing volatility of interest and exchange rates;
- (iii) leading to severe inflation;
- (iv) siphoning away money from the normal economic growth; and
- (v) affecting the stability of the global market.

To this end, the long title of the *FICA*, indicates that its purpose is *inter alia* to combat money laundering. While money laundering activities are criminalised under the *POCA*, the *FICA* puts measures in place to gather financial intelligence through the Financial Intelligence Centre.¹⁷²⁷ This is especially essential in developing countries, because criminals target countries which have weak financial controls.¹⁷²⁸

Historically, the controlling of the proceeds of crime in South Africa first started with the *Drug Trafficking Act*,¹⁷²⁹ albeit that it only dealt with the proceeds of drug related crimes.¹⁷³⁰ The *Drug Trafficking Act* was largely ineffective in controlling money laundering, even within its limited application,¹⁷³¹ and was later repealed by the *POCA*.¹⁷³² The controlling of money laundering was broadened by the *Proceeds of Crime Act*,¹⁷³³ which criminalised the laundering of proceeds of any and all crimes, as well as creating reporting duties for businesses coming into contact with suspected proceeds of crime.¹⁷³⁴ The *Proceeds of Crime Act* was,

¹⁷²⁵ Hough and Du Plessis *Organised Crime* 11.

¹⁷²⁶ Hough and Du Plessis *Organised Crime* 11.

¹⁷²⁷ The Financial Intelligence Centre is established by s 2 of the *FICA*.

¹⁷²⁸ Hough and Du Plessis *Organised Crime* 10.

¹⁷²⁹ The *Drug Trafficking Act* is discussed in more detail under para 5.9.2 below.

¹⁷³⁰ De Koker *South African Money Laundering* Com 2-3.

¹⁷³¹ See De Koker *South African Money Laundering* Com 2-4 for critique.

¹⁷³² Section 79(b) of the *POCA*.

¹⁷³³ *Proceeds of Crime Act* 76 of 1996.

¹⁷³⁴ De Koker *South African Money Laundering* Com 2-4.

however, short-lived as it was repealed by the *POCA*,¹⁷³⁵ which not only criminalised money laundering¹⁷³⁶ but “also created a general obligation for businesses to report certain suspicious transactions”.¹⁷³⁷

The reporting provision under the *POCA* was in turn repealed by the *FICA*,¹⁷³⁸ which introduced a string of reporting obligations to combat money laundering¹⁷³⁹ and terror financing.¹⁷⁴⁰ The combating of money laundering is a global initiative which gained momentum in the 1980s, which culminated in many countries adopting anti-money laundering legislation in the 1990s, after the Financial Action Task Force (FATF) was founded in Paris in 1989.¹⁷⁴¹ The FATF’s role is discussed in chapter 3 of this study.¹⁷⁴² Since South Africa is a member of the FATF,¹⁷⁴³ the *FICA* has the added role of ensuring South Africa complies with the FATF recommendations,¹⁷⁴⁴ which is what the Financial Intelligence Bill¹⁷⁴⁵ intends to do. Before the Bill is discussed, certain aspects of the *FICA*, which are essential to the combating of organised crime, must be analysed.

5.5.1 Supervisory bodies

While the Financial Intelligence Centre is discussed under the “structures” of chapter 6 of this study, it is prudent to mention the role and functions of the so-called “supervisory bodies” here. Schedule 2 of the *FICA* lists the supervisory bodies that are responsible for supervising and enforcing

¹⁷³⁵ Section 79(c) of the *POCA*.

¹⁷³⁶ See the discussion under the *POCA* above.

¹⁷³⁷ De Koker *South African Money Laundering* Com 2-6. The obligation was created by s 7 of the *POCA*.

¹⁷³⁸ Section 79 read with Schedule 4 of the *FICA*.

¹⁷³⁹ De Koker *South African Money Laundering* Com 2-6.

¹⁷⁴⁰ To this end, s 27(1) of the *POCDATARA*, amended the *FICA* by inserting s 28A and broadening s 29, thus creating reporting duties to combat the financing of terrorism.

¹⁷⁴¹ De Koker *South African Money Laundering* Com 1-8, Com 1-12.

¹⁷⁴² See para 3.3.4 above.

¹⁷⁴³ See FATF 2017 [http://www.fatf-gafi.org/countries/#South Africa](http://www.fatf-gafi.org/countries/#South%20Africa).

¹⁷⁴⁴ See FATF 2012 <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>.

¹⁷⁴⁵ *Financial Intelligence Amendment Bill* 33 of 2015.

compliance with the *FICA* – or any order, determination or directive made in terms of the *FICA* – by all accountable institutions regulated or supervised by them.¹⁷⁴⁶ The FIC, however, retains overall supervision for compliance.¹⁷⁴⁷

The obligation resting on supervisory bodies in terms of the *FICA* is deemed to form part of the relevant supervisory body's own legislative mandate and constitutes a core function of such supervisory body.¹⁷⁴⁸ Furthermore, any Act that regulates a supervisory body or authorises the supervisory body to supervise or regulate an accountable institution must be read as including the *FICA* obligation and a supervisory body may utilise any fees or charges it is authorised to impose or collect to defray expenditure incurred in performing its obligations under the *FICA* or any order, determination or directive made in terms of the Act.¹⁷⁴⁹ Supervisory bodies are given vast powers by the *FICA* in order to execute their functions.¹⁷⁵⁰

5.5.2 Reportable and accountable institutions

Schedule 1 of the *FICA* lists the so-called “accountable institutions”, while Schedule 3 of the *FICA* lists the so-called “reporting institutions”, who must be registered as such with the FIC within a prescribed period of time.¹⁷⁵¹ Currently, the only reporting institutions are persons who carry on the business of dealing in either motor vehicles or Kruger rands.¹⁷⁵²

While the reporting duties created by the *FICA*, discussed in the next section, do not apply exclusively to accountable and reporting institutions, certain the *FICA* provisions apply only to accountable institutions, whilst

¹⁷⁴⁶ Section 45(1) of the *FICA*.

¹⁷⁴⁷ Section 4(g) of the *FICA*.

¹⁷⁴⁸ Section 45(1A)(a) of the *FICA*.

¹⁷⁴⁹ Section 45(1A)(b) of the *FICA*.

¹⁷⁵⁰ See s 45(1A) as well as the Compliance and Enforcement sections in Chapter 4 of the *FICA*.

¹⁷⁵¹ Section 43B of the *FICA*.

¹⁷⁵² Schedule 3 of the *FICA*.

others apply only to accountable and reporting institutions. Reporting institutions are compelled to report cash transactions above a certain amount; so-called threshold reporting.¹⁷⁵³ This duty also applies to accountable institutions,¹⁷⁵⁴ along with several other duties¹⁷⁵⁵ relating to client identification and verification,¹⁷⁵⁶ record-keeping,¹⁷⁵⁷ appointment of compliance officers,¹⁷⁵⁸ establishment of internal procedures¹⁷⁵⁹ and employee training.¹⁷⁶⁰

5.5.3 Reporting duties

The *FICA* imposes certain duties, including reporting duties, on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities.¹⁷⁶¹ The broadest of the reporting duties relates to suspicious and unusual transactions, which can have a wide application as it places a reporting duty on any person who carries on a business, or is in charge of or manages a business, or who is employed by a business.¹⁷⁶²

Keeping in mind that “anything which occupies the time and attention and labour of a man for the purpose of profit is business”,¹⁷⁶³ the provision makes for a very large net to catch criminals, especially considering that it applies where the reporter “knows or ought reasonably to have known or suspected” that a business transaction involves certain elements. The *FICA* furthermore provides that a person “knows” if he or she has actual knowledge of that fact, or believes that there is a reasonable possibility of

¹⁷⁵³ Section 28 of the *FICA*. See De Koker *South African Money Laundering* Com 7-41 - Com 7-45 for a detailed discussion of this reporting duty.

¹⁷⁵⁴ Section 28 of the *FICA*.

¹⁷⁵⁵ De Koker *South African Money Laundering* Com 6-3.

¹⁷⁵⁶ Section 21 of the *FICA*.

¹⁷⁵⁷ Sections 22-26 of the *FICA*.

¹⁷⁵⁸ Section 43(b) of the *FICA*.

¹⁷⁵⁹ Section 42 of the *FICA*.

¹⁷⁶⁰ Section 43(a) of the *FICA*.

¹⁷⁶¹ Long title of the *FICA*.

¹⁷⁶² Section 29 of the *FICA*.

¹⁷⁶³ *Standard General Insurance Co v Hennop* 1954 4 SA 560 (A) 565A.

the existence of that fact and fails to obtain information to confirm or refute the existence of that fact (in other word *dolus eventualis*).¹⁷⁶⁴

Determining negligence in terms of the *FICA* involves an objective test with subjective elements, because the person carrying the reporting obligation did not in fact “know”, they “ought to have known or suspected” the fact (in other words negligence) of the conclusions that he or she ought to have reached, are those which would have been reached by a reasonably diligent and vigilant person having both:

- (i) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
- (ii) the general knowledge, skill, training and experience that he or she in fact has.¹⁷⁶⁵

Such person must report the business transaction to the FIC if the following elements are present:¹⁷⁶⁶

- (i) the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;
- (ii) a transaction or series of transactions to which the business is a party:
 - a. facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;
 - b. has no apparent business or lawful purpose;
 - c. is conducted for the purpose of avoiding giving rise to a reporting duty under the *FICA*;
 - d. may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by

¹⁷⁶⁴ Section 1(2) of the *FICA*.

¹⁷⁶⁵ Section 1(3) of the *FICA*.

¹⁷⁶⁶ Section 29(1) of the *FICA*.

- legislation administered by the Commissioner for the South African Revenue Service; or
- e. relates to an offence relating to the financing of terrorist and related activities; or
- (iii) the business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities.

As failure to report constitutes an offence,¹⁷⁶⁷ the provision seems draconian in nature. It envisioned the objective part of the test, namely the general knowledge, skill, training and experience that may reasonably be expected from a person in the same position to set the “baseline”,¹⁷⁶⁸ which could then be raised to a higher level of accountability by the subjective part of the test, namely the general knowledge, skill, training and experience that he or she in fact has. “It does not allow the person to rely on his own lack of knowledge or experience to avoid liability”.¹⁷⁶⁹ Muddying the waters more, is the fact that “suspicion” is a vague term, because when “suspicion is so strong that it actually amounts to a conviction or a belief, it would amount to actual knowledge”,¹⁷⁷⁰ meaning fault is now established by *dolus eventualis* and not negligence any longer. So the suspicion cannot be too strong for purposes of negligence, because then it would amount to *dolus eventualis*.

Consider therefore a situation where a first-year university student, studying BA Communication,¹⁷⁷¹ works behind the counter of a jewellery chain store during her autumn vacation to earn spending money for the following term. She may be prosecuted if she negligently fails to report a transaction where a drug dealer buys an expensive jewellery item and

¹⁷⁶⁷ Section 52 of the FICA.

¹⁷⁶⁸ See De Koker *South African Money Laundering* Com 3-28(2) for a discussion on the history of the “dual objective/subjective test”.

¹⁷⁶⁹ De Koker *South African Money Laundering* Com 3-28(2).

¹⁷⁷⁰ De Koker *South African Money Laundering* Com 3-28.

¹⁷⁷¹ Or any other qualification that does not involve legal modules, especially criminal law.

pays with cash. The objective factors that must be considered in terms of the test,¹⁷⁷² place her in the position of a “reasonable” first-year university student,¹⁷⁷³ upon which the subjective elements, namely the general knowledge, skill, training and experience that she in fact has,¹⁷⁷⁴ are used to see if the bar should be raised.¹⁷⁷⁵ The fact that she is studying a BA-degree¹⁷⁷⁶ with only three months of university life behind her, and that she hails from a small rural town where she has never been exposed to drug dealers, expensive jewellery or large amounts of cash, is not intended to lower the bar. She will therefore be measured against the “reasonable” first-year university student.

Thankfully the situation has been somewhat revised after the *Savoi*-case, discussed under the *POCA* above,¹⁷⁷⁷ where the Constitutional Court disagreed with the High Court decision in the same matter, intimating that it is in the interests of justice to allow the objective part of the test to be “tempered” by the subjective elements, which recognises “individual frailties and shortcomings”.¹⁷⁷⁸ Thus the background and naivety of the first-year student in the example will count for something.

The other reporting and related duties¹⁷⁷⁹ obligated by the *FICA* apply to accountable institutions who, as discussed, must appoint compliance officers and train staff. Hence, these reporting and related duties should raise few issues that cannot be dealt with effectively, as the FIC also issues guidance notes¹⁷⁸⁰ and holds roadshows¹⁷⁸¹ to facilitate compliance and remove any uncertainties. They do, however, remain vital to financial

¹⁷⁷² Section 1(3)(a) of the *FICA*.

¹⁷⁷³ The fact that she studies BA Communication will only be relevant under the subjective part of the test.

¹⁷⁷⁴ Section 1(3) of the *FICA*.

¹⁷⁷⁵ Section 1(3)(b) of the *FICA*.

¹⁷⁷⁶ With no criminal law modules.

¹⁷⁷⁷ *Savoi v National Director of Public Prosecutions* 2014 1 SACR 545 (CC) 581G-582E.

¹⁷⁷⁸ *Savoi v National Director of Public Prosecutions* 2014 1 SACR 545 (CC) 582D.

¹⁷⁷⁹ See ss 27-41 of the *FICA*.

¹⁷⁸⁰ See FIC 2017 <https://www.fic.gov.za/Compliance/Pages/Compliance%20Guidance.aspx>.

¹⁷⁸¹ See FIC 2017 <https://www.fic.gov.za/Resources/Pages/roadshows.aspx>.

intelligence gathering in support of the combating of organised crime in South Africa, especially because reporting is obligatory and failure carries severe penalties.

5.5.4 *Enforcement and failure to comply*

The *FICA* contains measures to promote compliance by accountable institutions,¹⁷⁸² as well as enforcement provisions for those who fail to comply.¹⁷⁸³ *Inter alia*, failure to comply with the provisions of the *FICA* constitutes various criminal offences¹⁷⁸⁴ that carry hefty fines and imprisonment sanctions.¹⁷⁸⁵ The enforcement provisions include the appointment of inspectors¹⁷⁸⁶ to conduct inspections in order to determine compliance.¹⁷⁸⁷ The unconstitutionality of the searches performed under the inspection provision,¹⁷⁸⁸ is discussed in the next section.

Furthermore, a so-called “structuring offence”¹⁷⁸⁹ is created whereby a person who conducts, or causes to be conducted, two or more transactions with the purpose, in whole or in part, of avoiding giving rise to a reporting duty under the *FICA*, is guilty of an offence.¹⁷⁹⁰ The structuring offence carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R100 million.¹⁷⁹¹

5.5.5 *Recent amendments to the FICA*

The recently adopted *Financial Intelligence Centre Amendment Act*¹⁷⁹² (hereafter *FIC Amendment Act*) brings South Africa in line with the 2012

¹⁷⁸² Sections 42-43B of the *FICA*.

¹⁷⁸³ Sections 45A-71 of the *FICA*.

¹⁷⁸⁴ See for instance the numerous offences created by ss 46-66 of the *FICA*.

¹⁷⁸⁵ Section 68 of the *FICA*.

¹⁷⁸⁶ Section 45A of the *FICA*.

¹⁷⁸⁷ Section 45B of the *FICA*.

¹⁷⁸⁸ Section 45B of the *FICA*.

¹⁷⁸⁹ De Koker *South African Money Laundering* Com 3-28(3).

¹⁷⁹⁰ Section 64 of the *FICA*.

¹⁷⁹¹ Section 68(1) of the *FICA*.

¹⁷⁹² *Financial Intelligence Centre Amendment Act* 1 of 2017.

revised FATF standards.¹⁷⁹³ The biggest change that the amendments have brought about, was to move South Africa from a rules-based approach to a risk-based approach in its anti-money laundering and terror financing regime.¹⁷⁹⁴ Coupled with the risk-based approach, are the significant changes relating to the dealings with politically exposed persons (PEPs), now referred to as a “domestic prominent influential person”¹⁷⁹⁵ and a “foreign prominent public official”.¹⁷⁹⁶ These changes were necessary because South Africa was rated as non-compliant in terms of its dealings with PEPs in the latest FATF evaluation report.¹⁷⁹⁷ Due diligence now requires that where either of these categories of prominent persons are prospective clients, the relevant institution must obtain senior management approval for establishing the business relationship; take reasonable measures to establish the source of wealth and source of funds of the client; and conduct enhanced on-going monitoring of the business relationship.¹⁷⁹⁸

The adoption of the *FIC Amendment Act* was, however, preceded by much controversy. Parliament passed it in Bill¹⁷⁹⁹ form (the Bill) after it was tabled at the end of October 2015 and submitted it to president Zuma for assent.¹⁸⁰⁰ President Zuma, however, referred the Bill back to Parliament for reconsideration, stating as follows in a press release:¹⁸⁰¹

I have given consideration to the Bill in its entirety and certain submissions regarding the constitutionality of the Bill. After consideration of the Bill and having applied my mind to it, I am of the view that certain provisions of the Bill do not pass constitutional muster. In term of section 79 (1) of the Constitution I have therefore referred the Bill to the National Assembly for

¹⁷⁹³ De Koker *South African Money Laundering* Com 2-9.

¹⁷⁹⁴ De Koker *South African Money Laundering* Com 2-10.

¹⁷⁹⁵ As defined in Schedule 3A of the *FICA*.

¹⁷⁹⁶ As defined in Schedule 3B of the *FICA*.

¹⁷⁹⁷ De Koker *South African Money Laundering* Com 2-14.

¹⁷⁹⁸ Sections 21F and 21G of the *FICA*.

¹⁷⁹⁹ The *Financial Intelligence Centre Amendment Bill*, 33 of 2015.

¹⁸⁰⁰ Sabinet 2016 <http://www.sabinetlaw.co.za/finances/articles/parliament-passes-financial-intelligence-centre-bill>.

¹⁸⁰¹ The Presidency 2016 <http://www.gov.za/speeches/fica-amendment-bill-30-nov-2016-0000>.

reconsideration for the reasons set out to the Speaker of the National Assembly.

South Africa feared a public rebuke by the FATF during its plenary meeting in February 2017 over the delays in adopting the Bill, as the FATF had already at its June 2016 meeting granted South Africa an extension from September 2016 to February 2017 to finalise the legislation.¹⁸⁰²

With a lot of controversy surrounding the Bill,¹⁸⁰³ it was finally assented to on 26 April 2017 and commenced on 13 June 2017, although the provisions regarding PEPs, on which the abovementioned controversy was centred, only came into effect on 2 October 2017.¹⁸⁰⁴ The change to a risk-based approach brought about by the *FIC Amendment Act* provides accountable institutions with more flexibility in dealing with their customer due diligence procedures, but may also complicate some compliance management issues.¹⁸⁰⁵ The provisions relating to PEPs are intended to combat the link between organised crime and corruption, as highlighted above.¹⁸⁰⁶ To this end, the *Prevention and Combating of Corrupt Activities Act*¹⁸⁰⁷ (hereafter the *PRECCA*) is covered next.

5.6 The PRECCA

Speaking at the Grim Reaper Conference, Assistant Commissioner Govender identified the three main targets susceptible to bribes from

¹⁸⁰² Peyper 2017 <http://www.fin24.com/Economy/sa-faces-public-rebuke-over-fic-bill-delay-20170103>.

¹⁸⁰³ See for instance Ensor 2017 <https://www.businesslive.co.za/bd/national/2017-01-25-security-agencies-weigh-in-on-problems-with-the-fic-amendment-bill/>; Merten 2017 <https://www.dailymaverick.co.za/article/2017-01-26-fic-amendment-bill-it-was-always-about-politically-exposed-persons/#.WOEODG997IU> and Peyper 2016 <http://www.fin24.com/Economy/zuma-faces-court-action-if-he-sits-on-banks-bill-20160923>.

¹⁸⁰⁴ See Ensor 2017 <https://www.businesslive.co.za/bd/national/2017-01-25-security-agencies-weigh-in-on-problems-with-the-fic-amendment-bill/>; Merten 2017 <https://www.dailymaverick.co.za/article/2017-01-26-fic-amendment-bill-it-was-always-about-politically-exposed-persons/#.WOEODG997IU> and Peyper 2016 <http://www.fin24.com/Economy/zuma-faces-court-action-if-he-sits-on-banks-bill-20160923>.

¹⁸⁰⁵ See De Koker *South African Money Laundering* Com 2-10.

¹⁸⁰⁶ See para 3.2.3.

¹⁸⁰⁷ The *Prevention and Combating of Corrupt Activities Act* 12 of 2004.

organised criminal groups as “politicians, customs and excise officials, and members of the criminal justice system” stating as follows:¹⁸⁰⁸

Organised crime is also preying on existing levels of corruption in South Africa and in neighbouring countries, making them almost safe havens for organised crime syndicates. The extent of organised crime can largely be attributed to assistance rendered to organised crime groups by corrupt officials.

South Africa’s commitment to the UN Corruption Convention is also discussed in chapter 3. To meet its international commitments, South Africa adopted the *PRECCA*.¹⁸⁰⁹

While the *PRECCA* is not solely aimed at the combating of organised crime in South Africa, the link between organised crime and corruption¹⁸¹⁰ means that preventing and combating corrupt activities has a combative effect on organised crime as well. While the offences created by the *PRECCA* all relate to corruption and are therefore secondary to the combating of organised crime, some of the other provisions in the *PRECCA* are extremely beneficial to the combating of organised crime. For instance, financial analyses is helpful in the combating of organised crime – especially as an effective investigative tool against money laundering – and to this end, nett worth analysis, flow of funds analysis and bank account analysis all contribute to determine whether someone is living above his or her stated income.¹⁸¹¹

The *PRECCA* facilitates the use of these investigative tools by allowing for a written application to a judge in chambers for the issuing of an investigation directive into a person who, on reasonable grounds, is believed to be in possession of property disproportionate to his or her present or past known sources of income or assets.¹⁸¹² Interestingly, the

¹⁸⁰⁸ Hough and Du Plessis *Organised Crime* 60.

¹⁸⁰⁹ Preamble of the *PRECCA*.

¹⁸¹⁰ See discussion in para 3.2.3 above.

¹⁸¹¹ Albanese *Organised Crime* 257-258.

¹⁸¹² Section 23 of the *PRECCA*. This point is made clear in the next chapter where the placement of the former Scorpions under the NPA rather than the SAPS, which was a very contentious issue, is explored.

authority to apply for such investigation direction vests in the National Director of Public Prosecutions or someone authorised in writing by him or her, and not with any of the crime investigation structures.¹⁸¹³

The written application must contain the following:¹⁸¹⁴

- (i) the identities of the applicant and, if available, the investigator, as well as the suspect who is to be investigated;
- (ii) the grounds of suspicion;
- (iii) full particulars of all the facts and circumstances alleged in support of the application;
- (iv) the basis for believing that evidence relating to the ground on which the application is made will be obtained through the investigation direction;
- (v) whether any previous application has been made for the issuing of an investigation direction in respect of the same suspect in the application and, if such previous application exists, must indicate the current status of that application; and
- (vi) the period for which the investigation is required.

The relevant judge may then issue such an investigation directive if satisfied that the facts contained in the written application provide reasonable grounds to believe that the relevant person:¹⁸¹⁵

- (i) maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets; or
- (ii) is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets; and

¹⁸¹³ Section 23(1) of the *PRECCA*.

¹⁸¹⁴ Section 23(2) of the *PRECCA*.

¹⁸¹⁵ Section 23(3) of the *PRECCA*.

- (iii) that person maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities; and
- (iv) such investigation is likely to reveal information, documents or things which may afford proof that such a standard of living is maintained through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities.

The relevant judge must issue the investigation directive in writing and must indicate the identity of the suspect and, if known, who the investigator will be, as well as the period to be investigated and any restrictions that apply to the investigation.¹⁸¹⁶ The investigation may be issued in respect of any place in South Africa¹⁸¹⁷ and no notice must be given to the suspect. In fact, the court need not hear from such a suspect except where an investigation directive has previously been issued and an extension is sought on the same facts.¹⁸¹⁸ In such an instance, reasonable notice must be given to the relevant suspect.¹⁸¹⁹

The person tasked with conducting an investigation in terms of such a directive, has wide powers in terms of summoning persons, including the suspect, for questioning and to provide relevant information, as well as conducting searches and seizures to gather information relating to the investigation.¹⁸²⁰ Information which is subjected to privilege is however excluded from such an investigation, but not information which is self-

¹⁸¹⁶ Section 23(3)(c)(i)-(iv) of the *PRECCA*.

¹⁸¹⁷ Section 23(3)(c)(v) of the *PRECCA*.

¹⁸¹⁸ Section 23(3)(d) of the *PRECCA*.

¹⁸¹⁹ Section 23(3)(d) of the *PRECCA*.

¹⁸²⁰ Section 23(4) of the *PRECCA*.

incriminating.¹⁸²¹ Such self-incriminating evidence will, however, not be admissible against such a person in a criminal trial, except in the case of a charge for giving false evidence.¹⁸²² It is an offence to obstruct or hinder a person conducting such an investigation in the performance of his or her functions.¹⁸²³

*Jwara*¹⁸²⁴ serves to illustrate the importance of commercial forensic investigations to the combating of organised crime in South Africa. In this case a forensic investigation into the financial affairs of the three appellants,¹⁸²⁵ all of them policemen stationed at the West Rand Organised Crime Unit, revealed that they “received monies in excess of their salaries and for which they could not account”.

The reporting duties under the *PRECCA* are also helpful in the combating of organised crime, because offences involving dishonesty of R100,000 or more, whether committed in the private or public sphere, can no longer be “swept under the rug”. Persons in position of authority¹⁸²⁶ who know or ought reasonably to have known or suspected that another person has committed corruption, theft, fraud, extortion, forgery or uttering of a forged document involving R100,000 or more, must report the knowledge or suspicion to the relevant police official at the Hawks.¹⁸²⁷ Failure to report is an offence punishable by a fine or imprisonment not exceeding 10

¹⁸²¹ Section 23(5)(a) of the *PRECCA*.

¹⁸²² In other words false or misleading information in terms of s 319(3) of the previous *Criminal Procedure Act* 56 of 1955 or s 23(7)(b) the *PRECCA*. Confer s 23(5)(b) of the *PRECCA*.

¹⁸²³ Section 7(a) of the *PRECCA*.

¹⁸²⁴ *S v Jwara* 2015 2 SACR 525 (SCA) 534E-F.

¹⁸²⁵ Appealing against *inter alia* their convictions on racketeering offences under the *POCA*.

¹⁸²⁶ Persons who are deemed to hold a position of authority are listed in s 34(4) of the *PRECCA*.

¹⁸²⁷ Section 34(1) read with s 26(1)(b) of the *PRECCA*. Note that the Hawks are discussed in chapter 6.

years.¹⁸²⁸ Certain administrative procedures relating to the filing of a report are also legislated.¹⁸²⁹

The problem with this reporting duty may be determining the value involved in the relevant crime, because the *PRECCA* makes it clear that the gratification need not be pecuniary in nature.¹⁸³⁰ Furthermore, does the amount relate to the gratification or the “reward” received in turn for paying the gratification, or both? For instance, would the reporting duty be applicable if someone pays a gratification of R3,000 to be awarded a tender valued at R97,000?¹⁸³¹ Problematic issues aside, the reporting duty to the Hawks may be helpful in identifying and combating organised crime where offences involving dishonesty are perpetrated by organised criminal groups.

5.7 The RICA

Surveillance is one of the key investigative tools in the combating of organised crime.¹⁸³² The value of intercepting and monitoring telephone conversations and mail to the combating of organised crime in South Africa was also highlighted at the Grim Reaper Conference.¹⁸³³ The *Regulation of Interception of Communications and Provision of Communication-related Information Act*¹⁸³⁴ (hereafter the *RICA*) came into effect on 30 September 2005¹⁸³⁵ and according to Mashida:¹⁸³⁶

This happened against the background of a rise in organised criminal activity caused by sophisticated communication technology such as mobile

¹⁸²⁸ Section 34(2) of the *PRECCA*.

¹⁸²⁹ See s 34(3) of the *PRECCA*. See De Koker *South African Money Laundering* Com 7-52(3) - Com 7-52(5) for a discussion of the reporting procedure.

¹⁸³⁰ Section 1 of the *PRECCA*.

¹⁸³¹ See also De Koker *South African Money Laundering* Com 7-52(3) fn 3 for a discussion of problematic issues regarding this reporting duty.

¹⁸³² Albanese *Organised Crime* 257; Von Lampe *Organised Crime* 383.

¹⁸³³ See Hough and Du Plessis *Organised Crime* 75.

¹⁸³⁴ *Regulation of Interception of Communications and Provision of Communication-related Information Act* 70 of 2002.

¹⁸³⁵ Section 62(1)-(5), however, only came into effect on 30 June 2008, while ss 40 and 62(6) came into effect on 1 July 2009.

¹⁸³⁶ Mashida 2013 <http://www.polity.org.za/article/what-is-rica-2013-08-23>.

telephones, satellite communications, email and other computer related communications. The legislature found it necessary to enact an act to combat such crimes and further assist the prevention thereof.

Although the *RICA* was meant to replace the previous *Interception and Monitoring Prohibition Act*¹⁸³⁷ (hereafter the *Interception Act*), it only repealed the *Interception Act* on 30 June 2008, meaning the two Acts existed concurrently for some time, which was not ideal.¹⁸³⁸ The previous *Interception Act* had also been enacted with the purpose of combating organised crime in South Africa, as was confirmed by the court in *Kidson*.¹⁸³⁹

What the statute appears to accommodate is applications for monitoring in respect of 'Mafia-type' cartel-organised syndicate crime - that is, criminal conduct that is the product or output of an organisation dedicated to, or otherwise regularly or extensively engaging in, criminal activities.

The significance of surveillance to the combating of organised crime in South Africa is evident from *Jwara*¹⁸⁴⁰ where one of the accused was a superintendent in the SAPS and the head of the West Rand Organised Crime Unit, with four of the other accused also being policemen stationed at the unit.¹⁸⁴¹ In this particular case the surveillance was not performed under the *RICA*, but under the previous *Interception Act* and the accused appealed against their racketeering convictions,¹⁸⁴² amongst others, arguing that the evidence obtained through the surveillance of their cell phone conversations was inadmissible because cell phones were not operational in South Africa when the *Interception Act* was promulgated and the *Interception Act* therefore did not provide for such surveillance. The court held that surveillance was the "only means to investigate" the racketeering offences in this case and excluding such evidence would lead

¹⁸³⁷ *Interception and Monitoring Prohibition Act* 127 of 1992.

¹⁸³⁸ *S v Cwele* 2011 1 SACR 409 (KZP) 413F-G.

¹⁸³⁹ *S v Kidson* 1999 (1) SACR 338 (W) 342F-G.

¹⁸⁴⁰ *S v Jwara* 2015 2 SACR 525 (SCA).

¹⁸⁴¹ *S v Jwara* 2015 2 SACR 525 (SCA) 527D-F.

¹⁸⁴² Under s 2 of the *POCA*.

to “a failure of justice” as any deficiencies in the procedure was “purely technical”.¹⁸⁴³

Also, under the *Interception Act*, the position regarding so-called “participant surveillance” – a phrase which the court in *Kidson*¹⁸⁴⁴ borrowed for the North American Courts – was not clear. “Participant surveillance” refers to a situation where the conversation is monitored by one of the participants, whereas “third party surveillance” refers to a situation where an outsider monitors the conversation of two other parties.¹⁸⁴⁵ The court had to decide whether someone who was participating in a conversation would commit a crime under the *Interception Act*¹⁸⁴⁶ if he or she monitored the relevant conversation without first obtaining a directive to do so.¹⁸⁴⁷

The court stated that the main objective of the legislature was to prevent the obtaining of confidential information through illicit surveillance by third parties.¹⁸⁴⁸ After much deliberation, the court therefore held that participant monitoring did not fall under the prohibition instituted by the *Interception Act*, as long as the person was not a police, defence or intelligence official, who were required by the *Interception Act* to apply for a directive even where they were participants in the relevant conversation.¹⁸⁴⁹

Cameron J found that the language and construction used by the legislature implied that law enforcement officials are required to obtain judicial authorisation for any surveillance, even where they are conducting participant monitoring, and that such judicial authorisation would only be granted in the case of “serious offences”. Furthermore, because such requirements do not apply in the case of private persons conducting

¹⁸⁴³ *S v Jwara* 2015 2 SACR 525 (SCA) 532E-G.

¹⁸⁴⁴ *S v Kidson* 1999 1 SACR 338 (W) 343B.

¹⁸⁴⁵ *S v Kidson* 1999 1 SACR 338 (W) 343A-B.

¹⁸⁴⁶ Section 8(1)(a) of the *Interception Act*.

¹⁸⁴⁷ In terms of s 2(2) of the *Interception Act*.

¹⁸⁴⁸ *S v Kidson* 1999 1 SACR 338 (W) 344F.

¹⁸⁴⁹ *S v Kidson* 1999 1 SACR 338 (W) 348D-F.

participant monitoring, the courts would need to be wary of law enforcement officials' efforts to circumvent the legislation by a re-arrangement of personnel and operators.¹⁸⁵⁰

The *RICA* has now provided more clarity on this issue. It prohibits the interception of communications without an interception directive,¹⁸⁵¹ except in instances where the person is not a law enforcement officer and is a party to the communication.¹⁸⁵² Where a law enforcement officer is a party to the communication, such law enforcement officer may only intercept the communication without a directive if he or she is satisfied that there are reasonable grounds to believe that the interception is necessary because a serious offence has been, is being, or will probably be committed.¹⁸⁵³ To this end, the offences created by the *POCA* are deemed to be serious offences for this purpose.¹⁸⁵⁴ Thus the *RICA* clearly states what the position is regarding participant monitoring and changes the position relating to law enforcement officials somewhat from the decision reached in *Kidson*.¹⁸⁵⁵

Luck¹⁸⁵⁶ is concerned that the *RICA* is open to abuse on two fronts, the interception of privileged information relating to communication between clients and their attorneys, and the provisions relating to oral directions and entry warrants.¹⁸⁵⁷ It is submitted that the subject of surveillance could rely on the exclusionary rule¹⁸⁵⁸ to challenge the admissibility of evidence obtained by means of surveillance that goes beyond the limits of the *RICA*,

¹⁸⁵⁰ *S v Kidson* 1999 1 SACR 338 (W) 346E-I.

¹⁸⁵¹ Section 2 read with s 3 of the *RICA*.

¹⁸⁵² Section 4(1) of the *RICA*.

¹⁸⁵³ Section 4 read with s 16(5)(a)(i) of the *RICA*.

¹⁸⁵⁴ Section 1(a) of the *RICA* refers to "any offence mentioned in the Schedule", whereas para 8 of the Schedule lists any offence referred to in Chapters 2, 3 and 4 of the *POCA*.

¹⁸⁵⁵ *S v Kidson* 1999 1 SACR 338 (W).

¹⁸⁵⁶ Luck 2014 <http://www.saflii.org/za/journals/DEREBUS/2014/6.pdf>.

¹⁸⁵⁷ Section 23 of the *RICA* makes provision for the oral application for, and issuing of, interception directions and entry warrants, subject to certain conditions.

¹⁸⁵⁸ Section 35(5) of the *Constitution*.

as this may infringe the constitutional right to a fair trial,¹⁸⁵⁹ which also encompasses the pre-trial procedure.¹⁸⁶⁰ An accused involved with organised crime will, however, find it difficult to rely on constitutional issues, like the right to privacy and dignity, in situations which the *RICA* expressly provides for, as in such instances the constitutional rights “must yield to the objectives of the Act”.¹⁸⁶¹

Perhaps the biggest issue regarding surveillance is the situation where confidential information is shared with a participant in a conversation who has not applied for a directive to monitor. To this end, the court in *Kidson*¹⁸⁶² distinguished between “confidential” information and “criminal” information as follows:

Confidentiality in its legal sense implies that the information in question is confided to another person. This suggests, at its lowest, that some burden or duty or, at its highest, trust, rests on the person to whom the information is communicated.

Where criminal information is shared, however, the court stated the following:¹⁸⁶³

It therefore seems to me that information voluntarily imparted in a two-party conversation concerning the criminal conduct of the communicator is not for the purposes of the 1992 statute 'confidential information' in relation to the other party to the conversation, and therefore that participant monitoring under these circumstances is not prohibited.

This view was followed in *Dube*,¹⁸⁶⁴ where the court held that the person who had recorded the conversation was a private person, and not an officer as mentioned in *Kidson*,¹⁸⁶⁵ and the information so obtained “did not have the attribute of confidentiality”. It is submitted that this interpretation will hold true under the *RICA* as well.

¹⁸⁵⁹ Guaranteed by s 35(3) of the *Constitution*.

¹⁸⁶⁰ See *S v Koekemoer* 1991 1 SACR 427 (Nm) 434G.

¹⁸⁶¹ *S v Cwele* 2011 1 SACR 409 (KZP) 417C.

¹⁸⁶² *S v Kidson* 1999 1 SACR 338 (W) 347H.

¹⁸⁶³ *S v Kidson* 1999 1 SACR 338 (W) 348B-C.

¹⁸⁶⁴ *S v Dube* 2000 1 SACR 53 (N) 76A-C.

¹⁸⁶⁵ *S v Kidson* 1999 1 SACR 338 (W).

The question of whether a directive to intercept and monitor calls attaches to the person who is the subject of surveillance, or to the particular communication device, was answered in *Roberts*,¹⁸⁶⁶ where the court ruled it attached to the person. In this case the accused had diverted his cell phone calls to other cell phones not listed in the directive. The court held that in those cases the calls could be monitored as they were still those of the accused.

Regarding the situation of third parties who are not mentioned in a directive, the court held in *Cwele*¹⁸⁶⁷ that exclusion of such conversations would be illogical as both sides of a conversation are required to determine context. In this case, the defence submitted that conversations between the accused and third parties were not admissible because such third parties were not identified in the judge's direction for interception and monitoring. The court, however, held that because organised crime investigations were ongoing, it would defeat the objective of such investigations if all the conversations that a suspect had with third parties not mentioned in the directive, were to be excluded.¹⁸⁶⁸

From the above discussion, it seems clear that as long as surveillance procedures are "followed as closely as possible" to the law, admissibility issues should be avoided.¹⁸⁶⁹ This means that an application for a directive must also not contain false or misleading information, because in *Pillay*,¹⁸⁷⁰ the court held as follows:

In the present case the infringement of accused 10's right to privacy through the illegal monitoring was quite serious when looked at from the point of view of how the direction to monitor was procured. It certainly was not merely technical. As has been mentioned above, it was conceded on behalf of the State before the trial Court that the application for the direction contained false information.

¹⁸⁶⁶ *S v Roberts* 2013 1 SACR 369 (ECP) 379F.

¹⁸⁶⁷ *S v Cwele* 2011 1 SACR 409 (KZP) 417C-F.

¹⁸⁶⁸ *S v Cwele* 2011 1 SACR 409 (KZP) 417C-F.

¹⁸⁶⁹ See *S v Jwara* 2015 2 SACR 525 (SCA) 532E.

¹⁸⁷⁰ *S v Pillay* 2004 2 SACR 419 (SCA) 434A-B.

5.8 The POCDATARA

The link between organised crime and terrorism is discussed in chapter 2.¹⁸⁷¹ The *POCDATARA* not only provides measures to prevent and combat terrorist and related activities in South Africa,¹⁸⁷² but was also adopted to give effect to South Africa's international obligations and commitment in respect of terrorist and related activities.¹⁸⁷³ The *POCDATARA* creates offences relating to terrorism under chapter 2, but also provides for measures to prevent and combat the financing of terrorist and related activities.¹⁸⁷⁴ The amendments which *POCDATARA* made to the *FICA* relating to the reporting duties regarding the financing of terrorism, are discussed under the *FICA* above.¹⁸⁷⁵

5.9 The trafficking laws

As discussed in chapter 2,¹⁸⁷⁶ the predicate offences which organised criminal groups commit vary according to market demands. So to legislate specifically to combat organised crime in every type of offence which organised criminal groups may keep themselves busy with, would be an impossible task. As Garcia¹⁸⁷⁷ puts it in his autobiography on his work as undercover FBI-agent investigating the Mafia: "How does the Mob make money? Let me count the ways."

Somewhat of an analogy can be drawn in this regard with the crime of murder. It is impossible to legislate against all manners in which someone may be killed, so rather than focusing on the method used, like stabbing, shooting, poisoning, strangling etc., the result of the method is instead criminalised as "the unlawful and intentional causing of the death of

¹⁸⁷¹ See para 2.7 above.

¹⁸⁷² Long title of the *POCDATARA*.

¹⁸⁷³ Long title of the *POCDATARA*.

¹⁸⁷⁴ Long title of the *POCDATARA*.

¹⁸⁷⁵ See para 5.5 above.

¹⁸⁷⁶ See discussion under para 2.4.3 above.

¹⁸⁷⁷ Garcia *Making Jack Falcone* 163.

another human being.¹⁸⁷⁸ Similarly, the racketeering and money laundering offences created under the *POCA* are enterprise-specific crimes legislated to combat organised crime, meaning the form of predicate offences are largely irrelevant, as long as they are “serious” offences.¹⁸⁷⁹

Two pieces of legislation have, however, been drafted to target specific crimes which organised criminal groups gravitate towards, which are drug trafficking and human trafficking. As seen in chapter 3,¹⁸⁸⁰ these crimes have been identified at international level as problematic in the combating of organised crime and the UN Conventions were drafted to combat these specific offences. South Africa drafted legislation to meet its international commitments under these conventions.¹⁸⁸¹

5.9.1 *The Prevention and Combating of Trafficking in Persons Act*

The *Prevention and Combating of Trafficking in Persons Act*¹⁸⁸² (hereafter the *Trafficking in Persons Act*) was enacted to give effect to South Africa's international obligations¹⁸⁸³ to prevent and combat human trafficking.¹⁸⁸⁴ The *Trafficking in Persons Act* creates offences and penalties for human trafficking and associated activities and creates measures to protect and assist victims of human trafficking, as well as establishing administrative measures to deal with human trafficking.¹⁸⁸⁵

The preamble of the *Trafficking in Persons Act* acknowledges with concern the role played by organised criminal groups in human trafficking, admitting that the existing common and statutory law did not adequately

¹⁸⁷⁸ Snyman *Criminal Law* 437.

¹⁸⁷⁹ See the discussion in chapter 2.

¹⁸⁸⁰ Under the Vienna and Palermo Conventions.

¹⁸⁸¹ See the discussion in chapter 3.

¹⁸⁸² The *Prevention and Combating of Trafficking in Persons Act* 7 of 2013.

¹⁸⁸³ In terms of the Palermo Convention and its accompanying *Protocol to Prevent, Suppress and Punish Trafficking in Persons*.

¹⁸⁸⁴ See the long title of the *Trafficking in Persons Act*.

¹⁸⁸⁵ See the long title of the *Trafficking in Persons Act*.

deal with human trafficking.¹⁸⁸⁶ While trafficking in persons is criminalised,¹⁸⁸⁷ the *Trafficking in Persons Act* goes further to create various other human trafficking associated offences.¹⁸⁸⁸

Furthermore, certain reporting duties are also implemented, whereby persons who know or suspect that someone – whether an adult or a child – is a victim of human trafficking, must report such knowledge or suspicion to a police officer.¹⁸⁸⁹ Failure to report such knowledge or suspicion is an offence, for which negligence is sufficient to establish fault.¹⁸⁹⁰ Various identified entities that can be abused for human trafficking purposes, are also given reporting duties under certain circumstances.¹⁸⁹¹ The *Trafficking in Persons Act* also provides for instances of extra-territorial jurisdiction for an act committed outside South Africa that would have constituted an offence under Chapter 2 if it had been committed within the borders, regardless of whether or not the act constitutes an offence at the place of its commission.¹⁸⁹²

The main offence of trafficking in persons¹⁸⁹³ is committed by someone who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of South Africa, by means of any of the following:

- (i) a threat of harm;
- (ii) the threat or use of force or other forms of coercion;
- (iii) the abuse of vulnerability;
- (iv) fraud;
- (v) deception;
- (vi) abduction;

¹⁸⁸⁶ See the preamble of the *Trafficking in Persons Act*.

¹⁸⁸⁷ Section 4 of the *Trafficking in Persons Act*.

¹⁸⁸⁸ Sections 5, 6, 7, 8, 9(1), 10, 18(9), 19(13) and 23 of the *Trafficking in Persons Act*.

¹⁸⁸⁹ Sections 18(1) and 19(1) of the *Trafficking in Persons Act*.

¹⁸⁹⁰ Sections 18(9) and 19(13) of the *Trafficking in Persons Act*.

¹⁸⁹¹ See ss 8(2)(b), 9(2) of the *Trafficking in Persons Act*.

¹⁸⁹² Section 12 of the *Trafficking in Persons Act*.

¹⁸⁹³ Section 4(1) of the *Trafficking in Persons Act*.

- (vii) kidnapping;
- (viii) the abuse of power;
- (ix) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
- (x) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage.

The above-listed means can be aimed at the victim, an immediate family member of the victim, or any other person in close relationship to the victim, for the purposes of any form or manner of exploitation. Subject to the minimum sentences provision,¹⁸⁹⁴ a person who is found guilty of this offence¹⁸⁹⁵ is liable to a fine not exceeding R100 million, or imprisonment, which includes life imprisonment, or such imprisonment without the option of a fine, or both. Like the *Trafficking in Persons Act*, the *Drug Trafficking Act* also has as its motivation the adherence to South Africa's global commitment to combat organised crime and is therefore covered next.

5.9.2 The Drug Trafficking Act

The *Drug Trafficking Act* is the oldest of the Acts dealt with in this chapter and complies with South Africa's Vienna Convention commitments.¹⁸⁹⁶ The *Drug Trafficking Act* was enacted to provide for the prohibition of the use or possession of, or the dealing in drugs as well as certain acts relating to the manufacture or supply of certain substances.¹⁸⁹⁷

The unconstitutionality of some search and seizure provisions of the *Drug Trafficking Act* is dealt with above.¹⁸⁹⁸ It is therefore submitted that the combating of drug-related crimes should be performed under the search

¹⁸⁹⁴ Found in s 51 of the *Criminal Law Amendment Act* 105 of 1997.

¹⁸⁹⁵ Contravening s 4(1) of the *Trafficking in Persons Act*.

¹⁸⁹⁶ See discussion in chapter 3.

¹⁸⁹⁷ Long title of the *Drug Trafficking Act*.

¹⁸⁹⁸ See the discussion under the *FICA* in para 5.5 above.

and seizure provisions of the *CPA*,¹⁸⁹⁹ rather than the provisions of the *Drug Trafficking Act*. Furthermore, some of the provisions relating to the proceeds of drug-related activities and reporting duties were repealed by the *POCA*.¹⁹⁰⁰

The remaining reporting duties regarding the proceeds of drug-related crimes, however, seem to be nonsensical. All stockbrokers, as defined by the *Stock Exchanges Control Act*,¹⁹⁰¹ and all financial instrument traders, as defined by the *Financial Markets Control Act*,¹⁹⁰² who have reason to suspect that property acquired by them from another person in the ordinary course of their business is the proceeds of a defined crime, must as soon as possible report their suspicion to any designated officer, and at the request of that designated office furnish the said officer with such particulars as may be available to them regarding the person from whom they acquired the property.¹⁹⁰³

The problem with this reporting duty is firstly that both the *Stock Exchanges Control Act* and the *Financial Markets Control Act* were repealed in 2004.¹⁹⁰⁴ Secondly, a “designated officer” is defined as “every commissioned officer of the SAPS assigned to the South African Narcotics Bureau”.¹⁹⁰⁵ The South African Narcotics Bureau (SANAB) was, however, closed down, also in 2004.¹⁹⁰⁶ So for more than a decade there has been no designated officer to report to, and even worse, nobody who has a duty to report.

¹⁸⁹⁹ Found in ss 19-36 of the *CPA*.

¹⁹⁰⁰ Section 79(b) of the *POCA*, repealed ss 6 and 7, relating to the proceeds of defined crimes, as well as s 10(2), relating to certain reporting duties, of the *Drug Trafficking Act*.

¹⁹⁰¹ Section 1 of the *Stock Exchanges Control Act* 1 of 1985.

¹⁹⁰² Section 1 of the *Financial Markets Control Act* 55 of 1989.

¹⁹⁰³ Section 10(3) of the *Drug Trafficking Act*.

¹⁹⁰⁴ Both acts were repealed by s 117 of the *Securities Services Act* 36 of 2004, which in turn was repealed by s 111 of the *Financial Markets Act* 19 of 2012.

¹⁹⁰⁵ Section 8 of the *Drug Trafficking Act*.

¹⁹⁰⁶ Kohler Barnard 2009 <http://www.politicsweb.co.za/news-and-analysis/drug-crime-up-since-sanab-closed-down--da>.

It is submitted that the above issue is not problematic because the reporting duties under the *FICA* now cater for such individuals. A financial services trader was defined previously as someone who is a member of a financial exchange and is authorized in terms of the rules thereof to carry on the business of buying and selling listed financial instruments on behalf of other persons or on his own account.¹⁹⁰⁷ A “stock-broker” for purposes of this provision was defined as any natural person who is a member or who is an officer or employee of a member, and who is authorised and qualified under the rules of the stock exchange concerned to be a stockbroker.¹⁹⁰⁸ Today a “stockbroker”¹⁹⁰⁹ is defined as a natural person who is a member of the South African Institute of Stockbrokers.¹⁹¹⁰ The *FICA* lists authorized users of an exchange,¹⁹¹¹ as well as a host of other dealers in securities, investments and foreign exchange as accountable institutions.¹⁹¹² The *lacunae* created in the *Drug Trafficking Act* are therefore remedied by the *FICA* and the provision in the *Drug Trafficking Act* should simply be deleted.¹⁹¹³

The only reporting duty created by the *Drug Trafficking Act* which remains effective, is where the owner, occupier or manager of any place of entertainment, or any person in control of any place of entertainment or who has the supervision thereof, has reason to suspect that any person in or on such place of entertainment uses, has in his possession or deals in

¹⁹⁰⁷ Section 1 of the *Financial Markets Control Act* 55 of 1989 (repealed).

¹⁹⁰⁸ Section 1 of the *Stock Exchanges Control Act* 1 of 1985.

¹⁹⁰⁹ Note the difference in spelling between the former “stock-broker” and current “stockbroker”.

¹⁹¹⁰ Section 1 of the *Securities Services Act*.

¹⁹¹¹ Defined in s 1 of the *Securities Services Act* as follows: “Authorised user” means a person authorised by a licensed exchange to perform one or more securities services in terms of the exchange rules, and includes an external authorised user, where appropriate, while “Exchange” means a person who constitutes, maintains and provides an infrastructure – (a) for bringing together buyers and sellers of securities; (b) for matching bids and offers for securities of multiple buyers and sellers; and (c) whereby a matched bid and offer for securities constitutes a transaction.

¹⁹¹² Schedule 1 of the *FICA*.

¹⁹¹³ That is s 10(3) of the *Drug Trafficking Act*.

any drug in contravention of the provisions of the *Drug Trafficking Act*.¹⁹¹⁴ Such a person must as soon as possible report the suspicion to any police official on duty at that place of entertainment or at the nearest police station, as the case may be and at the request of the said police official, furnish that police official with such particulars as may be available regarding the person in respect of whom the suspicion exists.¹⁹¹⁵ Failure to report is an offence,¹⁹¹⁶ punishable by a fine that the relevant court may deem fit to impose, or to imprisonment for a period not exceeding 15 years, or to both such fine and such imprisonment.¹⁹¹⁷

5.10 The Second-hand Goods Act

In organised crime, a “fence” is someone who “provides a readily available outlet for marketing stolen (‘hot’) merchandise”.¹⁹¹⁸ “Fencing” is thus one of the many ways in which organised criminal groups make money.¹⁹¹⁹ In his autobiography on his work as undercover FBI-agent investigating the Mafia, Garcia¹⁹²⁰ describes how he trapped a jewellery store owner, who acted as a fence for stolen goods.

While such persons can still be charged with the statutory offence of possession of property suspected of being stolen, without being able to give a satisfactory explanation,¹⁹²¹ the *Second-hand Goods Act*¹⁹²² was adopted to regulate the business of dealers in second-hand goods and combat trade in stolen goods, so as to promote ethical standards in the second-hand goods trade.¹⁹²³ Even though not legislated specifically with the combating of organised crime in mind, certain provisions of the

¹⁹¹⁴ Section 10(1) of the *Drug Trafficking Act*.

¹⁹¹⁵ Section 10(2) of the *Drug Trafficking Act*.

¹⁹¹⁶ Section 15(1) of the *Drug Trafficking Act*.

¹⁹¹⁷ Section 17(d) of the *Drug Trafficking Act*.

¹⁹¹⁸ Abadinsky *Organised Crime* 264; Burchell *Principles of Criminal Law* 864.

¹⁹¹⁹ See Abadinsky *Organised Crime* 264-265 for some comments on fencing as an organised crime business venture.

¹⁹²⁰ Garcia *Making Jack Falcone* 179-192.

¹⁹²¹ By contravening s 36 of the *General Law Amendment Act* 62 of 1955. See Burchell *Principles of Criminal Law* 864.

¹⁹²² *Second-hand Goods Act* 6 of 2009.

¹⁹²³ Long title of the *Second-hand Goods Act*.

Second-hand Goods Act are valuable to the combating of organised crime and are therefore analysed in this section.

The *Second-hand Goods Act* requires a person who carries on a business of dealing in second-hand goods, which includes a scrap metal dealer and a pawnbroker, to register as a dealer with the National Commissioner of the SAPS.¹⁹²⁴ Specific provisions are also legislated for dealers of second-hand motor vehicles¹⁹²⁵ and controlled metals,¹⁹²⁶ which are listed under Schedule 2.¹⁹²⁷ Registered dealers must keep record of every acquisition or disposal of second-hand goods,¹⁹²⁸ which includes the date and time of the transaction, the identity of the person from whom the goods are acquired, a detailed description of the goods and the purchase price paid, as well as details of the disposal of such goods.¹⁹²⁹

Most significant to the combating of organised crime is the reporting duties created by the *Second-hand Goods Act*. A dealer who suspects, or on reasonable grounds should suspect,¹⁹³⁰ that he or she has been given false information by the seller of goods, or that the goods offered are stolen goods, or that the appearance of the goods has been altered or tampered with to conceal its true identity, may not continue with and carry out any transaction to which such a suspicion relates and must report such suspicion to a police official on duty at the police station in whose area the dealer carries on business.¹⁹³¹

¹⁹²⁴ Sections 2-15, read with certain definitions in s 1 of the *Second-hand Goods Act*.

¹⁹²⁵ Section 24 of the *Second-hand Goods Act*.

¹⁹²⁶ Section 25 of the *Second-hand Goods Act*.

¹⁹²⁷ See Schedule 2 of the *Second-hand Goods Act*.

¹⁹²⁸ The relevant goods to which the provisions apply are listed under Schedule 1 of the *Second-hand Goods Act*. Works of art, like paintings and sculptures, are not specifically mentioned under Schedule 1, but may resort under either “antique goods” or “valuables”, which are listed under Schedule 1 and defined in s 1 of the *Second-hand Goods Act*.

¹⁹²⁹ Section 21 of the *Second-hand Goods Act*.

¹⁹³⁰ Meaning negligence is sufficient for fault.

¹⁹³¹ Section 22 of the *Second-hand Goods Act*.

Police officials are given powers to effect routine inspections¹⁹³² and, if there are reasonable grounds to suspect that the provisions of the *Second-hand Goods Act* have been contravened, obtain a warrant and enter the premises for purposes of search and seizure.¹⁹³³ Such search and seizure operations may also be conducted without a warrant if such police official has reasonable grounds to believe that a warrant would be issued to him or her if he or she applied for it and the delay in obtaining such warrant would defeat the purpose of the search.¹⁹³⁴

The *Second-hand Goods Act* also creates offences and penalties for failure to comply with its provisions.¹⁹³⁵ The value of the *Second-hand Goods Act* in the combating of organised crime in South Africa is firstly that it disrupts the “fencing” of stolen goods by organised criminal groups, and secondly through the reporting duties may assist with the identifying of organised criminal activities in South Africa, if the reporting provision is used optimally by intelligence gathering agencies.¹⁹³⁶

5.11 Summary and conclusion

The legislative provisions discussed in this chapter contribute in various ways to the combating of organised crime in South Africa. Many constitutional challenges are explored about when and where applicable, and the sum of these constitutional challenges is that the legislative framework currently in place to combat organised crime has passed constitutional muster. It is submitted that there are not many, if any, areas left in the legislative framework that are open to constitutional challenges. Hence, South Africa has in place a vast array of legislative tools with which to combat organised crime. This, however, does not guarantee success. As Snyman¹⁹³⁷ states, the eventual effective combating of crime

¹⁹³² Section 28 of the *Second-hand Goods Act*.

¹⁹³³ Sections 29 and 30 of the *Second-hand Goods Act*.

¹⁹³⁴ Section 29(5) of the *Second-hand Goods Act*.

¹⁹³⁵ See s 32 of the *Second-hand Goods Act*.

¹⁹³⁶ This aspect is explored in chapter 6.

¹⁹³⁷ Snyman 1999 SACJ 214.

does not rely on “pretty words in an Act”¹⁹³⁸ only, but also on the acceptance of the values contained in the Bill of Rights in the hearts of the whole community, as well as, amongst others, *an effective police force and prosecuting corps*¹⁹³⁹ to ensure that criminals do not escape the proverbial long arm of the law. To this end the next chapter explores the structures put in place to execute the legislation discussed in this chapter, in the combating of organised crime in South Africa.

¹⁹³⁸ Own translation.

¹⁹³⁹ Own emphasis.

Chapter 6

Law enforcement structures for combating organised crime in South Africa

6.1 Introduction

The internationalisation of crime, discussed in chapter 3 above,¹⁹⁴⁰ has led to globalised efforts to combat organised crime, with increased efforts in the cooperation among countries' law enforcement.¹⁹⁴¹ Besides the relevant international treaties, individual countries may also enter into bilateral or even multi-lateral agreements to establish an integrated approach towards combating organised crime.¹⁹⁴² The result is that international treaties, regional arrangements and lateral agreements create "a global 'net' or 'web' to catch organised criminals."¹⁹⁴³

At the Grim Reaper Conference, the then Executive Director of the United Nations Office for Drug Control and Crime Prevention, Professor Pino Arlacchi, warned as follows: "In nations that are going through political, social and economic transition, like South Africa, problems can develop quickly."¹⁹⁴⁴ The opening up of South Africa to the world post-Apartheid almost immediately led to increased international traffic.¹⁹⁴⁵ Cressey¹⁹⁴⁶ states that a proper understanding of organised crime and its place in the economic and political affairs of a society is essential to formulating combating strategies. Furthermore, the public is "entitled to be protected against crime through, amongst other measures, the effective prosecution thereof".¹⁹⁴⁷ Effective prosecution rests on effective

¹⁹⁴⁰ See para 3.2.1 above.

¹⁹⁴¹ Kruger *Organised Crime* 3.

¹⁹⁴² Guymon 2000 *BJIL* 99.

¹⁹⁴³ Guymon 2000 *BJIL* 99.

¹⁹⁴⁴ Hough and Du Plessis *Organised Crime* 14.

¹⁹⁴⁵ See Hough and Du Plessis *Organised Crime* 14, where it is stated that air travel increased six times in a short space of time of five years.

¹⁹⁴⁶ Cressey *Theft of the Nation* 297.

¹⁹⁴⁷ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 148B.

investigations. Hence, properly trained policeman and prosecutors are vital to the combating of organised crime.¹⁹⁴⁸

Due to the sophistication with which organised criminal groups operate, it would be “difficult, if not impossible, for the average police station detective to successfully investigate them”.¹⁹⁴⁹ Hence, “police agencies across the world form specialised teams of detectives and provide them with suitable training and equipment to investigate specific types of crime that require particular skills, expertise and experience”.¹⁹⁵⁰ According to Burger:¹⁹⁵¹

The establishment of specialised investigative teams must be based on the result of an in-depth study of the crime problem, why it has become a problem and what is needed to address it. It should include a thorough investigation of why existing police methods and practices are not effective and how a specialised team of detectives could make an impact.

This lengthy quote encapsulates the aim of this chapter. While the previous chapter focused on the legislation in place to combat organised crime in South Africa, this chapter explores the law enforcement structures in place to implement said legislation. It is counter-productive to have adequate legislation in place, only to have organised crime flourish due to a lack of enforcement.¹⁹⁵² Ultimately, the most effective way of combating organised crime is by means of prosecution.¹⁹⁵³ One of the challenges for both investigators and prosecutors in the combating of organised crime is “connecting *mens rea* and *actus reus* for individuals commissioning yet not getting directly involved in (organised) criminality”.¹⁹⁵⁴ Furthermore,

¹⁹⁴⁸ Cressey *Theft of the Nation* 297-298.

¹⁹⁴⁹ Burger 2015 *ISS* 19.

¹⁹⁵⁰ Burger 2015 *ISS* 19.

¹⁹⁵¹ Burger 2015 *ISS* 19.

¹⁹⁵² Leong *The Disruption of International Organised Crime* 113.

¹⁹⁵³ Harfield “The criminal not the crime” 32.

¹⁹⁵⁴ Harfield “The criminal not the crime” 33.

tensions among various law enforcement practitioners also enhance the threat of organised crime.¹⁹⁵⁵

Throughout this chapter, the South African position will be compared with the United Kingdom position, thus following the example set by the Khampepe Commission, which visited several foreign jurisdictions during its inquiry into the former Scorpions, amongst them the United Kingdom, which at that point was “in the process of passing legislation to create the Serious Organised Crime Agency (“SOCA”)”.¹⁹⁵⁶ Similarly the Supreme Court of Appeal “cited a line of English cases”¹⁹⁵⁷ in order to identify policy considerations regarding the interference of law courts in decision by prosecutors on whether to prosecute a matter or not.

While there are many South African entities that contribute to the combating of organised crime in South Africa, the main focus of this study is on the entities which are specifically tasked with implementing South Africa’s legislative framework and policies regarding the combating of organised crime. To this end, the following entities are covered:

- (i) the SAPS law enforcement structures;
- (ii) the prosecuting authority; and
- (iii) entities aimed specifically at disrupting the proceeds of organised crime.

Before analysing these aspects, however, a brief historical overview is required to show past difficulties facing the structures tasked with combating organised crime, and how those difficulties continue to haunt the current law enforcement structures.

¹⁹⁵⁵ Harfield “The criminal not the crime” 35. See Harfield “The criminal not the crime” 33-37 for an overview of such tensions among the UK law enforcement agencies in the endeavours to combat organised crime in the UK.

¹⁹⁵⁶ Khampepe *Final Report* 100. SOCA is discussed later in this chapter.

¹⁹⁵⁷ *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) 307G, 308A-H; *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 378A.

6.2 Historical overview of law enforcement's role in the combating of organised crime in South Africa

6.2.1 From the SAP to the SAPS

While there is evidence of some organised crime activity during South Africa's apartheid regime, the international embargoes placed on South Africa at the time isolated the country somewhat from international organised criminal groups.¹⁹⁵⁸ This situation, however, changed with the adoption of democracy in the early 1990s and South Africa's re-entry into the international community.¹⁹⁵⁹

The result of the liberation struggle under apartheid and the accompanying embargoes forced the SAP of the apartheid regime,¹⁹⁶⁰ also known as "the Force",¹⁹⁶¹ to focus its main intelligence efforts¹⁹⁶² on apprehending political dissidents and therefore everyday crime was combated by means of "traditional" investigation techniques.¹⁹⁶³ Gastrow¹⁹⁶⁴ thus claims that the post-apartheid SAPS¹⁹⁶⁵ only started focussing on organised crime from 1991, when four intelligence units were established to focus on the phenomenon.¹⁹⁶⁶

One of the earliest attempts at combating organised crime in South Africa was initiated by the late president Nelson Mandela, who established an elite presidential investigative task unit "to investigate Vito Palazzolo, a Cape Town-based Italian Mafioso, and his links to government officials,

¹⁹⁵⁸ Gastrow 1998 <http://www.issafrica.org/uploads/Mono28.pdf>; Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

¹⁹⁵⁹ Cowling 1998 SACJ 351; Hough and Du Plessis *Organised Crime* 52; Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

¹⁹⁶⁰ Established by the *South African Police Act* 7 of 1958.

¹⁹⁶¹ Section 1 of the *South African Police Act*.

¹⁹⁶² The importance of intelligence gathering in the combating of organised crime is discussed later in this chapter.

¹⁹⁶³ Hough and Du Plessis *Organised Crime* 52.

¹⁹⁶⁴ Gastrow 1998 <http://www.issafrica.org/uploads/Mono28.pdf>.

¹⁹⁶⁵ Established by the *SAPS Act*.

¹⁹⁶⁶ Kruger *Organised Crime* 6.

police, and businessmen”.¹⁹⁶⁷ President Mandela hand-picked Major-General André Lincoln to head the unit.¹⁹⁶⁸ The unit was, however, disbanded within a year due to allegations of misconduct and criminality.¹⁹⁶⁹ While a civil trial between Major-General Lincoln and the Minister of Police was still subject to an appeal at the time of writing, it seems that the involvement of police members in organised crime stifled these early efforts to combat the phenomenon in the new South Africa.¹⁹⁷⁰

The result was that while the newly-established SAPS focused on transforming itself in the new South Africa, organised crime remained poorly understood and largely unanalysed, with no substantial works on the phenomenon in existence at the time.¹⁹⁷¹ The transformation process also involved the amalgamation of 11 different police agencies¹⁹⁷² into a single national police service¹⁹⁷³ under the *Rationalisation of the South African Police Service*.¹⁹⁷⁴ Once this process was completed under the leadership of the then National Commissioner, George Fivaz, several restructuring exercises took place under his successor, Jackie Selebi.¹⁹⁷⁵

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- ¹⁹⁶⁷ Etheridge 2017 <http://www.news24.com/SouthAfrica/News/former-police-commissioner-had-no-grudges-against-ex-mandela-cop-20170515>. See also the links between Vito Palazzolo and the Apartheid regime politicians discussed in chapter 3.
- ¹⁹⁶⁸ Dolley 2017 <http://www.news24.com/SouthAfrica/News/mandela-ordered-select-cops-to-infiltrate-underworld-court-hears-20170629>; Etheridge 2017 <http://www.news24.com/SouthAfrica/News/former-police-commissioner-never-gave-ex-mandela-cop-clear-mandate-20170515>.
- ¹⁹⁶⁹ Dolley 2017 <http://www.news24.com/SouthAfrica/News/mandela-ordered-select-cops-to-infiltrate-underworld-court-hears-20170629>; Etheridge 2017 <http://www.news24.com/SouthAfrica/News/former-police-commissioner-had-no-grudges-against-ex-mandela-cop-20170515>.
- ¹⁹⁷⁰ See News24 2017 http://www.news24.com/Tags/People/andre_lincoln for several news articles on this early attempt by former president Nelson Mandela to combat organised crime in the new South Africa.
- ¹⁹⁷¹ Shaw 1998 <https://issafrica.org/reseach/papers/organised-crime-in-post-apartheid-south-africa>.
- ¹⁹⁷² These included the SAP of the former apartheid regime and the police forces of the former homelands. See Burger 2015 /SS 5.
- ¹⁹⁷³ As provided for by the *SAPS Act*.
- ¹⁹⁷⁴ Published under Proc R5 in GG 16239 of 27 January 1995.
- ¹⁹⁷⁵ See Burger 2015 /SS for a detailed analysis of these processes under Fivaz and Selebi.

6.2.2 Restructuring the new SAPS

The main motivation for the initial restructuring under Selebi was given as “transformation”¹⁹⁷⁶ and since then, several internal restructuring exercises have taken place.¹⁹⁷⁷ When one such restructuring exercise meant the closure of many specialist units in the SAPS, the United Nations Office for Drugs and Crime raised the following concerns regarding the combating of organised crime in South Africa:¹⁹⁷⁸

South Africa has the necessary legislative infrastructure to effect drug countermeasures and is aware of current production and trafficking trends. The specialised investigation units are being phased out of the police force. The impact of this on the country’s medium- to long-term capacity to deal effectively with the threat posed by organised criminal groups dealing in drugs is unclear.

It seems that one of the main motivating factors behind the closure of the specialist units was the remaining lack of transformation.¹⁹⁷⁹ At the time, many experienced and senior police officials¹⁹⁸⁰ felt “that dedicated capacities specialising in particular fields are vital to the combating of complicated and sophisticated crimes”,¹⁹⁸¹ while Burger¹⁹⁸² describes the effects of these restructuring exercises under Selebi as follows:

While the appointment of Selebi as SAPS national commissioner initially seemed to improve police morale and provide better focused policing, the concurrent review of the status of specialised units within the Detective

¹⁹⁷⁶ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>. See also Burger 2015 *ISS* 5 for an overview of the challenges faced during this amalgamation process.

¹⁹⁷⁷ See Lebeya *Defining Organised Crime* 346-356 for an historical overview of the various restructuring exercises within the SAPS. Burger 2015 *ISS* 8-12 discusses the restructuring under Selebi as two separate main phases, after which the post-Selebi “reconstruction era” followed.

¹⁹⁷⁸ UNODC *South Africa* i.

¹⁹⁷⁹ See Burger 2015 *ISS* 14 for a critical discussion of this issue.

¹⁹⁸⁰ It should be noted that Jackie Selebi was not a career policeman, but was labelled at the time as “the civilian national commissioner of the SAPS, since January 2000, and current president of INTERPOL” – see Hills 2007 *JMAS* 408. Prior to his appointment as national commissioner, Selebi was the “former director-general of the-then Department of Foreign Affairs” – see Burger 2015 *ISS* 4.

¹⁹⁸¹ Burger 2015 *ISS* 3.

¹⁹⁸² Burger 2015 *ISS* 7. See also Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath> for a discussion on the deflating effect that the restructuring had on SAPS detectives.

Division was to lead to nearly 10 years of institutional turmoil. In particular, the need for specialised investigative units was called into question. The result was either closure or drastic re-organisation.

In contrast, Redpath¹⁹⁸³ was more optimistic regarding the restructuring, stating as follows:

Part of the problem with the former units was that, given the nature of detective work, it was relatively easy for under-performing and under-motivated detectives to operate at sub-optimal level and escape notice. Units were granted far greater licence to operate under their own rules and in some instances became a law unto themselves. The extra prestige attached to working at a specialised unit also resulted in some of the detectives conducting their job with a certain degree of arrogance.

The problem with such periods of political transition is that organised crime is allowed to flourish as resources are expended on focus areas of transformation, leaving gaps for organised criminal groups to exploit.¹⁹⁸⁴ This is evidenced by the fact that, by 1998, organised crime had more than doubled since the end of apartheid and involved a wide range of criminal activities.¹⁹⁸⁵ According to Shaw,¹⁹⁸⁶ these organised crime activities were identified as “drugs, gold and diamond smuggling, vehicle theft, commercial crime, and arms smuggling”. Whether these were in fact the only criminal activities of organised crime at the time is debatable, because these specific crimes may simply have been highlighted because they were the focus areas of the various specialised units before the restructuring; namely the South African Narcotics Bureau (SANAB), Diamond and Gold Unit, Vehicle Theft Unit, Commercial Crime Unit, and Firearm Unit.¹⁹⁸⁷ What remains clear, though, is that the SAPS was ill-equipped to deal with the rapid expansion of organised crime,¹⁹⁸⁸ because several fragmented attempts at creating task teams to combat drug-

¹⁹⁸³ Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

¹⁹⁸⁴ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

¹⁹⁸⁵ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

¹⁹⁸⁶ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

¹⁹⁸⁷ Burger 2015 /SS 6.

¹⁹⁸⁸ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

related organised crime had come to naught.¹⁹⁸⁹ At the time, the operational definition for organised criminal groups read as follows:¹⁹⁹⁰

A well organised and structured group with a clear leadership corps which is involved in different criminal activities such as drug trafficking, vehicle theft or money laundering. Such syndicates have well established contacts with national and international criminal organisations, cartels or mafia groupings.

There was, however, still hope, because even though organised crime had doubled by 1998, it remained in a state of “relative fragmentation” and Shaw¹⁹⁹¹ maintained at the time that this fragmented state of organised criminal groups provided the SAPS with a window of opportunity to disrupt further expansion through appropriate and targeted interventions. The approach which the SAPS chose to follow, was to collapse the various specialised investigation units into three broad investigation categories, as illustrated in Table 2:¹⁹⁹²

Table 2

Investigation category	Specialised investigation units
Serious and violent crime component	• Murder and robbery units • Firearm investigation units • Child protection units • Taxi violence units
Organised crime [component]	• Vehicle theft units • Stock theft units

¹⁹⁸⁹ According to Bruger 2015 /SS 14, after SANAB's final closure in May 2004, a total of 24 task teams were established across South Africa to combat drug-related crimes, which “were never enough to deal effectively with the growing drug problem”. In the end none of these task teams were effective and by 2006 they had all been disbanded – see Bruger 2015 /SS 14.

¹⁹⁹⁰ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

¹⁹⁹¹ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

¹⁹⁹² Source: Burger 2015 /SS 6. See also Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

	• Transito theft units • Diamond and gold units • Endangered species protection units
Commercial crime component	• Commercial crime units • Fraud units • Syndicate fraud units

In doing so, the first tentative efforts were made to combat organised crime in South Africa through the newly-established organised crime component of the SAPS. Also, several Organised Crime Investigation Units (OCIUs) were established in selected provinces, which were supported by Organised Crime Threat Analysis Committees.¹⁹⁹³ The OCIUs registered investigation projects, which were financed through the SAPS's so-called "Secret Fund", in order to combat organised crime in South Africa.¹⁹⁹⁴ This approach is reminiscent of the UK approach discussed later in this chapter, where a national organised crime entity and regional organised crime units collaborate to combat organised crime in the UK.

The problem with the above approach followed by the SAPS was that silos were created during this restructuring process. While organised crime was still fragmented, the SAPS also fragmented itself in its strategy to combat the phenomenon. At the time, Shaw¹⁹⁹⁵ had identified links between organised crime and for instance firearm smuggling and money laundering, which respectively fell under the auspices of the newly-established serious and violent crime component and the commercial

¹⁹⁹³ Burger 2015 /SS 6; Hough and Du Plessis *Organised Crime* 58.

¹⁹⁹⁴ Burger 2015 /SS 6; Hough and Du Plessis *Organised Crime* 58.

¹⁹⁹⁵ Shaw 1998 <https://issafrica.org/reseach/papers/organised-crime-in-post-apartheid-south-africa>.

crime component of the SAPS.¹⁹⁹⁶ Furthermore, corruption and money laundering are commercial crime elements which lie “at the heart of organised crime”.¹⁹⁹⁷ This is where the UK approach differs, as not only organised crime itself, but also economic crime, borders and international work, as well as child exploitation and online protection, are all included under the umbrella of a national organised crime agency.¹⁹⁹⁸

What made the fragmentation worse was that the members of the former specialised investigative units who now resorted under the Organised Crime grouping, continued to investigate organised criminal groups within the confines of their former focus areas, which was not conducive to an effective, collaborated strategy for combatting organised crime in South Africa.¹⁹⁹⁹ The restructuring of the SAPS therefore hampered the effective combating of organised crime as it failed to take into consideration the various illicit activities which organised criminal groups perpetrate.²⁰⁰⁰

To add insult to injury, “approximately 7,000 detectives formerly based at the 503 specialised units (were) re-deployed to station level”.²⁰⁰¹ This was counter-productive because “some individual criminals and certainly most crime syndicates possess a level of expertise or sophistication that makes it difficult, if not impossible, for the average police station detective to successfully investigate them.”²⁰⁰² While the idea was to increase investigative capacity at station level, the result was a skills drain as many vastly experienced detectives left the SAPS due to poor working

¹⁹⁹⁶ See also the discussion in Burger 2015 /SS 10, where the need to “counter silo management and promote integrated policing” was identified almost a decade later by the SAPS management.

¹⁹⁹⁷ Hough and Du Plessis *Organised Crime* 13.

¹⁹⁹⁸ Discussed in more detail later in this chapter.

¹⁹⁹⁹ See Burger 2015 /SS 6 for a description of these specialised units and their respective focus areas.

²⁰⁰⁰ Burger 2015 /SS 8.

²⁰⁰¹ Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

²⁰⁰² Burger 2015 /SS 19.

conditions.²⁰⁰³ Some strategies presented at the Grim Reaper Conference however sought to rectify the situation.

6.2.3 *The Grim Reaper Conference*

While the legal aspects raised at the Grim Reaper Conference are dealt with in the previous chapter,²⁰⁰⁴ the purpose of this discussion is to highlight the action which had been taken by the law enforcement structures to combat organised crime in South Africa. By the time of the conference, the restructuring exercises of the SAPS had been completed and, as will be seen at the end of this discussion, optimism soared regarding the successful combating of organised crime in South Africa.

The then Executive Director of the United Nations Office for Drug Control and Crime Prevention (ODCCP), Professor Pino Arlacchi, warned the conference that organised criminal groups had adopted an entrepreneurial and capitalist outlook, searching for markets outside their home regions to exploit and preying on weak law enforcement structures.²⁰⁰⁵ He also firmly believed that the greatest achievement in the combating organised crime was disproving the myth that organised crime was invincible.²⁰⁰⁶

Accordingly, the then-National Head of the SAPS Interdepartmental Intelligence, Assistant Commissioner George Govender, told the conference that South Africa had been identified as one of the primary places for breeding organised crime, with only Russia being better suited.²⁰⁰⁷ He furthermore maintained that the successful combating of organised crime in South Africa required an effective law enforcement programme which could identify the organised criminal groups operating

²⁰⁰³ See Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath> for a detailed discussion of these poor working conditions.

²⁰⁰⁴ See para 5.2 above for details regarding this conference.

²⁰⁰⁵ Hough and Du Plessis *Organised Crime* 7-8.

²⁰⁰⁶ Hough and Du Plessis *Organised Crime* 8-9.

²⁰⁰⁷ Hough and Du Plessis *Organised Crime* 50.

in South Africa, as well as their specific criminal activities.²⁰⁰⁸ This would be facilitated by the establishment of an intelligence gathering network utilising informants and undercover agents, as well as recruiting personnel with the ability to conduct enterprise-orientated investigations.²⁰⁰⁹ Such steps are necessary because traditional approaches to policing are insufficient to combat organised crime and a proactive approach of “long, and often tedious, searches thorough financial records; interviews of informants, criminals and suspected victims; and surveillance activities” is required, always with the aim of gathering sufficient evidence for successful prosecution.²⁰¹⁰ Electronic surveillance and the utilisation of informants and undercover agents are among the main investigative tools available to law enforcement for combating organised crime.²⁰¹¹

The Organised Crime Units established under the restructuring of the SAPS²⁰¹² were fully operational by 1997²⁰¹³ and were investigating organised crime through registered projects, which were funded by the Secret Fund and focused on specific criminal operations.²⁰¹⁴ Govender²⁰¹⁵ stated the following regarding these projects:

Many successes have already been achieved in this regard. Project driven (undercover) investigations, that follow a dichotomous approach of intelligence gathering and investigation of crime, have become a successful way of investigating organised crime.

Other units within the SAPS, such as the Commercial Crime Component and the Border Policing Unit, were also involved in combating organised crime in South Africa as part of their own investigations.²⁰¹⁶ These efforts

²⁰⁰⁸ Hough and Du Plessis *Organised Crime* 51.

²⁰⁰⁹ Hough and Du Plessis *Organised Crime* 51.

²⁰¹⁰ Albanese *Organised Crime* 255.

²⁰¹¹ Albanese *Organised Crime* 257. The legislation relating to these investigative tools is discussed in chapter 5.

²⁰¹² See the discussion under para 5.2 above.

²⁰¹³ Burger 2015 *ISS* 6; Hough and Du Plessis *Organised Crime* 58.

²⁰¹⁴ Burger 2015 *ISS* 6; Hough and Du Plessis *Organised Crime* 58.

²⁰¹⁵ Hough and Du Plessis *Organised Crime* 58.

²⁰¹⁶ Hough and Du Plessis *Organised Crime* 58.

in combating organised crime, although still somewhat fragmented, were supported by the newly-established Crime Information Management Centre (CIMC), which profiled organised crime individuals, syndicates and networks through its research initiatives in order to assist with investigations.²⁰¹⁷ Coupled with these strategies, was the United Nations ODCCP initiative of opening a new field office in Pretoria to assist South Africa with the combating of organised crime through various projects.²⁰¹⁸

The abovementioned strategies were the beginning of South Africa's efforts to fall into step with the international trend of establishing specialised units to combat organised crime, supported by networks of databases to process and analyse information relating to the phenomenon.²⁰¹⁹ Because of these strategies, confidence was high at the Grim Reaper Conference that the legislative framework²⁰²⁰ and organised crime units put in place would be effective in combating organised crime in South Africa. Cowling²⁰²¹ was not as optimistic though, stating at the time that the “the largest factor attributing to the current breakdown in law and order is the lack of proper law enforcement due to deficiencies in policing and the criminal process in general”.

Fundamentally, properly trained investigators remain essential to the effective combating of organised crime,²⁰²² and one of the initiatives to improve the capacity of detectives tasked with investigating organised crime, was the development of a “comprehensive training course”, of

²⁰¹⁷ Hough and Du Plessis *Organised Crime* 58.

²⁰¹⁸ Hough and Du Plessis *Organised Crime* 15.

²⁰¹⁹ Von Lampe *Organised Crime* 368.

²⁰²⁰ Refer to the previous chapter.

²⁰²¹ Cowling 1998 SACJ 354.

²⁰²² As underlined by the Attorney-General of the Republic of Mozambique, Dr António Paulo Namburete, in his address to the Grim Reaper Conference as follows: “The solution to combating organised crime and especially the new forms thereof, lies in the provision of specialised training to the authorities. Government should also enhance the capacity of the agencies charged with the administration of justice” – see Hough and Du Plessis *Organised Crime* 33.

which the first was held at the end of 1997.²⁰²³ Sadly, these training goals were never reached.²⁰²⁴ This, coupled with the lack of operational implementation of the strategies espoused at the Grim Reaper Conference, led to a failure in combating organised crime in South Africa. Justice Sisi Khampepe²⁰²⁵ put it as follows almost a decade later:²⁰²⁶

The inexorable quest for an effective and efficient strategy to tackle organised crime must run like a golden thread through the whole tapestry of the law enforcement/ prosecutorial and intelligence structures...The imperfections in the inter-relationship of the law enforcement structures ... giving rise to the establishment of the Commission derive largely to operational matters.

It also became clear that proper systems to manage the challenges faced by the structures responsible to effectively combat organised crime in South Africa were vital.²⁰²⁷ Therefore, a short while after the Grim Reaper Conference it became apparent that the existing law enforcement structures were ineffective in combating organised crime and general consensus was reached that some form of “new independent structure was necessary to launch a fresh and comprehensive answer to the challenges presented by organised crime”.²⁰²⁸ This structure was the DSO or “Scorpions”.

6.2.4 *The Scorpions*

Albeit that the Scorpions no longer exist, much can be learned from its ten-year tenure as the leading entity in the combating of organised crime in South Africa.²⁰²⁹ The Scorpions came into legal existence during

²⁰²³ Hough and Du Plessis *Organised Crime* 57.

²⁰²⁴ Almost a decade after the Grim Reaper Conference, the Khampepe Commission found that there was still a lack of in-depth training of SAPS members in the investigation of organised crime as “the training only provides some general background on the approaches to be followed in (organised crime) investigations” – see Khampepe *Final Report* 89.

²⁰²⁵ Note that the Khampepe Commission is discussed in more detail below.

²⁰²⁶ Khampepe *Final Report* 112.

²⁰²⁷ Khampepe *Final Report* 112.

²⁰²⁸ Khampepe *Final Report* 8. This “independent structure” was the DSO (referred to as the “Scorpions”).

²⁰²⁹ Berning and Montesh 2012 SACQ 4.

January 2001²⁰³⁰ and fell under the supervision of the NPA. This structure was “not only novel but ... also unique in the world” as no other law enforcement entities resort under the prosecuting authorities of their respective countries.²⁰³¹ Interestingly, the establishment of the Scorpions coincided with the promulgation of the *POCA* and the signing of the Palermo Convention by South Africa.²⁰³²

The Scorpions were created largely by collapsing two existing investigating directorates within the NPA into the DSO.²⁰³³ The Office for Serious Economic Offences (OSEO) had been established first by the *Investigation of Serious Economic Offences Act*,²⁰³⁴ which was later repealed when a second directorate was created.²⁰³⁵ OSEO then became known as the Investigating Directorate: Serious Economic Offences, while the second directorate was known as the Investigating Directorate: Organised Crime and Public Safety.²⁰³⁶

One of the first major investigations of the Scorpions was the so-called “Arms Deal”.²⁰³⁷ While many allegations regarding large-scale tender fraud, high-level government corruption, as well as gross overspending surround the Arms Deal even today,²⁰³⁸ it did not involve organised crime as defined in chapter 2 of this study. It is therefore submitted that this investigation did not in fact fall within the envisioned purpose of the

²⁰³⁰ Established under the *NPA Act*.

²⁰³¹ Khampepe *Final Report* 127.

²⁰³² Berning and Montesh 2012 SACQ 4.

²⁰³³ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 12.

²⁰³⁴ *Investigation of Serious Economic Offences Act* 117 of 1991.

²⁰³⁵ By s 44 of the *NPA Act*.

²⁰³⁶ Both these directorates were created by s 7 of the *NPA Act*.

²⁰³⁷ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 16.

²⁰³⁸ On 15 September 2011, President Jacob Zuma announced another investigation into the arms deal by way of a commission of inquiry, later known as the Seriti Commission. See Arms Procurement Commission 2015 http://www.gov.za/sites/www.gov.za/files/Arms%20Commission%20Report_a.pdf 1. The process and findings of the Seriti Commission however remain controversial. See for instance the special report by Mail & Guardian 2016 <http://mg.co.za/specialreport/the-arms-deal>.

Scorpions,²⁰³⁹ which was to be “an organisation focused firmly on organised crime, in a world and country primarily concerned about organised crime”.²⁰⁴⁰ In the same vein, the Khampepe Commission explains the establishment of the Scorpions as follows:²⁰⁴¹

The history of the establishment of the DSO stems from the need to curb rampant organised crime which was threatening the political and economic integrity of the country. Some corrupt elements in the police force which existed at the time, necessitated the creation of a *de novo* entity, designed with the specific intent to pursue the elusive elements of organised crime.

This statement is of grave concern, as it implies that the top echelon of the newly-established SAPS was so corrupt that no-one within the SAPS could be entrusted with the investigation of organised crime.²⁰⁴²

Initially, it seems that the plan was to have the Scorpions investigate and prosecute racketeering and money laundering offences under the *POCA*, while the also newly-established Asset Forfeiture Unit would be responsible for implementing the civil and criminal asset forfeiture provisions under the *POCA*.²⁰⁴³ Hence, at the time it was stated that “[t]he DSO routinely sets monetary asset forfeiture targets, and sees the procedure as integral to its strategy.”²⁰⁴⁴

To achieve this goal of combating organised crime in South Africa, the members of the Scorpions received training at an international level from the American FBI at its training academy in Quantico, as well as from Scotland Yard.²⁰⁴⁵ Redpath²⁰⁴⁶ ascribes the helpfulness of the US and UK authorities as “not purely philanthropically based, but to a degree based

²⁰³⁹ As is seen later in this chapter, in the UK such investigations resort under the UK’s Serious Fraud Office and not the National Crime Agency, which is responsible for combating organised crime in the UK.

²⁰⁴⁰ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 18.

²⁰⁴¹ Khampepe *Final Report* 6.

²⁰⁴² More on this under the discussion of the SAPS below.

²⁰⁴³ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 21.

²⁰⁴⁴ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 21.

²⁰⁴⁵ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 22. The importance of proper training of law enforcement officials for effective combating of organised crime has already been alluded to in para 6.2.3 above.

²⁰⁴⁶ Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

on preventing South Africa from becoming a base for activities would could (*sic*) impinge on those countries”. Most of these trainees were, however, new recruits in the form of graduates fresh from university campuses.²⁰⁴⁷ This meant that South Africa relied on individuals who had no real law enforcement experience, or even life experience for that matter, to combat organised crime. Redpath explains the thinking behind this as follows:²⁰⁴⁸

The idea was that the “cream of the crop”, brimming with youthful enthusiasm and energy, would be armed with the tools of the trade with which to combat crime, and would do so without fear or favour, and with proper regard for human rights ... At the time of writing in late 2003, just more than a quarter of DSO members were under the age of 30. Only 3% were older than 50 years of age. More than a quarter of the DSO’s entire staff complement had no prior work experience before being employed by the DSO, although most were university graduates. Most were employed as investigators, so that for every experienced investigator, there is another who had no work experience prior to being taken on by the DSO.

Relying on inexperienced investigators to take on the underworld of organised crime is wishful thinking to say the least, especially in the light of so many experienced detectives from the former specialised units being available after Selebi’s restructuring exercises. The problem was exacerbated by the fact that the Scorpions would only take on complex investigations and hence the inexperienced investigators had no smaller cases to “cut their teeth on”, marginalising those to smaller roles in the large investigations, where the experience was gained slowly.²⁰⁴⁹

6.2.4.1 Powers and structure challenges

Members of the Scorpions had various powers which were bestowed on them in terms of legislative amendments.²⁰⁵⁰ These powers were the same

²⁰⁴⁷ See Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 22.

²⁰⁴⁸ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 22.

²⁰⁴⁹ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 23.

²⁰⁵⁰ In terms of the *NPA Act*. These amendments were brought about by the *National Prosecuting Authority Amendment Act* 61 of 2000, which was subsequently repealed by the *National Prosecuting Authority Amendment Act* 56 of 2008, when the Scorpions were disbanded.

as those which the SAPS²⁰⁵¹ had in terms of the CPA. The powers which the SAPS members received under the SAPS Act, were therefore not bestowed on the Scorpions.²⁰⁵² The Scorpions did, however, possess extended search and seizure powers in terms of its own legislation.²⁰⁵³

The Scorpions comprised multi-disciplinary teams made up of prosecutors, investigators and analysts, which were supported by various administrative and specialist staff.²⁰⁵⁴ This multi-disciplinary approach, referred to as the “troika principle”,²⁰⁵⁵ was therefore an extension of the multi-disciplinary approach promoted by Advocate John Welch at the Grim Reaper Conference.²⁰⁵⁶

“At inception, the term prosecution-led investigation was an accurate and unequivocal description of the DSO’s operation.”²⁰⁵⁷ This position soon changed to a “double-headed group structure”, where teams were led by a lead investigator as well as a prosecutor, because investigators felt that prosecutors were not always the best equipped to lead the investigations.²⁰⁵⁸ This caused some unhappiness with prosecutors as they felt that the responsibility for litigating the criminal matter in court ultimately fell on their shoulders, and as such, they had to be in control of the investigation.²⁰⁵⁹

The extent of prosecutors’ involvement during the investigation-phase of a project however remains a contentious issue. As a starting point, the *Constitution* requires national legislation which ensures that the prosecuting authority exercises its functions without fear, favour or

²⁰⁵¹ See s 30(2) of the *NPA Act* (now repealed).

²⁰⁵² Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 26-27.

²⁰⁵³ In terms of s 29 of the *NPA Act*.

²⁰⁵⁴ See Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 26-42 for a discussion on the operation of the Scorpions.

²⁰⁵⁵ Khampepe *Final Report* 18.

²⁰⁵⁶ Hough and Du Plessis *Organised Crime* 68. See the discussion under para 5.3 of chapter 5.

²⁰⁵⁷ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 30.

²⁰⁵⁸ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 31.

²⁰⁵⁹ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 31.

prejudice.²⁰⁶⁰ This requirement has been met by the *NPA Act*,²⁰⁶¹ which states that a member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice; subject only to the *Constitution* and the law. In *Bonugli v Deputy National Director of Public Prosecutions*²⁰⁶² the court went as far as to hold that the requirement that a prosecutor must exercise his or her functions without fear, favour or prejudice forms part of an accused person's Constitutional right to a fair trial.

It must be noted, however, that improper purpose is not sufficient to make a prosecution wrongful, what is also required is that there must be no "reasonable and probable grounds for prosecuting",²⁰⁶³ which can only be determined after the proceedings.²⁰⁶⁴ In other words, "the motive behind the prosecution is irrelevant".²⁰⁶⁵ This must, however, not be understood as giving a prosecutor *carte blanche*, because an abuse of power with "ulterior motives" may still ultimately be found to infringe on the principle of legality.²⁰⁶⁶

Moreover, while a public prosecutor is *dominis litis*, his or her duties and responsibilities extend beyond merely prosecuting a case. In *Rickert*²⁰⁶⁷ the court held that a public prosecutor is not in the same position as an attorney representing a private client. Such an attorney only has the interests of his or her client at heart, whereas a public prosecutor "represents the State, the community at large and the interests of justice generally". As such, a public prosecutor must at times even have the

²⁰⁶⁰ Section 179(4) of the *Constitution*.

²⁰⁶¹ Section 32(1)(a) of the *NPA Act*.

²⁰⁶² *Bonugli v Deputy National Director of Public Prosecutions* 2010 2 SACR 134 (T) 143E.

²⁰⁶³ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 378C-379A.

²⁰⁶⁴ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 379A.

²⁰⁶⁵ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 379A.

²⁰⁶⁶ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 379B.

²⁰⁶⁷ *R v Riekert* 1954 (4) SA 254 (SWA) 261C-F. See also Khampepe *Final Report* 95.

interests of the accused at heart, due to the responsibility of ensuring that an innocent person is not convicted and the corresponding “duty to disclose, in certain circumstances, facts harmful to his own case”.

Hence it is of utmost importance for a public prosecutor to remain objective in pursuing the truth so that the interests of justice may prevail.²⁰⁶⁸ Not only over-exuberance, but also laxness by prosecutors goes against the constitutional principle of legality, for the court in *Freedom Under Law v National Director of Public Prosecutions*²⁰⁶⁹ held as follows:

It seems to me, therefore, inherently wrong to allow laxity to prosecutors, by permitting them to act unreasonably or unfairly, when there is no compelling policy or moral reason for doing so, especially in an era where throughout the world corruption and malfeasance are on the rise.

This is also the international view on the role of prosecutors, as contained in the United Nations Guidelines on the Role of Prosecutors.²⁰⁷⁰ Referring to these principles on the role of prosecutors, Du Plessis J came to the following conclusion in *Bonugli v Deputy National Director of Public Prosecutions*:²⁰⁷¹

If a prosecutor who acts without fear, favour or prejudice and thus independently is an integral part of a just criminal prosecution, it follows, in my view, that such a prosecutor is also an integral part of a fair trial. An accused person, who is prosecuted by a prosecutor who is not free from outside influence, does not receive a fair trial.

The court went on to consider the *perceptions* on the role of a prosecutor during trial, stating that “[i]t is a well-established principle of law that justice

²⁰⁶⁸ *R v Riekert* 1954 4 SA 254 (SWA) 261G. See also Khampepe *Final Report* 95.

²⁰⁶⁹ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 150H-I.

²⁰⁷⁰ United Nations 1990 <https://www.un.org/ruleoflaw/blog/document/guidelines-on-the-role-of-prosecutors/>, especially paras 11 to 13. The problem is that these provisions are not binding on states – see, for instance, Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 2.

²⁰⁷¹ *Bonugli v Deputy National Director of Public Prosecutions* 2010 2 SACR 134 (T) 142I.

must not only be done, but must also be *seen to be done*".²⁰⁷² Therefore, not only must a prosecutor act without fear, favour or prejudice, he or she must also be *seen* to act in this manner if the accused is to have a fair trial, because "the right to a fair trial in terms of s 35(3) of the Constitution includes the right to a prosecutor that acts and is *perceived* to act without fear, favour or prejudice".²⁰⁷³ Hence perceptions are important and the court applied the objective test formulated by the Constitutional Court²⁰⁷⁴ and found that, under the circumstances of the particular case,²⁰⁷⁵ a reasonable and informed person would not view the prosecutors as acting, even if only subconsciously, free from fear, favour or prejudice.²⁰⁷⁶ Thus the court came to the following conclusion:²⁰⁷⁷

I conclude that the appointment of the second and third respondents as prosecutors in the case against the applicants is in conflict with the provisions of s 35(3) of the Constitution, and therefore unlawful. I should add that there was no argument that the appointment constitutes a valid limitation of the applicants' right to a fair trial.

Therefore, despite the Khampepe Commission's finding that "housing multiple disciplines under one command structure is sound practice" because it enhances inter-disciplinary cooperation and the accompanying "cross-pollination" leads to an effective strategy in the combating of organised crime,²⁰⁷⁸ the Scorpions' methods were questionable nevertheless. Prosecution-led investigations may give the perception that the prosecutor is too close to the investigation.²⁰⁷⁹ So even if he or she

²⁰⁷² *Bonugli v Deputy National Director of Public Prosecutions* 2010 2 SACR 134 (T) 143A (emphasis added).

²⁰⁷³ *Bonugli v Deputy National Director of Public Prosecutions* 2010 2 SACR 134 (T) 143B, 143H (emphasis added).

²⁰⁷⁴ See *Van Rooyen v The State (General Council of the Bar of South Africa Intervening)* 2002 2 SACR 222 (CC).

²⁰⁷⁵ In this matter, private advocates of the Johannesburg Bar were appointed, by the Deputy National Director of Public Prosecutions and at the insistence of the complainants, to prosecute the criminal case against the accused.

²⁰⁷⁶ *Bonugli v Deputy National Director of Public Prosecutions* 2010 2 SACR 134 (T) 144G-I.

²⁰⁷⁷ *Bonugli v Deputy National Director of Public Prosecutions* 2010 2 SACR 134 (T) 145C.

²⁰⁷⁸ Khampepe *Final Report* 95.

²⁰⁷⁹ The advantages of intelligence-led investigations over prosecution-led investigations are discussed later in this chapter.

has not in fact lost objectivity, he or she may nevertheless be *perceived* to have lost such objectivity.²⁰⁸⁰

Also, nothing prohibits such a prosecutor from actively getting involved in the investigation – to the point of even taking down witness statements – and losing objectivity; even if it is only at a subjective level. The Khampepe Commission expressed such concern as follows:²⁰⁸¹

There is a thin line between the prosecutor who is “embedded” in the investigation to still have the necessary “distance” to bring his or her mind to a dispassionate decision as to whether a particular matter is prosecutable or not. It is particularly important that a prosecutor acts independently to enable him or her when conducting investigations to have the neutrality of pursuing exculpatory information and making such information available to an accused person if the prosecution is nevertheless pursued.

This ties in with other concerns raised internally at the Scorpions, where many investigators felt that “prosecutors are not always best-placed to properly lead an investigation, and a desire for more control over investigation by investigators themselves”.²⁰⁸² At the time of formation of the Scorpions, the thinking behind prosecutor-led investigations was expressed as follows:²⁰⁸³

[T]he need to move from the traditional “detached” way in which prosecutors work, arose because the law had evolved to such an extent that the success of prosecutions, particularly in respect of organised crime, would often be compromised on legal technicalities. Simply involving legal expertise at an earlier stage alleviates the problem.

It is submitted that the solution is not to have a prosecutor leading the investigation, but rather for well-trained and experienced investigators, as opposed to graduates fresh from university campuses, to lead investigations in such a manner that they are free from challenges on legal technicalities. The answer lies in addressing the weak training of police

²⁰⁸⁰ As discussed later in this chapter, the UK position is to have prosecutors at the ready to advise law enforcement officials conducting organised crime investigations, but they remain under the auspices of the Crown Prosecution Service, while the law enforcement officials do not.

²⁰⁸¹ Khampepe *Final Report* 94.

²⁰⁸² Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 31.

²⁰⁸³ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 64.

investigators explored above, and not in having a prosecutor take over the investigation. Furthermore, nothing prohibits a lead investigator from consulting with a prosecutor when technical issues arise; but at arms' length, which includes their not being employed within the same organisation chasing the same productivity targets.²⁰⁸⁴ Having a prosecutor lead the investigation will in any event not guarantee that there will never be challenges regarding legal technicalities from the defence.

One of the early criticisms against the Scorpions, in terms of their operational practice, was that the teams cherry-picked their cases, thus ensuring high success rates.²⁰⁸⁵ Even worse were the allegations of misappropriation of funds.²⁰⁸⁶ The worst, however, from a combating of organised crime perspective, was whether the Scorpions would suffer political interference. These concerns were first proven valid, to some extent, with the appointment of retired judge Joos Hefer to head up the Hefer Commission of Inquiry, with the mandate to investigate whether the then National Director of Public Prosecutions, Bulelani Ngcuka, had been an apartheid spy and was abusing his powers.²⁰⁸⁷

Many felt that the motivation behind the commission of inquiry was to disrupt the Scorpions' investigation of *inter alia*, the then deputy-president, Jacob Zuma's involvement in the controversial Arms Deal.²⁰⁸⁸ These investigations involved allegations that Zuma had solicited bribes in exchange for quashing investigations into certain arms deal contracts.²⁰⁸⁹ In the end the Hefer Commission found that the spying allegations were unfounded and "Mr Ngcuka probably never acted as an agent for a pre-

²⁰⁸⁴ As is the case in the UK, which is discussed later in this chapter.

²⁰⁸⁵ See Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 9.

²⁰⁸⁶ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 14.

²⁰⁸⁷ Hefer 2004 http://www.justice.gov.za/commissions/comm_hefer/2004%2001%2020_hefer_report.pdf.

²⁰⁸⁸ Hefer 2004 http://www.justice.gov.za/commissions/comm_hefer/2004%2001%2020_hefer_report.pdf 11; Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 17. See also Crawford-Browne 2004 *ROAPE* for a full discussion of the arms deal scandal.

²⁰⁸⁹ Crawford-Browne 2004 *ROAPE* 335.

1994 government security service”.²⁰⁹⁰ Ultimately, even though the Scorpions maintained that they had a *prima facie* case against Zuma, they declined to prosecute.²⁰⁹¹

6.2.4.2 Organised crime mandate

The actual mandate of the Scorpions was to investigate and prosecute offences committed in an organised fashion.²⁰⁹² “Organised fashion” was defined as the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics.²⁰⁹³ This definition was unnecessary because it was very similar to racketeering offences created by the *POCA* and it would therefore have been more prudent, for clarity sake, to simply refer to the *POCA* as the legislative mandate of the Scorpions. Redpath²⁰⁹⁴ however states the following:

Interviews with those involved in the drafting of the DSO legislation indicated that the DSO’s legislative mandate was designed to be broad so that almost any matter could, in terms of the legislation, be argued to fall within the DSO legislative mandate. This was done intentionally so that the DSO would be able to avoid “jurisdictional” arguments in court.

This again highlights problems created by housing the Scorpions within the NPA rather than under the SAPS, where “jurisdiction” over the investigation of crime would not pose any issues. Soon after its formation,

²⁰⁹⁰ Hefer 2004 http://www.justice.gov.za/commissions/comm_hefer/2004%2020_hefer_report.pdf 61.

²⁰⁹¹ Crawford-Browne 2004 *ROAPE* 335; Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 17.

²⁰⁹² Section 7(1)(a) of the *NPA Act* (now repealed). Section 7 was substituted in its entirety on 6 July 2009 by s 3 of the *National Prosecuting Authority Amendment Act* 56 of 2008.

²⁰⁹³ Section 7(1)(b) of the *NPA Act* (now repealed). Section 7 was substituted in its entirety on 6 July 2009 by s 3 of the *National Prosecuting Authority Amendment Act* 56 of 2008.

²⁰⁹⁴ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 45.

the Scorpions determined its own operational mandate by identifying strategic focus areas as follows:²⁰⁹⁵

[D]rug trafficking, organised violence (including taxi violence, urban terror and street gangs), precious metals smuggling, human trafficking, vehicle theft and hijacking syndicates, serious and complex financial crime, and organised public corruption.

Such an operational mandate is not optimal for the combating of organised crime, because the entrepreneurial nature of organised criminal groups does not limit them to only the above “strategic focus areas” identified by the Scorpions. As is seen later in this chapter, the better strategy, as is used in the UK, is to focus on the organised criminal group rather than the criminal activities.

The legislative mandate of the Scorpions furthermore made it clear that nothing derogated from the powers of the SAPS to prevent, combat or investigate crime.²⁰⁹⁶ Hence the Scorpions operated parallel to the SAPS Organised Crime Unit and unsurprisingly, the Khampepe Commission found that the Scorpions and the SAPS Organised Crime Unit had identical mandates.²⁰⁹⁷ Redpath²⁰⁹⁸ proposed the following solution to the problem of overlapping mandates:

[T]he solution is not to disband the DSO, but to tinker with its mandate and the procedure by which it takes on cases as well as improve communication, to minimise the extent of overlap and number of parallel investigations. Furthermore, it is also argued that organised crime in South Africa is such that more than one approach to combating it is in all likelihood justified, and that there is more than enough work to go around for the various agencies concerned. This point of view sees the existence of both the DSO and the SAPS as an important safety net, such that if one entity cannot or will not investigate a matter, the option remains for the other to do so.

The Scorpions were somewhat hamstrung in their daily functioning. Firstly, the manner in which the investigations were launched was rather

²⁰⁹⁵ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 46.

²⁰⁹⁶ Section 26(2) of the *NPA Act*.

²⁰⁹⁷ Khampepe *Final Report* 111. Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

²⁰⁹⁸ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 49.

cumbersome, as the decision-making was centralised and bureaucratic.²⁰⁹⁹ Secondly, because the Scorpions fell under the NPA, the analysts who were tasked with criminal analyses regarding trends and climate, were isolated from other intelligence gathering institutions²¹⁰⁰ and could therefore not function properly due to their own uncertainty of task.²¹⁰¹ Thirdly, administering the Scorpions seems to have been a nightmare as it was a newly established directorate within the NPA, which needed support and administrative staffing,²¹⁰² and because of cost-cutting and a shared-services model within the NPA, the administrative and support functions were extremely centralised.²¹⁰³ Moreover, difficulties were exacerbated by the fact that the “entire Human Resources department of the NPA was suspended for suspected corruption after a DSO investigation in June 2003”.²¹⁰⁴ Fourthly, the Scorpions were an extremely expensive entity when compared with the SAPS and National Prosecuting Service.²¹⁰⁵ Fifthly, the Scorpions’ productivity was also questioned, as Redpath²¹⁰⁶ concludes:

[C]omparison with other entities, although a problematic exercise, suggests that there is room for the DSO to take on more matters. This appeared to be confirmed by frustration expressed by some interviewees, who felt that they themselves and the DSO could be taking on more work. The number of cases taken on at present, although admittedly of a difficult and complex nature, is small, and each case is therefore effectively very costly, given the expanding budget of the DSO.

Finally, the Ministerial Coordinating Committee (MCC) consisting of the ministers of Justice, as the chairperson, Correctional Services, Defence,

²⁰⁹⁹ See Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 32-34 for a discussion of the various roles played by persons in the decision-making process.

²¹⁰⁰ The South African Intelligence network is discussed after this analysis of the Scorpions.

²¹⁰¹ See Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 35.

²¹⁰² See Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 37.

²¹⁰³ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 37.

²¹⁰⁴ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 38.

²¹⁰⁵ See Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 56-57 for a detailed comparative analysis.

²¹⁰⁶ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 62.

Intelligence Services and Safety and Security, established in terms of the *NPA Act*²¹⁰⁷ to oversee the functioning of the Scorpions, especially also with regards to the overlapping of the Scorpions' mandate with that of the SAPS, never met.²¹⁰⁸ While the Khampepe Commission concluded that this committee could have prevented the eventual irretrievable breakdown in relations between the Scorpions and the SAPS if the committee had indeed met,²¹⁰⁹ it seems that this may not have been the case. The main responsibility of the MCC was "to determine policy guidelines in respect of the functioning of the DSO"²¹¹⁰ and, measured against the judgment of the Constitutional Court in *Glenister*²¹¹¹ regarding the similar function of the Ministerial Committee established over the Hawks, it seems that his provision relating to the operation of the Scorpions was unconstitutional in any event.²¹¹²

Over and above these issues, probably the biggest challenge that the Scorpions faced was the continued debate on whether it should have been located under the SAPS instead of the NPA.²¹¹³ This issue was raised early on in the existence of the Scorpions and eventually led to then President Thabo Mbeki's appointing Justice Sisi Khampepe in April 2005 to head a commission of inquiry into the mandate and location of the Scorpions.²¹¹⁴

²¹⁰⁷ Section 31 of the *NPA Act*.

²¹⁰⁸ See Khampepe *Final Report* 41-42 and Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 15 for discussions on the dysfunctionality of the MCC.

²¹⁰⁹ Khampepe *Final Report* 50.

²¹¹⁰ Khampepe *Final Report* 41.

²¹¹¹ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 418C-D.

²¹¹² See discussion under para 6.3 below.

²¹¹³ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 16.

²¹¹⁴ Khampepe *Final Report*.

6.2.4.3 Challenges and closure

The stated motivation for the commission of inquiry into the Scorpions was described as follows:²¹¹⁵

- (i) the perceived institutional nightmare of the DSO mandate to:
 - a. investigate and to carry out any function incidental thereto;
 - b. gather, keep and analyse information;
 - c. institute criminal proceedings, relating to offences or unlawful activities committed in an organised fashion, or such other offences as determined by the President by proclamation in the gazette;
- (ii) the jurisprudential soundness of housing the investigative and prosecutorial functions of the Scorpions in a single structure under the NDPP, with political oversight held by the minister for justice and constitutional development; and
- (iii) the overlapping mandates and the resultant duplication of resources between the Scorpions and the SAPS with regard to the investigation of *inter alia* organised crime.

These aspects have been touched on in the discussion above. A further issue which the Khampepe Commission had to investigate, was the intelligence gathering capacity which had formed within the Scorpions.²¹¹⁶ This issue is an important one, because as discussed below,²¹¹⁷ intelligence gathering is vital to the combating of organised crime, and the issue was that the Scorpions' intelligence gathering leg operated outside the legislative framework which regulated South Africa's intelligence structures.²¹¹⁸ This meant that the Scorpions' intelligence gathering activities fell outside the oversight of the Inspector General of Intelligence

²¹¹⁵ Khampepe *Final Report* 6-7.

²¹¹⁶ Khampepe *Final Report* 6-7.

²¹¹⁷ See para 6.5.

²¹¹⁸ See para 6.5 below. Compare Khampepe *Final Report* 6-7.

(IGI) and the joint standing committee on intelligence.²¹¹⁹ Furthermore, there was a perceived lack of coordination and cooperation between the Scorpions and the other intelligence structures, including the SAPS Crime Intelligence Division.²¹²⁰ The traditional view is that having intelligence and operational functions fall under one department is not desirable, as this often leads to such an entity becoming self-centred.²¹²¹ Furthermore, such separation of tasks better protects intelligence sources from becoming exposed or compromised during trial.²¹²² However, as is discussed later in this chapter, this view has undergone a dramatic change in the UK.

Finally, the main issue to be investigated was the constitutionality of locating the Scorpions, more especially both the investigation and prosecuting functions, within the NPA under the Department of Justice. In light of the above concerns, the Khampepe Commission was expressly mandated “to obtain clarity in respect of the location, mandate and operation of the DSO *vis-à-vis* other relevant government departments or institutions”.²¹²³ The commission’s final report recognises that the Scorpions were established to combat organised crime at a time when the SAPS was – and arguably still is – unable to perform this function properly due to “corrupt elements”.²¹²⁴ As such, the commission found that “organised crime still presents a threat that needs to be addressed through a comprehensive strategy”²¹²⁵ and the commission recommended that the Scorpions remain under the structure of the NPA, subject to certain administrative measures to ensure better co-operation with *inter alia* the SAPS.²¹²⁶

²¹¹⁹ Khampepe *Final Report* 6-7.

²¹²⁰ Khampepe *Final Report* 6-7.

²¹²¹ See Harfield “The criminal not the crime” 35, 37 for an overview of this conclusion drawn after an extensive review of the UK law enforcement structures by an interdepartmental organised crime strategy group.

²¹²² Harfield “The criminal not the crime” 37.

²¹²³ Khampepe *Final Report* 7.

²¹²⁴ Khampepe *Final Report* 6.

²¹²⁵ Khampepe *Final Report* 23.

²¹²⁶ Khampepe *Final Report* 142.

Despite this recommendation, the African National Congress (ANC) in December 2007 adopted a resolution at its national conference in Polokwane “calling for a single police service and the dissolution of the DSO”.²¹²⁷ This resolution set in place the process of drafting legislation to dissolve the Scorpions under the NPA and establish a new entity under the SAPS, which was ultimately signed by the president on 27 January 2009.²¹²⁸

Many believe that the main motivation behind the closure of the Scorpions was its investigation into current-president Jacob Zuma’s role in the controversial Arms Deal.²¹²⁹ Hence, shortly after it was decided to disband the Scorpions, businessman Hugh Glenister approached the High Court to interdict and restrain the president and his relevant cabinet members from passing the legislation that would effectively dissolve the Scorpions.²¹³⁰ The court however held that, due to separation of powers, it had no jurisdiction to decide the matter as this would only be justified in exceptional cases where special circumstances existed for the court to intervene.²¹³¹ Van der Merwe J thus held that only the Constitutional Court had the jurisdiction to possibly intervene.²¹³²

Glenister then approached the Constitutional Court, which held that his application was premature as Parliament could still “make significant and substantial amendments to the draft legislation or it may choose not to enact the legislation at all”.²¹³³ Hence, the court held that it had not been established that it was appropriate for the court to intervene in the affairs of Parliament because there was no proof that any material and

²¹²⁷ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 352A.

²¹²⁸ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 352.

²¹²⁹ Berning and Montesh 2012 SACQ 4.

²¹³⁰ See *Glenister v The President of the Republic of South Africa (Amicii Curiae: The African Christian Democratic Party)* 2008 JDR 0569 (T).

²¹³¹ *Glenister v The President of the Republic of South Africa (Amicii Curiae: The African Christian Democratic Party)* 2008 JDR 0569 (T) paras 39-40.

²¹³² *Glenister v The President of the Republic of South Africa (Amicii Curiae: The African Christian Democratic Party)* 2008 JDR 0569 (T) para 41.

²¹³³ *Glenister v President of the Republic of South Africa* 2009 1 SA 287 (CC) 306D.

irreversible harm would result if the court failed to intervene; hence it was not in the interests of justice to grant Glenister's application.²¹³⁴ Ultimately, the Scorpions was replaced by the DPCI, nicknamed the "Hawks", on 6 July 2009,²¹³⁵ The end result was that the Scorpions was yet another failed attempt at establishing a law enforcement structure to combat organised crime in South Africa within the parameters of the newly adopted legislative framework aimed at disrupting the phenomenon. One of the main differences between the Hawks and the former Scorpions, is that the Hawks now resorts under the SAPS, which is analysed next.

6.3 The SAPS law enforcement structures

As stated above, the SAPS Organised Crime Unit, which was in full operation by the time of the Grim Reaper Conference in 1998, continued to function parallel to the Scorpions. By the time the Khampepe Commission analysed the SAPS Organised Crime Unit in 2006, it had grown to 981 police officials based at "52 operational units consisting of 26 Organised Crime Investigation Units; 13 Precious Metals and Diamond Units; 9 Asset Investigation Sections and 4 satellite Organised Crime Units".²¹³⁶ The selection criteria entailed at least three years' service as detective with the completion of a basic detective's course and a specialist course.²¹³⁷ The intelligence gathering of the unit functioned as follows: ²¹³⁸

Assessment of Crime Threat Analysis from Station level (CTA); Assessment of Organised Crime Threat Analysis from Area level (OCTA); Processing of Organised Crime Project Investigation at Area level by the Area Organised Crime Secretariat (AOCS); Processing of Organised Crime Project Investigation at Provincial level by the Provincial Organised Crime Secretariat (POCS); Processing of Organised Crime Project Investigation at National level by the National Organised Crime Secretariat (NOCS).

²¹³⁴ *Glenister v President of the Republic of South Africa* 2009 1 SA 287 (CC) 307G-308A.

²¹³⁵ Berning and Montesh 2012 SACQ 8.

²¹³⁶ Khampepe *Final Report* 74.

²¹³⁷ Which were either vehicle course; drug course; FCS course; serious and violent crime course; or commercial crime course – see Khampepe *Final Report* 74.

²¹³⁸ Khampepe *Final Report* 75.

When the Hawks were established in 2009, the investigators were mainly sourced from three areas, namely the former Scorpions, the SAPS Organised Crime Units and the SAPS Commercial Crime Units.²¹³⁹

6.3.1 *The Hawks*

The mandate of the Hawks is to prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption.²¹⁴⁰ Creating an elite unit allows such an entity to attract and select the best candidates while at the same time guarding against appointing those who are only in it for the glory.²¹⁴¹ “Therefore, specialised units also have a particular responsibility to guard against abuse of the unit and must be seen to take immediate steps to root out corrupt and criminal elements within their ranks”.²¹⁴²

One of the challenges with establishing an elite unit to combat organised crime, lies in preventing its members from acting “like the criminal organisations that they were established to eradicate”.²¹⁴³ This is precisely what happened with the early attempt at combating organised crime in South Africa by then President Mandela, discussed above,²¹⁴⁴ and as will be seen in this section, may hold true of the Hawks as well. Burger²¹⁴⁵ states that one of the reasons why such units become delinquent is the protection of their “turf” and a reluctance to share information.

²¹³⁹ Burger 2015 /SS 12.

²¹⁴⁰ Section 17B(a) of the *SAPS Act*. See also *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 38H-I, where the court held that the “DPCI has the primary duty to prevent, combat and investigate those national priority offences that are intimate to its core business like corruption, crimes against humanity, organised crime or serious commercial crime ‘which in the opinion of the national head of the Directorate need to be addressed by the Directorate’”.

²¹⁴¹ Burger 2015 /SS 20.

²¹⁴² Burger 2015 /SS 20.

²¹⁴³ Burger 2015 /SS 2.

²¹⁴⁴ See para 6.2.1.

²¹⁴⁵ Burger 2015 /SS 2.

The *troika*-methodology utilised by the Scorpions was not completely discarded, as provision is made for a multi-disciplinary approach whereby members from other government departments, especially the NPA, must assist the Hawks with their expertise when required to do so.²¹⁴⁶ This is similar to the position with the National Crime Agency of the UK, which is discussed later in this chapter.

There are a number of advantages to establishing the Hawks under the umbrella of the SAPS. One such advantage is the absence of the need to legislate powers and mandates, which, once legislated, can be overstepped and/or legally challenged.²¹⁴⁷ It also minimises territorial competition, which had existed between the Scorpions and the SAPS,²¹⁴⁸ as well as fears regarding prosecutor involvement, which Ngcobo CJ sums up as follows:²¹⁴⁹

It is apparent from the record before us that the establishment of the DPCI and the displacement of the DSO stemmed from, among other concerns, the controversy that surrounded the DSO since its inception, in particular, concerns about the level of involvement by the prosecutors into investigations, and the loss of objectivity of prosecutors leading investigations.

The need for the extensive control bodies, as recommended by the Khampepe Commission²¹⁵⁰ to regulate clashes and overlapping of mandates that existed between the Scorpions and the SAPS, is also negated. Instead, co-operation with other police units needed in the combating of organised crime in South Africa, such as the Task Force and Public Order Policing Unit, may be streamlined.²¹⁵¹

²¹⁴⁶ Section 17F of the *SAPS Act*.

²¹⁴⁷ See Khampepe *Final Report* 9 where it is stated regarding the Scorpions: "The evidence pointed to numerous incidence of DSO conduct which went beyond the legislative mandate of the DSO or threatened to do so."

²¹⁴⁸ See Khampepe *Final Report* 9.

²¹⁴⁹ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 367B.

²¹⁵⁰ See Khampepe *Final Report* 48-50.

²¹⁵¹ See Khampepe *Final Report* 86 for examples of coordination between the former Scorpions and various SAPS units.

Furthermore, the issues of lack of oversight and control by the Minister of Safety and Security over the investigations performed by the Scorpions, which the Khampepe Commission found to be “untenable and anomalous”, are also avoided.²¹⁵² Political oversight over the Hawks now rests with Parliament,²¹⁵³ which must also approve policy guidelines for the selection of the national priority offences by the Head of the Hawks for investigation, as well as for the referral of investigations to the Hawks by the National Commissioner of the SAPS.²¹⁵⁴ While there are thus many advantages in housing the Hawks within the SAPS, the disadvantage may outweigh them, as becomes clear in the rest of this chapter. To start with, the establishment of the Hawks was not smooth sailing.

6.3.1.1 The Glenister challenge

Once the legislation establishing the Hawks had been passed, Hugh Glenister again challenged these legislative changes in the High Court, where the court once again ruled that “disputes that involve important questions that relate to the sensitive area of separation of powers, must be decided by the Constitutional Court.”²¹⁵⁵ Furthermore, the court held that, objectively speaking, the establishment of the Hawks was aimed at enhancing the capacity of the SAPS, which was a legitimate executive function that appeared to be rational and not arbitrary.²¹⁵⁶

Glenister again approached the Constitutional Court, challenging the constitutionality of the legislation aimed at disbanding the Scorpions under the NPA and establishing the Hawks under the SAPS.²¹⁵⁷ The crux of his

²¹⁵² Khampepe *Final Report* 68.

²¹⁵³ This oversight of Parliament over an executive function must be welcomed. The value of the doctrine of *Trias Politica* becomes apparent later in this study when it is covered as part of the discussion on judicial review over the executive.

²¹⁵⁴ Section 17K(1) and (4) of the SAPS Act.

²¹⁵⁵ *Glenister v President of the Republic of South Africa* (WCC case No 7798/09, 26 February 2010) paras 5 and 7. This case is also referred to as “*Glenister I*” – see *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 350.

²¹⁵⁶ *Glenister v President of the Republic of South Africa* (WCC case No 7798/09, 26 February 2010) para 13.

²¹⁵⁷ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

application was that Parliament was “blindly” following a resolution made by a political party “in order to shield high-ranking ANC politicians and their associates from prosecution” by the Scorpions, and the Hawks would furthermore have to operate in “a dysfunctional SAPS under political control instead of independently”.²¹⁵⁸ The court held that organised crime, especially drug trafficking, was becoming a serious issue, threatening the democracy of South Africa, and because these crimes are committed by sophisticated organised criminal groups, the capacity of the SAPS to combat organised crime needed to be enhanced and the establishment of the Hawks “for that purpose is rationally related to the achievement of that purpose”.²¹⁵⁹

While placing the Hawks in the SAPS brought it under the jurisdiction of the Independent Police Investigative Directorate (IPID),²¹⁶⁰ which had not been the case with the Scorpions,²¹⁶¹ an interesting complaints provision in the Hawks legislation allows the Minister of Police, after consultation with the Minister of Justice and the Chief Justice, to appoint a retired judge²¹⁶² to investigate complaints of improper influence or interference, whether of a political or any other nature, exerted upon a member of the Hawks regarding the conducting of an investigation.²¹⁶³ Furthermore, the head of the Hawks may request the retired judge to investigate complaints or allegations relating to investigations by the Hawks or alleged interference with such investigations.²¹⁶⁴

²¹⁵⁸ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 365B-C.

²¹⁵⁹ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 364D-365A.

²¹⁶⁰ Discussed later in this chapter.

²¹⁶¹ Khampepe *Final Report* 49.

²¹⁶² Section 17L(1)(b) of the *SAPS Act* defines a retired judge as a judge discharged from active service as referred to in the *Judges' Remuneration and Conditions of Employment Act* 47 of 2001.

²¹⁶³ Section 17L(1) and (4) of the *SAPS Act*.

²¹⁶⁴ Section 17L(1) of the *SAPS Act*.

The minority judgment in *Glenister*²¹⁶⁵ found this complaints mechanism important in the addressing of “undue political interference”. However, the majority view held that it “deals with history” as it creates an after-the-fact investigation and does not provide advance protection against political pressure.²¹⁶⁶ Furthermore, such an investigation may be hampered by provisions that allow the NDPP to refuse submitting information requested by the retired judge.²¹⁶⁷ These fears seem well-founded in light of recent criticism by former Constitutional Court judge, Johann Kriegler, who questioned the competence of the Hawks after the way it handled criminal charges²¹⁶⁸ against amongst others, the former Minister of Finance, Pravin Gordhan.²¹⁶⁹ Even with this criticism from a retired constitutional judge, no further action was taken against the Hawks in this regard, which raises serious concerns regarding its independence.

6.3.1.2 Independence

In the *Glenister* judgment,²¹⁷⁰ the Constitutional Court was divided five against four in its view on whether the Hawks enjoy adequate independence from undue influence. In the main judgment, Ngcobo CJ, expressing the view of the minority, held that the legislation was drafted in such a manner as to ensure the involvement of all spheres of government in safeguarding the Hawks’ independence. Ngcobo CJ explains these safeguards as follows:²¹⁷¹

The executive, in the form of the Ministerial Committee, sets the policy guidelines; the legislature, in the form of Parliament, approves or rejects these policy guidelines and otherwise exercises oversight over the unit; and

²¹⁶⁵ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 393E.

²¹⁶⁶ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 422C-E.

²¹⁶⁷ Section 17L(7) of the SAPS Act; *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 422F.

²¹⁶⁸ Which it has subsequently come to light were trumped-up charges. See Tham 2017 <https://www.dailymaverick.co.za/article/2017-10-03-sars-wars-kpmg-report-the-firm-the-lawyers-the-auditor-and-the-blame-game/#.WhriSVWWbIU>.

²¹⁶⁹ See Galens 2016 <http://www.news24.com/SouthAfrica/News/abrahams-caused-untold-harm-to-economy-judge-kriegler-20161031>.

²¹⁷⁰ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

²¹⁷¹ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 393G-H.

the judiciary, in the form of a retired judge, assures that complaints of interference with the unit are investigated.

The majority view, however, held that the Hawks lacked structural and operational independence and that the legislative provisions establishing the Hawks were therefore unconstitutional.²¹⁷² The Constitutional Court found that independence is necessary to protect the investigators from undue influence.²¹⁷³ “Independence in this context therefore means the ability to function effectively without any undue influence.”²¹⁷⁴ Most of these observations, however, relate to independence regarding corruption investigations as required by South Africa’s obligations as State party to the Corruption Convention.²¹⁷⁵ It is, however, submitted that the close links between corruption and organised crime²¹⁷⁶ mean independence of a law enforcement entity tasked with the combating organised crime remains crucial, especially considering that the Scorpions had been established under the NPA due to large-scale corruption in the SAPS, a position which has not improved.²¹⁷⁷ Hence, Kinnes and Newham²¹⁷⁸ argue that the Hawks should be separated from the SAPS in order to instil public confidence in its ability to operate free from political interference.

The court held that the question was whether the Hawks “enjoy[s] an adequate level of structural and operational autonomy, secured through institutional and other legal mechanisms aimed at preventing undue influence”.²¹⁷⁹ Failure to ensure its independence would leave it open to

²¹⁷² *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 397B-D, 403A.

²¹⁷³ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 383B-C.

²¹⁷⁴ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 383D.

²¹⁷⁵ See discussion in chapter 3. Reeves 2012 SACQ 23-32 therefore calls for a new statutory anti-corruption agency, which is established independently of other law enforcement structures.

²¹⁷⁶ See chapter 2.

²¹⁷⁷ This position will become clearer as this study progresses.

²¹⁷⁸ Kinnes and Newham 2012 SACQ 33-39.

²¹⁷⁹ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 385H.

challenges.²¹⁸⁰ The majority held that the Ministerial Committee²¹⁸¹ caused their “gravest disquiet”, stating as follows: ²¹⁸²

[T]he power of the Ministerial Committee to determine guidelines appears to be untrammelled. The guidelines could, thus, specify categories of offences that it is not appropriate for the DPCI to investigate — or, conceivably, categories of political office-bearers whom the DPCI is prohibited from investigating.

Ironically, the majority felt that these concerns “may be far-fetched”,²¹⁸³ but only five years later, and after amendments had been made “to align the provisions relating to the DPCI with a judgment of the Constitutional Court”,²¹⁸⁴ the Hawks have come under severe criticism for being politically influenced in their fruitless efforts to arrest and prosecute the former Minister of Finance, Pravin Gordhan, on trumped-up charges,²¹⁸⁵ yet failing to probe the Minister of State Security, David Mahlobo, for his involvement with the suspected leader of an organised criminal group specialising in rhino poaching and rhino horn smuggling.²¹⁸⁶ Hence the majority view that the legislation did “far too little” to secure the Hawks from interference by the very political executives who could find

²¹⁸⁰ In terms of s 17B of the *SAPS Act*. See *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 388F-G.

²¹⁸¹ In terms of s 17I of the *SAPS Act*, the President must designate a Ministerial Committee, consisting of at least the ministers of Police, Finance, Home Affairs, State security and Justice and Constitutional Development, in order to determine procedures to coordinate the activities of the Hawks and other relevant Government departments or institutions. The Ministerial Committee is answerable to Parliament. This provision was inserted by the *South African Police Service Amendment Act* 10 of 2012 to align the provision with the judgment in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC). Previously, the Ministerial Committee had the duty to determine the policy guidelines for the selection of national priority offences by the head of the Hawks for investigation by the entity.

²¹⁸² *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 418C-D.

²¹⁸³ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 418D.

²¹⁸⁴ Long title of the *South African Police Service Amendment Act* 10 of 2012.

²¹⁸⁵ See for instance Ngoepe 2016 <http://www.news24.com/SouthAfrica/News/hawks-allegations-against-gordhan-baseless-former-top-judge-20160825>.

²¹⁸⁶ DA 2017 <https://www.da.org.za/2017/01/ipid-must-investigate-hawks-failure-probe-mahlobos-links-rhino-poacher/>; Beeld 2017 <http://www.netwerk24.com/Stemme/Kommentaar/kommentaar-valke-ystervuis-wat-zuma-en-vriende-veilig-hou-20170126>.

themselves as the subjects of corruption investigations, is proven correct.²¹⁸⁷

The view of the general public plays an extremely important role in determining whether an entity such as the Hawks is in actual fact independent. The Constitutional Court put it as follows:²¹⁸⁸

Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective bench marks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.

This lengthy quote is necessary to underscore the inferences that can be drawn from the public criticism against the Hawks and recently sacked head,²¹⁸⁹ Major-General Berning Ntlemenza,²¹⁹⁰ as well as the head of the NPA, Adv Shaun Abrahams, in the way they conducted their functions, as such public criticism is also evidence that the Hawks lack sufficient independence, which may be alleviated by following the recommendation of the Khampepe Commission²¹⁹¹ to establish some form of “Multidisciplinary Vetting Structure (MVS)”. Even though the exact composition of the MVS proposed by the Khampepe Commission does not need to be followed, the powers, functions and obligations as recommended could *mutatis mutandis* be applied to the Hawks, which includes “the power to refer the cases to be investigated and prosecuted”.²¹⁹²

The end result of Glenister’s challenge was that the Constitutional Court found that the legislation creating the Hawks failed to provide sufficient

²¹⁸⁷ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 418E-F.

²¹⁸⁸ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 412D.

²¹⁸⁹ Ntlemenza’s dismissal by the high court is discussed later in this chapter.

²¹⁹⁰ See for instance EWN 2017 <http://ewn.co.za/Topic/Major-General-Berning-Ntlemenza>.

²¹⁹¹ Khampepe *Final Report* 47.

²¹⁹² Khampepe *Final Report* 48-50.

independence because the Hawks were “insufficiently insulated from political influence in its structure and functioning”, but more so because the conditions of service pertaining to the Head and members of the Hawks made them vulnerable “to an undue measure of political influence” due to “factors such as security of tenure and remuneration, and mechanisms for accountability and oversight”.²¹⁹³ The head of the Hawks carries the rank of Deputy National Commissioner and answers to the National Commissioner, who is a political appointee and is therefore extremely susceptible to political pressure.²¹⁹⁴ The Constitutional Court also made a comparative analysis between the former Scorpions and the Hawks²¹⁹⁵ and concluded that the Scorpions had in fact been more independent than the Hawks.²¹⁹⁶ Hence the Hawks represented a step backwards from the former Scorpions. The Constitutional Court ruled as follows:²¹⁹⁷

In summary, however, we have concluded that the absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives, and the subordination of the DPCI's power to investigate at the hands of members of the executive, who control the DPCI's policy guidelines, are inimical to the degree of independence that is required.

The Constitutional Court, however, suspended the declaration of constitutional invalidity by 18 months to allow Parliament the opportunity to rectify the defect.²¹⁹⁸ Subsequently, amendments were made to align the relevant provisions with the Constitutional Court judgment and to ensure that the Hawks carry the necessary independence to secure it from political interference.²¹⁹⁹ These amendments mainly placed decision-making authority regarding cases to be investigated by the Hawks with the

²¹⁹³ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 412F-G, 413B.

²¹⁹⁴ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 418A-B.

²¹⁹⁵ Discussed after the Scorpions.

²¹⁹⁶ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 412G-413C.

²¹⁹⁷ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 423B.

²¹⁹⁸ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 397E-F.

²¹⁹⁹ Long title of the *South African Police Service Amendment Act* 10 of 2012.

head rather than with the National Commissioner.²²⁰⁰ As will be seen, these amendments seem to have failed in isolating the Hawks from political interference. Once the 18 months had expired, it was the Helen Suzman Foundation's (HSF) turn to approach the law courts.

6.3.1.3 The HSF challenge

After the 18 months grace period had expired, the issue relating to the political independence of the Hawks was placed before the Constitutional Court again.²²⁰¹ The result was that the Constitutional Court declared a number of provisions unconstitutional and therefore deleted them.²²⁰² The court held that the main consideration for deleting the relevant sections was whether the Hawks legislation had sufficient provisions to protect the members from interference, allowing them "to carry out their duties without any inhibitions or fear of reprisals".²²⁰³

Furthermore the Constitutional Court held that the provisions²²⁰⁴ allowing the extension of the national head and the deputy national head of the Hawks' term of office, was incompatible with their required independence and was therefore unconstitutional.²²⁰⁵ Also, the discretion granted to the relevant minister to remove the head of the Hawks from office²²⁰⁶ was held to be "inconsistent with the constitutional obligation to establish an adequately independent corruption-busting agency" and also declared unconstitutional.²²⁰⁷ Another provision that was held to be unconstitutional

²²⁰⁰ The National Commissioner being a political appointment. See Kinnes and Newham 2012 SACQ 37-38.

²²⁰¹ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC).

²²⁰² *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 5I-6B.

²²⁰³ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 17B.

²²⁰⁴ Section 17CA(15) and (16) of the SAPS Act.

²²⁰⁵ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 34B-C.

²²⁰⁶ Section 17DA(2) of the SAPS Act.

²²⁰⁷ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 37E.

was the power afforded the Minister of Police to issue policy guidelines determining the functioning of the Hawks.²²⁰⁸ This, the court felt, would open up the possibility “to limit the class of national priority offences the DPCI is to confine itself to or to identify public office bearers the DPCI is not allowed to investigate”²²⁰⁹ and the court therefore ordered that the words “subject to any policy guidelines issued by the Minister and approved by Parliament” be removed from various sections of the *SAPS Act*, to leave the head of the Hawks firmly in charge of its functioning.²²¹⁰ However, as is seen later in this chapter, leaving the head of the Hawks in charge is not a guarantee against political interference.

The terms “selected offences”²²¹¹ as well as “any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and approved by Parliament”,²²¹² were also removed from the legislation as they were seen as threatening the operational independence of the Hawks.²²¹³ Deleting these words provided clarity on the exact offences which the Hawks are to investigate.²²¹⁴

In light of the recent scandal surrounding the appointment of the former head of the Hawks, Major-General Berning Ntlemeza,²²¹⁵ the question put by Cameron J (with Froneman J and Van der Westhuizen J concurring) in

²²⁰⁸ Section 17K(4), (7) and (8) of the *SAPS Act*.

²²⁰⁹ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 39D.

²²¹⁰ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 39G-40C.

²²¹¹ Section 17D(1)(a) of the *SAPS Act*.

²²¹² Section 17D(1)(b) of the *SAPS Act*.

²²¹³ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 40F.

²²¹⁴ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 41A.

²²¹⁵ Discussed below. See for instance Burger 2016 <https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-in-sa> and EWN 2017 <http://ewn.co.za/Topic/Major-General-Berning-Ntlemeza>.

his minority judgment, regarding the process of appointment of the head of the Hawks, seems to have been correct.²²¹⁶

So the minister chooses the head of the DPCI, subject to the concurrence of cabinet. Once the appointment has been made, the minister must 'report' to Parliament. But Parliament has no veto power, nor any other say in the appointment. Is that constitutionally permissible?

In this minority judgment he continues to find that “the more the institution's mandate threatens political office bearers, the greater is the risk of political weight being brought to bear on its appointments”, which means such politicians would be prone to recruit “a compliant appointee”.²²¹⁷ Cameron J found the mandate of the Hawks to be similar to those of the Auditor-General and Public Protector,²²¹⁸ whose recommended appointments have to be approved by a supermajority of Parliament.²²¹⁹ The minority expressed the following concerns regarding the appointment process, whereby the Minister of Police appoints the head with the approval of cabinet, simply because it is the president who appoints the cabinet and they serve at his pleasure.²²²⁰ Furthermore, these ministers are usually senior members of the relevant political party and therefore mostly form an alliance which “does not adequately dilute the minister's power”.²²²¹ Because the head of the Hawks and the minister have a hand in appointing the deputy national heads and provincial heads of the Hawks, the ranks are in effect open to political influence.²²²²

²²¹⁶ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 56H.

²²¹⁷ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 57B-C.

²²¹⁸ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 58A.

²²¹⁹ According to s 193(5)(b)(i) of the *Constitution*, the appointment of both the Public Protector and the Auditor-General must be approved by a supporting vote of at least 60 per cent of the members of the Assembly.

²²²⁰ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 58F, 58H-59A, as well as s 17CA of the SAPS Act.

²²²¹ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 58F, 58H-59A, as well as s 17CA of the SAPS Act.

²²²² *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 58F, 58H-59A, as well as s 17CA of the SAPS Act.

Sadly therefore, the safeguards against political interference have failed in practice, as also evidenced by the High Court application of the Helen Suzman Foundation and Freedom Under Law in which they successfully contended that the Minister of Police acted unlawfully and irrationally when he appointed Berning Ntlemenza as National Head of the Hawks, thereby also failing to fulfil his constitutional duty to uphold the law in South Africa by ensuring the independence of the Hawks.²²²³ Due to a previous high court ruling that Ntlemenza had *inter alia* exercised his powers in bad faith, arbitrarily, irrationally and unlawfully,²²²⁴ the court in this matter found that the Minister of Police “could not have been satisfied that Major General Ntlemenza was a fit and proper person to be appointed as the national head of the DPCI”²²²⁵ as required by the *SAPS Act*.²²²⁶

This test is an objective one²²²⁷ and therefore the question is not whether the person is a fit and proper person in the eyes of the Minister of Police.²²²⁸ The test entails the measuring of the actual conduct of the person who is appointed, against the conduct that is *expected* of a person holding such office.²²²⁹ In light of the High Court’s previous rulings on his character,²²³⁰ the court in this matter held that Ntlemenza “lacks the requisite honesty, integrity and conscientiousness to occupy the position

²²²³ *Helen Suzman Foundation v Minister of Police* (23199/16) [2017] ZAGPPHC 68 (17 March 2017) para 2.

²²²⁴ See *Sibiya v Minister of Police* 2015 JDR 0398 (GP) para 31.

²²²⁵ *Helen Suzman Foundation v Minister of Police* (23199/16) [2017] ZAGPPHC 68 (17 March 2017) para 27.

²²²⁶ Section 17CA(1) of the *SAPS Act* requires the National Head of the Hawks to be a fit and proper person, with due regard to his or her experience, consciousness, and integrity, to be entrusted with the responsibilities of the office concerned as the National Head of the Directorate.

²²²⁷ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) para 20; *Helen Suzman Foundation v Minister of Police* (23199/16) [2017] ZAGPPHC 68 (17 March 2017) para 33.

²²²⁸ *Helen Suzman Foundation v Minister of Police* (23199/16) [2017] ZAGPPHC 68 (17 March 2017) para 33.

²²²⁹ *Helen Suzman Foundation v Minister of Police* (23199/16) [2017] ZAGPPHC 68 (17 March 2017) para 35.

²²³⁰ See *Sibiya v Minister of Police* 2015 JDR 0398 (GP).

of *any public office*, not to mention an office as more important as that of the National Head of the DPCI”.²²³¹

Based on the above, the court reviewed and set aside the decision of the Minister of Police to appoint Ntlemeza as the National Head of the Hawks.²²³² Subsequent to the ruling, both Ntlemeza and the Minister of Police filed applications for leave to appeal against the court order, which in turn caused the Helen Suzman Foundation to file “an urgent application to have the court order, to set aside Hawks boss Berning Ntlemeza’s appointment, executed”, submitting that the application for leave to appeal did not suspend the High Court’s order.²²³³ After Ntlemeza’s subsequent application to the Supreme Court of Appeal for leave to appeal against the above ruling was denied, he was demoted from lieutenant-general – the rank to which he was promoted with his now-invalid appointment as head of the Hawks – to his former rank of major-general and placed on retirement.²²³⁴

Failure to apply the legislative provisions in a manner that promotes the independence of the Hawks, is not only a violation of those legislative provisions, but according to the Constitutional Court, also a violation of the *Constitution* itself.²²³⁵ If drastic measures are not implemented to better insulate the DPCI from political interference, its ability to combat organised crime in South Africa will be adversely compromised. In its current state, the Hawks is a half-baked attempt at establishing a national agency to combat organised crime in South Africa. Hence the minority judgment of

²²³¹ *Helen Suzman Foundation v Minister of Police* (23199/16) [2017] ZAGPPHC 68 (17 March 2017) para 36 (emphasis added).

²²³² *Helen Suzman Foundation v Minister of Police* (23199/16) [2017] ZAGPPHC 68 (17 March 2017) para 46.

²²³³ Tandwa 2017 www.news24.com/SouthAfrica/News/hsf-wants-ntlemeza-ruling-to-be-executed-urgently-20170327.

²²³⁴ Merten 2017 https://www.dailymaverick.co.za/article/2017-09-19-ntlemeza-saga-over-hawks-heads-unlawful-appointment-ends-at-a-cost-to-the-general/#.WcH-O03_rmR; Shange 2017 <https://www.businesslive.co.za/bd/national/2017-09-19-former-hawks-boss-placed-on-retirement-at-lower-rank-says-police-minister/>.

²²³⁵ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 395C.

Froneman J (with Cameron J concurring) in *Helen Suzman Foundation v The President of the Republic of South Africa* rings true:²²³⁶

If the ruling party has stated that it wishes to control all levers of power in society, it may be inferred that the location of the DPCI within SAPS is not a reasonable option because the potential for control over the DPCI through cadre deployment in SAPS would undermine the adequate structural and operational independence required of a dedicated anticorruption unit. The ANC's own statements, relied upon by Mr Glenister, can hardly be described as vexatious or scandalous within the meaning of the rule.

The next structure to be explored plays a vital role in combating organised crime in South Africa because, while the Scorpions professed the now defunct “prosecution-led investigations”,²²³⁷ many scholars advocate “intelligence-led investigations” for the effective combating of organised crime.²²³⁸ As such, the SAPS Crime Intelligence Division is the leading law enforcement structure in gathering intelligence on organised crime in South Africa.

6.3.2 *The Crime Intelligence Division*

6.3.2.1 The vital role of intelligence

The role that intelligence played in the SAPS Organised Crime Unit has already been touched on above. Harfield²²³⁹ maintains that UK law enforcement followed the wrong intelligence strategy when, in the mid-twentieth century, they believed the correct approach was so-called “policing-led intelligence” and thus “the cart was put before the horse”, leading to the ineffective use of informers.²²⁴⁰ A subsequent shift in approach led to the application of Organised Crime Group Mapping (OCGM) which, as part of an intelligence-led policing approach, “maps

²²³⁶ *Helen Suzman Foundation v The President of the Republic of South Africa* 2015 2 SA 1 (CC) 51E-52D.

²²³⁷ See para 6.3 above.

²²³⁸ Fitzpatrick 2005 *FLJ* 252; Leong *The Disruption of International Organised Crime* 165, 167.

²²³⁹ Harfield “The criminal not the crime” 34. Confer Leong *The Disruption of International Organised Crime* 164-167.

²²⁴⁰ See also Harfield “The criminal not the crime” 37, 41 and Leong *The Disruption of International Organised Crime* 165-167 for the effects which this failure by law enforcement to grasp the importance of intelligence-led policing had in the UK.

and indexes the presence and methods of those involved in designated organised crime” in the UK.²²⁴¹ The relevant information is gathered by means of “agency intelligence, arrests (and) open sources”, after which those involved in organised crime are assessed “according to their judged intent and capability”.²²⁴²

To this end, Leong²²⁴³ argues that an effective intelligence strategy accompanied by inter-agency cooperation is vital to the combating of organised crime in the UK and, it is submitted, by extension also in South Africa. Organised criminal groups are after all “intelligent, resourceful, well-funded and well-equipped with the latest technology”, no matter which country they operate in.²²⁴⁴ Unfortunately, though, in South Africa, instead of inter-agency cooperation, “[i]t is unsettling that different law enforcement agencies of government appear to be spying upon each other.”²²⁴⁵ This recent criticism by the Supreme Court of Appeal does not elicit confidence in the abilities of law enforcement officers and intelligence operatives to successfully combat organised crime in South Africa. Instead of gathering intelligence on organised crime they are involved in turf wars and, as will become clear during the analysis in this section of the study, seem to have become copies of the organisations they are supposed to be combating.

Centralised intelligence remains vital to combating organised crime²²⁴⁶ and in the UK, the National Criminal Intelligence Service (NCIS) was established on 1 April 1992 to focus on the threat of organised crime.²²⁴⁷ Its aim is to combat organised crime by providing “leadership and

²²⁴¹ Doig and Levi 2013 *PMM* 147.

²²⁴² Doig and Levi 2013 *PMM* 147.

²²⁴³ Leong *The Disruption of International Organised Crime* 165.

²²⁴⁴ Leong *The Disruption of International Organised Crime* 165.

²²⁴⁵ *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* (771/2016, 1170/2016) [2017] ZASCA 146 (13 October 2017) para 63.

²²⁴⁶ Leong *The Disruption of International Organised Crime* 78.

²²⁴⁷ Leong *The Disruption of International Organised Crime* 79.

intelligence in criminal intelligence”.²²⁴⁸ As organised crime cases have no traditional “complainant” who informs the police of criminal conduct that must be investigated, the investigation of organised criminal activities requires proactive measures, like intelligence-led investigations.²²⁴⁹ “Crime intelligence is crucial if the police are to reduce the more organised types of crime that require planning and are supported by networks dealing in stolen goods.”²²⁵⁰ Such intelligence-led investigations are necessary to gather evidence and information in order to prosecute. In some instances, however, intelligence is not necessarily collected to build a case, but to gather and organise sufficient intelligence to understand the organised criminal group and build cases against the group leaders rather than the foot soldiers.²²⁵¹ Under such circumstances, intelligence “informs and guides criminal investigations”.²²⁵² Another important role played by intelligence is criminal profiling of individuals and groups in order to paint a proper picture of the landscape of organised criminal groups and their activities.²²⁵³

One of the shortcomings of the former Scorpions was that it failed to make use of the existing South African intelligence structures, instead relying on its own limited intelligence gathering abilities, which the Khampepe Commission held was unconstitutional.²²⁵⁴ The issue was that the Scorpions did not fall under the legislative framework regulating intelligence gathering and urgent legislative reform was recommended so that the analyst division of the Scorpions would resort under the Minister of

²²⁴⁸ Leong *The Disruption of International Organised Crime* 79.

²²⁴⁹ Albanese *Organised Crime* 255; Von Lampe *Organised Crime* 383.

²²⁵⁰ Burger 2013 <https://issafrica.org/iss-today/a-dysfunctional-saps-intelligence-division-has-severe-implications-for-reducing-crime>.

²²⁵¹ Albanese *Organised Crime* 257; Von Lampe *Organised Crime* 382-383.

²²⁵² Von Lampe *Organised Crime* 383.

²²⁵³ Leong *The Disruption of International Organised Crime* 77.

²²⁵⁴ Khampepe *Final Report* 11, 85. Of course this recommendation was made because, as discussed above, the Khampepe Commission did not recommend the closure or relocation of the Scorpions. What the Khampepe Commission did find was that the Scorpions had gone beyond mere information gathering as per its mandate in s 7(a)(ii) of the *NPA Act*, and had in fact gathered intelligence, which was unconstitutional. This led to a duplication of resources between the Scorpions and other intelligence agencies.

Intelligence.²²⁵⁵ Furthermore, the equipment and personnel needed for such intelligence gathering led to a duplication of those possessed by the National Intelligence Agency (NIA) at the time.²²⁵⁶ With the Hawks now resorting under the SAPS, it must be supported by the Crime Intelligence Division of the SAPS to gather, correlate, evaluate, co-ordinate and use crime intelligence in the performance of its functions.²²⁵⁷

6.3.2.2 Towards the gathering of criminal intelligence

Von Lampe²²⁵⁸ sees criminal intelligence as “the collection and analysis of data independent of specific criminal proceedings (cases)”. In South Africa, the various South African intelligence structures were consolidated by the *Intelligence Services Act*,²²⁵⁹ which established a single entity the State Security Agency.²²⁶⁰ The Inspector-General of Intelligence is responsible solely for intelligence oversight and has no mandate to conduct criminal investigations.²²⁶¹

As the focus of this study is confined to combating organised crime in South Africa, an exploration of the intelligence structures involved in national security is largely irrelevant, save to say that such intelligence structures should “simultaneously uphold national security requirements as well as civil liberties”.²²⁶² Therefore, since 1997, the role of these national intelligence structures has also been expanded to include assisting the SAPS with gathering crime intelligence.²²⁶³ Such an

²²⁵⁵ Khampepe *Final Report* 96.

²²⁵⁶ Khampepe *Final Report* 87.

²²⁵⁷ Section 17F(6) of the *SAPS Act*.

²²⁵⁸ Von Lampe *Organised Crime* 382-383.

²²⁵⁹ *Intelligence Services Act* 65 of 2002.

²²⁶⁰ In terms of s 3 of the *Intelligence Services Act*, the State Security Agency comprises *inter alia* the former Electronic Communications Security (Pty) Ltd, South African National Academy of Intelligence, National Intelligence Agency and South African Secret Service.

²²⁶¹ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) at 126F-G.

²²⁶² Hutton 2009 *ISS* vi.

²²⁶³ Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

approach is important because organised crime is seen as a security threat to any country, especially because of the susceptibility of poorer communities to its dangers.²²⁶⁴ Sheptycki²²⁶⁵ highlights the UK position as follows:

In the U.K., currently both MI5 and MI6 are competing for a slice of the enforcement pie... With a notable lack of foreign political adversaries and a hiatus in terrorist activity all over Europe, these organisations are looking for a continuing mission, and the sheer scale of the war on drugs seems more than able to accommodate these new players.

It is important to note that, as found by the Khampepe Commission,²²⁶⁶ “[t]here is a marked difference between intelligence gathering and information gathering”. To this end, intelligence is defined as any information obtained and processed by a National Intelligence Structure, which includes the intelligence division of the SAPS,²²⁶⁷ for the purposes of informing any government decision or policy-making process carried out in order to protect or advance the national security, and includes *inter alia*, crime intelligence.²²⁶⁸ Crime intelligence is defined as intelligence used in the prevention of crime or to conduct criminal investigations and to prepare evidence for the purpose of law enforcement and the prosecution of offenders.²²⁶⁹ Hence there may be a fine line between intelligence gathering by intelligence officers and evidence gathering by investigating officers. Burger²²⁷⁰ explains the process used by the former as follows:

Crime Intelligence officers perform their functions by conducting ‘network’ operations and undercover or ‘covert’ projects. Network operations generally refer to information that is gathered through a network of informers, electronic surveillance and other sources. ‘Undercover projects’ refers to operations involving agent infiltration and the recruitment of sources (informants) within target organisations such as crime syndicates. In addition, this division is responsible for analysing crime statistics and other information so as to direct visible policing operations.

²²⁶⁴ Hutton 2009 *ISS* 24.

²²⁶⁵ Sheptycki 1996 *IJSL* 68-69.

²²⁶⁶ Khampepe *Final Report* 122.

²²⁶⁷ See s 1 of the *National Strategic Intelligence Act* 39 of 1994.

²²⁶⁸ Section 1 of the *National Strategic Intelligence Act*.

²²⁶⁹ Section 1 of the *National Strategic Intelligence Act*.

²²⁷⁰ Burger 2013 <https://issafrica.org/iss-today/a-dysfunctional-saps-intelligence-division-has-severe-implications-for-reducing-crime>.

It is thus the function of the SAPS to *inter alia* gather, correlate, evaluate, co-ordinate and use crime intelligence in support of its constitutional obligation to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.²²⁷¹ The Khampepe Commission²²⁷² therefore found that the “national mandate for the co-ordination of crime intelligence rests with the crime intelligence division of the SAPS”.

Intelligence-led investigations are therefore vital to the combating of organised crime. Regarding the combating of organised crime in the United Kingdom, Leong²²⁷³ highlights the following lessons learned:

The police forces began to realise that good quality intelligence-led and proactive police service would result in an increasingly accurate crime pattern analysis underpinning crime prevention and reduction strategies.

Similarly, the SAPS Crime Intelligence Division has a vital role to play in combating the phenomenon in South Africa and as stated earlier, much optimism regarding such strategies existed in the early days of post-apartheid South Africa.

6.3.2.3 The rise of crime intelligence

During the apartheid era, the SAPS Security Branch and other intelligence gathering entities such as the National Intelligence Agency focused on political aspects like the ANC and other banned political associations and individuals. After apartheid, the politically orientated former SAP Security Branch morphed into the Criminal Intelligence Service, but the shift in emphasis from political intelligence to crime intelligence was slow.²²⁷⁴ The

²²⁷¹ Section 2(3) of the *National Strategic Intelligence Act* and s 205(3) of the *Constitution*.

²²⁷² Khampepe *Final Report* 84.

²²⁷³ Leong *The Disruption of International Organised Crime* 114.

²²⁷⁴ Shaw 1998 <https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa>.

relevant intelligence structures were battling to make a mind shift in how they conducted their business, as explained by Redpath:²²⁷⁵

[I]ntelligence operatives are struggling to adapt to the new climate in terms of evidence and rights. There is often over-reliance on single informants, with little effort to corroborate the information supplied by such sources. This leaves the intelligence service open to manipulation and the gathering of weak information.

Such abuse and manipulation of the intelligence structures may actually stifle the combating of organised crime. Hutton²²⁷⁶ describes one such example, where the Director General of the former NIA, Manala Manzini, abused his position to intervene in the investigation against the then national police commissioner, Jackie Selebi, by obtaining “an exculpatory affidavit from key witness Glenn Agliotti²²⁷⁷ (later retracted) without informing the NPA, Agliotti’s lawyer or his own minister about his involvement in this exercise”. Manzini solicited the help of a police official stationed at the SAPS Crime Intelligence Division, who had strong ties with Agliotti, and the affidavit found its way into Selebi’s hands in a bid to help him avoid prosecution.²²⁷⁸ The secret nature of the intelligence structures, coupled with the threat of manipulation, means that, unlike in the case of the Scorpions²²⁷⁹ effective and independent regulation is required to prevent abuse.²²⁸⁰

The slow transition in gathering criminal intelligence was not conducive to the combating of organised crime in South Africa, which is extremely dependent on intelligence gathering through undercover operations by means of infiltration of organised criminal groups, informants, monitoring and interception of communication of known members of organised crime.²²⁸¹ The result was that by 1997, at the time of the Grim Reaper

²²⁷⁵ Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

²²⁷⁶ Hutton 2009 *ISS* 62.

²²⁷⁷ A known member of organised crime.

²²⁷⁸ Hutton 2009 *ISS* 62.

²²⁷⁹ See discussion under para 6.3 above.

²²⁸⁰ Hutton 2009 *ISS* 62.

²²⁸¹ Hough and Du Plessis *Organised Crime* 69.

Conference, the SAPS Crime Information Management Centre (CIMC) found it “extremely difficult and perhaps even impossible to determine the contribution made by organised crime” to South African crime statistics.²²⁸² Yet it was crucial to find some way of establishing what influence organised crime had on criminality in South Africa.²²⁸³ Such intelligence was vital to determining strategies to combating the phenomenon.²²⁸⁴ Of grave concern was also the threat that lay in organised crime’s ability to corrupt public servants.²²⁸⁵ At the time of the Grim Reaper Conference, South Africa’s intelligence community consisted of the SAPS, National Intelligence Agency (NIA), South African Secret Service (SASS) and Military Intelligence (MI), all of whom were bound by the *National Strategic Intelligence Act*.²²⁸⁶

The intelligence community co-ordinates intelligence through the National Intelligence Coordinating Committee (Nicoc).²²⁸⁷ The function of Nicoc is *inter alia* to co-ordinate the flow of intelligence among state departments and to interpret such intelligence for strategic decision-making.²²⁸⁸ One of Nicoc’s focal areas is to facilitate strategic decision-making regarding the combating of organised crime.²²⁸⁹ However, at the time, the following were some of the shortcomings identified in intelligence gathering for the purposes of combating organised crime in South Africa:²²⁹⁰

- (i) the lack of an organised crime database;
- (ii) the lack of intelligence on organised crime in the Southern African region, resulting in a fragmented overall picture; and
- (iii) the lack of trust between intelligence and investigating officers.

²²⁸² Hough and Du Plessis *Organised Crime* 42.

²²⁸³ Hough and Du Plessis *Organised Crime* 42.

²²⁸⁴ Hough and Du Plessis *Organised Crime* 42.

²²⁸⁵ Hough and Du Plessis *Organised Crime* 42.

²²⁸⁶ Hough and Du Plessis *Organised Crime* 61.

²²⁸⁷ Section 4 of the *National Strategic Intelligence Act*. See also Hough and Du Plessis *Organised Crime* 61.

²²⁸⁸ Section 2 of the *National Strategic Intelligence Act*.

²²⁸⁹ Hough and Du Plessis *Organised Crime* 55.

²²⁹⁰ Hough and Du Plessis *Organised Crime* 61-62.

The following challenges in operational capacity were also identified at the Grim Reaper Conference:²²⁹¹

- (i) shortage of specialised expertise in the combating of organised crime within law enforcement and intelligence entities;
- (ii) shortage of specialised knowledge in financial crimes, like money laundering, an essential part of organised crime, within law enforcement and intelligence entities;
- (iii) lack of equipment in forensic laboratories, leading to problems in, for instance, identifying the type and origin of drugs; and
- (iv) lack in border controls, especially at airports.

To rectify the situation, the SAPS CIMC was in the process of establishing an intelligence database of organised crime suspects, structures and activities as well as an organised Crime Threat Analysis (CTA) system, but warned that it would “still take a number of years before the computerised, integrated and centralised data base is populated to the desired level”.²²⁹² The aim with the CTA was to “provide a more effective way of reaching answers concerning the extent of organised crime; ... and prioritising different organised crime structures in a scientific fashion” in South Africa.²²⁹³

The criteria identified at the time and which a criminal group had to meet in order to be deemed “organised crime” is open to criticism as it differed in many respects from the characteristics discussed in chapter 2 of this study.²²⁹⁴ As discussed under paragraph 2.3 above, criteria such as “commercial or businesslike structures”; “division of labour” with “own appointed tasks”; “some form of discipline and control”; the use of violence for “purposes of intimidation” all relate to the hierarchical model of

²²⁹¹ Hough and Du Plessis *Organised Crime* 62.

²²⁹² Hough and Du Plessis *Organised Crime* 43.

²²⁹³ Hough and Du Plessis *Organised Crime* 43.

²²⁹⁴ Compare Hough and Du Plessis *Organised Crime* 44 with the discussion under para 2.3 above.

organised crime, which would allow many organised criminal groups to avoid the attention of law enforcement authorities when such criteria are applied in a strict manner.²²⁹⁵ More confusing are the following criteria that were listed at the time, because they would be difficult or impossible to measure:

- (i) the group must be involved in money laundering;²²⁹⁶ and
- (ii) the group must aim its efforts at exerting influence on “politics, the media, public administration, judicial authorities or the economy (corruption)”.²²⁹⁷

An attempt to make the criteria less restrictive was made by requiring that six of the listed eleven criteria had to be met, with the first four listed criteria being compulsory.²²⁹⁸ It is submitted, however, that some identified organised criminal groups would still avoid detection under such stringent requirements.

The view at the time was that organised crime “syndicates” were “more sophisticated organisations operating at a higher level than gangs”, while gangs were “criminal organisations of a lower order of influence and sophistication”.²²⁹⁹ In terms of this grouping, gangs “do the dirty work at street level” on behalf of the syndicates “with the latter co-ordinating the

²²⁹⁵ These criteria were listed as essential to the identification of organised criminal groups at the time. See Hough and Du Plessis *Organised Crime* 44.

²²⁹⁶ Hough and Du Plessis *Organised Crime* 44. As De Koker *South African Money Laundering* Com 1-4 states, the clandestine nature of money laundering makes it difficult to measure, as it is by design aimed at avoiding detection. So in many instances it would be impossible to know whether a criminal group is actually “engaged in money laundering”.

²²⁹⁷ Hough and Du Plessis *Organised Crime* 44. Again the question is whether it would be possible to determine this in every organised criminal group.

²²⁹⁸ These four criteria are elements of the definition of organised crime in para 2.8 above, as follows: more than two people; involved in serious crimes; existing for a prolonged period of time; and having financial gain as objective. Compare Hough and Du Plessis *Organised Crime* 44.

²²⁹⁹ Hough and Du Plessis *Organised Crime* 46.

activities of different gangs”.²³⁰⁰ So-called “target groups” had also been identified and were defined as follows:²³⁰¹

A target group is an organised criminal group which has come to the attention of either the SAPS or other intelligence agencies, but of which, due to various factors, the whole structure or full extent of criminal activities is not yet known. A target group is therefore a potential syndicate, to be classified either as a gang or a syndicate once investigation is completed and its structures and involvement in crime more comprehensively identified.

Once again the focus on “structure” to classify the group is regrettable due to reasons already discussed.²³⁰² At least some idea²³⁰³ of the extent of organised crime existed at the time, as follows:²³⁰⁴

The extent of organised crime in South Africa is accentuated by the fact that 192 organised crime syndicates with a combined number of 1 903 primary suspects are currently known to be operating in South Africa. The majority specialise either in drug trafficking (96 syndicates), vehicle related crimes (83 syndicates), commercial crime (60 syndicates), or in any combination of these crimes. At least 32 of the 192 known syndicates in South Africa operate internationally, while the criminal activities of these syndicates are presently limited to countries in sub-Saharan Africa.

Furthermore, approximately 500 so-called organised crime “target groups”, containing 1 184 suspected criminals and of which at least 16 groups operated internationally, had been identified, again dealing in the same crimes as the syndicates identified above.²³⁰⁵

One identified aspect which seems valid,²³⁰⁶ was relying on the assistance of station level crime threat analysis to identify the presence of organised criminal groups within the various station areas. This entailed a Station Crime Threat Analysis Committee which would analyse crime patterns in its relevant station area to detect the possible patterns of organised crime

²³⁰⁰ Hough and Du Plessis *Organised Crime* 46.

²³⁰¹ Hough and Du Plessis *Organised Crime* 47.

²³⁰² See para 2.4.1 above.

²³⁰³ Note the disclaimer regarding “uneven” co-operation amongst the various provinces in compiling this Organised Crime Threat Analysis in Hough and Du Plessis *Organised Crime* 46.

²³⁰⁴ Hough and Du Plessis *Organised Crime* 46.

²³⁰⁵ Hough and Du Plessis *Organised Crime* 47.

²³⁰⁶ This system is similar to the UK intelligence gathering process. See Harfield “The criminal not the crime” 29-42. Note that this strategy also focuses on the criminal (group) rather than on the crimes committed by such groups at station level.

activity, which would then be referred to the local Area Intelligence Gathering structure for investigation if necessary.²³⁰⁷ The Area Crime Threat Analysis Committee would in turn conduct an area analysis of crime at area level, with similar analyses conducted at provincial and national level.²³⁰⁸ It was envisioned that the resultant National Crime Threat Analysis would be “used to prioritise the various threats; to register organised crime projects on those organised crime structures enjoying the highest priority”, which would avoid an overlap of efforts and ensure “the focused combating of organised crime” in South Africa.²³⁰⁹

The plan was therefore *inter alia* to establish an organised crime database, which was the global trend in the effective combating of organised crime and would allow the use of an Organised Crime Threat Analysis (OCTA) to provide a holistic view of the threats organised crime in South Africa in order to combat the phenomenon.²³¹⁰

The establishment of the Scorpions, however, caused a huge gap in this regard, because the Khampepe Commission found that the Scorpions operated outside of Nicoc in its intelligence gathering operations, which the commission felt was unconstitutional.²³¹¹ During the existence of the Scorpions it was thought that the involvement of prosecutors was the answer to an organised crime investigation.²³¹²

Prosecutorial involvement in investigations tends to occur in situations where identified persons (corrupt policemen; known organised crime groups) appear to be involved in crime or appear successfully to have avoided being implicated in a crime, and although suspicion surrounds them, admissible evidence has not yet been obtained.

It is, however, submitted that because in the case of organised crime investigations there are no complainants who open a criminal case at a police charge office, intelligence gathering is vital to the combating of

²³⁰⁷ Hough and Du Plessis *Organised Crime* 45.

²³⁰⁸ Hough and Du Plessis *Organised Crime* 45.

²³⁰⁹ Hough and Du Plessis *Organised Crime* 46.

²³¹⁰ Burger 2015 *ISS* 6; Hough and Du Plessis *Organised Crime* 59.

²³¹¹ Khampepe *Final Report* 11, 85.

²³¹² Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 66.

organised crime. More problematic however, is a lack of leadership in the intelligence structures.

6.3.2.4 The fall of crime intelligence

One of the biggest problems facing any police service is a lack of coordination and direction in crime control, which “results in the lack of intelligence sharing and overlaps in resources”.²³¹³ The head of the SAPS Crime Intelligence Division therefore has an extremely important role to play in combating organised crime in South Africa. Murphy J sums up this role as follows:²³¹⁴

The position is one of the senior leadership positions within SAPS and the intelligence community of the state. The incumbent exercises complete control over all surveillance that any division of SAPS carries out in any investigation, and has access to highly sensitive and confidential information, and to the funds making up the Secret Service Account (the SSA). The position calls for an official with an exemplary record of honesty, discretion and integrity.

Unfortunately, much like the Hawks, the SAPS Crime Intelligence Division has not been spared political interference,²³¹⁵ with allegations of fraud and corruption against its embattled former head, Richard Mdluli, for *inter alia* “defrauding the crime intelligence unit’s secret slush fund”.²³¹⁶ The charges relate to procurement fraud involving the Secret Service Account,²³¹⁷ which benefitted Mdluli and his wife.²³¹⁸ This abuse came coupled with the abuse of power, as many a leader unfortunately sees the police as a vehicle of domination by the state rather than a law enforcement agency.²³¹⁹ Hence, “law enforcement agencies act in the

²³¹³ Leong *The Disruption of International Organised Crime* 76.

²³¹⁴ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 122A-B.

²³¹⁵ Burger 2013 <https://issafrica.org/iss-today/a-dysfunctional-saps-intelligence-division-has-severe-implications-for-reducing-crime>.

²³¹⁶ Mashego 2015 <http://city-press.news24.com/News/Mdluli-milks-the-system-20150614>.

²³¹⁷ Created in terms of the *Secret Services Act* 56 1978.

²³¹⁸ *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) 302F-H.

²³¹⁹ Leong *The Disruption of International Organised Crime* 72.

interests of the dominant groups of a society and their central function is to control the working class”.²³²⁰

In 2017, six years after his initial arrest and suspension, Mdluli had still not been removed from the SAPS and was still receiving full perks,²³²¹ because “senior police and NPA officials have all gone out of their way to prevent Mdluli’s investigation and prosecution”.²³²² This is evidenced by the courts finding in *Freedom Under Law v National Director of Public Prosecutions*²³²³ that the acting police commissioner at the time, Nhlanhla Mkhwanazi, was instructed to withdraw disciplinary charges against Mdluli by “authorities ‘beyond him’” and by doing so, “failed to act independently in the discharge of his functions, and accordingly acted inconsistently with s 207 of the *Constitution*”.²³²⁴ In doing so, the acting commissioner “acted under dictation, without independence and inconsistently with his constitutional duties”.²³²⁵

This situation has a direct influence in the combating of organised crime in South Africa, for as Burger²³²⁶ intimates, the success of any area of specialisation and expertise within the SAPS depends on professional leaders who are “able to plan effectively, consult meaningfully and ultimately drive the implementation of an effective specialised capacity”. Burger²³²⁷ also raises the following deeply concerning issue:

²³²⁰ Leong *The Disruption of International Organised Crime* 72.

²³²¹ Newham 2016 <https://issafrica.org/iss-today/why-saps-needs-better-crime-intelligence>; Serrao 2017 <https://www.news24.com/SouthAfrica/News/mdluli-has-earned-a-full-salary-during-suspension-20170403>.

²³²² Burger 2016 <https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-in-sa>. See also the scathing remarks of Legodi J in *General Council of the Bar of South Africa v Jiba* 2017 1 SACR 47 (GP), especially in paras 136D-E.

²³²³ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 167G-H.

²³²⁴ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP).

²³²⁵ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 168B-C.

²³²⁶ Burger 2015 *ISS* 21.

²³²⁷ Burger 2013 <https://issafrica.org/iss-today/a-dysfunctional-saps-intelligence-division-has-severe-implications-for-reducing-crime>. The author also gives a brief

Given that the approximately 8 000 police officials in the Crime Intelligence Division are clearly busy, the obvious question is why they are not effective against organised crime. The simple answer is that the 'ailing' state of the Crime Intelligence Division can mainly be attributed to a combination of large-scale fraud and corruption within the division, and the struggle for political control of this powerful intelligence institution.

Burger²³²⁸ therefore attributes the failure of the SAPS Crime Intelligence Division to effectively gain intelligence for the successful combating of organised crime in South Africa "to a combination of large-scale fraud and corruption within the division, and the struggle for political control of this powerful intelligence institution". Newham²³²⁹ also identifies political interference in SAPS crime intelligence as one of the main causes for the failure in combating organised crime in South Africa, especially because the SAPS Crime Intelligence Division has been leaderless since the suspension of Richard Mdluli in May 2014, which has caused much damage to the gathering of criminal intelligence on organised crime.²³³⁰

The Mdluli saga caused havoc in the SAPS Crime Intelligence Division as senior officers who were also implicated in the procurement fraud and slush-fund abuse were suspended, while others who were a threat to Mdluli's survival were removed, leaving the gathering of intelligence in the hands of "lower-ranking officers who cannot trust their leaders to do the right thing".²³³¹ Ultimately, the North Gauteng High Court ruled that the decision to withdraw the disciplinary charges and reinstate Mdluli to his

historical account of the political wrangling for control over this division of the SAPS.

²³²⁸ Burger 2013 <https://issafrica.org/iss-today/a-dysfunctional-saps-intelligence-division-has-severe-implications-for-reducing-crime>.

²³²⁹ Newham 2016 <https://issafrica.org/iss-today/why-saps-needs-better-crime-intelligence>.

²³³⁰ See Burger 2016 <https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-in-sa> for a brief historical overview of Mdluli's appointment and tenure as head of the SAPS Crime Intelligence Division as well as critical perspectives on his role in this position.

²³³¹ Burger 2013 <https://issafrica.org/iss-today/a-dysfunctional-saps-intelligence-division-has-severe-implications-for-reducing-crime>.

post was illegal²³³² and the court therefore ordered that the disciplinary charges must be reinstated.²³³³

Organised crime can only be combatted effectively in South Africa if the SAPS makes better use of its intelligence resources.²³³⁴ History shows that where police make concerted efforts to have task teams of detectives working closely with dedicated intelligence officers, organised criminal groups are targeted effectively.²³³⁵ This requires effective leadership over and direction of the SAPS.

6.3.3 Lack of SAPS leadership and direction

The National Commissioner of the SAPS has the constitutional duty to exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.²³³⁶ Furthermore, in *Freedom Under Law v National Director of Public Prosecutions*,²³³⁷ the court held as follows:

Every organ of state is required to exercise the powers conferred upon it accountably, responsively and openly, and to protect the integrity of the institution by ensuring the proper exercises of powers by its functionaries. Congruent with that, the Commissioner is required to maintain an impartial, accountable, transparent and efficient police service. The SAPS, in turn, is tasked with preventing, combating and investigating crime, and with upholding and enforcing the law.

As already mentioned, in this case the court found that the failure by the then acting National Commissioner, General Mkhwanazi, to suspend the head of the SAPS Crime Intelligence Division, Richard Mdluli, when there were serious allegations lodged against him, was a dereliction of his

²³³² *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 71A.

²³³³ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 177B-C.

²³³⁴ Newham 2016 <https://issafrica.org/iss-today/why-saps-needs-better-crime-intelligence>.

²³³⁵ See Newham 2016 <https://issafrica.org/iss-today/why-saps-needs-better-crime-intelligence>.

²³³⁶ Section 207(2) of the *Constitution*.

²³³⁷ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 169I-170B.

constitutional and statutory duties,²³³⁸ while at the same time undermining the integrity of the SAPS and failing to ensure transparency and accountability.²³³⁹ The result was a loss of confidence in the SAPS by the public.²³⁴⁰

The latest scandal to hit the SAPS leadership was in 2016 when an intensive investigation was launched into the lavish lifestyle of Khomtoso Phahlane, who was the acting National Commissioner at the time, accompanied by claims of corruption.²³⁴¹ This made Phahlane the fourth SAPS National Commissioner to be investigated while in office, following Jackie Selebi, Bheki Cele and Riah Phiyega.²³⁴² When Phahlane was appointed after the demise of Phiyega, there was much optimism. Newham, for example, stated as follows:

Fortunately, there is cause for optimism in relation to policing at the current time. Under the leadership of acting SAPS National Commissioner Khomotso Phahlane, who was appointed on 14 October 2015, a number of promising initiatives are taking place to improve policing.

Equally, Burger²³⁴³ at the time stated that “Phahlane’s restructuring of the SAPS, especially in top management, is particularly promising”. The optimism was, however, short-lived and Phahlane was replaced recently,²³⁴⁴ while ordered by the Minister of Police to return to his previous position at SAPS forensics.²³⁴⁵ He was also asked to submit

²³³⁸ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 170E-F.

²³³⁹ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 170D.

²³⁴⁰ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 170D.

²³⁴¹ See for instance Bateman 2017 <http://ewn.co.za/2017/01/25/first-on-ewn-ipid-widens-probe-into-phahlane-hones-in-on-top-cop-s-luxury-cars>.

²³⁴² Serrao and Myburgh 2016 <http://www.news24.com/SouthAfrica/News/exclusive-ipid-to-charge-acting-police-commissioner-20161123>.

²³⁴³ Burger 2016 <https://issafrica.org/iss-today/finally-good-news-from-the-saps>.

²³⁴⁴ In June 2017.

²³⁴⁵ See Merten 2017 https://www.dailymaverick.co.za/article/2017-09-19-ntlemeza-saga-over-hawks-heads-unlawful-appointment-ends-at-a-cost-to-the-general/#.WcH-O03_rmR.

reasons why he should not be suspended.²³⁴⁶ Charges of defeating the ends of justice were subsequently brought by IPID²³⁴⁷ against Phahlane for interfering with witnesses in the investigation against him, but the NPA declined to prosecute these charges “because there were ‘no prospects of success’”.²³⁴⁸ At the time of writing, IPID had requested the NDPP to review the decision and were awaiting his response.²³⁴⁹

Coupled with the string of controversies surrounding the SAPS leadership, the *SAPS Strategic Plan* for 2014-2019 is also not conducive to the combating of organised crime in South Africa. It states that the first element of the National Crime Combating Strategy (NCCS) is to focus on the geographical areas with the highest crime rates.²³⁵⁰ Of importance to this study, however, is the second of the two elements of the NCCS, which is to focus on organised crime and “involves the investigation of syndicates by task teams of experienced detectives”.²³⁵¹ How exactly this is to be achieved by 2019 remains a mystery, because the plan lists as part of its strategic goals: “Increasing the detection rate for all serious crimes and particularly contact crime, including organised crime and crimes against women and children.”²³⁵² Another strategic objective is to “Increase the reporting of unlawful possession of and dealing in drugs by at least 13%” because these drugs “play a facilitating role in the commission of crimes such as contact, property-related and organised crime”.²³⁵³ Apparently, the result of increased reporting would be “feelings of safety in communities”.²³⁵⁴ It remains unclear how such increases would

²³⁴⁶ See 2017 Merten https://www.dailymaverick.co.za/article/2017-09-19-ntlemeza-saga-over-hawks-heads-unlawful-appointment-ends-at-a-cost-to-the-general/#.WcH-O03_rmR.

²³⁴⁷ The IPID is discussed in more detail later.

²³⁴⁸ Bornman 2017 <https://www.news24.com/SouthAfrica/News/npa-declines-to-prosecute-phahlane-20171107>.

²³⁴⁹ Bornman 2017 <https://www.news24.com/SouthAfrica/News/npa-declines-to-prosecute-phahlane-20171107>.

²³⁵⁰ SAPS 2014 https://www.saps.gov.za/about/stratframework/strategic_plan.php 6.

²³⁵¹ SAPS 2014 https://www.saps.gov.za/about/stratframework/strategic_plan.php 6.

²³⁵² SAPS 2014 https://www.saps.gov.za/about/stratframework/strategic_plan.php 12.

²³⁵³ SAPS 2014 https://www.saps.gov.za/about/stratframework/strategic_plan.php 24.

²³⁵⁴ SAPS 2014 https://www.saps.gov.za/about/stratframework/strategic_plan.php 24.

be achieved. What is clear is that the SAPS views organised crime as tantamount to drug-related offences. As far back as 1996 the following objective was stated by the SAPS:²³⁵⁵

Organised crime (narcotics): 'To implement effective counter-narcotic strategies in conjunction with enhanced investigative capacity and skills, supported by related intelligence, education and awareness programmes'.

Hence, from 1996 to 2014 – and continuing on to 2019 – the SAPS has maintained, and it seems will continue to maintain, the view that drug-related crimes are the main focus of organised criminal groups. While this may have been the starting point of combating organised crime in the 1980s,²³⁵⁶ the discussion under chapter 2 shows that organised criminal groups do not confine themselves to drugs only. Hence, the view that organised crime mostly involves illicit substances, is outdated.

Furthermore, the only other mention made of the activities of organised criminal groups, is their involvement in environmental crime. "Various environmental assets have become the target of organised crime syndicates."²³⁵⁷ The measures to combat this phenomenon, which will be implemented "in collaboration with various stakeholders", are as follows:²³⁵⁸

- (i) "Prevention assets belonging to the infrastructure network";
- (ii) "Combating the theft of environmental assets and natural resources";
- (iii) "Combating of illegal mining"; and
- (iv) "Prevention of rhino poaching".

Because the detective services provide specialised investigations for the "prevention, combating and investigation of national priority offences, including the investigation of organised crime syndicates, serious and

²³⁵⁵ SAPS 1996 *Annual plan 1996/1997*, 15–18. See also Burger 2015 /SS 5.

²³⁵⁶ See the discussion on the Vienna Convention under para 3.2.1 above.

²³⁵⁷ SAPS 2014 https://www.saps.gov.za/about/stratframework/strategic_plan.php 16.

²³⁵⁸ SAPS 2014 https://www.saps.gov.za/about/stratframework/strategic_plan.php 16.

violent crime, commercial crime and corruption (includes crimes investigated by the DPCI)”,²³⁵⁹ such capacity needs to be developed. Hence it was envisioned that an *Organised Crime Investigators Course* would be presented as follows:²³⁶⁰

- (i) 2015/16: Four courses attended by 100 members;
- (ii) 2016/17: Five courses attended by 125 members;
- (iii) 2017/18: Five courses attended by 125 members; and
- (iv) 2018/19: Five courses attended by 125 members

It can only be hoped that these courses will provide proper training in the investigation of organised crime, for as David²³⁶¹ states:

[T]he law enforcement methodology required to effectively investigate and prosecute an enduring, structured organised criminal group is likely to be quite different to the methodology that could be applied to investigate and prosecute a relatively unsophisticated, solo offender.

While the strategic plan at least aims at combating organised crime in South Africa, to some extent, the latest crime statistics unfortunately make absolutely no mention of organised crime and it therefore seems that organised crime activity is intermingled with the general crime statistics.²³⁶² Hence, 20 years after the Grim Reaper Conference, it is still “extremely difficult and perhaps even impossible to determine the contribution made by organised crime” to the South African crime statistics.²³⁶³ Nothing has changed in this regard.

Furthermore, the latest annual police report indicates a severe decline in completed organised crime projects by the SAPS detective services.²³⁶⁴ While the 2014/15 period indicated a 48% successful completion rate²³⁶⁵ of registered serious organised crime project investigations, the 2015/16

²³⁵⁹ SAPS 2014 https://www.saps.gov.za/about/stratframework/strategic_plan.php 25.

²³⁶⁰ SAPS 2014 https://www.saps.gov.za/about/stratframework/strategic_plan.php 67.

²³⁶¹ David 2012 A/C 11.

²³⁶² SAPS 2017 <https://www.saps.gov.za/services/crimestats.php>.

²³⁶³ Hough and Du Plessis *Organised Crime* 42.

²³⁶⁴ SAPS 2016 <https://www.saps.gov.za/about/stratframework/annualreports.php> 166.

²³⁶⁵ Completion of 31 projects form a total of 64.

period reflects a dismal 9.62% successful completion rate.²³⁶⁶ Hence it is stated that the detective services underperformed in the “[p]ercentage of registered serious organised crime project investigations successfully terminated”.²³⁶⁷ The following strategies have been identified to rectify the underperformance of the detective services:²³⁶⁸

- (i) improving skills development and the knowledge based in multidisciplinary project and programme management methodologies and practices;
- (ii) improving the functioning of the project committees by ensuring implementation of processes and procedures for the initiation and approval of projects; and
- (iii) monitoring instruments such as Organised Crime Threat Management System to track the progress and status of projects, ensuring timely interventions and the closure of projects.

Whether these strategies will improve performance is debatable, for Redpath²³⁶⁹ finds the following:

Poor performance is a function of several factors, such as uncertain career paths to becoming a detective, inappropriate promotion policies, insufficient training, the unmanageable workload, and the skills drain. Many skilled detectives have left the service, largely as a result of an inability to perform their work properly given the capacity and other constraints they face. Few former detectives that were interviewed for the study said they left because of poor pay.

The statistics of the Hawks are somewhat better. The combating of organised crime falls under the responsibility of the Serious Organised Crime Investigation Units, where Organised Crime Project Investigations (OCPI) are registered upon identifying an organised criminal group

²³⁶⁶ Completion of five from a total of 52 projects.

²³⁶⁷ SAPS 2016 <https://www.saps.gov.za/about/stratframework/annualreports.php> 211-212.

²³⁶⁸ SAPS 2016 <https://www.saps.gov.za/about/stratframework/annualreports.php> 213.

²³⁶⁹ Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

involved with organised crime activity.²³⁷⁰ The aim of such OCPI is to dismantle the organised criminal groups by gathering relevant and admissible evidence through covert and overt investigation techniques conducted under the legislative framework discusses in the previous chapter.²³⁷¹

The 2015/16 *SAPS Annual Report* states that the Serious Organised Crime Units made 217 arrests, which led to “the securing of 1 699 years’ convictions collectively”.²³⁷² On the other hand, the NPA²³⁷³ annual report for the same 2015/16 period claims a conviction rate of 88.9% from a “total of 359 cases ... finalised by the dedicated personnel dealing with organised crime”.²³⁷⁴ Discrepancies in figures between the SAPS and the NPA may exist because the NPA centralises its focus on organised crime strategies around “various areas such as illegal precious metal including copper, rhino related offences, drug dealings, illicit mining and tax matters”.²³⁷⁵ The Hawks Serious Organised Crime Units, on the other hand investigated the following range of crimes under the OCPI:²³⁷⁶

Narcotics, non-ferrous metal, theft of copper cables, dealing in abalone, money laundering, fraud, gang-related murder, rhino poaching, illegal trade in tobacco products, corruption, forgery, truck jacking, dealing in stolen property, cultivation of hydrophobic cannabis, car hijacking and theft of motor vehicles.

According to the NPA 2015/16 annual report, a workshop on organised crime was held in March 2016 because of an increased threat posed by organised crime to the sovereignty, constitutional democracy, security and economy of South Africa.²³⁷⁷ The aim was to “consolidate the significant

²³⁷⁰ SAPS 2016 <https://www.saps.gov.za/about/stratframework/annualreports.php> 198.

²³⁷¹ SAPS 2016 <https://www.saps.gov.za/about/stratframework/annualreports.php> 198.

²³⁷² SAPS 2016 <https://www.saps.gov.za/about/stratframework/annualreports.php> 198.

²³⁷³ While the NPA is discussed below, it makes sense to conduct a comparison of its statistics with the SAPS statistics at this point.

²³⁷⁴ NPA 2016 <https://www.npa.gov.za/node/32> 38.

²³⁷⁵ NPA 2016 <https://www.npa.gov.za/node/32> 38.

²³⁷⁶ SAPS 2016 <https://www.saps.gov.za/about/stratframework/annualreports.php> 198.

²³⁷⁷ NPA 2016 <https://www.npa.gov.za/node/32> 11.

gains made” and renew partnerships in order to advance even more in the combating of organised crime.²³⁷⁸ The following was achieved:²³⁷⁹

Through the workshop resolutions which will lead to the signing of a protocol that will bring about synergy in the fight against organised crime were adopted. These include, *inter alia*, joint training initiatives, joint target setting, identified focus areas and many others.

It is submitted that a first step in such a joint initiative is for the SAPS and NPA to agree on a uniform definition of organised crime as well as focusing on the identified organised crime activities in which organised criminal groups operate. This will lead to effective intelligence gathering, allowing for effective data base population and targeted organised crime threat analyses and strategies.²³⁸⁰

6.3.4 Cross-border policing

Traditionally, policing was seen as a purely domestic matter which held that “no other authority should dictate to state governments how their own instruments of force should be used” in the combating of organised crime.²³⁸¹ At the Grim Reaper Conference, Paul Higson, the then Director: Liaison and Criminal Intelligence Directorate of the INTERPOL Secretariat in Lyon, France, stated that INTERPOL is often incorrectly viewed as “a group of trenchcoated, super sleuths with international jurisdiction”.²³⁸² In order to correct this view, he defined INTERPOL as “an international organisation that provides a means for police forces of member states to conduct criminal enquiries beyond their own borders”.²³⁸³ Hence, INTERPOL would have no reason to exist if it were not for transnational crime. In order to facilitate this process, INTERPOL establishes National

²³⁷⁸ NPA 2016 <https://www.npa.gov.za/node/32> 11.

²³⁷⁹ NPA 2016 <https://www.npa.gov.za/node/32> 11.

²³⁸⁰ Compare Hough and Du Plessis *Organised Crime* 47.

²³⁸¹ Guymon 2000 *BJIL* 89.

²³⁸² Hough and Du Plessis *Organised Crime* 21.

²³⁸³ Hough and Du Plessis *Organised Crime* 21.

Central Bureaus (NCBs) within the borders of member states to serve as links between the police forces of the various member states.²³⁸⁴

South Africa has been a member of INTERPOL since 1 January 1948.²³⁸⁵ The INTERPOL NCB for South Africa is located in Pretoria where it assists the SAPS with the prevention, combating and investigation of global crime.²³⁸⁶ To this end, INTERPOL Pretoria is part of the SAPS Corporate Communications Department, which reports to the SAPS National Commissioner.²³⁸⁷ Practically, INTERPOL Pretoria facilitates international outreach in investigations which require police cooperation, which includes the processing of extradition requests.²³⁸⁸ INTERPOL Pretoria also works closely with the Southern African Regional Police Chiefs Co-Operation Organisation (SARPCCO),²³⁸⁹ which was founded in 1995 with South Africa as a founding member.²³⁹⁰ The SARPCCO “is the primary force in Southern Africa for the prevention and fighting of cross-border crime”.²³⁹¹

Contributing further to the international effort of combating organised crime, INTERPOL operates a colour-coded notice system, which may be either “international requests for cooperation or alerts allowing police in member countries to share critical crime-related information”.²³⁹² These notices operate as follows: ²³⁹³

- (i) Red Notice – seeks to locate and arrest someone with the view of extradition;

²³⁸⁴ Hough and Du Plessis *Organised Crime* 21.

²³⁸⁵ INTERPOL unknown date www.interpol.int/Member-countries/Africa/South-Africa.

²³⁸⁶ INTERPOL unknown date www.interpol.int/Member-countries/Africa/South-Africa.

²³⁸⁷ INTERPOL unknown date www.interpol.int/Member-countries/Africa/South-Africa.

²³⁸⁸ INTERPOL unknown date www.interpol.int/Member-countries/Africa/South-Africa.

²³⁸⁹ INTERPOL unknown date www.interpol.int/Member-countries/Africa/South-Africa.

²³⁹⁰ Hough and Du Plessis *Organised Crime* 56.

²³⁹¹ SADC unknown date www.sadc.int/themes/politics-defence-security/police-sarpcco/.

²³⁹² INTERPOL unknown date www.interpol.int/INTERPOL-expertise/Notices. See Hough and Du Plessis *Organised Crime* 23 for some examples of successes resulting from INTERPOL red and green notices.

²³⁹³ INTERPOL unknown date www.interpol.int/INTERPOL-expertise/Notices.

- (ii) Green Notice – seeks to warn and provide intelligence of someone who has committed criminal offence and will likely repeat such crime in other countries;
- (iii) Purple Notice – seeks to disseminate information regarding the *modus operandi*, concealment methods, objects or devices utilised by criminals;
- (iv) Blue Notice – seeks to intelligence regarding someone’s location, identity or criminal activities;
- (v) Orange Notice – seeks to warn of a person, object, event or process which is a “serious and imminent threat to public safety”;
- (vi) Black Notice – seeks information about an unidentified dead person; and
- (vii) Yellow Notice – seeks help in locating missing persons or help with the identification of someone who is unable to identify him- or herself.

International police organisations such as INTERPOL and the SARPCCO allow for the exchange and analyses of data on organised crime, whereby links between crimes and offenders are established and shared with member states, thus creating valuable criminal intelligence which is hosted on databases readily accessible by the various law enforcement authorities.²³⁹⁴

6.3.5 The role of the IPID

*Quis custodiet ipsos custodes!*²³⁹⁵ With the link between organised crime and corruption already established in chapter 2, the combating of organised crime goes hand in hand with the combating of corruption, especially within the police. As will be seen under the analysis of the

²³⁹⁴ Hough and Du Plessis *Organised Crime* 22. See also the importance of regional co-operation as emphasized in the then Attorney-General of the Republic of Mozambique’s address to the Grim Reaper Conference, available in Hough and Du Plessis *Organised Cime* 29.

²³⁹⁵ Who will guard the guardians!

NPA, there is concern that no accountability structure oversees the functioning of the NPA. In the case of the SAPS, a system of accountability has developed over time.

An Anti-Corruption Unit (ACU) was established within the SAPS in 1996 to investigate corruption cases against police officials.²³⁹⁶ Prior to the establishment of the ACU, cases against policemen were investigated by so-called “police docket units” who had offices only in Pretoria and Johannesburg.²³⁹⁷ It does, however, seem that the ACU was practically still-born, for early on Camerer²³⁹⁸ identified the following challenges:

For one, it is not independent and is therefore viewed with some scepticism from within – the situation of police investigating other police is fraught with problems – as well as outside the police. The creation of the Independent Complaints Directorate may address the question of independence; however, in the long term the fate of the anti-corruption unit appears uncertain. Further problems are a lack of clarity among members of the unit about their brief, as well as a shortage of skilled personnel and resources.

The establishment of the Independent Complaints Directorate (ICD), known today as the IPID, shortly after the ACU contributed to the above-mentioned confusion, for both entities could investigate police corruption. Hence, the ACU was finally closed in 2003²³⁹⁹ and members were absorbed into the organised crime units established during the restructuring of the SAPS discussed above.²⁴⁰⁰ All cases involving police corruption involving organised crime, were also transferred to the SAPS Organised Crime Unit, while the SAPS Crime Intelligence Division became responsible for gathering intelligence on police corruption.²⁴⁰¹

²³⁹⁶ Burger 2015 /SS 7; Hough and Du Plessis *Organised Crime* 60.

²³⁹⁷ Burger 2015 /SS 15.

²³⁹⁸ Camerer 1997 <https://issafrica.org/research/monographs/monograph-15-costly-crimes-commercial-crime-and-corruption-in-south-africa-edited-by-lala-camerer>. The study was published in September 1997, which means the ACU had only been in existence for approximately one year.

²³⁹⁹ Burger 2015 /SS 15-16.

²⁴⁰⁰ See para 6.2 above.

²⁴⁰¹ Burger 2015 /SS 16.

At the time, Redpath²⁴⁰² felt that it would be “difficult for detectives in the new units to investigate their colleagues – given that organised crime more often than not operates with the assistance of corrupt police officers”. This was exacerbated by the fact that the ICD faced a “precarious financial position”, which meant that ICD detectives often had to refer cases against SAPS officials to the SAPS detectives for investigation due to lack in capacity within the ICD.²⁴⁰³ It is submitted that under such conditions the so-called “independence” is questionable and an entity like the ICD is nothing more than window dressing. An opposing argument by the former national head of the ACU, is that “nobody knows the police better – and thus all the ‘tricks of the trade’ – than the police themselves”, thus placing police detectives in the best position to investigate police corruption.²⁴⁰⁴ This argument is founded on the view that such police detectives “not only bring with them their police experience, but they also develop a unique expertise in this kind of investigation”.

It is, however, submitted that such skills and experience can just as easily be obtained under a separate independent entity, with proper training and supervision.²⁴⁰⁵ Also, members of an independent anti-corruption unit would be free from intimidation or influence by SAPS members under investigation.²⁴⁰⁶ This seems more pertinent in light of the fact that the ACU was closed in 2003 under orders from then national commissioner of the SAPS and president of INTERPOL, Jackie Selebi, who was himself convicted of corruption in 2010, where the charges involved links

²⁴⁰² Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

²⁴⁰³ Redpath 2002 <https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath>.

²⁴⁰⁴ Burger 2015 /SS 15.

²⁴⁰⁵ It falls outside the scope of this study to explore the creation of an independent anti-corruption entity, separate from the SAPS. See, however, ISS 2012 <https://issafrica.org/research/south-african-crime-quarterly/south-african-crime-quarterly-39>, which is dedicated to combating corruption in South Africa and advances arguments in favour of such an entity. Also see the arguments put forward in Burger 2015 /SS 17.

²⁴⁰⁶ See these concerns raised by Burger 2015 /SS 16.

between him and known organised crime members.²⁴⁰⁷ Ironically, one of the reasons Selebi gave for his order to close down the ACU, was that “corruption is an organised crime function and it was decreasing”.²⁴⁰⁸ Burger²⁴⁰⁹ therefore concludes that “it seems probable that the ACU at the time was aware of irregularities in relation to the former national commissioner” and this may have been the real motivation behind its closure.

Today, IPID is a constitutionally²⁴¹⁰ mandated entity which investigates complaints regarding misconduct and offences by SAPS members.²⁴¹¹ Amongst others, IPID is mandated with investigating corruption matters within the police, initiated by the Executive Director of IPID, or after the receipt of a complaint from a member of the public, or referred to IPID by the Minister of Police, an MEC responsible for policing in a specific province or the Secretary for the Police Service.²⁴¹² Furthermore, IPID may also investigate matters relating to systemic corruption involving the police.²⁴¹³ Even though IPID seems to have had some successes, as evidenced by the above-mentioned investigation into Phahlane, who at the time was the acting National Commissioner, it has been “at war” with other law enforcement structures like the NPA and Crime Intelligence.²⁴¹⁴ This indicates once again that internal politics prevents law enforcement structures from successfully working together, thus hampering the effective combating of organised crime in South Africa.

²⁴⁰⁷ Burger 2015 /ISS 16. See also *S v Selebi* 2010 JDR 0820 (GSJ) and *S v Selebi* 2010 JDR 0894 (GSJ).

²⁴⁰⁸ Burger 2015 /ISS 16.

²⁴⁰⁹ See Burger 2015 /ISS 16 for the grounds upon which he draws the inference regarding Selebi’s “ulterior motive” for closing the ACU.

²⁴¹⁰ In terms of s 206(6) of the *Constitution*.

²⁴¹¹ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 5. See also the *Independent Police Investigative Directorate Act 1 of 2011* (hereafter the *IPID Act*).

²⁴¹² Section 28(1)(g) of the *IPID Act*.

²⁴¹³ Section 28(2) of the *IPID Act*.

²⁴¹⁴ Dolley 2017 <https://www.news24.com/SouthAfrica/News/backstabbing-and-bad-faith-the-npa-and-ipid-war-intensifies-20170907>; Serrao 2017 <https://www.news24.com/SouthAfrica/News/ipid-believes-mcbride-is-target-of-crime-intelligence-plot-20170826>.

6.3.6 Comparison with UK law enforcement structures

Leong²⁴¹⁵ lists several issues which have hampered the effective combating of organised crime in the United Kingdom in the past. Similar to the erstwhile SAP and early SAPS, a lack of clear definitions and understanding of the phenomenon meant that “organised crime activity was generally understated by the traditional law enforcement in the United Kingdom”.²⁴¹⁶ Another factor was reluctance to accept that a different approach to combating organised crime as opposed to traditional crimes was required. This approach includes the investigation of the financial side of organised crime, namely money laundering, as well as the important role which intelligence gathering plays in combating organised crime.²⁴¹⁷ Furthermore, the most significant change must be the mind-set of senior management, as illustrated by Leong:²⁴¹⁸

There had been substantial institutional and political opposition within the British police forces, especially among the senior management, in identifying the problem or accepting the fact that existing resources and structures were ill-equipped and incapable in solving the problem of organised crime. Besides, they opposed to the development of resources specially designed to assess and control organised crime (*sic*).

The advantage of having a specialised unit to combat organised crime lies in the following: ²⁴¹⁹

- (i) clear responsibility is taken for tasks involved in combating organised crime;
- (ii) fields of expertise, as well as the necessary skills to combat organised crime are developed, especially with regards to the investigation of complex crimes such as racketeering and money laundering;
- (iii) increased efficiency as specialised units usually exhibit a high level of productivity and are results-orientated; and

²⁴¹⁵ Leong *The Disruption of International Organised Crime* 77.

²⁴¹⁶ Leong *The Disruption of International Organised Crime* 77.

²⁴¹⁷ Leong *The Disruption of International Organised Crime* 77.

²⁴¹⁸ Leong *The Disruption of International Organised Crime* 77.

²⁴¹⁹ Burger 2015 ISS 3.

- (iv) a high level of camaraderie exists among the members of such specialised units due to common goals and inter-dependence.

Initially, the United Kingdom adopted a task force approach to combating organised crime, which quickly morphed into a multi-agency approach requiring “coordination and cooperation between different law enforcement agencies, various national agencies, security services and other professionals (such as lawyers, accountants and tax experts)”; however, various constraints with this approach finally led to the establishment of the Serious Organised Crime Agency (SOCA) in April 2005 by means of the UK *Serious Organised Crime and Police Act*,²⁴²⁰ which facilitated “a long-term commitment of intelligence operatives and covert operations” and is *inter alia* required to combat organised crime effectively.²⁴²¹

Prior to SOCA, there had always been resistance in the UK to a national police agency aimed at combating organised crime.²⁴²² The new approach was part of a broader shift in policing in the UK, as highlighted by Doig and Levi:²⁴²³

- (i) emphasising partnerships and the sharing of information;
- (ii) the framing of clear policies and strategies based on analysing trends and patterns; and
- (iii) implementing intelligence-led policing.

SOCA was established by collapsing several law enforcement and intelligence agencies into one entity headed by a Director-General who is accountable directly to the Home Secretary.²⁴²⁴ The main objective of SOCA is to combat serious organised crime causing harm to the UK.²⁴²⁵

²⁴²⁰ Part I of the *Serious Organised Crime and Police Act* 2005.

²⁴²¹ Leong *The Disruption of International Organised Crime* 114-118, 208.

²⁴²² See Harfield “The criminal not the crime” 29-42 for a detailed description of such resistance.

²⁴²³ Doig and Levi 2013 *PMM* 147.

²⁴²⁴ Fitzpatrick 2005 *JFC* 251; Leong *The Disruption of International Organised Crime* 208.

²⁴²⁵ Leong *The Disruption of International Organised Crime* 208.

The UK approach to combating crime is thus prioritised “on the basis of harm, disruption, prevention and reduction”.²⁴²⁶ The advantage which is professed with having all the policing functions in one unit are many, and include eradicating duplication of services, uniformity in the application of skills, increased security and intelligence gathering.²⁴²⁷ Furthermore, SOCA would be more proactive than “traditional policing” in combating organised crime in the United Kingdom “through understanding and evaluating the problem rather than being concerned only in investigating and prosecuting specific offences”.²⁴²⁸

The main advantage of SOCA, is said to be the absence of “turf wars” with other law enforcement and police departments,²⁴²⁹ which is reminiscent of the turf wars with the SAPS which hampered the work of the Scorpions.²⁴³⁰ One of the main pro-active objectives of SOCA was to house intelligence and operations in one agency, thus forming “intelligence cells with officers and analysts from different law enforcement agencies”.²⁴³¹ Prior to this there had been reluctance in the UK, as is the case in SA, to housing intelligence and operations together. Thus the importance of intelligence-led investigations in the combating of organised crime is emphasised in the functioning of SOCA.²⁴³² Leong²⁴³³ explains this strategy in combating organised crime in the UK as follows:

The Agency aims to improve the performance of intelligence and coordinates the collection, collation, analysis and dissemination of intelligence. The Agency analyses organised crime as a business, focuses on the crime sectors and aims to make the criminal market higher risk and less profitable.

²⁴²⁶ Doig and Levi 2013 *PMM* 147.

²⁴²⁷ Fitzpatrick 2005 *JFC* 252; Leong *The Disruption of International Organised Crime* 209.

²⁴²⁸ Leong *The Disruption of International Organised Crime* 208-209.

²⁴²⁹ Fitzpatrick 2005 *JFC* 252.

²⁴³⁰ The turf wars between the Scorpions and the SAPS is discussed above.

²⁴³¹ Leong *The Disruption of International Organised Crime* 167.

²⁴³² Leong *The Disruption of International Organised Crime* 209.

²⁴³³ Leong *The Disruption of International Organised Crime* 209.

One of the shifts in investigation technique relating to organised crime, was in the slogan exhorting officers to investigate “the criminal not the crime”.²⁴³⁴ This approach allows a holistic view of organised criminal group activity, rather than focusing in isolation on the various crimes perpetrated by individual members of such groups. Its furthermore transcends the traditional ethnicity-based approach to combating organised crime²⁴³⁵ and facilitates an enterprise-focused approach and “justifies having specialist squads having specialist investigating methods”.²⁴³⁶ Mainly, the reasoning behind this approach is that individuals, not criminal networks or organisations, are prosecuted before court.²⁴³⁷

During 2009, Her Majesty’s Inspectorate of Constabulary issued a thematic report on the police service’s response to serious and organised crime.²⁴³⁸ It concluded as follows:²⁴³⁹

The conclusion is that, despite evidence of impressive results achieved by a few individual forces and some collaborative efforts, the national response overall is blighted by the lack of a unifying strategic direction, inadequate covert capacity and under-investment in intelligence gathering, analysis and proactive capability.

Part of the problem was that SOCA and the relevant police forces had collaborated on a case-by-case basis, “rather than within the framework of a well-supported threat assessment, priorities and ‘treatments’ of organised crime”.²⁴⁴⁰ Hence, in 2013, SOCA was abolished and replaced by the National Crime Agency (NCA) under the UK *Crime and Courts Act*.²⁴⁴¹ The NCA operates under directorship of the Director General of

²⁴³⁴ Harfield “The criminal not the crime” 30-31.

²⁴³⁵ As discussed in detail in chapter 2.

²⁴³⁶ Harfield “The criminal not the crime” 31-32.

²⁴³⁷ Harfield “The criminal not the crime” 33.

²⁴³⁸ HMIC 2009 <https://www.justiceinspectorates.gov.uk/hmicfrs/media/getting-organised-20090330.pdf>.

²⁴³⁹ HMIC 2009 <https://www.justiceinspectorates.gov.uk/hmicfrs/media/getting-organised-20090330.pdf> 2.

²⁴⁴⁰ HMIC 2009 <https://www.justiceinspectorates.gov.uk/hmicfrs/media/getting-organised-20090330.pdf> 2.

²⁴⁴¹ While s 1 of the *Crime and Courts Act* 2013 formed the NCA, section 15(1) of the same Act abolished SOCA.

the National Crime Agency.²⁴⁴² The NCA has a “crime-reduction function” whereby it must ensure that efficient and effective activities to combat organised crime and serious crime are carried out, whether by itself or other law enforcement agencies or persons.²⁴⁴³

The NCA also has a “criminal intelligence function” of gathering, storing, processing, analysing, and disseminating information that is relevant to any of the following:²⁴⁴⁴

- (i) activities to combat organised crime or serious crime;
- (ii) activities to combat any other kind of crime; and
- (iii) exploitation proceeds investigations,²⁴⁴⁵ exploitation proceeds orders,²⁴⁴⁶ and applications for such orders.

The NCA executes its “crime-reduction function” by, firstly, preventing and detecting organised crime and serious crime, investigating offences relating to organised crime or serious crime, and otherwise carrying out activities to combat organised crime and serious crime, including by instituting criminal proceedings in England and Wales and Northern Ireland.²⁴⁴⁷ Secondly, by the NCA securing that activities to combat organised crime or serious crime are carried out by persons other than the NCA.²⁴⁴⁸ Thirdly, by the NCA securing improvements in co-operation between persons who carry out activities to combat organised crime or serious crime, and in co-ordination of activities to combat organised crime or serious crime.²⁴⁴⁹ The *Crime and Courts Act* makes it expressly clear that the “crime-reduction function” of the NCA does not include the function of the NCA itself in prosecuting offences or instituting criminal

²⁴⁴² Section 1(2) of the *Crime and Courts Act*.

²⁴⁴³ Section 1(4) of the *Crime and Courts Act*.

²⁴⁴⁴ Section 1(5) of the *Crime and Courts Act*.

²⁴⁴⁵ Within the meaning of s 341(5) of the *Proceeds of Crime Act 2002*.

²⁴⁴⁶ Within the meaning of Part 7 of the *Coroners and Justice Act 2009*.

²⁴⁴⁷ Section 1(6) and (7) of the *Crime and Courts Act*.

²⁴⁴⁸ Section 1(8) of the *Crime and Courts Act*.

²⁴⁴⁹ Section 1(9) of the *Crime and Courts Act*.

proceedings in Scotland.²⁴⁵⁰ This is the main difference between the NCA and the Scorpions, with the other being that intelligence gathering by the Scorpions was considered unconstitutional by the Khampepe Commission.

The launch of the NCA coincided with the publication of a new *Serious and Organised Crime Strategy*, aimed at dealing with the challenges which the UK was facing in combating organised crime.²⁴⁵¹ The stated objective of the NCA reads as follows:²⁴⁵²

The NCA will formally begin work in October 2013. It will develop and bring together intelligence on all types of serious and organised crime, prioritise crime groups according to the threats they present and, in conjunction with the police, then lead, coordinate and support our operational response.

The law enforcement work in the combating of organised crime in the UK therefore remains the responsibility of the local police, with Regional Organised Crime Units in England and Wales being strengthened.²⁴⁵³ This is a fragmented approach which, as acknowledged in the *Serious and Organised Crime Strategy*²⁴⁵⁴ relies heavily on collaboration and sharing information among the various departments, something that history shows is not easily achieved in the police.²⁴⁵⁵ The NCA consists of the following four command units:²⁴⁵⁶

²⁴⁵⁰ Section 1(10) of the *Crime and Courts Act*.

²⁴⁵¹ HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 7.

²⁴⁵² HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 10.

²⁴⁵³ HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 10.

²⁴⁵⁴ See HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 28, where the following statement is made: "The success of the NCA depends on the closest collaboration with the police and other law enforcement agencies, notably the major metropolitan police forces in England and Wales (Metropolitan Police Service, West Midlands Police, Greater Manchester Police, Merseyside Police and West Yorkshire Police), Police Scotland and the Police Service of Northern Ireland (PSNI), and with the security and intelligence agencies."

²⁴⁵⁵ See Doig and Levi 2013 *PMM* 145-152 for similar concerns relating to the implementation of the UK National Fraud Strategy by the UK National Fraud Authority (NFA). Amongst others, the authors state that such strategic goals have

- (i) organised crime;
- (ii) economic crime;
- (iii) borders and international work; and
- (iv) child exploitation and online protection.

Over and above these fields, the NCA also houses the National Cyber Crime Unit²⁴⁵⁷ and “a unit to coordinate investigations into the most serious corruption cases in the UK”.²⁴⁵⁸ The UK Human Trafficking Centre (UKHTC) also forms part of the NCA, under the Organised Crime Command, and aims at combating human trafficking,²⁴⁵⁹ while the purpose of the Economic Crime Command is *inter alia* “to address constraints on police forces” by developing partnerships among the various role players in the combating of economic crime.²⁴⁶⁰

The core of the NCA, however, is very optimistically identified as “a new multi-agency intelligence hub which will draw intelligence together on all these issues, and inform tasking and the allocation of operational resources”.²⁴⁶¹ However, as Doig and Levi²⁴⁶² state, the challenge in the UK police environment has always been an “over-supply of ‘intelligence

been hampered on the one hand by other priorities of local police forces and on the other hand because “competing agendas have captured limited resources” – Doig and Levi 2013 *PMM* 149. The NFA was subsequently closed in March 2014 – see HM Government unknown date <https://www.gov.uk/government/organisations/national-fraud-authority> – with the responsibility for economic crime now resting in the NCA’s Economic Crime Command in conjunction with the Fraud Prosecution Service, which resorts under the Crown Prosecution Service, as well as the Serious Fraud Office, which is the “lead agency for prosecuting corruption” and is “responsible for reducing the threat from fraud and corruption” – see HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 73-75.

²⁴⁵⁶ HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 28.

²⁴⁵⁷ See Wall and Williams 2013 *Policing & Society* 409-412 for the policing challenges faced by this unit.

²⁴⁵⁸ HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 28.

²⁴⁵⁹ Lipscombe and Beard 2014 *House of Commons Library* 18 – a detailed description of the UK responses to human trafficking is also discussed in this work.

²⁴⁶⁰ Doig and Levi 2013 *PMM* 147.

²⁴⁶¹ HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 28.

²⁴⁶² Doig and Levi 2013 *PMM* 148.

packages' and the much more limited operational capacity to act on them". The organised crime strategic plan mentions nine Regional Organised Crime Units (ROCUs) which work closely with the NCA to combat organised crime in the UK.²⁴⁶³

6.4 The prosecuting authority

6.4.1 Independence and accountability

While the attempts at regulating the police and intelligence structures are discussed above, no external accountability mechanisms relating to the NPA exist in South Africa,²⁴⁶⁴ causing Redpath²⁴⁶⁵ to state the following:

The independent operation of a prosecuting authority is increasingly seen as crucial to the just operation of criminal justice systems internationally. Yet the framers of the South African Constitution appear to have envisaged a degree of institutional dependence of the NPA on the executive, particularly in relation to the setting of prosecution policy and around the accounting of finances.

Within the abovementioned framework, the NPA is held accountable fiscally by the Auditor-General,²⁴⁶⁶ and operationally by the relevant justice minister.²⁴⁶⁷ The responsibility of the minister was explained as follows in *National Director of Public Prosecutions v Zuma*:²⁴⁶⁸

[A]lthough the Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.

²⁴⁶³ HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 29.

²⁴⁶⁴ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 1.

²⁴⁶⁵ Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 19.

²⁴⁶⁶ In terms of s 188 of the *Constitution*, read with the *Public Finance Management Act* 1 of 1999 and the *Public Audit Act* 25 of 2004.

²⁴⁶⁷ In terms of s 179(6) of the *Constitution*.

²⁴⁶⁸ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 377A.

While the National Director of Public Prosecutions (NDPP) therefore has the sole power to review decisions regarding prosecutions,²⁴⁶⁹ he or she must still receive concurrence from the minister regarding prosecution policy and the issuing of policy directives.²⁴⁷⁰ If such policy directives are not complied with, the NDPP has the power to intervene in the prosecution process.²⁴⁷¹ Final responsibility over the prosecuting authority, however, still lies with the Cabinet member responsible for the administration of justice.²⁴⁷²

Advocating better external control mechanisms over the NPA, Schönteich²⁴⁷³ warns that the NPA's current internal quality control methodology creates "the danger that the organisation will become inward looking and use resource constraints to justify poor service". These words were prophetic, because *Beeld*²⁴⁷⁴ reports that the current NDPP, Shaun Abrahams, on 04 October 2017 reported to the portfolio committee on justice and correctional services that the NPA was in urgent need of R250 million in order to conduct its prosecutions effectively. He had already approached the director-general of national treasury regarding the shortfall and the R250 million would at least cover the prosecution related work, but not all of the projects with which the NPA was involved at the time. Furthermore, the NDPP informed the portfolio committee that the NPA was experiencing dire personnel shortages across the country. It is against this background that Schönteich²⁴⁷⁵ highlights the problematic nature of independence versus accountability:

²⁴⁶⁹ In terms of s 179(5)(d) of the *Constitution* and, after consulting the relevant DPP and after taking representations from the accused person, the complainant or any other person or party whom the NDPP considers to be relevant.

²⁴⁷⁰ In terms of s 179(5)(a) and (b) of the *Constitution* and after consulting the Directors of Public Prosecutions.

²⁴⁷¹ Section 179(5)(c) of the *Constitution*.

²⁴⁷² Section 179(6) of the *Constitution*. Note that the position of the NDPP is discussed later in this section.

²⁴⁷³ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 12.

²⁴⁷⁴ Prince 2017 *Beeld* 10.

²⁴⁷⁵ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 3.

Prosecutorial authorities must be sufficiently independent from external influence to permit the fair and impartial application of the law and prosecution policy. Yet prosecutors should be sufficiently transparent and accountable to the public to help ensure that prosecutorial authority is not abused.

Hence the NPA should remain free from political interference and, due to the lack of external accountability measures, this largely depends on how free its head, the NDPP, is from political interference by the relevant minister.²⁴⁷⁶ This very thin veil against interference causes Schönteich²⁴⁷⁷ to argue for more “constructive oversight”, which can assist the NPA “to enhance its performance and public confidence in its work“, especially because prosecutors are the gatekeepers to the criminal justice system, with a discretion to decide on whether to prosecute or not, making them extremely powerful officials.²⁴⁷⁸

Examples of external oversight mechanisms are “prosecution service inspectorates, independent prosecutorial complaints assessor mechanisms and prosecutorial review commissions”.²⁴⁷⁹ Inspectorates and review commissions lead to accountability for prosecutorial decisions, while complaints directorates only aim to “empower the public” as far as service delivery by the prosecuting authority is concerned and therefore do not encompass legal decisions made by prosecutors.²⁴⁸⁰ Schönteich²⁴⁸¹ argues that prosecutorial inspectorates, as implemented in England and Wales, “would be obliged to use objective criteria that measure aspects of the prosecution service’s work that matter to the public”. Such

²⁴⁷⁶ Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 3.

²⁴⁷⁷ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 1.

²⁴⁷⁸ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 1.

²⁴⁷⁹ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 1.

²⁴⁸⁰ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 11.

²⁴⁸¹ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 12.

inspectors could help identify real issues facing a prosecuting authority and make recommendations to correct and prevent constraints.²⁴⁸²

From a combating of organised crime perspective, Schönteich²⁴⁸³ states that the advantage of a prosecutorial review commission, as implemented in Japan, will serve to review cases in order to prevent the “perception that wealthy individuals, high-level state officials and organised crime groups who have corrupted criminal justice officials” escape prosecution. If such situations are allowed to exist, the confidence of the general public in the NPA to combat organised crime in South Africa will be severely weakened and undermine the state’s authority.²⁴⁸⁴ This would also be unconstitutional, because in *Basson*²⁴⁸⁵ the Constitutional Court held as follows:

[B]y providing for an independent prosecuting authority with power to institute criminal proceedings on behalf of the State, the Constitution makes it plain that effective prosecution of crime is an important constitutional objective.

The result would be less co-operation by the public with law enforcement and criminal justice officials and may “engender a general sense of lawlessness, leading to higher levels of crime and communities taking the law into their own hands”.²⁴⁸⁶ This situation would counter the stated objectives of the SAPS’ strategic plan of ensuring better crime reporting by the public. It is however submitted that a prosecutorial review commission may not necessarily remedy the situation, as illustrated by the recent public criticism of the Seriti Commission of Inquiry, a supposed

²⁴⁸² Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 12.

²⁴⁸³ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 17.

²⁴⁸⁴ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 17.

²⁴⁸⁵ *S v Basson* 2007 1 SACR 566 (CC) 620A-B.

²⁴⁸⁶ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 17.

“independent” external review commission into the Arms Deal scandal.²⁴⁸⁷

Though not a prosecutorial review commission, this matter serves to illustrate that external commissions can still be subjected to political interference.

The constitutional attempts at ensuring independence and accountability are also less than satisfactory. The *Constitution* requires that the NPA exercises its functions without fear, favour or prejudice.²⁴⁸⁸ The Constitutional Court therefore held that the provision against fear, favour and prejudice is “a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts”.²⁴⁸⁹ Such constitutional “guarantee” is unfortunately also not the answer in the quest for ensuring independence free from political interference. This is evidenced by the recent public criticism of what is supposed to be the epitome of constitutionally guaranteed independence, namely the Public Protector, with several allegations of political interference lodged against her.²⁴⁹⁰ Even more alarming than the public criticism, is the judicial criticism which the Public Protector was subjected to.²⁴⁹¹

As a so-called “Chapter Nine Institution”,²⁴⁹² the Public Protector is supposed to strengthen constitutional democracy in South Africa by

²⁴⁸⁷ See for instance Jamal 2016 <https://www.timeslive.co.za/news/south-africa/2016-04-22-seriti-commission-of-inquiry-whitewash---findings-are-a-joke-critics/>; Mail & Guardian 2016 <https://mg.co.za/article/2016-04-21-editorial-arms-deal-gets-a-coat-of-whitewash>.

²⁴⁸⁸ Section 179(4) of the *Constitution*.

²⁴⁸⁹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) 819F.

²⁴⁹⁰ See for instance Omarjee 2017 <http://www.fin24.com/Economy/public-protector-plotted-with-presidency-on-sarb-mandate-report-20170912> and Rahlaga 2017 <http://ewn.co.za/2017/09/13/people-are-trying-to-discredit-the-public-protector>. See also *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP) para 6 for and exposition by the court of the consternation that resulted from the report of the Public Protector on the mandate of the South African Reserve Bank.

²⁴⁹¹ *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP).

²⁴⁹² *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP) para 56. The phrase “Chapter Nine Institutions” refers to state institutions created in Chapter 9 of the *Constitution* in order to support constitutional democracy. Section 181 of the

operating independently and impartially, subject only to the *Constitution* and the law while exercising her powers and performing her functions without fear, favour or prejudice.²⁴⁹³ Ultimately, the court held that the Public Protector's conduct was unconstitutional and violated the doctrine of separation of powers.²⁴⁹⁴ So, while many advocate more independence in law enforcement structures tasked with combating serious crimes in South Africa, the analysis that follows shows that even the most "independent" structures, namely the Chapter Nine institutions like the Public Protector, are not free from political interference.

In this matter the Public Protector had expanded the scope of her investigation to include an investigation into the mandate of the SA Reserve Bank without explaining whether "it was done at her own instance or at the instance of another interest group".²⁴⁹⁵ After making negative findings regarding *inter alia* the SA Reserve Bank and the Ministry of Finance,²⁴⁹⁶ she directed that the *Constitution* must be amended to significantly change the mandate of the SA Reserve Bank from protecting the value of South Africa's currency in consultation with the relevant minister, to promoting sustainable economic growth in South Africa in consultation with Parliament.²⁴⁹⁷

The Public Protector then ordered the SA Reserve Bank and the chairman of the Portfolio Committee on Justice and Correctional Services to submit, within 60 days, action plans on how these changes to the *Constitution*

Constitution establishes their governing principles as follows: They are independent and subject only to the *Constitution* and the law, must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. They are accountable to the National Assembly and must report on their activities and the performance of their functions to the National Assembly at least once a year. No person or organ of state may interfere with the functioning of these institutions, but must assist and protect these institutions through legislative and other measures in order to ensure the independence, impartiality, dignity and effectiveness of these institutions.

²⁴⁹³ Section 181(1)(a) and (2) of the *Constitution*.

²⁴⁹⁴ *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP) para 46.

²⁴⁹⁵ *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP) para 31.

²⁴⁹⁶ *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP) para 32.

²⁴⁹⁷ *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP) paras 35-36.

would be brought about.²⁴⁹⁸ The court found that the “Public Protector's order trenches unconstitutionally and irrationally on Parliament's exclusive authority” because the Public Protector cannot prescribe to Parliament how it should exercise its power to draft legislation.²⁴⁹⁹ The court found it disconcerting that she had failed to address criticism levelled against her by the Governor of the Reserve Bank and the Speaker of Parliament, adding the following criticism before setting aside her findings:²⁵⁰⁰

[T]here is no getting away from the fact that the Public Protector is the constitutionally appointed custodian of legality and due process in the public administration... A dismissive and procedurally unfair approach by the Public Protector to important matters placed before her by prominent role players in the affairs of state will tarnish her reputation and damage the legitimacy of the office.

Schönteich's²⁵⁰¹ thesis that the NPA should be held accountable for its decisions cannot be faulted, and as he states: “Accountability is an acknowledgement that prosecution services derive their powers from the state, which in turn derives its powers from the people”. Also, “greater accountability strengthens prosecutorial independence”.²⁵⁰² The problem is that all of Schönteich's suggested accountability mechanisms still fall under the scope of the executive power and as indicated in chapter 3, accountability of the executive is difficult in an environment where the ruling party obtains landslide victories come election time. So, while the NPA is also accountable to Parliament, which as legislator falls under a separate sphere of authority, Redpath²⁵⁰³ highlights the fact that “the implications of this accountability have not been tested, as members of Parliament from the majority party are frequently politically ‘junior’ to members of the executive.” While prosecutorial review commissions have been effective in Japan in instances where prosecutors failed to institute

²⁴⁹⁸ *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP) para 38.

²⁴⁹⁹ *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP) para 43.

²⁵⁰⁰ *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP) paras 59-60.

²⁵⁰¹ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 2.

²⁵⁰² Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 3.

²⁵⁰³ Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 19.

prosecutions due to political interference,²⁵⁰⁴ in South Africa, one of the most successful accountability measures remains the review function of the third sphere of government, the law courts.²⁵⁰⁵

6.4.2 Review function of the law courts

The South African law courts fall under the judiciary power of Montesquieu's Doctrine of *Trias Politica*.²⁵⁰⁶ As Rautenbach and Malherbe²⁵⁰⁷ put it:

The doctrine of the separation of powers entails that freedom of the citizens of a state can be ensured *only* if a concentration of power, which can lead to abuse, is prevented by a division of government authority into legislative, executive and judicial authority, and its exercise by different government bodies.

Also, in *South African Reserve Bank v Public Protector*²⁵⁰⁸ the court stated the following regarding the separation of powers where the Public Protector ordered remedial action that was ultra vires and unconstitutional:

The remedial action therefore violates the doctrine of the separation of powers guaranteed by section 1(c) of the Constitution. The principle requires constitutionally established institutions to respect the confines of their own powers and not to intrude into the domain of others.

The problematic nature of the legislative authority, namely Parliament, as accountability measure has already been highlighted above. While the judiciary remains the most successful accountability measure over the NPA – as will become clear during the rest of this analysis – the problem with this system is the length of time and expense involved in enforcing such accountability. This is evidenced by the attitude of the Supreme

²⁵⁰⁴ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 14, however, seriously questions the transferability of such a system to South Africa, with its diverse social-political environment differing extensively from Japan's.

²⁵⁰⁵ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 4.
²⁵⁰⁶ The Doctrine of *Trias Politica* is ascribed to the 18th century French philosopher, Montesquieu, and has tremendously influenced "the development of modern politics and constitutional law" – see Rautenbach and Malherbe *Constitutional Law* 87.

²⁵⁰⁷ Rautenbach and Malherbe *Constitutional Law* 86 (emphasis added).

²⁵⁰⁸ *South African Reserve Bank v Public Protector* 2017 JDR 1358 (GP) para 44 (emphasis added).

Court of Appeal in *Zuma v Democratic Alliance* when the court, referring to the “protracted litigation battle” expressed itself as follows:

[I]t is necessary, especially in the light of the litigation referred to above, that the history of this case culminating in the present appeal, and the issues that arose therein, be carefully set out and that the concessions made in court be accurately recorded. It is also necessary to provide as succinctly as possible the bases for the orders that appear at the end of this judgment. The object of this exercise, perhaps optimistically, is *to obviate further protraction and to expedite the litigation*.

The NPA has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.²⁵⁰⁹ In *Basson*²⁵¹⁰ the Constitutional Court held that this power to prosecute crime “enables the State to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens”. After a submission by advocate Hodes SC, acting on behalf of the NDPP, that the courts “have no power to review any prosecutorial decision, only the NDPP may do so, and her decision will be final and not reviewable”, Murphy J stressed the importance of this function as follows:²⁵¹¹

It is inconceivable in our constitutional order that the NPA would be immune from judicial supervision to the extent that it may act illegally and irrationally without complainants having access to the courts. Considering the implications, one can only marvel at the fact that senior lawyers are prepared to make such a submission.

The court, however, warned that the law courts should not intervene in prosecuting authority decisions at will, but should only constrain themselves to instances where the discretion is exercised illegally or irrationally, or where mala fides or ulterior motives are involved, as such instances breach the constitutional principle of legality.²⁵¹² This is also

²⁵⁰⁹ Section 179(2) of the *Constitution*.

²⁵¹⁰ *S v Basson* 2007 1 SACR 566 (CC) 620A-B.

²⁵¹¹ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 143E-G.

²⁵¹² *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 145B-C. This position was subsequently confirmed by the Supreme Court of Appeal in *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) 309A.

underlined by Redpath's²⁵¹³ conclusion that "[w]hen the discretion to decline to prosecute is wielded in politically sensitive matters on weak grounds, the appearance of a lack of independent operation of the prosecution service arises".

Illegal or irrational decisions refer to "decisions coloured by material errors of law, based on irrelevant considerations or ignoring relevant considerations".²⁵¹⁴ The court furthermore held that "grounds such as reliance on irrelevant considerations, ignoring relevant considerations or even unreasonableness" were also "judicially determinable and just as capable of application as the standards of legality and rationality".²⁵¹⁵ Hence in *Democratic Alliance v Acting National Director of Public Prosecutions*,²⁵¹⁶ the court held that "[r]ationality involves substantive and procedural issues", which implies that "both the process by which the decision is made (the means) and the decision itself must be rationally related".

6.4.2.1 Case studies: review of decision to withdraw charges

The following section deals with cases where the NPA decisions to withdraw charges were reviewed by the law courts. The purpose is to establish the grounds and limits for such reviews as well as reasons why such decisions were set aside. In *Freedom Under Law v National Director of Public Prosecutions*,²⁵¹⁷ the court found that a decision to withdraw several criminal charges against the then head of the SAPS Crime Intelligence Division, Richard Mdluli, were unlawful and the court therefore ordered that they be reinstated.

²⁵¹³ Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 54.

²⁵¹⁴ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 147A-B.

²⁵¹⁵ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 150H.

²⁵¹⁶ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 13B.

²⁵¹⁷ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 176G-H, 177A.

Freedom Under Law (FUL), a non-profit company established in 2008 with offices in South Africa and Switzerland,²⁵¹⁸ approached the High Court to review a decision by the NDPP to withdraw criminal charges against the Lieutenant-General Richard Mdluli, then Head of SAPS Crime Intelligence Division, asking the court to declare the withdrawal unlawful.²⁵¹⁹ The NDPP at the time was Advocate Nomgcobo Jiba, who was acting in the post.²⁵²⁰ Lawrence Mrwebi, then Head of the Specialised Commercial Crimes Unit of the NPA, had instructed the withdrawal of fraud and corruption charges against Mdluli.²⁵²¹ More charges relating to intimidation, assault, kidnapping, attempted murder and murder were also withdrawn against Mdluli under the supervision of the acting NDPP.²⁵²²

The court found that Mrwebi's decision to withdraw said charges was *ultra vires*, because, as a Special DPP, he was obliged to act under "the supervision of the most senior ordinary prosecutor in the area of jurisdiction", which in this case was the DPP for the North Gauteng region.²⁵²³ Mrwebi had failed to do so, which rendered his decision unlawful because he had no jurisdiction and it was an infringement of the principle of legality.²⁵²⁴ Furthermore, the court found that Mrwebi's belief that the case fell under the jurisdiction of the Inspector-general for

²⁵¹⁸ See *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 116D-E.

²⁵¹⁹ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 116B-C.

²⁵²⁰ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 117D-E. Advocate Jiba was appointed as acting NDPP after the Supreme Court of Appeal and the Constitutional Court found advocate Simelane's appointment as NDPP to be unconstitutional. See *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 117D-E; *Democratic Alliance v President of the Republic of South Africa* 2012 1 SA 417 (SCA); *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC). This matter is discussed in more detail later.

²⁵²¹ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 118B-C.

²⁵²² *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 118C-D.

²⁵²³ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 153E.

²⁵²⁴ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 154B-E, 155A.

Intelligence (IGI) and not the under the NPA because it involved a member of the SAPS Crime Intelligence Division, was erroneous.²⁵²⁵ The court held that the role of the IGI was simply to oversee compliance with the *Constitution* and other pieces of legislation, as well as receiving complaints of misconduct.²⁵²⁶

The decision to withdraw the charges because the matter had been referred to the IGI, was found to be “based on errors of law and fact. He took account of irrelevant considerations and ignored relevant considerations”.²⁵²⁷ Furthermore, the court held that the NDPP²⁵²⁸ does not have “carte blanche to act without regard to the requirements of legality, rationality and reasonableness”²⁵²⁹ and any suggestion to the contrary “is preposterous and no more need be said”.²⁵³⁰

A subsequent appeal to the Supreme Court of Appeal against this decision was only partly successful.²⁵³¹ The Supreme Court of Appeal upheld the ruling of the court *a quo* that the withdrawal of criminal charges and disciplinary proceedings against Mdluli must be set aside, thereby in effect reinstating them.²⁵³² However, the Supreme Court of Appeal held that the court *a quo* went too far in ordering that the NDPP must ensure the prosecution of the criminal charges and the National Commissioner of Police must pursue the disciplinary process, as such order oversteps the

²⁵²⁵ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 159B.

²⁵²⁶ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 159B-D.

²⁵²⁷ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 160E.

²⁵²⁸ It is submitted that this applies to all prosecutors under supervision of the NDPP as well.

²⁵²⁹ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 164B. See also *Nhlabathi v Adjunk Prokureur-generaal, Transvaal* 1978 3 SA 620 (W) 630A-D.

²⁵³⁰ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 164B.

²⁵³¹ *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA).

²⁵³² *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) 316F-G.

separation of powers between judiciary and executive.²⁵³³ The court held that courts will “only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons”, which was not the case in this matter, because the court found as follows:²⁵³⁴

I can find no compelling reason why the executive authorities should not be given the opportunity to perform their constitutional mandates in a proper way. The setting-aside of the withdrawal of the criminal charges and the disciplinary proceedings has the effect that the charges and the proceedings are automatically reinstated, and it is for the executive authorities to deal with them.

Equally, in *Democratic Alliance v Acting National Director of Public Prosecutions*²⁵³⁵ the high court found that the discontinuance of the prosecution of President Jacob Zuma for corruption should be set aside and held that Jacob Zuma “should face the charges as outlined in the indictment”.²⁵³⁶ The Democratic Alliance, referred to as “the official political opposition party in the Republic of South Africa” asked the court to review, correct and set aside a decision by the NPA to discontinue the criminal prosecution of Jacob Zuma on corruption.²⁵³⁷

The respondents opposed the application on the basis that the then head of the former Scorpions, Advocate Leonard McCarthy, “unduly influenced and interfered with the service of the indictment for political reasons”.²⁵³⁸ The main reasons for discontinuing the decision to prosecute Jacob Zuma, was summarised by the court as follows:²⁵³⁹

²⁵³³ *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) 316C-G.

²⁵³⁴ *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) 316E-G.

²⁵³⁵ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP).

²⁵³⁶ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 23H-24A.

²⁵³⁷ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 5A-B.

²⁵³⁸ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 6A-B.

²⁵³⁹ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 10E-F.

In essence, Messrs McCarthy, Ngcuka and others are alleged to have manipulated the timing of the envisaged service of the indictment on Mr Zuma for political reasons. The service of the indictment was supposed to be used to disadvantage Mr Zuma in his contest against Mr Mbeki for the presidency of the ANC.

The court held that, if proven, the alleged conduct of Leonard McCarthy would constitute “a serious breach of the law and prosecutorial policy”, which therefore required an investigation and “censure by a court of law if needed.”²⁵⁴⁰ More to the point though, was the NDPP’s breach of the *audi alteram partem* rule before making his decision to discontinue the prosecution, which the court labelled as “a half-hearted attempt at investigating and verifying the allegations before he took the decision”.²⁵⁴¹

The court referred to the English case of *Latif*²⁵⁴² and held that the NDPP had ignored an imperative of the abuse-of-process doctrine, which is that the criminal justice system may incur the reproach of the public where a prosecution is discontinued and the impression is created that there is a failure to protect the public from serious crime.²⁵⁴³ Furthermore, a “court of law is the appropriate forum to deal with the abuse-of-process doctrine, not extra-judicial process”.²⁵⁴⁴ Hence the court found that the NDPP’s failure to refer the complaints regarding Leonard McCarthy’s abuse of process to a court of law, left his decision irrational.²⁵⁴⁵ Moreover, the court held that the then acting NDPP, Mr Mpshe, ignored “the recommendations of the prosecution team that, even if the allegations regarding Mr

²⁵⁴⁰ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 14B-C.

²⁵⁴¹ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 14E.

²⁵⁴² *R v Latif* [1996] 1 WLR 104 (HL) ([1996] 2 Cr App R 92).

²⁵⁴³ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 17D-E.

²⁵⁴⁴ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 17G.

²⁵⁴⁵ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 18G.

McCarthy are true, the decision to stop the prosecution was to be made by a court of law”.²⁵⁴⁶

Moreover, “Mr Mpshe²⁵⁴⁷ ignored the importance of the oath of office which demanded of him to act independently and without fear or favour”.²⁵⁴⁸

Various appeals by president Zuma against this decision were unsuccessful.²⁵⁴⁹ In the latest appeal, unlike the previous instances, “the NPA and Mr Zuma made common cause”.²⁵⁵⁰ However, notwithstanding the fact that the Supreme Court of Appeal could “find no fault with the reasoning and conclusions of the court below that the decision to discontinue the prosecution was irrational and liable to be set aside”,²⁵⁵¹ and after many years of litigation,²⁵⁵² the matter seems set to continue for much longer, for the Supreme Court of Appeals stated the following:²⁵⁵³

The current applications are part of the continuing litigation saga that has endured over many years and involved numerous court cases. It is doubtful that a decision in this case will be the end of the continuing contestations concerning the prosecution of Mr Zuma. Minutes into the argument before us counsel for both Mr Zuma and the NPA conceded that the decision to

²⁵⁴⁶ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 17B-C.

²⁵⁴⁷ The then acting NDPP.

²⁵⁴⁸ *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP) 23G.

²⁵⁴⁹ See *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA); *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 3 SA 486 (SCA); *Zuma v Democratic Alliance* 2014 4 All SA 35 (SCA); *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* (771/2016, 1170/2016) [2017] ZASCA 146 (13 October 2017).

²⁵⁵⁰ *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* (771/2016, 1170/2016) [2017] ZASCA 146 (13 October 2017) para 2.

²⁵⁵¹ *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* (771/2016, 1170/2016) [2017] ZASCA 146 (13 October 2017) para 92.

²⁵⁵² See *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* (771/2016, 1170/2016) [2017] ZASCA 146 (13 October 2017) paras 6-35 for an historic overview of the case, where criminal investigations commenced in 2001 and resulted in the initial corruption charges being brought by the NPA against Mr Zuma in 2005.

²⁵⁵³ *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* (771/2016, 1170/2016) [2017] ZASCA 146 (13 October 2017) para 3.

discontinue the prosecution was flawed. Counsel on behalf of Mr Zuma, having made the concession, with the full realisation that the consequence would be that the prosecution of his client would revive, gave notice that Mr Zuma had every intention in the future to continue to use such processes as are available to him to resist prosecution.

More disconcerting is the Supreme Court of Appeals finding that “[t]he manner in which the affidavits were drawn and the case conducted on behalf of the NPA was inexcusable”,²⁵⁵⁴ as this does not instil confidence in the NPA conducting its prosecutions without fear, favour of prejudice, as expected. Such concern regarding the disregard of proper legal process however dates back to the Hefer Commission. In a facsimile addressed to the chairperson of the Hefer Commission of Inquiry, dated 25 November 2003, Jacob Zuma, the then deputy president of South Africa, wrote as follows:²⁵⁵⁵

I note your last sentence that expresses your wish not to have to reach the point where you may have resort to a subpoena. I am in full support of this sentiment and indeed hope that we do not have to reach that point as I also would not want to reach the point where I would be forced not to respect your subpoena.

Judge Hefer responded as follows in his final report to then president Thabo Mbeki:²⁵⁵⁶

I must draw attention to the concluding remark in Mr Zuma's facsimile of 25 November 2002 (sic) quoted in paragraph [39] which seems to be an indication that he might not be averse to ignoring a subpoena. All I wish to say is that it would be a sad day if, for fear of incurring the wrath of a political organisation to which he belongs, the holder of one of the highest offices of State were to consider ignoring a subpoena issued by a commission appointed by the President under a power vested in him by the Constitution.

Meanwhile Mkhabela²⁵⁵⁷ reports that NDPP Shaun Abrahams has taken two decisions since the Supreme Court of Appeal ruled that the failure to prosecute Zuma was irrational. He has allowed Zuma to make new

²⁵⁵⁴ *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* (771/2016, 1170/2016) [2017] ZASCA 146 (13 October 2017) para 94.

²⁵⁵⁵ Hefer 2004 http://www.justice.gov.za/commissions/comm_hefer/2004%2001%2020_hefer_report.pdf 26-27.

²⁵⁵⁶ Hefer 2004 http://www.justice.gov.za/commissions/comm_hefer/2004%2001%2020_hefer_report.pdf 31.

²⁵⁵⁷ Mkhabela 2017 https://www.news24.com/Columnists/Mpumelelo_Mkhabela/abrahams-a-lighty-next-to-judges-who-say-zuma-must-be-prosecuted-20171201.

representations regarding his prosecution and he has assembled “a team of senior prosecutors to advise him on the way forward”. Ultimately, however, as indicated by the Supreme Court of Appeal, the decision (and accountability for such decision) vests in the NDPP, no matter what the representations by Zuma or the advice by the prosecutorial team dictate.²⁵⁵⁸

The preceding two cases highlight instances where the court set aside NPA decisions to withdraw criminal charges and serve to illustrate how the law courts ensure accountability and independence of the NPA in prosecuting high level officials. It is, however, not only in the case of withdrawal that the courts have intervened, but also in instances where irrational decisions regarding the bringing of charges are concerned.

6.4.2.2 Case study: review of decision to prosecute

In *Booyesen v Acting National Director of Public Prosecutions*,²⁵⁵⁹ for example, the court considered the legality of organised crime-related charges²⁵⁶⁰ brought against Major-General Johan Booyesen, who was “a Provincial Commander in charge of KwaZulu-Natal Organised Crime” until 2010, when “he was appointed as the Provincial Head of the newly established Directorate for Priority Crime Investigations (DPCI) in KwaZulu-Natal”.²⁵⁶¹ The allegations in the press at the time were that Booyesen’s arrest and intended prosecution were politically motivated.²⁵⁶² The court stated that the review process entailed the question “whether the decision of the NDPP, viewed objectively, was rational”, which in this

²⁵⁵⁸ Mkhabela 2017 https://www.news24.com/Columnists/Mpumelelo_Mkhabela/abrahams-a-lighty-next-to-judges-who-say-zuma-must-be-prosecuted-20171201.

²⁵⁵⁹ *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD).

²⁵⁶⁰ Specifically contraventions of s 2(1)(e) and (f), respectively, of the POCA. See *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 559H.

²⁵⁶¹ *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 569I.

²⁵⁶² See as an example Maughan 2016 <https://mg.co.za/article/2016-02-18-npa-plays-political-games-at-inopportune-time>.

case meant “that the information on which the NDPP relied to arrive at her decision must be rationally connected to the decision taken”.²⁵⁶³

The reasons for the charges in terms of the *POCA* against Booysen, as provided by the then NDPP, Nomgcobo Jiba, would be alarming if it were not so far-fetched:²⁵⁶⁴

During 2006, the Serious Violent Crime (SVC) section based at Cato Manner was incorporated into the Durban Organised Crime Unit. The Durban Organised Crime Unit form part of the KwaZulu-Natal Provincial Organised Crime structure. The applicant then conducted it as an enterprise as defined in the *Prevention of Organised Crime Act* 121 of 1998.

In other words, a SAPS Organised Crime Unit operating an enterprise akin to the organised criminal groups it is supposed to combat. The profits which mainly motivated this “enterprise”, were alleged to be the following:²⁵⁶⁵

[T]he unlawful activities (were) motivated by the applicant's and members of his Unit's desire to enrich themselves by means of state monetary awards and/or certificates for excellent performance. In this regard, I annex a copy of an example of such a monetary award claim ... in which inter alia the applicant is recommended for such an award... I submit with respect that the aforementioned information is prima facie proof that the applicant was involved in racketeering activities.

What is even more alarming is that the NDPP conceded that the contents of the SAPS dockets did not contain any statements to directly implicate Booysen in any of the *POCA* offences with which he was charged.²⁵⁶⁶ Hence the court held that the SAPS dockets could “not have provided a rational basis for arriving at the impugned decisions”,²⁵⁶⁷ nor could any

²⁵⁶³ *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 568E-F.

²⁵⁶⁴ *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 570A.

²⁵⁶⁵ *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 570E-J.

²⁵⁶⁶ *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 571E-F.

²⁵⁶⁷ *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 571F.

other information which the NDPP was relying on.²⁵⁶⁸ The result was that the court found the decisions made by the NDPP to prosecute for the POCA offences were “arbitrary, offend the principle of legality and, therefore, the rule of law, and were unconstitutional” and therefore invalid.²⁵⁶⁹ This was, however, not the end of the matter, because Mngadi²⁵⁷⁰ states the following regarding the case against Booyesen, who took early retirement in February 2017:

This ruling was never appealed and the charges against him were withdrawn. An internal disciplinary inquiry, chaired by Advocate Nazeer Cassim, also cleared Booyesen of any wrongdoing, finding that he was a victim of political battles. Soon after his appointment in June 2015, National Director of Public Prosecutions Shaun Abrahams - allegedly using the same documentation as Jiba - reinstated the charges.

The court in this matter once again warned that the lawcourts should not easily entertain all applications of this kind, as it is limited by the doctrine of separation of powers,²⁵⁷¹ and said the following:²⁵⁷²

I hasten to emphasise that this outcome is based purely on the facts of the present case. It does not provide a basis for opening the floodgates to applications to review and set aside decisions to issue authorisations to prosecute under s 2(4) of POCA.

From this it is clear that there are limits to the review function of the law courts, where “judges are themselves constrained by the law”.²⁵⁷³ The Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma*²⁵⁷⁴ therefore explored the judicial function in order to deal with the judgment of the court a quo, where “the court below failed to adhere to some basic tenets” and the Supreme Court of Appeal feared that the

²⁵⁶⁸ *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 572H.

²⁵⁶⁹ *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 573D-E.

²⁵⁷⁰ Mngadi 2017 <https://www.news24.com/SouthAfrica/News/another-delay-in-cato-manor-death-squad-case-20170929>. At the time of writing the case was still *sub judice*.

²⁵⁷¹ See *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 574I-575A.

²⁵⁷² *Booyesen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) 573G-H.

²⁵⁷³ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 371H.

²⁵⁷⁴ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 371H.

incorrect judgment would become authoritative.²⁵⁷⁵ This was because the judge in the court *a quo* “changed the rules of the game, took his eyes off the ball and red-carded not only players but also spectators” in his discussion.²⁵⁷⁶ The court *a quo* had furthermore “applied a novel approach to motion proceedings which, if left undisturbed, may serve as a dangerous precedent”.²⁵⁷⁷ Harms DP expressed the independence of the courts as follows:²⁵⁷⁸

The independence of the judiciary depends on the judiciary's respect for the limits of its powers. Even if, in the words of the learned judge, the judiciary forms a 'secular priesthood' (para 161), this does not mean that it is entitled to pontificate or be judgmental, especially about those who have not been called upon to defend themselves - as said, its function is to adjudicate the issues between the parties to the litigation and not extraneous issues.

Also, in *National Director of Public Prosecutions v Freedom Under Law*²⁵⁷⁹ the Supreme Court of Appeal again took issue with the manner in which the court *a quo* had conducted itself, stating the following regarding objectivity of the court:

What I do find somewhat perturbing is the court's high praise for Dr Mamphela Ramphele and Justice Johan Kriegler who deposed to FUL's founding and replying affidavits, respectively (see para 4). It needs to be emphasized that all litigants, irrespective of their status, should be treated equally by our courts. Judges must therefore be wary of creating the impression – which would undoubtedly be unfounded in this case – that they have more respect for some litigants or their representatives than for others.

It is unfortunately not only in this regard that the review function of the law courts is limited. There are also other factors that are in some instances even more limiting. Firstly, it is expensive and thus only open to those who have the necessary financial means.²⁵⁸⁰ Secondly, courts can only review conduct by the NPA on a case by case basis, which is time consuming.²⁵⁸¹ Thirdly, such reviews happen *ex post facto*, meaning the damage may

²⁵⁷⁵ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 371E.

²⁵⁷⁶ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 371E.

²⁵⁷⁷ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 373B-C.

²⁵⁷⁸ *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 373A-B.

²⁵⁷⁹ *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) 305C-D.

²⁵⁸⁰ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 5.

²⁵⁸¹ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 5.

have been done and some form of complaint must be lodged with the court.²⁵⁸² Finally, such courts should in most instances only be approached after internal remedies have been exhausted.²⁵⁸³ However, where such internal remedy would in all probability be a waste of time, a court may condone a direct approach without first exhausting internal remedies.²⁵⁸⁴ The analysis of the NPA thus far has explored the various ways in which the accountability and independence of the NPA can be ensured, especially because corruption plays such a vital role in hampering the prosecution of organised crime. It is submitted, however, that proper and effective leadership of the NPA will reduce the need for judicial review of NPA decisions and other accountability measures. The important role which leadership plays in the NPA was expressed by the Hefer Commission as follows:²⁵⁸⁵

Section 41(6)(a) of the Prosecuting Authority Act was not enacted for nothing and as long as someone in the National Director's office keeps flouting the prohibition against the disclosure of information, one cannot be assured that the Prosecuting Authority is being used for the purpose for which it was intended.

6.4.3 Leadership woes of the NPA

Decisions of the NPA must be made rationally, which means both the process in terms of which the decision is made and the decision itself must be rational.²⁵⁸⁶ This requires proper leadership and due to the adverse statements made by the court in *inter alia* the Mdluli saga,²⁵⁸⁷ regarding

²⁵⁸² Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 5.
²⁵⁸³ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 164B-167A. In this case the court also highlighted the common law and statutory exceptions under which a court can be approached before the available internal remedies have been exhausted.

²⁵⁸⁴ *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) 311H-I.

²⁵⁸⁵ Hefer 2004 http://www.justice.gov.za/commissions/comm_hefer/2004%2001%2020_hefer_report.pdf 56-57.

²⁵⁸⁶ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 270E.

²⁵⁸⁷ That is *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) and *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA).

the conduct of Lawrence Mrwebi²⁵⁸⁸ and Nomgcobo Jiba,²⁵⁸⁹ the General Bar Association successfully applied for their names to be struck from the roll of advocates.²⁵⁹⁰ At the time of writing, both were in the process of appealing the decision to have them so removed.²⁵⁹¹

Unfortunately, this was not the only leadership woes which the NPA has had to deal with. As head of the NPA,²⁵⁹² the NDPP is *inter alia* given the authority to institute prosecutions in terms of the *POCA*.²⁵⁹³ The NDPP is appointed for ten years by the President²⁵⁹⁴ and must not only be a citizen possessing the necessary legal qualifications that allow him or her to practise in all the South African lawcourts, but must also be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity.²⁵⁹⁵ Because the NDPP is appointed by the president, concerns have been raised that his or her “continuing tenure depends on the president’s continuing good opinion of the appointee”, meaning that the NDPP can be pressured into acting according to the will of the president.²⁵⁹⁶

²⁵⁸⁸ In *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 132G, for instance, the court said that Mrwebi’s conduct before court fell “troublingly below the standard expected from a senior officer of this court”.

²⁵⁸⁹ In *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 167F-G, for instance, the court stated that Jiba’s “conduct is inconsistent with the duty imposed on all public functionaries by s 195 of the *Constitution* to be responsive, accountable and transparent”.

²⁵⁹⁰ *General Council of the Bar of South Africa v Jiba* 2017 1 SACR 47 (GP) 140E-F.

²⁵⁹¹ See Shange 2017 <https://www.businesslive.co.za/bd/national/2017-09-19-former-hawks-boss-placed-on-retirement-at-lower-rank-says-police-minister/>.

²⁵⁹² See s 179(1)(a) of the *Constitution*. For an historical overview of the independence of the NDPP, previously known as the Attorney-General, see *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) 375C-377A.

²⁵⁹³ For a brief overview of the history of the prosecution service in South Africa until 2012, see Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 9-19. The historic overview, however, ends during the active leadership of Menzi Simelane, whose subsequent demise is covered in this study.

²⁵⁹⁴ Sections 10 and 12(1) of the *NPA Act* read with s 179(1)(a) of the *Constitution*. Note that in terms of s 12(1) of the *NPA Act* the NDPP must vacate office at the age of 65, if such age is attained before the expiry of his or her tenure.

²⁵⁹⁵ Section 9 of the *NPA Act*.

²⁵⁹⁶ Redpath 2004 <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> 68-69.

During the certification proceedings of the *Constitution*,²⁵⁹⁷ the court refuted contentions that the appointment of the NDPP by the president contravened the doctrine of separation of powers, stating as follows:

The prosecuting authority is not part of the Judiciary ... In any event, even if it were part of the Judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the President does not in itself contravene the doctrine of separation of powers.

Whether the candidate is a “fit and proper person” does, however, not lie in the discretion of the President, but must instead be determined as an objective jurisdictional fact.²⁵⁹⁸ The Constitutional Court held that leaving such determination in the discretion of the President would infringe on the constitutional guarantee of independence.²⁵⁹⁹ Moreover, in *Freedom Under Law v National Director of Public Prosecutions*²⁶⁰⁰ the court stated that “justice must be seen to be done” and found in the particular matter that the “NDPP and the DPPs have not demonstrated exemplary devotion to the independence of their offices, or the expected capacity to pursue this matter without fear or favour”. Redpath²⁶⁰¹ maintains that a neutral and non-political NPA, which is non-arbitrary in its decision-making process, is vital to justice being served in South Africa. This is by extension also vital for the successful combating of organised crime in South Africa.

Like the SAPS, the NPA has not been a paragon of accountability and effectiveness.²⁶⁰² Schönteich²⁶⁰³ summarises it as follows:

²⁵⁹⁷ See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) 818G-H.

²⁵⁹⁸ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 265B.

²⁵⁹⁹ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 266A-B.

²⁶⁰⁰ *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) 176B-C.

²⁶⁰¹ Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 2.

²⁶⁰² Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 3.

After an auspicious start in 1998, the NPA's public credibility has been undermined through multiple changes in leadership, the quality of some of that leadership and significant public controversy surrounding the prosecution or non-prosecution of a number of high-profile cases. Moreover, the NPA has been riven by internal dissent, is accused of prosecuting too few cases and has been criticised for losing a number of high-profile cases.

Similarly, Redpath²⁶⁰⁴ maintains that current accountability measures have failed to ensure the independence of the NPA, given its “controversial history” accompanied by a rapid and frequent change in leadership.²⁶⁰⁵ This, Redpath²⁶⁰⁶ maintains, is as a result of “the intense political battles that have played out in the arena of the office of the NDPP”. The importance of independence of the NDPP is stressed by the Constitutional Court as follows:²⁶⁰⁷

It is true that the functions of the National Director are not judicial in character. Yet, the determination of prosecution policy, the decision whether or not to prosecute and the duty to ensure that prosecution policy is complied with are ... fundamental to our democracy. The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice.

These political battles also brought the appointment of the NDPP into the fray of the lawcourts when, in *Democratic Alliance v President of the Republic of South Africa*,²⁶⁰⁸ the Constitutional Court confirmed a finding by the Supreme Court of Appeal²⁶⁰⁹ that the appointment by the president

²⁶⁰³ Schönreich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 3-4.

²⁶⁰⁴ Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 1.

²⁶⁰⁵ See for instance *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* (771/2016, 1170/2016) [2017] ZASCA 146 (13 October 2017) paras 20-21 where “notes taken at an internal meeting of the NPA on 1 April 2009, at which it was decided to discontinue the prosecution” of president Zuma on racketeering and corruption charges reveal how political influence can affect the NPA in its decision-taking process.

²⁶⁰⁶ Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 7.

²⁶⁰⁷ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 267B-D.

²⁶⁰⁸ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 294B.

²⁶⁰⁹ See *Democratic Alliance v President of the Republic of South Africa* 2012 1 SA 417 (SCA).

of then NDPP, Adv. Menzi Simelane, was irrational and constitutionally invalid.²⁶¹⁰

In this matter, the government's view was that "the President has a wide, subjective discretion"²⁶¹¹ when appointing the NDPP and "that it should be understood that the National Director is a political appointee who has a substantial policy-related role as distinct from other Directors of Public Prosecutions".²⁶¹² The Constitutional Court, however, held a different view, stating that the effect of the changes brought about by the *Constitution*²⁶¹³ on the NPA, was "to gather the strands of the country's prosecutorial services in the hands of one *non-political* chief executive officer directly appointed by the President".²⁶¹⁴ Previously there had been a direct link between the former Attorneys-General and the relevant minister, with the Attorneys-General having to report directly to the minister, who was responsible for coordinating their activities.²⁶¹⁵

The court implemented a three-stage test to be applied where a court has to review an "executive decision where certain factors were ignored".²⁶¹⁶ Firstly, the court must determine whether the factors that were ignored were in fact relevant. Secondly, the court must determine whether the means are rationally connected to the purpose for which the [power is conferred. Thirdly, if the answer in stage two is negative, the court must

²⁶¹⁰ In terms of s 172(2)(a) of the *Constitution*, the Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

²⁶¹¹ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 458E.

²⁶¹² *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 458E-F.

²⁶¹³ Specifically by s 179 of the *Constitution*.

²⁶¹⁴ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 1 SA 1 (CC) 11D-E, endorsed in *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 263E-264A (emphasis added).

²⁶¹⁵ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 1 SA 1 (CC) 11D-E.

²⁶¹⁶ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 272D-F.

determine “whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational”.²⁶¹⁷

In Simelane’s case, the Ginwala Commission, which investigated the fitness of the then NDPP, Vusi Pikoli, to continue in office, found Simelane’s testimony to be “contradictory and without basis in fact or in law”.²⁶¹⁸ Hence the court ruled that his dishonesty was inconsistent with the office of NDPP, which required “conscientiousness and integrity”.²⁶¹⁹ The court therefore set aside his appointment and NDPP, ruling as follows: “The President’s decision to ignore it was of a kind that coloured the rationality of the entire process, and thus rendered the ultimate decision irrational.”²⁶²⁰

The current NDPP, Shaun Abrahams, has not covered himself in glory either, as evidenced by the controversy surrounding the manner in which he handled the charges against amongst others, the former minister of finance, Pravin Gordhan.²⁶²¹

In fact, the NPA has been riddled with controversy regarding its leadership and reluctance to prosecute high-profile cases, placing it in a position where it needs to restore public confidence in its ability to uphold the rule of law, rather than undermine it.²⁶²² With much public criticism lodged against Abrahams, president Zuma nevertheless maintained in Parliament

²⁶¹⁷ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 272D-F.

²⁶¹⁸ See Ginwala 2008 http://www.justice.gov.za/commissions/2008_ginwala.pdf 12. See also Ginwala 2008 http://www.justice.gov.za/commissions/2008_ginwala.pdf 195-196, where Dr Ginwala expresses her personal displeasure with the manner in which Simelane acted during the Enquiry.

²⁶¹⁹ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 275D.

²⁶²⁰ *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) 292F.

²⁶²¹ See Galens 2016 <http://www.news24.com/SouthAfrica/News/abrahams-caused-untold-harm-to-economy-judge-kriegler-20161031>.

²⁶²² Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 4.

that it would be “irrational and unconstitutional” to remove Abrahams from his post as NDPP.²⁶²³

The links between organised crime and corruption, established and explored in especially chapters 2 and 3 of this study, highlight the importance of an accountable NPA with the will to play its role in the effective combating of organised crime in South Africa. This is because without accountability “elections and the notion of the will of the people lose their meaning, and government has the potential to become arbitrary and self-serving”.²⁶²⁴ However, as Redpath²⁶²⁵ concludes:

For justice to be done and to be seen to be done, a prosecution service must be independent, impartial, fair and effective, and be accountable for its actions and decisions. The shaping of the prosecuting authority in this direction appears still to be in progress.

Ironically, the independence of the NPA and its freedom from political influence is essential to the government’s own success, because as Leong²⁶²⁶ states, a government’s existence “depends on its ability to create and maintain order in the society”. The preceding discussion however shows that, like the Hawks and the SAPS Crime Intelligence Division, the NPA has failed to ensure that it evokes public confidence by means of accountability and independence, bringing its ability to combat organised crime in South Africa into serious question. These three institutions form the backbone of the law enforcement structures whose purpose is to combat organised crime in South Africa, but political meddling in their affairs has seriously jeopardised their success in achieving this goal. Hence, the only structures worth analysing further, are those which aim to disrupt the financing of organised crime.

²⁶²³ Herman 2017 <http://www.news24.com/SouthAfrica/News/zuma-defends-shaun-abrahams-fitness-as-npa-head-20171110>.

²⁶²⁴ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 2.

²⁶²⁵ Redpath 2012 <https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> 20.

²⁶²⁶ Leong *The Disruption of International Organised Crime* 70.

6.4.4 Comparison with UK prosecuting authority

The Crown Prosecution Service (CPS), established in 1986 and headed by the Director of Public Prosecutions (DPP), is responsible for criminal prosecutions in England and Wales under the supervision of the Attorney-General, who in turn is accountable to parliament.²⁶²⁷ The CPS is also held accountable by the Crown Prosecution Service Inspectorate (CPSI), which is an independent body headed by an Inspector, who reports directly to the Attorney-General as relevant minister.²⁶²⁸ Much of the CPSI's work, however, usurps the function of senior prosecuting staff. It seems like a waste of resources to have CPSI staff review completed cases and conduct office inspections in order to assist prosecutors in improving their service delivery, while this could equally be performed by senior CPS staff members.²⁶²⁹

Complaints against the CPS are handled by the independent assessor of complaints, who does not handle legal decisions but complaints which are related to service delivery, as complaints involving legal decisions are dealt with internally by the CPS.²⁶³⁰

Importantly, in the combating of organised crime in the UK, with the establishment of SOCA, specialist prosecutors were made available to law enforcement officers yet remained answerable to the Attorney-General, even though they “work closely to its officers, staying with each case from the outset of investigation right through to the point of sentence”.²⁶³¹ Amongst others, these duties of such specialist prosecutors include the following:²⁶³²

²⁶²⁷ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 6.

²⁶²⁸ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 7.

²⁶²⁹ See Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 7-8 for a description of the work performed by the CPSI.

²⁶³⁰ Schönteich 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> 10.

²⁶³¹ Fitzpatrick 2005 *JFC* 251.

²⁶³² Fitzpatrick 2005 *JFC* 252.

- (i) advice on legal issues surrounding extradition;
- (ii) gathering evidence from overseas;
- (iii) dealing with legal issues surrounding undercover operations;
- (iv) assisting with witness protection;
- (v) asset forfeiture procedures; and
- (vi) prosecuting cases before court.

The advantage of having specialist prosecutors working in partnership with law enforcement lies in their closer working relationship with the intelligence analysts and police officials, “even taking a role in advising on operational matters” and in some instances employing “compulsory powers to gather evidence in secret”.²⁶³³ While these specialist prosecutors may be subject to judicial criticism in instances where investigations are conducted badly, the benefits are that these specialist prosecutors become more *au fait* with the undercover and secretive nature of organised crime investigations and the accompanying money laundering activities.²⁶³⁴

6.5 Investigating the financing of organised crime

“[D]isrupting the source of funding is the key to interdict serious organised crime.”²⁶³⁵ Converting the proceeds of unlawful activities into “legitimate income” is of paramount importance to members of organised criminal groups.²⁶³⁶ Hence, effective anti-money laundering (AML) strategies are vital to the effective combating of organised crime in South Africa as this precludes criminals from enjoying the spoils of their criminal activities and disrupts the investment of profits to further organised criminal activities.²⁶³⁷ Several roleplayers aim at dismantling organised crime groups through money laundering control. The Financial Intelligence Centre (FIC), for

²⁶³³ Fitzpatrick 2005 *JFC* 261.

²⁶³⁴ Fitzpatrick 2005 *JFC* 261; Leong *The Disruption of International Organised Crime* 209.

²⁶³⁵ Leong *The Disruption of International Organised Crime* 164.

²⁶³⁶ Leong *The Disruption of International Organised Crime* 209.

²⁶³⁷ Leong *The Disruption of International Organised Crime* 209.

example aims at gathering financial intelligence in order to assist law enforcement structures to investigate the financial side of organised crime.

6.5.1 *The FIC*

The principal objective of the FIC is to assist in the identification of the proceeds of unlawful activities, the combating of money laundering and the financing of terrorist and related activities.²⁶³⁸ Its secondary objectives are as follows:²⁶³⁹

- (i) to make information collected available to investigating authorities, supervisory bodies, the intelligence services and the South African Revenue Services to facilitate the administration and enforcement of the laws of South Africa;
- (ii) to exchange information with bodies with similar objectives in other countries regarding money laundering activities, the financing of terrorist and related activities, and other similar activities; and
- (iii) to supervise and enforce compliance with the *FICA* or any directive made in terms of it and to facilitate effective supervision and enforcement by supervisory bodies.

To achieve these objectives, the FIC is given various powers²⁶⁴⁰ to perform its functions.²⁶⁴¹ The FIC is however not an investigative body and merely gathers and analyses financial information to facilitate investigations relating to amongst others, organised criminal groups, by means of the referral of suspected offences to investigating authorities and other public bodies.²⁶⁴² Its powers therefore relate to its own operational

²⁶³⁸ Section 3(1) of the *FICA*.

²⁶³⁹ Section 3(2) of the *FICA*.

²⁶⁴⁰ In terms of s 5 of the *FICA*.

²⁶⁴¹ Listed in s 4 of the *FICA*.

²⁶⁴² De Koker *South African Money Laundering* Com 5-4. See also s 44 of the *FICA*.

functions, its intelligence gathering and law enforcement functions, and its supervisory and compliance functions.²⁶⁴³

Furthermore, because the FIC is a member of the Egmont Group,²⁶⁴⁴ it can share information relating to transnational organised criminal groups with over 150 other Financial Intelligence Units of various countries, as well as building up expertise in the combating of anti-money laundering and terror financing control through international consultation.²⁶⁴⁵

The FIC is a member of the Egmont Group of Financial Intelligence Units, which comprises 156 FIUs and “provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing”.²⁶⁴⁶ Because the FIC is not an investigative body, the success of its efforts is directly linked to the success of the law enforcement bodies, like the Hawks, in combating organised crime in South Africa. The FIC also has a role to play in asset forfeiture, as the financial intelligence gathered by it may assist in identifying the illicitly obtained assets of organised criminal groups, which may then be confiscated by the Asset Forfeiture Unit (AFU).

6.5.2 The AFU

Von Lampe²⁶⁴⁷ sees asset forfeiture as a “new form of punishment” aimed at disrupting organised crime by confiscating the proceeds of unlawful activities. Forfeiture is a double-edged sword used against organised criminal groups, for not only does it remove the profits of past crimes, but it also removes the funds available for investment into future illegal activities

²⁶⁴³ De Koker *South African Money Laundering* Com 5-5.

²⁶⁴⁴ According to Egmont Group unknown date <https://www.egmontgroup.org/en/content/about>, it consists of a group of 152 Financial Intelligence Units of member countries who exchange financial intelligence on a secure platform to combat money laundering and terrorist financing.

²⁶⁴⁵ De Koker *South African Money Laundering* Com 5-10.

²⁶⁴⁶ Egmont Group unknown date <https://www.egmontgroup.org/en/content/about>.

²⁶⁴⁷ Von Lampe *Organised Crime* 370.

and expansion of the organised criminal group.²⁶⁴⁸ The legal framework regarding asset forfeiture is discussed in the previous chapter.²⁶⁴⁹ The implementation of this framework rests with the Asset Forfeiture Unit, which falls under the NPA and was established by the NDPP in 1999.²⁶⁵⁰

While its motto is “taking the profit out of crime”, the AFU was established with the mandate “to ensure that the powers in the Act [the *POCA*] to seize criminal assets would be used to their maximum effect in the fight against crime, and particularly, organised crime”.²⁶⁵¹ To achieve this, the AFU has formulated the following objectives:²⁶⁵²

- (i) to develop the law by taking test cases to court and creating the legal precedents that are necessary to allow the effective use of the law;
- (ii) to build the capacity to ensure that asset forfeiture is used as widely as possible to make a real impact in the fight against crime;
- (iii) to make an impact on selected categories of priority crimes;
- (iv) to establish a national presence;
- (v) to establish excellent relationships with its key partners, especially the SAPS, and the South African Revenue Service (SARS); and
- (vi) to build the AFU into a professional and representative organisation.

Assets derived from forfeiture proceedings are paid into the Criminal Assets Recovery Account (CARA),²⁶⁵³ which is a separate account created within the National Revenue Fund.²⁶⁵⁴ The Criminal Assets Recovery Committee²⁶⁵⁵ was established to, amongst others, advise Cabinet in connection with the rendering of financial assistance to law

²⁶⁴⁸ Von Lampe *Organised Crime* 370.

²⁶⁴⁹ See para 5.4.4.

²⁶⁵⁰ Kruger *Organised Crime* 10.

²⁶⁵¹ NPA 2016 <https://www.npa.gov.za/node/13>.

²⁶⁵² NPA 2016 <https://www.npa.gov.za/node/13>.

²⁶⁵³ Section 64 of the *POCA*.

²⁶⁵⁴ Section 63 of the *POCA*.

²⁶⁵⁵ Created by s 65 of the *POCA*.

enforcement agencies in order to combat organised crime, money laundering, criminal gang activities, the financing of terrorist and related activities and crime in general.²⁶⁵⁶ The committee has the power to make recommendations to Cabinet with regard to the allocation of property and moneys from the CARA to specific law enforcement agencies.²⁶⁵⁷

The success of the AFU largely depends on the success of other law enforcement agencies tasked with the combating of organised crime, especially as far as criminal confiscations are concerned,²⁶⁵⁸ hence the importance of its stated objective of having good relationships with the SAPS and SARS. In the UK, the Assets Recovery Agency, responsible for asset forfeiture, merged with SOCA when SOCA was established and now forms part of the NCA, as mentioned above.²⁶⁵⁹ An interesting approach adopted in the UK is to incentivize asset forfeiture by awarding a certain percentage of assets forfeited to the relevant law enforcement agency involved.²⁶⁶⁰ In the UK, this saw an expansion in asset forfeiture work by the various law enforcement agencies.²⁶⁶¹ In South Africa, because the AFU falls under the office of the NDPP, the same concerns raised regarding the NPA apply to the AFU.

6.5.3 *The role of forensic accountancy*

One of the aspects hampering the investigation of the finances of organised crime is the fear that law enforcement officers and prosecutors have for financial complexity that they hold, which Murray²⁶⁶² maintains should be handled as follows:

Complexity should be considered more of a challenge than a problem. With the right skill sets and attitudes, that challenge can become an opportunity.

²⁶⁵⁶ Section 68(b) of the *POCA*.

²⁶⁵⁷ Section 69(b) of the *POCA*.

²⁶⁵⁸ See Kruger *Organised Crime* 10.

²⁶⁵⁹ Doig and Levi 2013 *PMM* 148.

²⁶⁶⁰ Doig and Levi 2013 *PMM* 148.

²⁶⁶¹ Doig and Levi 2013 *PMM* 148.

²⁶⁶² Murray 2010 *JMLC* 11.

The fact is that delineation of complex audit trails provides a powerful means of dismantling OCGs.²⁶⁶³

A valuable role can be played by forensic accountants in this regard, especially as far as money laundering activities are concerned. Van Romburgh²⁶⁶⁴ defines the South African forensic accountant as:

[A] person possessing sufficient legal, accounting, auditing, investigative and interviewing skills to perform investigations in a commercial environment, provide litigation support, act as expert witness and provide accounting and auditing skills to specific business scenarios.

Forensic accountants therefore use their expertise to conduct financial crime investigations within the parameters of the law of evidence and present their findings in a court of law.²⁶⁶⁵ To this end, Slot²⁶⁶⁶ maintains that it is important for a forensic accountant to have the skills set to “interpret, summarise and present complex financial and business-related issues in a manner that is both understandable and properly supported before a court of law”.

Murray²⁶⁶⁷ makes the case that “proving the criminality of proceeds can be achieved by reference to the way in which the money is handled”. In this manner, pro-active money laundering investigations contribute hugely to the combating of organised crime and ties in with asset forfeiture, which galvanises “the principle that the criminal should not be able to enjoy the benefits of his crime”.²⁶⁶⁸ The benefits of a money laundering investigation are summarised by Murray²⁶⁶⁹ as follows: “If it is done properly, the impact of a well-run money laundering case will disable, disrupt and punish every facet of an OCG²⁶⁷⁰ such that it is no longer able to function”. Hence, in the UK, the *Proceeds of Crime Act*²⁶⁷¹ has been used successfully to

²⁶⁶³ Murray 2010 JMLC 11.

²⁶⁶⁴ Van Romburgh *The Training of a Forensic Accountant* 49.

²⁶⁶⁵ Slot *An Evaluation of the Forensic Accountant's Role* 14, 16.

²⁶⁶⁶ Slot *An Evaluation of the Forensic Accountant's Role* 17.

²⁶⁶⁷ Murray 2010 JMLC 7.

²⁶⁶⁸ Murray 2010 JMLC 7-8.

²⁶⁶⁹ Murray 2010 JMLC 8.

²⁶⁷⁰ Organised criminal group.

²⁶⁷¹ *Proceeds of Crime Act* 2002.

dismantle organised criminal groups through both asset forfeiture as well as the money laundering offences.²⁶⁷² Murray²⁶⁷³ explains the importance of forensic accountancy in these successes as follows:

The work of the forensic accountant develops a productive symbiosis with the senior investigating officer and his team with sufficient scope being generated in the investigative team to outflank the OCG bosses, so that ultimately they have no place left to hide.

By having forensic accountants act as expert witnesses in court, complex financial transactions are presented in court in such a manner that it is understandable where “the facts in a money laundering case ought to speak for themselves”.²⁶⁷⁴

The UK organised crime strategy acknowledges the importance of “[r]elentless disruption of organised crime and organised criminals by all available means – not just prosecution”.²⁶⁷⁵ In terms of the role of forensic accounting, the NCA may recruit so-called “NCA Specials”²⁶⁷⁶ who are volunteers bringing specialist skills, like forensic accounting, which are not “traditionally found in law enforcement agencies”.²⁶⁷⁷ Such NCA Special may, subject to certain provisions, be given the same powers as a police constable.²⁶⁷⁸ The importance of this approach to the success of such investigations, is underlined by Murray²⁶⁷⁹ as follows:

The integration of a forensic accountancy function within law enforcement therefore means integration in the case from cradle to grave. It is not an

²⁶⁷² See Murray 2010 *JMLC* 7-14 for a detailed history and first breakthrough in the use of this legislation.

²⁶⁷³ Murray 2010 *JMLC* 11.

²⁶⁷⁴ Murray 2010 *JMLC* 12. See Slot *An Evaluation of the Forensic Accountant's Role* 75-96 for a detailed analysis of the forensic accountant's role in testimony in South African criminal law proceedings.

²⁶⁷⁵ HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 33.

²⁶⁷⁶ In terms of para 15 of Schedule 1, Part 2, of the UK *Crime and Courts Act*.

²⁶⁷⁷ HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 33-34.

²⁶⁷⁸ In terms of para 15(5) of Schedule 1, Part 2, of the UK *Crime and Courts Act*. See also HM Government 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf 34.

²⁶⁷⁹ Murray 2010 *JMLC* 14.

approach that lends itself to forensic accountancy being introduced to law enforcement as a bought-in service, or an add-on at the back end to identify confiscation or civil recovery opportunities. It requires it to be integrated as a key function within the law enforcement team that is devoted to the dismantling of the OCG.

Unfortunately in South Africa forensic accountancy is still a “bought-in service”, where the law enforcement structures have no in-house forensic accountancy capacity, instead relying on private firms to provide this service on a case-by-case basis,²⁶⁸⁰ which may not be a cost-effective approach to investigating the financing of organised crime. One example is the investigation by KPMG into the so-called SARS “rogue intelligence unit” at a cost of R23 million, which KPMG offered to pay back after it became clear that the investigation formed part of “political wars”.²⁶⁸¹

The mandate is summarised by Thamm²⁶⁸² as follows:

KPMG SA was appointed to undertake a documentary review of “evidence” and conduct a forensic report into allegations that a “covert unit” had existed within SARS and had spied on President Jacob Zuma and other politically connected individuals and had set up a brothel aimed at “infiltrating” the ANC.

Van Loggerenberg and Lackay²⁶⁸³ claim that “the Hawks sought to invoke criminal proceedings against Gordhan²⁶⁸⁴ based on ... the controversial KPMG report into the ‘rogue unit’”. Moreover, “[t]hat the witch hunt was politically motivated is evidenced by the ever moving target of alleged charges aimed at Gordhan” and spearheaded by the controversial (former) head of the Hawks, Major-General Berning Ntlemeza.²⁶⁸⁵ The criticism of the role played by the NDPP, Shaun Abrahams, in this saga was

²⁶⁸⁰ See Slot *An Evaluation of the Forensic Accountant's Role* 97-108.

²⁶⁸¹ KPMG 2017 <https://home.kpmg.com/za/en/home/home/press-releases/2017/09/kpmg-international-media-statement.html>. See also Thamm 2017 <https://www.dailymaverick.co.za/article/2017-10-03-sars-wars-kpmg-report-the-firm-the-lawyers-the-auditor-and-the-blame-game/#.WhriSVWWbIU> for a detailed exposé on the KPMG/SARS scandal.

²⁶⁸² Thamm 2017 <https://www.dailymaverick.co.za/article/2017-10-03-sars-wars-kpmg-report-the-firm-the-lawyers-the-auditor-and-the-blame-game/#.WhriSVWWbIU>.

²⁶⁸³ Van Loggerenberg and Lackay *Rogue* 76.

²⁶⁸⁴ Former finance minister Pravin Gordhan.

²⁶⁸⁵ Thamm 2017 <https://www.dailymaverick.co.za/article/2017-10-03-sars-wars-kpmg-report-the-firm-the-lawyers-the-auditor-and-the-blame-game/#.WhriSVWWbIU>.

mentioned above. Subsequently, KPMG admitted that “the evidence in the documentation provided to KPMG South Africa does not support the interpretation that Mr Gordhan knew, or ought to have known, of the ‘rogue’ nature of this unit” and released the following statement:²⁶⁸⁶

Given the failure to appropriately apply our own risk management and quality controls, that part of the report which refers to conclusions, recommendations and legal opinions should no longer be relied upon. KPMG South Africa has contacted SARS and offered to repay the R23 million fee received for the extensive work performed, or to make a donation for the same amount to charity.

KPMG International has indicated that it will launch an investigation into the KPMG/SARS scandal, to which Thamm²⁶⁸⁷ responds as follows:

That KPMG International is seeking to set up its own investigation into the firm’s involvement is an indictment of South Africa’s criminal justice system whose job it is to uphold the law and hold those who violate it – be they the president or multibillion dollar private enterprises – accountable.

Unfortunately, therefore, forensic accountancy in South Africa has not attained the level of the example set in the UK, where it plays a vital role in the combating of organised crime.²⁶⁸⁸ Much progress has been made, however, with the establishment of the Institute for Commercial Forensic Practitioners (ICFP), which is “a self-regulatory body mandated by its members to cohere, co-ordinate and regulate the commercial forensic profession in South Africa”.²⁶⁸⁹ Part of the ICFP’s objectives is to “regulate the commercial forensic profession in South Africa by providing a regulatory framework and a code of conduct for forensic practitioners”.²⁶⁹⁰ Recently, the ICFP was recognised as a professional body by the South African Qualifications Authority (SAQA) and “SAQA also approved the registration of the designation ‘Commercial Forensic Practitioner (FP)SA’”, which is a designation awarded to full members of the ICFP who are in

²⁶⁸⁶ KPMG 2017 <https://home.kpmg.com/za/en/home/home/press-releases/2017/09/kpmg-international-media-statement.html>.

²⁶⁸⁷ Thamm 2017 <https://www.dailymaverick.co.za/article/2017-10-03-sars-wars-kpmg-report-the-firm-the-lawyers-the-auditor-and-the-blame-game/#.WhriSVWWbIU>.

²⁶⁸⁸ See Murray 2010 *JMLC* 7-14 for a detailed analysis of the successful role played by forensic accountancy in the dismantling of organised criminal groups in the UK.

²⁶⁸⁹ ICFP 2017 <https://www.icfp.co.za/history-icfp>.

²⁶⁹⁰ ICFP 2017 <https://www.icfp.co.za/about-icfp>.

good standing.²⁶⁹¹ These steps will go a long way towards establishing professional forensic accountants who can contribute significantly to the combating of organised crime.

6.6 Conclusion

As Kinnes and Newham²⁶⁹² state, “[i]nternational experience suggests that combating organised crime and corruption can only be successful if there is a strong political commitment on the part of governments to tackle these challenges”. This chapter has shown that such political will does not exist in South Africa and that every law enforcement structure tasked with implementing South Africa’s legal framework against organised crime has been subjected to political interference motivated by large-scale corruption. Where corruption is rife among high-ranking officials, it follows that those very officials will be reluctant to implement anti-corruption responses, meaning “that those who abuse state resources will not be dealt with effectively”.²⁶⁹³

The result of a corruption-infested country is that the organised crime disease is allowed to spread unchecked, because the wings of the structures put in place to combat it have been clipped, and instead of protecting the people against the harms caused by organised crime, they are used to protect those who line their pockets with state resources, thereby acting like the very organised criminal groups which they are supposed to eradicate.

²⁶⁹¹ ICFP 2017 <https://www.icfp.co.za/article/professional-body-recognition-and-professional-designation-registration.html>.

²⁶⁹² Kinnes and Newham 2012 SACQ 33.

²⁶⁹³ Kinnes and Newham 2012 SACQ 33.

Chapter 7

Summary, conclusion and recommendations

7.1 *Summary*

7.1.1 *Objectives of the study*

In chapter 1, the stated primary objective of this study was to determine to what extent South Africa's laws and law enforcement system meet the international standards for combating organised crime. In order to reach this objective, the study set out to achieve key secondary objectives. Before a conclusion can be drawn in order to make recommendations, the secondary objectives must first be addressed; the first being to determine an appropriate definition for organised crime for purposes of the study.

7.1.2 *Defining organised crime*

While remaining a difficult prospect,²⁶⁹⁴ clarity of concept remains vital to the combating of organised crime, as such a phenomenon cannot be fought if those who must combat it are not clear on exactly what it is they are fighting. Fundamentally, organised crime comprises several individuals committing crime in a collective effort to gain financially. This requires some form of collectivism among the members of the group, which could be based on a number of factors, of which ethnicity is but one such binding factor. Furthermore, the level of hierarchy within such a group is largely dependent on size, with larger groups needing more of a "management" structure to organise the criminal activities. Therefore it is impossible to formulate hierarchical rules as a requirement for labelling a criminal group as "organised crime", because each group will operate in the manner which best suits its operational needs, adapting as its illicit enterprise grows until it reaches the point where it forms a large-scale international operation requiring very formalised structures.

²⁶⁹⁴ See para 2.2.1.1.

Because of America's influence in the UN,²⁶⁹⁵ the American understanding of organised crime became internationalised, to such an extent that the American understanding of organised crime influenced the notion of organised crime in the UN's conventions.²⁶⁹⁶ Several attempts at identifying the internal characteristics of organised criminal groups were made in efforts to help formulate a suitable definition for the phenomenon.²⁶⁹⁷ While helpful to an extent at the operational level, such analyses of the characteristics are based on an historical perspective, whereas organised crime keeps adapting with the times. Hence, what is known regarding the characteristics of organised crime is only the aspects that have been uncovered through investigation and may not represent the complete picture because of the secretive nature of the phenomenon. An analysis of the known characteristics therefore does not contribute to the drafting of policies to combat the phenomenon.²⁶⁹⁸

In this regard organised crime models contribute more towards the understanding of a phenomenon, by presenting a picture or theory of something which is difficult to observe, like organised crime.²⁶⁹⁹ To this end, several models have been developed to represent organised crime, of which the most significant is the enterprise model, because it focuses on the element of profit and the economic factors associated with organised crime.²⁷⁰⁰ The enterprise model is also significantly represented in the Palermo Convention definition of an organised criminal groups as follows:²⁷⁰¹

[A] structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established by the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

²⁶⁹⁵ See paras 2.2.1.2 and 2.2.1.3.

²⁶⁹⁶ See para 2.2.1.3.

²⁶⁹⁷ See para 2.3.

²⁶⁹⁸ See para 2.3.1.8.

²⁶⁹⁹ See para 2.4.

²⁷⁰⁰ See para 2.4.3.

²⁷⁰¹ See para 2.5.1.

For purposes of this definition, a “structured group” means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.²⁷⁰² “Serious crime” in turn means conduct constituting an offence punishable by maximum deprivation of liberty of at least four years or a more serious penalty.²⁷⁰³ These definitions help clarify the concept of *organised* for purposes of this study, especially as far as the second secondary objective of the study is concerned, which is stated in chapter 1 as determining the challenges facing South Africa in meeting its obligations as far as the combating of organised crime is concerned.

7.1.3 South Africa’s organised crime challenges in a national and international context

Due to the international threat of organised crime, the United Nations drafted the 2000 Palermo Convention to combat the phenomenon on a global level.²⁷⁰⁴ This was, however, not the first international action against organised crime, with the “War on Drugs” of the 1980s culminating in the 1988 Vienna Convention, aimed at combating international drug trafficking.²⁷⁰⁵ The Vienna Convention requires countries to implement strategies aimed at combating international drug trafficking. These strategies include the adoption of legislation creating drug-related offences, which include money laundering offences where the proceeds of such drug-related offences are concerned, as well as provisions that allow the confiscation of said proceeds.²⁷⁰⁶

Furthermore, the Vienna Convention contains provisions which facilitate the cross-border cooperation among the various law enforcement

²⁷⁰² See para 2.5.1.

²⁷⁰³ See para 2.5.1.

²⁷⁰⁴ See paras 3.2.1 and 3.3.2.

²⁷⁰⁵ See paras 3.2.2 and 3.3.1.

²⁷⁰⁶ See para 3.3.1.1.

structures of the State Parties.²⁷⁰⁷ These provisions include extradition, mutual legal assistance in criminal matters, the transfer of prisoners, the cross-border seizure and forfeiture of illicit proceeds of crime; and the transfer of criminal proceedings.²⁷⁰⁸ The success of the Vienna Convention is, however, debatable, because implementation by State Parties was slow and they displayed a reluctance to fully comply with its provisions.²⁷⁰⁹

The Palermo Convention is a renewed effort to combat organised crime on a global level and it extends the international scope beyond drug-related offences to all forms of organised crime.²⁷¹⁰ Though still recognising the sovereignty of State Parties,²⁷¹¹ the Palermo Convention requires countries to adopt legislation criminalising participation in an organised criminal group; laundering the proceeds of crime; corruption; and obstruction of justice.²⁷¹² Similar to the Vienna Convention, the Palermo Convention contains a string of provisions facilitating international cooperation among law enforcement structures.²⁷¹³ Also, action has been taken to disrupt the finances of organised crime through anti-money laundering provisions as well as asset forfeiture.²⁷¹⁴ In order to keep abreast of the latest methodologies employed by organised criminal groups to launder the proceeds of their illicit activities, the UN established the FATF in 1989 with the aim of determining strategies to combat money laundering of the proceeds of crime at an international level.²⁷¹⁵ The FATF continually issues and updates recommendations on legislative measures which countries must adopt in the fight against, amongst others, money laundering.²⁷¹⁶

²⁷⁰⁷ See para 3.3.1.3.

²⁷⁰⁸ See para 3.3.1.3.

²⁷⁰⁹ See para 3.3.1.4.

²⁷¹⁰ See para 3.3.2.1.

²⁷¹¹ See para 3.3.2.2.

²⁷¹² See para 3.3.2.3.

²⁷¹³ See para 3.3.2.4.

²⁷¹⁴ See paras 3.2.4, 3.3.1.2 and 3.3.2.3.2.

²⁷¹⁵ See para 3.3.4.

²⁷¹⁶ See para 3.3.4.

While the international community made these strides in combating organised crime at a global level, South Africa faced many challenges after becoming a new democracy when the Apartheid regime fell in the early 1990s.²⁷¹⁷ Such periods of transition allow organised criminal groups to exploit weaknesses, especially relating to border controls, and establish their dominance by means of corrupting weak public officials and utilising existing criminal elements, like street gangs.²⁷¹⁸

The most prominent example of the manifestation of this phenomenon is the conviction of then-SAPS National Commissioner and president of INTERPOL, Jackie Selebi, of corruption involving known members of organised crime.²⁷¹⁹ The problematic nature of such high level corruption is evidenced by the adoption of the UN *Convention against Corruption*, which expresses concern regarding the links between corruption and other forms of crime, particularly organised crime and economic crime.²⁷²⁰ Hence, the view is taken that corruption has grown into a transnational phenomenon which requires international cooperation to eradicate the problem parallel with the global efforts at combating organised crime. The convention takes a strong stance against all form of corruption, calling on governments to create offences related to such activities, which include the creation of extraterritorial offences relating to foreign public officials.²⁷²¹

As stated above, the USA's own efforts at combating organised crime significantly influenced the international understanding of organised crime, especially in the wording adopted in both the Vienna and Palermo Conventions. Because of this and the significant influence which America's own organised crime laws had on the wording of South Africa's legislative efforts, the fourth secondary objective of this study was stated

²⁷¹⁷ See para 3.4.

²⁷¹⁸ See para 3.4.

²⁷¹⁹ See para 3.4.

²⁷²⁰ See paras 3.2.3, 3.3.2.3.3 and 3.3.3.

²⁷²¹ See para 3.3.3.

as determining the contributions of America's *RICO Act* to the current South African position.

7.1.4 *The influence of the RICO Act*

The *RICO Act* was established in 1970 when the predominant view, largely influenced by the work of criminologist, Donald Cressey,²⁷²² was that organised crime comprised a highly structured and bureaucratic criminal group, named the Mafia.²⁷²³ What concerned the US Congress most at the time was the threat which organised crime posed to legitimate business and the possibility of it corrupting a vast array of professions.²⁷²⁴ The *RICO Act* would therefore target organised crime in America by the strengthening of legal tools available in the evidence-gathering process; establishing new penal provisions; instituting enhanced sanctions; and providing new remedies to deal with the unlawful activities of those engaged in organised crime.²⁷²⁵ The *RICO Act* was however drafted broadly so that it could be applied wider than the combating of organised crime only. This led to a phenomenon where the *RICO Act* became a tool which is utilised for other purposes than originally intended, namely the combating of organised crime, with many scholars criticising the manner in which it is being applied to everyday business transactions, especially as far as the civil claims provisions are concerned, whereby treble damages and attorney's fees may be claimed in a civil suit brought under the *RICO Act*.²⁷²⁶ Critics therefore bemoan the fact that very few actual organised crime prosecutions occur under the *RICO Act* – as was initially intended by the US Congress.

The racketeering provisions of South Africa's *POCA* are based squarely on the *RICO Act* racketeering offences, meaning the South African courts are

²⁷²² See para 2.4.1.

²⁷²³ See para 4.2.

²⁷²⁴ See para 4.2.

²⁷²⁵ See para 4.2.

²⁷²⁶ See para 4.2.

able to turn to the three decades' longer history of American court decisions when dealing with the *POCA* racketeering offences.²⁷²⁷ Fundamentally, the common elements of the racketeering offences namely an accused (referred to as a defendant in America), an enterprise and a pattern of racketeering activity are the same in both the *RICO Act* and the *POCA*.²⁷²⁸

The accused person is separate from the enterprise and is prosecuted for his or her involvement in the affairs of the enterprise, which is defined broadly.²⁷²⁹ Basically what is required is a grouping of people who are unified with a shared purpose. Hence, hierarchy or formal structure is not required, only a set purpose, with some form of relationship among the members and enough longevity to allow the members to pursue their purpose.²⁷³⁰ In this manner, the enterprise is established through association-in-fact, rather than through formal agreement. Thus, in time the understanding of organised crime has developed from Cressey's early model of a single, bureaucratic and very hierarchical criminal group to an enterprise-based model. Whether the accused was sufficiently involved in the enterprise, rests on the operation-or-management-test formulated by the American courts, whereby the accused must at least have been involved in the operation or management of the enterprise, yet not necessarily at upper management level.²⁷³¹ In some instances, even third parties who control an enterprise through corruption will comply with the operation and management test.²⁷³² Low-ranking employees who do not operate the enterprise under direction of upper-management will, however, not meet the test.²⁷³³

²⁷²⁷ See para 5.4.

²⁷²⁸ See para 5.5.

²⁷²⁹ See paras 4.4.1 and 4.4.2.

²⁷³⁰ See para 4.4.2.

²⁷³¹ See paras 4.2 and 4.3.3.

²⁷³² See para 4.2.

²⁷³³ See para 4.3.3.

As far as a pattern of racketeering activities is concerned, both the *RICO Act* and the *POCA* in essence define it as two acts of racketeering activity committed within ten years of each other (excluding any period of imprisonment) where at least one of the two acts occurred after the effective date of the Act.²⁷³⁴ It is not necessary to prove the involvement of the accused charged with racketeering in any of the two predicate offences.²⁷³⁵ However, because the aim is not to combat sporadic crime, the American courts formulated the continuity-plus-relationship-test to determine whether a pattern exists. In terms of this test, continuity and interrelatedness show a pattern, which will be the case where criminal acts for example have similar purposes, results, participants, victims, or *modus operandi*.²⁷³⁶

Hence, although the *RICO Act* has had a largely civil application, some of the American court decisions have proven valuable for guidance to the South African courts because of the longer history that American courts have had in grappling with the concepts. Against this backdrop, the fifth secondary objective was to analyse the existing legislative framework put in place to combat organised crime in South Africa.

7.1.5 South African legislative framework

Because the successful combating of organised crime rests on effective intelligence gathering, aptly named “intelligence-led investigations”,²⁷³⁷ one of the most telling legislative measures introduced in the new South Africa and which assists with the combating of organised crime, was the insertion of section 252A into the *CPA*, in late 1996. The provision not only regulates the use of traps and undercover operations, but also regulates the admissibility of evidence so obtained.²⁷³⁸ This also gave statutory

²⁷³⁴ See paras 4.4.2 and 5.4.2.

²⁷³⁵ See para 4.4.2.

²⁷³⁶ See para 4.4.2.

²⁷³⁷ See para 6.3.2.1.

²⁷³⁸ See para 5.3.

recognition to a multi-disciplinary approach to the investigation of crime, as provision is made for the DPP to give prior approval for the use of traps and undercover operations. The use of traps and undercover operations has been subjected to a great deal of criticism,²⁷³⁹ but the usefulness of these techniques in the gathering of intelligence cannot be overstated.²⁷⁴⁰ Add to that the use of accomplice evidence, through the indemnity offered in terms of section 204 of the *CPA*,²⁷⁴¹ as well as plea bargaining under section 105A of the *CPA* and law enforcement has been provided with effective tools to disrupt organised criminal groups. Also, the protections of informers through so-called “informer privilege”, whereby informers may not be compelled to testify,²⁷⁴² allows members of the community to assist the police with combating crime without fear of retribution.²⁷⁴³

In the late 1990s, South Africa also adopted the *POCA*, which is specifically aimed at combating organised crime and, as mentioned, is based largely on the *RICO Act* as far as the racketeering offences are concerned.²⁷⁴⁴ Conversely, the asset forfeiture provisions are similar to those found in the UK.²⁷⁴⁵ The racketeering offences created by the *POCA*, as well as related definitions of enterprise and pattern of racketeering found in the Act, survived constitutional challenge and cleared the way for South African courts to continue to turn to the American courts for guidance on interpreting the Act.²⁷⁴⁶ The *POCA* also provides for modern techniques in combating organised crime, through disrupting the financial gains of the phenomenon through its money laundering offences and asset forfeiture provisions.²⁷⁴⁷ To further these modern crime combating techniques, namely anti-money laundering and

²⁷³⁹ See para 5.3.2.1.

²⁷⁴⁰ See para 5.3.2.2.

²⁷⁴¹ See paras 5.3.3 and 5.3.3.1.

²⁷⁴² See para 5.3.1.

²⁷⁴³ See para 5.3.1.

²⁷⁴⁴ See para 5.4.

²⁷⁴⁵ See para 5.4.

²⁷⁴⁶ See para 5.4.2.

²⁷⁴⁷ See paras 5.4.3 and 5.4.4.

asset forfeiture provisions, the *FICA* was enacted in 2001 to put measures in place for the gathering of financial intelligence by the FIC,²⁷⁴⁸ which it does through entities that are susceptible for abuse for money laundering purposes, with the banking industry being but one example.²⁷⁴⁹

Other pieces of legislation which assist in the combating of organised crime are the following:

- (i) the *PRECCA*, which combats corruption as required by the UN conventions,²⁷⁵⁰ and is helpful due to the close link between organised crime and corruption;
- (ii) the *RICA*, which regulates the interception and monitoring of communications, especially because surveillance is vital to intelligence and/or evidence gathering in the efforts to combat organised crime, and remains contentious due to the possibility of obtaining confidential information through illicit surveillance;²⁷⁵¹
- (iii) the *Trafficking in Persons Act*, which was not only enacted to give effect to South Africa's international obligations to prevent and combat human trafficking in terms of the Palermo Convention, but was also put in place out of concern for the role played by organised criminal groups in human trafficking and the inability of the existing laws of the time to combat the problem effectively;²⁷⁵²
- (iv) the *Drug Trafficking Act*, which was enacted to meet South Africa's obligation in terms of the Vienna Convention, but has been significantly watered down by repeals through other pieces of legislation;²⁷⁵³ and
- (v) the *Second-hand Goods Act*, which aims to disrupt the fencing of stolen items and combats the trading of stolen items by organised

²⁷⁴⁸ See para 5.5.

²⁷⁴⁹ See para 5.5.2.

²⁷⁵⁰ See para 5.6.

²⁷⁵¹ See para 5.7.

²⁷⁵² See para 5.9.1.

²⁷⁵³ See para 5.9.2.

criminal groups who specialise in these type of crime, like for instance the theft of expensive art or jewellery.²⁷⁵⁴

The above legislative framework not only brings South Africa into step with global legislative efforts to combat organised crime, but also provides law enforcement structures with the necessary tools to effectively combat organised crime in South Africa. With the recent amendments to the *FICA* brought about after much controversy caused by the *FIC Amendment Act*,²⁷⁵⁵ it is submitted that South Africa largely complies with its international legislative obligations to combat organised crime. The problem is however that having a solid legislative framework is one thing, implementing it successfully is quite another, which leads to the final secondary objective of the study, namely critically analysing the law enforcement structures put in place to combat organised crime in South Africa, whilst at the same time comparing them to their UK counterparts to determine appropriate solutions for any identified shortcomings. The UK was chosen because of several factors, including the historical ties between South Africa and the United Kingdom and the influence of English law on the development of the South African legal order, where the British trained legal practitioners and judges largely influenced South African criminal procedure and evidence, which had an effect on the South African policing structures as well. Furthermore, as mentioned, South Africa's asset forfeiture provisions are largely based on UK laws.

7.1.6 South Africa's law enforcement structures

The rationalisation of the SAPS led to the amalgamation of the former SAP of the Apartheid regime with ten other police entities, including those of the former homelands, to form the new SAPS under National Commissioner George Fivaz.²⁷⁵⁶ Once the amalgamation was completed, the main focus was transformation, which led to several restructuring

²⁷⁵⁴ See para 5.10.

²⁷⁵⁵ See para 5.5.5.

²⁷⁵⁶ See para 6.2.1.

exercises under Fivaz's successor, Jackie Selebi.²⁷⁵⁷ While the police was inward focused, organised crime flourished to such an extent that it had doubled by the late 1990s. The SAPS' approach to combating the phenomenon was through the newly-established Organised Crime Unit (OCU), which was formed by collapsing the former specialist units, namely the Vehicle Theft Unit, Stock Theft Unit, Transito Theft Unit, Diamond and Gold Unit and Endangered Species Protection Unit into one entity during one of Selebi's restructuring exercises.²⁷⁵⁸

The OCU operated by registering projects, which were funded by the SAPS Secret Fund, and focused on very specific criminal operations.²⁷⁵⁹ This approach, however, remained fragmented, because the investigators continued to focus on what they knew; which was the niche area of the specialist units from whence they had come.²⁷⁶⁰ The result was that by the end of the 1990s it was clear that the existing law enforcement structures were ineffective in combating organised crime and there was general consensus that a new independent entity was needed to meet the challenges posed by organised criminal groups.²⁷⁶¹

The Scorpions unit was established for this purpose, with its explicit mandate being to combat organised crime.²⁷⁶² Instead of being established as an independent entity, the Scorpions was housed under the prosecuting authority with the NDPP as its ultimate head, which was a novel approach for a law enforcement structure.²⁷⁶³ It was, however, given the same powers as what the SAPS have under the CPA. The Scorpions used a multi-disciplinary approach – known as the *Troika*-principle – as the methodology for its prosecutor-led investigations.²⁷⁶⁴ Almost from the

²⁷⁵⁷ See para 6.2.2.

²⁷⁵⁸ See para 6.2.2.

²⁷⁵⁹ See para 6.2.3.

²⁷⁶⁰ See para 6.2.2.

²⁷⁶¹ See para 6.2.3.

²⁷⁶² See para 6.2.4.2.

²⁷⁶³ See para 6.2.4.

²⁷⁶⁴ See para 6.2.4.1.

start the Scorpions were criticized for cherry-picking its cases, with many believing that the Scorpions should never have been housed within the NPA, while frowning upon the intimate involvement of prosecutors in the investigation-phase of its cases.²⁷⁶⁵ The concern was that such involvement could detract from a prosecutor's duty to remain impartial, as well as his or her constitutional duty to act without fear, favour or prejudice.²⁷⁶⁶

One of the first matters to be investigated by the Scorpions was the controversial Arms Deal scandal. The Arms Deal involved large-scale government corruption, which it is submitted did not fall within the intended scope for which the Scorpions were established, namely combating organised criminal groups. The Arms Deal investigation also led to the Scorpions' swift demise, which many allege was due to its investigation into the involvement of then deputy president, Jacob Zuma, in the Arms Deal. The first attack on the Scorpions was an investigation by the Hefer Commission into allegations that the NDPP, Bulelani Ngcuka, under whose authority the Scorpions fell, was a former apartheid spy. The commission found no grounds to support the allegations and cleared the NDPP. Justice Hefer did, however, express concern when then deputy president, Jacob Zuma, indicated that he would ignore any subpoena to testify.²⁷⁶⁷ The next challenge came in the form of the Khampepe Commission, which was launched to inquire whether it was correct for the Scorpions to be housed within the NPA and although the Khampepe Commission concluded that the Scorpions should ultimately continue to exist under the umbrella of the NPA, the ANC at its national conference in December 2007 resolved to dissolve the Scorpions.²⁷⁶⁸ The result was the closure of the Scorpions in January 2009 and the establishment of the

²⁷⁶⁵ See para 6.2.4.3.

²⁷⁶⁶ See para 6.2.4.1.

²⁷⁶⁷ See para 6.2.4.1.

²⁷⁶⁸ See para 6.2.4.3.

DPCI, nicknamed the Hawks, in June 2009 within the SAPS.²⁷⁶⁹ The mandate of the Hawks is to *inter alia* combat organised crime in South Africa. From the outset the Hawks faced several challenges in the law courts, which were launched at the lack of independence of its structure.²⁷⁷⁰ These challenges culminated in the Constitutional Court deleting several sections of the establishing legislation to leave the head of the Hawks firmly in control of its operations, clear of undue political influence.²⁷⁷¹ It is however clear from the analyses in this study that these attempts at isolating the Hawks from political interference have been largely unsuccessful.²⁷⁷² Not only the Hawks, but several of the law enforcement structures tasked with the combating of organised crime, have been subjected to weak leadership either due to allegations of political interference or corruption.

7.1.6.1 Lack of good leadership

Probably the most concerning manifestation of the breakdown in leadership over the law enforcement structures was the conviction of National Commissioner and president of INTERPOL, Jackie Selebi, on corruption charges which also involved known members of organised crime. After Selebi, there has been a string of National Commissioners who have all left under controversial circumstances, the latest being Khomotso Phahlane, whose lavish lifestyle allegedly financed through corruption is still under investigation by IPID,²⁷⁷³ a constitutionally mandated entity tasked with investigating complaints of misconduct and criminal conduct against police members.²⁷⁷⁴

It is not only at National Commissioner level that the police has suffered a breakdown in leadership, as other high-ranking officials have also treated

²⁷⁶⁹ See para 6.2.4.3.

²⁷⁷⁰ See paras 6.3.3.1, 6.3.1.2 and 6.3.1.3.

²⁷⁷¹ See para 6.3.1.3.

²⁷⁷² See para 6.3.1.3.

²⁷⁷³ See para 6.3.3.

²⁷⁷⁴ See para 6.3.5.

the police as a vehicle of domination by the state rather than a law enforcement agency.²⁷⁷⁵ At the Hawks, the High Court in *Sibiya v Minister of Police* 2015 JDR 0398 (GP) held that the Minister of Police acted unlawfully and irrationally when he appointed Berning Ntlemeza²⁷⁷⁶ as head of the Hawks because Ntlemeze had previously been found to be lacking in character and unfit for public office.²⁷⁷⁷ Equally, the High Court in *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SACR 111 (GNP) held that the acting police commissioner at the time, Nhlanhla Mkhwanazi, who was instructed to withdraw disciplinary charges against the head of the SAPS Crime Intelligence Division, Richard Mdluli, by “authorities ‘beyond him’”, acted unconstitutionally when he complied with these instructions and withdrew the charges.²⁷⁷⁸

Similarly the prosecuting service has not escaped leadership woes, suffering a lot of controversy in a string of leadership changes, with many being reluctant to prosecute high-profile cases.²⁷⁷⁹ The latest of these is the current pressure on NDPP, Shaun Abrahams, in making a decision to prosecute the South African President on corruption charges.²⁷⁸⁰ This comes in the wake of public criticism of the manner in which Abraham handled the trumped-up charges against, amongst others, the former minister of finance, Pravin Gordhan.²⁷⁸¹ Some scholars have therefore called for better accountability of the NPA, because while the police and intelligence structures have some form of external accountability structures, no such mechanism exists for the NPA²⁷⁸² and, given the abovementioned close links between organised crime and corruption, where corrupt officials allow members of organised criminal groups to

²⁷⁷⁵ See para 6.3.2.4.

²⁷⁷⁶ See para 6.3.1.3.

²⁷⁷⁷ See para 6.3.1.3.

²⁷⁷⁸ See para 6.3.2.4.

²⁷⁷⁹ See para 6.4.3.

²⁷⁸⁰ See para 6.4.3.

²⁷⁸¹ See para 6.4.3.

²⁷⁸² See para 6.4.1.

escape prosecution, accountability of the law enforcement structures is of paramount importance.

History, however, reveals that the review function of the courts remains the most effective accountability measure over the NPA.²⁷⁸³ The drawbacks are unfortunately many, as such litigation is not only expensive, but the courts can also only review conduct by the NPA on a case by case basis, which is time consuming and *ex post facto*, meaning the damage may already have been done.²⁷⁸⁴ Hence, the cumbersome history of the NPA has placed it in a position where it needs to restore public confidence in its ability to uphold the rule of law, rather than undermine it.²⁷⁸⁵ The leadership woes suffered by the law enforcement structures tasked with the combating of organised crime, has also led to a lack of directions and cohesion among them.

7.1.6.2 Lack of co-ordination

The combating of organised crime requires a concerted and coordinated approach, with the various law enforcement structures forming a united front against the phenomenon. This is evidenced by the efforts of INTERPOL to co-ordinate transnational strategies at fighting organised crime. Hence, INTERPOL establishes National Central Bureaus (NCBs) within the borders of member states to serve as links between the police forces of the various member states.²⁷⁸⁶ In this manner the NCB for South Africa is located in Pretoria and assists the SAPS with the prevention, combating and investigation of global crime. The lack of cohesion in South Africa is revealed in the weak crime statistics on organised crime issued by the SAPS, as well as the disparities in approaches to combating of organised crime revealed in a comparative analysis of the respective

²⁷⁸³ See para 6.4.2.

²⁷⁸⁴ See para 6.4.2.2.

²⁷⁸⁵ See para 6.4.3.

²⁷⁸⁶ See para 6.3.4.

statistics of the SAPS and NPA.²⁷⁸⁷ Hence, any joint initiative between the SAPS and NPA to combat organised crime should be anchored on a uniform definition of organised crime as well as focusing on the identified organised crime activities in which the various organised criminal groups operate. This will lead to effective intelligence gathering, allowing for effective data base population and targeted organised crime threat analyses and strategies.²⁷⁸⁸

Furthermore, combating organised crime in South Africa should include effective anti-money laundering (AML) and asset forfeiture strategies to disrupt organised criminal groups from either enjoying the spoils of their criminal activities or the investment of profits in further organised criminal activities.²⁷⁸⁹ The FIC and AFU play vital roles in this regard,²⁷⁹⁰ but forensic accountancy, which remains a very expensive bought-in service in South Africa, has a much larger role to play in combating organised crime in South Africa than it currently does.²⁷⁹¹ This is because forensic accountants use their expertise to conduct financial crime investigations within the parameters of the law of evidence and present their findings in a court of law.²⁷⁹² Addressing these shortcomings in the strategies to combat organised crime in South Africa, could be accelerated by investigating the UK approach because of the reasons previously mentioned.

7.1.6.3 Lessons from the UK

The development of the UK strategies culminated in the establishment of the NCA in 2013, with a Director-General as its head, reporting directly to the Home Secretary.²⁷⁹³ The NCA has two functions, namely crime

²⁷⁸⁷ See para 6.3.3.

²⁷⁸⁸ See para 6.3.3.

²⁷⁸⁹ See para 6.5.

²⁷⁹⁰ See paras 6.5.1 and 6.5.2.

²⁷⁹¹ See para 6.5.3.

²⁷⁹² See para 6.5.3.

²⁷⁹³ See para 6.3.6.

reduction and criminal intelligence. The crime reduction function requires the NCA to ensure that efficient and effective activities to combat organised crime and serious crime are carried out, whether by itself or other law enforcement agencies or persons. The criminal intelligence function of the NCA involves the gathering, storing, processing, analysing, and disseminating of information that is relevant to amongst others the combating of organised crime as well as the confiscation of the proceeds of crime.²⁷⁹⁴

The core of the NCA is its intelligence hub, where it collates intelligence and disseminates it to the Regional Organised Crime Units (ROCs), which work closely with the NCA to combat organised crime in the UK. Furthermore the NCA also focuses on the confiscation of the proceeds of crime,²⁷⁹⁵ which is incentivised by awarding a certain percentage of assets forfeited to the relevant law enforcement agency involved.²⁷⁹⁶ The NCA may make recruit forensic accountants as “NCA Specials”²⁷⁹⁷ to investigate criminal finances and may call on specialist prosecutors for assistance where technical legal questions arise.²⁷⁹⁸

In the UK, the *Proceeds of Crime Act*, 2002, has been used successfully to dismantle organised criminal groups through asset forfeiture and money-laundering offences.²⁷⁹⁹ This is because the UK realised that having forensic accountants involved in cases from the outset allows them to act as expert witnesses in court where complex financial transactions are presented in such a manner that they are understandable, thus assisting in the combating of organised crime in the UK by focusing on the criminal finances of organised crime.²⁸⁰⁰

²⁷⁹⁴ See para 6.3.6.

²⁷⁹⁵ See para 6.3.6.

²⁷⁹⁶ See para 6.5.2.

²⁷⁹⁷ See para 6.5.3.

²⁷⁹⁸ See para 6.3.6.

²⁷⁹⁹ See para 6.5.3.

²⁸⁰⁰ See para 6.5.3.

7.2 Conclusion

The overall question remains: To what extent do South Africa's laws and law enforcement systems meet the international standards for combating organised crime? The study reveals that, while good strides were made shortly after the new democratic South Africa entered the global arena, these initial gains have over time fallen by the wayside. Each attempt at establishing a "new" entity to effectively combat organised crime in South Africa, has fundamentally failed. The result has been a lack of coordination in strategies, mostly because of a lack of strong leadership and abuse of the law enforcement structures. Ultimately, South Africa sits with the reverse situation where civil society is policing the law enforcement structures through the law courts, while the law enforcement structures have become vehicles of domination by those in power. The answer is therefore, having created a solid legislative framework to combat organised crime due to its international responsibilities, South Africa has unfortunately failed in creating suitable law enforcement structures to enforce those laws.

7.3 Recommendations

Finally, the following recommendations serve to strengthen the combating of organised crime in South Africa:

The fragmented approach and lack of direction in developing strategies to combat the phenomenon need to be addressed urgently. In order to achieve this, it is submitted that South Africa does not need another "new" investigative entity. What South Africa needs is an agency to coordinate efforts and ensure a targeted approach to the combating of organised crime, similar in operation to the UK's NCA.²⁸⁰¹ Fundamentally, a uniform definition of the concept should be used by all involved, which would

²⁸⁰¹ See para 6.3.6.

facilitate a targeted approach²⁸⁰². It is therefore submitted that the international definition of the Palermo Convention be applied.²⁸⁰³ Furthermore, a multi-disciplinary approach remains vital and it is submitted, should comprise the following:

7.3.1 *Intelligence function*

The lack of intelligence-led investigations has hounded South Africa since the Grim Reaper Conference.²⁸⁰⁴ It is therefore submitted that the barely functional SAPS Crime Intelligence Division be dissolved in favour of the agency becoming solely responsible for gathering *criminal* intelligence.²⁸⁰⁵ Such an agency must therefore be focused on intelligence gathering through surveillance, properly trained undercover agents, as well as through informers, who are protected by informer-privilege.²⁸⁰⁶ Such operations will allow the population of an organised crime data base, whereby individual profiles of members of organised criminal groups, as well as interconnectedness of the various organised criminal groups and their members, can be captured and analysed by agents.²⁸⁰⁷ Accountability vests in the Inspector-General of Intelligence, whose legislative duties include responsibility for intelligence oversight, ensuring compliance with the *Constitution* and other pieces of legislation, as well as receiving complaints of misconduct.²⁸⁰⁸ Such agents will also operate under the auspices of Nicoc, as required by existing legislation, where Nicoc remains responsible to co-ordinate intelligence among the various intelligence gathering entities.²⁸⁰⁹ In this manner, the unconstitutional intelligence gathering of the former Scorpions is avoided.²⁸¹⁰ Furthermore, close collaboration with the FIC will allow financial intelligence gained

²⁸⁰² See para 6.3.3.

²⁸⁰³ See para 2.8.

²⁸⁰⁴ See para 6.3.2.1.

²⁸⁰⁵ See para 6.3.2.4.

²⁸⁰⁶ See para 6.3.2.4.

²⁸⁰⁷ See para 6.3.6.

²⁸⁰⁸ See paras 6.3.2.2, 6.3.2.3 and 6.4.2.1.

²⁸⁰⁹ See para 6.3.2.3.

²⁸¹⁰ See para 6.2.4.3.

through the *FICA* to better target organised criminal groups by means of forensic investigations.²⁸¹¹

7.3.2 *Investigative function*

The intelligence can then be disseminated for investigation by the SAPS Hawks,²⁸¹² whose members work closely with the agency as in the case of the UK's NCA and ROCU's.²⁸¹³ Such investigations are aimed at gathering evidence on the racketeering and money laundering offences of the *POCA*, as influenced by the American *RICO Act*.²⁸¹⁴ As the Hawks resort under the SAPS, no legislative measures to grant investigative powers are necessary. Accountability for the investigators hence rests in the Head of the Hawks, where the Constitutional Courts deletion of unconstitutional passages in the establishing legislation has isolated to Hawks from political interference.²⁸¹⁵ IPID also remains responsible for receiving and investigating complaints against members of the Hawks.²⁸¹⁶

7.3.3 *Prosecutorial function*

Specialist prosecutors should be made available by the NPA to assist with legal technicalities and to work closely with the agency on the relevant cases,²⁸¹⁷ especially because the legislative measures allowing the use of surveillance, traps, participant evidence through indemnity, as well as plea bargaining are valuable tools in the dismantling of organised criminal groups. Prosecutors remain accountable to the NDPP, where ultimate accountability for prosecutorial decisions lies with the review functions of the court.²⁸¹⁸ It is, however, submitted that a better practice would be for

²⁸¹¹ See para 6.5.1.

²⁸¹² See para 6.3.1.

²⁸¹³ See para 6.3.6.

²⁸¹⁴ See para 5.4.

²⁸¹⁵ See para 6.3.1.3.

²⁸¹⁶ See para 6.3.5.

²⁸¹⁷ See para 6.4.2.

²⁸¹⁸ See para 6.4.2.

the Asset Forfeiture Unit should merge with the agency,²⁸¹⁹ thus no longer falling under the control of the NPA, in order to allow effective confiscation of the proceeds of crime under the *POCA* through forensic investigations, which also ties in with the next recommendation.²⁸²⁰

7.3.4 *Forensic accountancy function*

It is recommended that an in-house forensic accountancy function should be assimilated into the approach, thereby targeting criminal finance through the money-laundering provisions of the *POCA*, as successfully applied in the UK.²⁸²¹ The requirement for such appointments should be that the forensic accountants are registered with the ICFP, thus ensuring that such accountants operate within the regulatory framework and code of conduct of the ICFP.²⁸²² Hence, accountability for the work of forensic accountants rests with the ICFP, where complaints regarding unethical conduct are received and investigated.²⁸²³

7.3.5 *Establishment*

It is recommended that the abovementioned agency be a creature of statute, with its own head. Since it will form part of the Executive, the head of the agency should report to Parliament to ensure optimum accountability. Also, because the members of the different functions as set out above are held accountable by different entities, political interference in the functioning of the agency is made more difficult. As in the case of the UK *Crime and Courts Act*, 2013, which established the UK's NCA, the Act establishing the South African agency should as a minimum provide for the functions and methodology of the agency.²⁸²⁴ Also, in order to avoid

²⁸¹⁹ See para 6.4.2.

²⁸²⁰ See para 6.5.2.

²⁸²¹ See para 6.5.3.

²⁸²² See para 6.5.3.

²⁸²³ See para 6.5.3.

²⁸²⁴ See para 6.3.6.

the issues experienced regarding the mandate of the Scorpions,²⁸²⁵ the Act should provide for the establishment of strategic priorities and operations of the agency. Most importantly, because of the lessons learned from the turf wars between the SAPS and the former Scorpions,²⁸²⁶ as well as the concern expressed by the Supreme Court of Appeals regarding the law enforcement structures spying on one another,²⁸²⁷ the legislation must, as in the case of the UK legislation, regulate the relationships between the agency and other law enforcement structures.²⁸²⁸ With such a coordinated, multi-disciplinary approach in mind, it is hoped that this study will make a valuable contribution to the combating of organised crime in South Africa.

²⁸²⁵ See para 6.2.4.2.

²⁸²⁶ See para 6.2.4.3.

²⁸²⁷ See para 6.3.2.1.

²⁸²⁸ See para 6.3.6.

BIBLIOGRAPHY

LITERATURE

A

Abadinsky *Organised Crime*

Abadinsky H *Organised Crime* 9th ed (Wadsworth Belmont 2010)

Albanese *Organised Crime*

Albanese JS *Organised Crime: From the Mob to Transnational Organised Crime* (Routledge Oxford and New York 2015)

Albanese "Models of organised crime"

Albanese JS "Models of organised crime" in Kelly RJ, Chin K, and Schatzberg R (eds) *Handbook of Organised Crime in the United States* (Greenwood Press Westport 1994)

Albanese *JCCJ*

Albanese JS "Risk assessment in organised crime: Developing a market and product-based models to determine threat levels" 2008 *Journal of Contemporary Criminal Justice* 263-273

Albanese *JCCJ2*

Albanese JS "The causes of organised crime" 2000 *Journal of Contemporary Criminal Justice* 409-423

Albini *The American Mafia*

Albini JL *The American Mafia: Genesis of a Legend* (Appleton-Century-Crofts New York 1971)

Atkinson *JCLC*

Atkinson J "Criminal Law 'Racketeer Influenced and Corrupt Organisations,' 18 U.S.C. §§ 1961-68: Broadest of the federal criminal statutes" 1978 *The Journal of Criminal Law & Justice* 1-18

B

Basson *Selebi's Fall*

Basson A *Finish & Klaar: Selebi's Fall from Interpol to the Underworld* (Tafelberg Cape Town 2010)

Baumgartel *JCLC*

Baumgartel S "The crime of associating with criminals? An argument for extending the *Reves* 'operation or management' test to RICO conspiracy" 2006 *Journal of Criminal Law & Criminology* 1-48

Bennun *SACJ*

Bennun ME "Negotiated pleas: Policy and purpose" 2007 *SACJ* 17-45

Bequai *Organised Crime*

Bequai A *Organised Crime: The Fifth Estate* (Lexington Books Lexington 1979)

Berning and Montesh *SACQ*

Berning J and Montesh M "Countering corruption in South Africa: The rise and fall of the Scorpions and Hawks" 2012 *SA Crime Quarterly* 3-10

Bewley-Taylor *IJDP*

Bewley-Taylor DR "Challenging the UN drug control conventions: problems and possibilities" 2003 *International Journal of Drug Policy* 171-179

Blakey *RICO*

Blakey GR "RICO: The federal experience (criminal and civil) and an analysis of attacks against the statute" in Kelly RJ, Chin K, and Schatzberg R (eds) *Handbook of Organised Crime in the United States* (Greenwood Press Westport 1994)

Blakey and Gerardi *Notre Dame*

Blakey GR and Gerardi M "Eliminating overlap, or creating a gap? Judicial Interpretation of the Private Securities Litigation Reform Act of 1995 and RICO" 2014 *Notre Dame Journal of Law Ethics and Public Policy* 435-480

Block and Chambliss *Organising Crime*

Block AA and Chambliss WJ *Organising Crime* (Elsevier New York 1981)

Boister *SACJ*

Boister N "Transnational penal norm transfer: The transfer of civil forfeiture from the United States to South Africa as a case in point" 2003 *SACJ* 271-294

Botha *Statutory Interpretation*

Botha C *Statutory Interpretation: An Introduction for Students* 3rd ed (Juta Cape Town 1998)

Bourgeois *et al ACLR*

Bourgeois RL Jr., Hennessey SP, Moore J and Tschupp ME
“Racketeer Influenced and Corrupt Organisations” 2001 *American Criminal Law Review* 1211-1275

Brody and Kiehl *JFC*

Brody RG and Kiehl KA “From white-collar crime to red-collar crime”
2010 *Journal of Financial Crime* 351-364

Bronstein *SALJ*

Bronstein V “Unconstitutionally obtained evidence – a study of entrapment” 1997 *South African Law Journal* 108-133

Burchell *Principles of Criminal Law*

Burchell J *Principles of Criminal Law* 4th ed (Juta Cape Town 2013)

Burger *ISS*

Burger J “No-man’s-land: The uncertain existence of SAPS specialised investigative units” 2015 *ISS* 1-23

C

Cassim *et al Contemporary Company Law*

Cassim FHI, Cassim MF, Cassim R *et al Contemporary Company Law* (Juta Cape Town 2011)

Cihlar *JMLC*

Cihlar FP “The financial institution as a racketeering enterprise: RICO and beyond” 2010 *Journal of Money Laundering Control* 125-131

Cilliers *et al Entrepreneurial Law*

Cilliers HS *et al. Entrepreneurial Law* 2nd ed (Butterworths Durban 2000)

Clark WLR

Clark RS "The United Nations Convention Against Transnational Organised Crime" 2004 *Wayne Law Review* 161-184

Coppola and DeMarco *New England*

Coppola L and DeMarco N "Civil RICO: How ambiguity allowed the Racketeer Influenced and Corrupt Organisations Act to expand beyond its intended purpose" 2012 *New England Journal on Criminal & Civil Confinement* 241-255

Cowling SACJ

Cowling M "Fighting organised crime: comment on the Prevention of Organised Crime Bill 1998" 1998 *South African Journal of Criminal Justice* 350-374

Crawford-Browne ROAPE

Crawford-Browne T "The arms deal scandal" 2004 *Review of African Political Economy* 329-342

Cressey *Theft of the Nation*

Cressey D *Theft of the Nation: The Structure and Operations of Organised Crime in America* (Harper & Row New York 1969)

D

David A/C

David F "Organised crime and trafficking of persons" 2012 *Australian Institute of Criminology* 1-12

De Koker *South African Money Laundering*

De Koker L *South African Money Laundering and Terror Financing Law* (LexisNexis Durban 2008)

De Villiers *De Jure*

De Villiers W "Plea and sentence agreements in terms of section 105A of the Criminal Procedure Act: A step forward?" 2004 *De Jure* 244-255

Doig and Levi *PMM*

Doig A and Levi M "A case of arrested development? Delivering the UK National Fraud Strategy within competing policing priorities" 2013 *Public Money & Management* 145-152

Dugard *International Law*

Dugard J *International Law: A South African Perspective* 2nd ed (Juta Cape Town 2000)

E

Egmont Group *Egmont Cases*

Egmont Group *Egmont Cases: Financial Analysis Cases 2011 – 2013* (Egmont Secretariat Ontario 2014)

Enck *SJILC*

Enck JL "The United Nations Convention against Transnational Organised Crime: is it all it's cracked up to be? Problems posed by the Russian Mafia in the trafficking of humans" 2003 *Syracuse Journal of International Law and Commerce* 369-394

F

Fazey *IJDP*

Fazey SCJ "The Commission on Narcotic Drugs and the United Nations International Drug Programme: politics, policies and prospect for change" 2003 *International Journal of Drug Policy* 155-169

Fazey *JDI*

Fazey SCJ "International policy in illicit drug trafficking: the formal and informal mechanisms" 2007 *Journal of Drug Issues* 755-780

Fick and Snyman-Van Deventer *Tydskrif vir Regswetenskap*

Fick C vdM and Snyman-Van Deventer E "Inkwisatoriese en akkusatoriese elemente in die Amerikaanse pleitonderhandelingsproses: rigtingwyser en waarskuwingstekens" 2002 *Tydskrif vir Regswetenskap* 101-113

Finckenauer *Trends in Organised Crime*

Finckenauer JO "Problems of definition: what is organised crime?" 2005 *Trends in Organised Crime* 63-83

Fitzpatrick *JFC*

Fitzpatrick D "Advising the Serious Organised Crime Agency: The role of the specialist prosecutors" 2005 *Journal of Financial Crime* 251-263

Flynn *The Use of Informers*

Flynn HF *The Use of Informers during Precious Metals Undercover Operations* (MTech-dissertation UNISA 2009)

G

Galleotti *Global Crime*

Galleotti M "The Russian "Mafiya": Consolidation and globalisation"
2004 *Global Crime* 54-69

Garcia *Making Jack Falcone*

Garcia J *Making Jack Falcone: An Undercover Agent Takes Down a Mafia Family* (Pocket Books London 2008)

Gardiner and Lansdown *South African Criminal Law and Procedure*

Gardiner CWH, Hoal WG and Lansdown AV *South African Criminal Law and Procedure Vol I: General Principles and Procedure* 6th ed (Juta Cape Town 1957)

Gastrow *ISSa*

Gastrow P "Penetrating state and business: organised crime in Southern Africa, volume 1" 2003 *Institute for Security Studies Monographs Issue 86*

Gastrow *ISSb*

Gastrow P "Penetrating state and business: organised crime in Southern Africa, volume 2" 2003 *Institute for Security Studies Monographs Issue 89*

Geldenhuys *Servamus*

Geldenhuys K "Is South Africa a paradise for organised crime groups?" 2016 *Servamus Volume 109, Issue 4* 10-13

Gilligan *JFC*

Gilligan GP "Business, risk and organised crime" 2007 *Journal of Financial Crime* 101-112

Glenny *McMafia*

Glenny M *McMafia: Seriously Organised Crime* (Vintage Books London 2009)

Goga SACQ

Goga K "Taking stock of the last 20 years: Responses to organised crime in a democratic South Africa" 2014 *SA Crime Quarterly* 63-73

Gottschalk *Criminal Entrepreneurship*

Gottschalk P *Criminal Entrepreneurship* (Nova New York 2008)

Gurulé J *FILJ*

Gurulé J "The 1988 U.N. Convention against Illicit Traffic in Narcotics and Psychotropic Substances – A ten year perspective: Is international cooperation merely illusionary?" 1998 *Fordham International Law Journal* 74-121

Guymon *BJIL*

Guymon CD "International legal mechanisms for combating transnational organised crime: The need for a multilateral convention" 2000 *Berkley Journal of International Law* 53-101

H

Haefele *Acta Criminologica*

Haefele B "Drug trafficking in South Africa: Does the state have the capacity to counter this security threat?" 2000 *Acta Criminologica* 105-115

Hagan *CJR*

Hagan FE "The organised crime continuum: A further specification of a new conceptual model" 1983 *Criminal Justice Review* 52-56

Harfield "The criminal not the crime"

Harfield C "The Criminal not the crime: Practitioner discourse and the policing of organised crime in England and Wales" in Allum F *et al* (eds) *Defining and Defying Organised Crime: Discourse, Perceptions and Reality* (Routledge London 2010) 29-42

HLRA *HLR*

Harvard Law Review Association (HLRA) "Recent Case: Racketeer Influenced and Corrupt Organisations Act (RICO) – Scope of liability after *Revens v Ernst & Young* – Second Circuit holds liable only those who operate or manage the enterprise; First Circuit extend liability to all in chain of command – *United States v Viola*, 35 F.3d 37 (2d Cir. 1994); *United States v Oreto*, 37 F.3d 739 (1st Cir. 1994)" 1995 *Harvard Law Review* 1405-1410

Hemraj *JFC*

Hemraj MB "The liability of accountants and auditors under the Federal Securities Acts and the Racketeer Influenced and Corrupt Organisations Act in the USA" 2002 *Journal of Financial Crime* 159-165

Henning *JFC*

Henning J "Perspectives on financial crimes in Roman-Dutch law: Bribery, fraud and the general crime of falsity (*falsiteyt*)" 2009 *Journal of Financial Crime* 295-304

Herbig and Warchol *Acta Criminologica*

Herbig FJW and Warchol G "South African conservation crime and routine activities theory: A causal nexus?" 2011 *Acta Criminologica* 1-16

Hills JMAS

Hills A "Police commissioners, presidents and the governance of security" 2007 *Journal of Modern African Studies* 403-423

Hobbs and Antonopoulos *Global Crime*

Hobbs D and Antonopoulos GA "'Endemic to the species': ordering the 'other' via organised crime" 2013 *Global Crime* 27-51

Hough and Du Plessis *Organised Crime*

Hough M and Du Plessis A *The Grim Reaper: Organised Crime in the 1990s – Implications for South and Southern Africa* (Institute for Strategic Studies University of Pretoria 1999)

Hutton ISS

Hutton L (ed) "To spy or not to spy? Intelligence and democracy in South Africa" 2009 *Institute for Security Studies Monograph* 157

I

Irish-Qhobosheane *Organised Crime*

Irish-Qhobosheane J *Gentleman or Villains, Thugs or Heroes? The Social Economy of Organised Crime in South Africa* (SAIIA Braamfontein 2007)

J

Jamieson SCT

Jamieson A "Transnational organised crime: a European perspective" 2001 *Studies in Conflict & Terrorism* 377-387

K

Kemp *et al Criminal Law*

Kemp G *et al Criminal Law in South Africa* (Oxford Southern Africa Cape Town 2012)

Kemp SACJ

Kemp G "The United Nations Convention against Transnational Organised Crime: A milestone in international criminal law" 2001 *South African Journal of Criminal Justice* 152-167

Khampepe *Final Report*

Khampepe S *Final Report of the Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations ("The DSO")* (Government of the Republic of South Africa Pretoria 2006)

Kinnes and Newham SACQ

Kinnes I and Newham G "Freeing the Hawks: Why and anti-corruption agency should not be in the SAPS" 2012 *SA Crime Quarterly* 33-39

Kruger *Hiemstra SA Strafproses*

Kruger A *Hiemstra Suid-Afrikaanse Strafproses 7^{de} uitg* (LexisNexis Durban 2010)

Kruger *Organised Crime*

Kruger A *Organised Crime and Proceeds of Crime Law in South Africa* 2nd ed (LexisNexis Durban 2013)

L

Lamprechts *De Rebus*

Lamprechts D “Again that silent trap?” 1996 *De Rebus* 761-762

Lebeya *Defining Organised Crime*

Lebeya SG *Defining Organised Crime: A Comparative Analyses*. (LLD-thesis UNISA 2012)

Leong *The Disruption of International Organised Crime*

Leong AVM. *The Disruption of International Organised Crime: An analysis of legal and non-legal strategies* (Ashgate: Hampshire 2007)

Levi *Howard Law Journal*

Levi M “Perspectives on ‘organised crime’: An overview” 1998 *The Howard Law Journal* 335-345

Lindesmith *Organised Crime*

Lindesmith AR “Organised Crime” 1941 *The Annals of the American Academy of Political and Social Science* 119-127

Lipscombe and Beard *House of Commons Library*

Lipscombe S and Beard J “Human trafficking: UK responses” 2014 *House of Commons Library*

Lloyd *SCLR*

Lloyd E "Making civil RICO 'suave': Congress must act to ensure consistent judicial interpretations of the Racketeer Influenced Corrupt Organisations Act" 2007 *Santa Clara Law Review* 123-155

Longo "Discoursing organised crime"

Longo F "Discoursing organised crime: Towards a two-level analysis" in Allum F *et al* (eds) *Defining and Defying Organised Crime: Discourse, Perceptions and Reality* (Routledge London 2010) 15-28

Louw SCJa

Louw R "Police traps" 1995 *South African Journal of Criminal Justice* 286-296

Louw SCJb

Louw R "Act 85 of 1996: legislative regulation of evidence obtained by police traps" 1997 *South African Journal of Criminal Justice* 186-194

Lynch CLR

Lynch GE "RICO: The crime of being a criminal" 1987 *Columbia Law Review* 661-764, 920-984

M

Manning *Financial Investigation*

Manning GA *Financial Investigation and Forensic Accounting* (CRC Press Boca Raton 2005)

Maltz "Defining organised crime"

Maltz MD "Defining organised crime" in Kelly RJ, Chin K and Schatzberg R (eds) *Handbook of Organised Crime in the United States* (Greenwood Press Westport 1994)

Martin *CJR*

Martin WA "Toward specifying a spectrum-based theory of enterprise" 1981 *Criminal Justice Review* 54-57

McCarrick *ACLR*

McCarrick T *et al* "Racketeer Influenced and Corrupt Organisations" 2014 *American Criminal Law Review* 1601-1659

McClea *Transnational Organised Crime*

McClea D *Transnational Organised Crime: A Commentary on the UN Convention and Its Protocols* (Oxford University Press Oxford 2007)

McCusker *CLSC*

McCusker R "Transitional organised cyber crime: distinguishing threat from reality" 2006 *Crime Law Soc Change* 257-273

McCusker "Organised cyber crime"

McCusker R "Organised cyber crime: myth or reality, malignant or benign?" in Manacorda S (ed) *Cybercriminality: Finding a Balance between Freedom and Security* (ISPAC Vienna 2011)

Mittelman and Johnston *Global Governance*

Mittelman JH and Johnston R "The globalisation of organised crime, the courtesan state, and the corruption of civil society" 1999 *Global Governance* 103-126

Moley *The Annals*

Moley R "Politics and Crime" 1926 *The Annals of the American Academy of Political and Social Science* 78-84

Morrison AIC

Morrison S "Approaching organised crime: Where are we now and where are we going?" 2002 *Australian Institute of Criminology* 1-6

Mouton *How to Succeed*

Mouton J *How to Succeed in Your Master's and Doctoral Studies: A South African Guide and Resource Book* (Juta Cape Town 2001)

Murray JMLC

Murray K "Dismantling organised crime groups through enforcement of the POCA money laundering offences" 2010 *Journal of Money Laundering Control* 7-14

O

Oomen *African Studies*

Oomen B "Vigilantism or alternative citizenship? The rise of *Mapogo a Mathamaga*" 2004 *African Studies* 153-171

Ormerod *Smith and Hogan*

Ormerod D *Smith and Hogan Criminal Law* 12th ed (Oxford University Press Oxford 2008)

P

Paoli CLSC

Paoli L "The paradoxes of organised crime" 2002 *Crime, Law and Social Change* 51-97

Phelps A *Dangerous Precedent*

Phelps K "A dangerous precedent indeed – A response to CR Snyman's note on *Mayisa*" 2008 *SALJ* 648-659

Plevin AJTA

Plevin MD "Holmes v Securities Investor Protection Corp.: The Supreme Court Restricts Civil RICO" 1992 *American Journal of Trial Advocacy* 447-476

Piegl and Newman *Glenn Agliotti*

Piegl P and Newman S *Glenn Agliotti: A Biography* (Penguin Johannesburg 2013)

Prince *Beeld*

Prince L 2017 "Nasionale Vervolgingsgesag: 'R250 m. dringend benodig'" *Beeld* 05 Oktober 2017

R

Rademeyer *Killing for Profit*

Rademeyer J *Killing for Profit* (Zebra Press Cape Town 2012)

Ram FCS

Ram C "The United Nations Convention against Transnational Organised Crime and its Protocols" 2001 *Forum on Crime and Society* 135-145

Rautenbach and Malherbe *Constitutional Law*

Rautenbach IM and Malherbe EFJ *Constitutional Law* 3rd ed
(Butterworths Durban 1999)

Reeves SACQ

Reeves C “After Glenister: The case for a new dedicated agency”
2012 *South African Crime Quarterly* 23-32

S

SAPS *Annual Plan 1996/97*

SAPS *Annual Plan 1996/97* (SAPS Strategic Management Pretoria
1996)

Sheptycki *IJSL*

Sheptycki JWE “Law enforcement, justice and democracy in the
transnational arena: Reflections on the War on Drugs” 1996
International Journal of the Sociology of Law 61-75

Schrad *The Policy Studies Journal*

Schrad ML “Constitutional blemishes: American alcohol prohibition
and repeal as policy punctuation” 2007 *The Policy Studies Journal*
437-463

Schwartz *Chambers Concise Dictionary*

Schwartz C (ed) *Chambers Concise Dictionary* (Chambers
Edinburgh 1991)

Shaw *ISS Policy Brief*

Shaw M “Leadership required: Drug trafficking and the crisis of
statehood in West-Africa” 2012 *ISS Policy Brief* 1-6

Sipo Organised Crime

Sipo D *Understanding Organised Crime and Corruption in South Africa* (Vaandel Publishers Heiderand 2009)

Slot An Evaluation of the Forensic Accountant's Role

Slot J *An Evaluation of the Forensic Accountant's Role in Criminal Law Proceedings* (MCom-dissertation NWU 2012)

Smith Crime & Delinquency

Smith DC "Paragons, pariahs, and pirates: A spectrum-based theory of enterprise" 1980 *Crime & Delinquency* 358-386

Smith The Mafia Mystique

Smith DC *The Mafia Mystique* (Basic Books New York 1975)

Smith UFLR

Smith DC "Some thighs that may be more important to understand about organised crime than Cosa Nostra" 1971 *University of Florida Law Review* 1-30

Snyman Criminal Law

Snyman CR *Criminal Law* 6th ed (LexisNexis Durban 2014)

Snyman SALJ

Snyman CR "Extending the scope of rape – A dangerous precedent" 2007 *SALJ* 677-687

Snyman SACJ

Snyman CR “Die nuwe statutêre misdaad van deelname aan ’n kriminele bende” 1999 *South African Journal of Criminal Justice* 213-222

Soudijn and Kleemans *CLSC*

Soudijn MRJ and Kleemans ER “Chinese organised crime and situational context: comparing human smuggling and synthetic drugs trafficking” 2009 *Crime, Law and Social Change* 457-474

Standing *Transnational Organised Crime*

Standing A (*rapporteur*) *Transnational Organised Crime and the Palermo Convention: A Reality Check* (International Peace Institute New York 2010)

Standing *African Security Review*

Standing A “Re-conceptualising organised crime” 2003 *African Security Review* 103-108

Stegmann *SALJ*

Stegmann MS “A point at which the law and morality may part” 1991 *South African Law Journal* 688-705

Stewart *DJILP*

Stewart DP “Internationalising the war on drugs: The UN Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances” 1989 *Denver Journal of International Law and Policy* 387-403

Symeonidou-Kastanidou *EJC*

Symeonidou-Kastanidou E "Towards a new definition of organised crime in the European Union" 2007 *European Journal of Crime* 83-103

T

Theophilopoulos SALJ

Theophilopoulos C "The parameters of witness indemnity: A review of section 204 of the Criminal Procedure Act" 2003 *South African Law Journal* 373-387

Thomas NYULR

Thomas ML "How does one operate or manage an enterprise? Insights from *Boyle v United States*" 2012 *N.Y.U. Law Review* 284-322

Thomas, Van der Merwe and Stoop *Historical Foundations*

Thomas PJ, Van der Merwe CC and Stoop BC *Historical Foundations of South African Private Law* 2nd ed (Butterworths Durban 2000)

Trabeau LLR

Trabeau DT "*H.J. Inc. v Northwestern Bell Telephone Co.*: Another contribution to RICO confusion" 1990 *Louisiana Law Review* 1219-1235

Tupman *Journal of Money Laundering Control*

Tupman WA "Ten myths about terrorist financing" 2009 *Journal of Money Laundering Control* 189-205

U

UNODC *Legislative Guides*

UNODC *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto* (United Nations New York 2004)

UNODC *West Africa*

UNODC *Transnational Organised Crime in the West African Region* (United Nations New York 2005)

UNODC *South Africa*

UNODC *Country Profile on Drugs and Crime: South Africa* (Regional Office for South Africa Pretoria 2002)

V

Van der Mescht SACJ

Van der Mescht HL "Die noodsaaklikheid vir die aanwending van die lokvinkstelsel in die ondersoek van sindikaatmisdrywe: die dilemma van die sindikaatlokvink" 1995 *South African Journal of Criminal Justice* 271-285

Van Romburgh *The Training of a Forensic Accountant*

Van Romburgh JD *The Training of a Forensic Accountant* (MCom-Mini-dissertation NWU 2008)

Van Loggerenberg and Lackay *Rogue*

Van Loggerenberg J and Lackay A *Rogue: The inside Story of SARS's Elite Crime-busting Unit* (Jonathan Ball Publishers Cape Town 2016)

Von Lampe *Forum on Crime and Society*

Von Lampe K "Not a process of enlightenment: The conceptual history of organised crime in Germany and the United States of America" 2001 *Forum on Crime and Society* 99-116

Von Lampe "The use of models"

Von Lampe K "The use of models in the study of organised crime" in Antonopoulus G *et al* (eds) *Usual and Unusual Organising Criminals in Europe and Beyond: Profitable Crimes, from Underworld to Upper World* (Maklu Apeldoorn 2011) 291-306

Von Lampe *Organised Crime*

Von Lampe K *Organised Crime: Analysing Activities, Criminal Structures, and Extra-legal Governance* (Sage California 2016)

W

Wall and Williams *Policing & Society*

Wall DS and Williams ML "Policing cybercrime: networked and social media technologies and the challenges for policing" 2013 *Policing & Society* 409-412

Warchol, Zupan and Clack *ICJR*

Warchol GL, Zupan LL and Clack W "Transnational criminality: An analysis of the illegal wildlife market in Southern Africa" 2003 *International Criminal Justice Review* 1-27

Watney *TSAR*

Watney M "Judicial scrutiny of plea and sentence agreements" 2006 *TSAR* 224-230

Williams and Godson *CLSC*

Williams P and Godson R "Anticipating organised and transnational crime" 2002 *Crime, Law and Social Change* 311-355

Woodiwiss "Transnational organised crime"

Woodiwiss M "Transnational organised crime: The global reach of an American concept" in Edwards A and Gill P (eds) *Transnational Organised Crime* (Routledge London 2003) 13-27

Z

Zang and Chin *Criminology*

Zang S and Chin K "Enter the dragon: Inside Chinese human smuggling organisations" 2002 *Criminology* 737-768

CASE LAW

South Africa

Bester v Van Niekerk 1960 2 SA 779 (A)

Bonugli v Deputy National Director of Public Prosecutions 2010 2 SACR 134 (T)

Booyesen v Acting National Director of Public Prosecutions 2014 2 SACR 556 (KZD)

Brooks v National Director of Public Prosecutions 2017 1 SACR 701 (SCA)

Democratic Alliance v Acting National Director of Public Prosecutions 2012 3 SA 486 (SCA)

Democratic Alliance v Acting National Director of Public Prosecutions 2016 2 SACR 1 (GP)

Democratic Alliance v President of the Republic of South Africa 2013 1 SA 248 (CC)

Democratic Alliance v President of the Republic of South Africa 2012 1 SA 417 (SCA)

Els v Minister of Safety and Security 1998 2 SACR 93 (N)

Estate Agency Affairs Board v Auction Alliance (Pty) Ltd 2014 3 SA 106 (CC)

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC)

Freedom Under Law v National Director of Public Prosecutions 2014 1 SACR 111 (GNP)

Gaertner v Minister of Finance 2014 1 SA 442 (CC)

General Council of the Bar of South Africa v Jiba 2017 1 SACR 47 (GP)

Glenister v The President of the Republic of South Africa (Amicii Curiae: The African Christian Democratic Party) 2008 JDR 0569 (T)

Glenister v President of the Republic of South Africa 2009 1 SA 287 (CC)

Glenister v President of the Republic of South Africa (WCC case No 7798/09, 26 February 2010)

Glenister v President of the Republic of South Africa 2011 3 SA 347 (CC)

Helen Suzman Foundation v The President of the Republic of South Africa 2015 2 SA 1 (CC)

Helen Suzman Foundation v Minister of Police (23199/16) [2017] ZAGPPHC 68 (17 March 2017)

Key v Attorney-General, Cape Provincial Division 1996 4 SA 187 (CC)

Mayisa v Director of Public Prosecutions, Pretoria, (Centre for Applied Legal Studies, Amici Curiae) 2007 5 SA 30 (CC)

Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence 2002 1 SA 1 (CC)

Minister of Police v Kunjana 2016 2 SACR 473 (CC)

Mohunram v National Director of Public Prosecutions 2007 2 SACR 145 (CC)

National Coalition for Gay and Lesbian Lovers v Minister of Justice 1998 2 SACR 556 (CC)

National Director of Public Prosecutions v Geyser (160/2007) [2008] ZASCA 15 (25 March 2008)

National Director of Public Prosecutions v Freedom Under Law 2014 4 SA 298 (SCA)

National Director of Public Prosecutions v Mohamed 2002 2 SACR 196 (CC)

National Director of Public Prosecutions v Mohamed 2002 4 SA 843 (CC)

National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan 2004 2 SACR 208 (SCA)

National Director of Public Prosecutions v Starplex 47 CC: *In Re Ex Parte National Director of Public Prosecutions v Mamadou* 2009 1 SACR 68 (C)

National Director of Public Prosecutions v Van Staden 2007 1 SACR 338 (SCA)

National Director of Public Prosecutions v Vermaak 2008 1 SACR 157 (SCA)

National Director of Public Prosecutions v Zuma 2009 1 SACR 361 (SCA)

North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape) 1999 2 SACR 669 (C)

Nhlabathi v Adjunk Prokureur-generaal, Transvaal 1978 3 SA 620 (W)

Prophet v National Director of Public Prosecutions 2006 2 SACR 525 (CC)

R v Clever; R v Iso 1967 4 SA 256 (RA)

R v Ndabeni 1959 2 SA 630 (EC)

R v Riekert 1954 4 SA 254 (SWA)

R v Salmonson 1960 4 SA 748 (T)

R v Van Schalkwyk 1938 AD 543

S v Basson 2007 1 SACR 566 (CC)

S v Boshoff 2014 1 SACR 422 (ECG)

S v Cwele 2011 1 SACR 409 (KZP)

S v De Vries 2012 1 SACR 186 (SCA)

S v Del Ré 1990 1 SACR 392 (W)

S v Dos Santos 2006 JDR 0604 (C)

S v Dos Santos 2010 2 SACR 382 (SCA)

S v Dube 2000 1 SACR 53 (N)

S v Ebrahim 1991 2 SA 553 (A)

S v Eyssen 2009 1 SACR 406 (SCA)

S v Govender 1967 2 SA 121 (N)

S v Graham 1975 3 SA 569 (A)

S v Gwevera 1979 2 SA 250 (R)

S v Hammond 2008 1 SACR 476 (SCA)

S v Hlapezula 1965 4 SA 439 (A)

S v Jwara 2015 2 SACR 525 (SCA)

S v Kampher 1997 2 SACR 418 (C)

S v Kidson 1999 1 SACR 338 (W)

S v Koekemoer 1991 1 SACR 427 (Nm)

S v Kotzé 2010 1 SACR 100 (SCA)

S v M 2004 1 SACR 228 (O)

S v Makgopa (CA 19/09) [2011] ZANWHC 26 (2 June 2011)

S v Makhanya 2002 3 SA 201 (N)

S v Malinga 1963 1 SA 692 (A)

S v Mintoer 1996 1 SACR 514 (C)

S v Nortjé 1996 2 SA SACR 308 (C)

S v Odugo 2001 1 SACR 560 (W)

S v Ohlenschlager 1992 1 SACR 695 (T)

S v Pillay 2004 2 SACR 419 (SCA)

S v Pule 1996 2 SACR 604 (O)

S v Roberts 2013 1 SACR 369 (ECP)

S v Selebi 2010 JDR 0820 (GSJ)

S v Selebi 2010 JDR 0894 (GSJ)

S v Shaik 2008 2 SACR 165 (CC)

S v Singh 2016 2 SACR 443 (SCA)

S v Thinta 2006 1 SACR 4 (E)

S v Van der Berg 2009 1 SACR 661 (C)

S v Zürich 2010 1 SACR 171 (SCA)

Savoi v National Director of Public Prosecutions 2013 JDR 1021 (KZP)

Savoi v National Director of Public Prosecutions 2014 1 SACR 545 (CC)

Sello v Grobler 2011 1 SACR 310 (SCA)

Sibiya v Minister of Police 2015 JDR 0398 (GP)

South African Reserve Bank v Public Protector 2017 JDR 1358 (GP)

Standard General Insurance Co v Hennop 1954 4 SA 560 (A)

Suliman v National Directorate of Special Operations 2010 2 SACR 324 (C)

Tap Wine Trading CC v Cape Classic Wines (Western Cape) CC 1999 4 SA 194

Van Rooyen v The State (General Council of the Bar of South Africa Intervening) 2002 2 SACR 222 (CC)

Zuma v Democratic Alliance 2014 4 All SA 35 (SCA)

Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance (771/2016, 1170/2016) [2017] ZASCA 146 (13 October 2017)

United Kingdom

R v Latif [1996] 1 WLR 104 (HL) ([1996] 2 Cr App R 92)

United States of America

Agency Holding Corp. v Malley-Duff & Associates, Inc. 483 U.S. 143 (1987)

Boyle v United States 129 S.Ct. 2237 (2009)

Cedric Kushner Promotions, Ltd. v King, 533 U.S. 158 (2001)

Gebardi v United States 287 U.S. 112 (1932)

H.J Inc. v North-western Bell Tel Co 49 U.S. 229 (1989)

Holmes v Securities Investor Protection Corp. 503 U.S. 258 (1992)

Ker v Illinois 119 U.S. 436 (1886)

Reves v Ernst & Young 507 U.S. 170 (1993)

Salinas v United States 522 U.S. 52 (1997)

Schreiber Distribution Co. V Serv-Well Furniture Co., 806 F.2d 1393

Sedima, S.P.R.L. v Imrex Co. 473 U.S. 479 (1985)

Smith v United States 133 S. Ct. 714 (2013)

Sorrels v United States 287 US 435 (1932)

Superior Oil Co. v Fulmer 785 F.2d 252 (1986)

United States v Alvarez-Machain 31 ILM 900 (1992)

United States v Corrado, 227 F.3d 543 (6th Cir. 2000)

United States v Eisen, 974 F.2d 246 (2d Cir. 1992)

United States v Farmer 924 F.2D 647(7th Cir. 1991)

United States v Johnson 440 F.3d 832 (6th Cir. 2006)

United States v Juvenile Male 118 F3d 1344 (9th Cir. 1997)

United States v Oreto 37 F.3d 739 (1st Cir. 1994)

United States v Turkette 452 US 576 (1981)

United States v Viola 35 F.3d 37 (2nd Cir. 1994)

LEGISLATION

South Africa

Criminal Procedure Act 51 of 1977

Customs and Excise Act 91 of 1964

Electricity Act 41 of 1987

Estate Agency Affairs Act 112 of 1976

Finance and Financial Adjustments Acts Consolidation Act 11 of 1977

Financial Intelligence Centre Act 38 of 2001

Financial Intelligence Centre Amendment Act 1 of 2017

General Law Amendment Act 62 of 1955

Independent Police Investigative Directorate Act 1 of 2011

Intelligence Services Act 65 of 2002

Intelligence Services Oversight Act 40 of 1994

Interception and Monitoring Prohibition Act 127 of 1992 (repealed)

National Prosecuting Authority Act 32 of 1998

National Prosecuting Authority Amendment Act 61 of 2000

National Prosecuting Authority Amendment Act 56 of 2008

National Strategic Intelligence Act 39 of 1994

Prevention and Combating of Corrupt Activities Act 12 of 2004

Prevention and Combating of Trafficking in Persons Act 7 of 2013

Prevention of Organised Crime Act 121 of 1998

Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004

Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002

South African Police Service Act 68 of 1995

Special Investigating Units and Special Tribunals Act 74 of 1996

United Kingdom

Coroners and Justice Act, 2009

Crime and Courts Act, 2013

Proceeds of Crime Act, 2002

United States of America

Mann Act 1910, 36 Stat. 825, 18 U.S.C.

Organised Crime Control Act 1970, Public Law No. 91-452, 84 Stat. 922

INTERNATIONAL INSTRUMENTS

United Nations Convention against Corruption (2004)

United Nations Convention against Transnational Organised Crime (2000)

United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances (1988)

United Nations Model Treaty on Extradition (1990)

United Nations Model Treaty on Mutual Assistance in Criminal Matters (1990)

INTERNET SOURCES

Allingham PV 2006 *England and China: The Opium Wars, 1839-60*
<http://www.victorianweb.org/history/empire/opiumwars/opiumwars1.html>
accessed 28 October 2011

Arms Procurement Commission 2015 *Commission Of Inquiry Into Allegations Of Fraud, Corruption, Impropriety Or Irregularity In The Strategic Defence Procurement Package Report*
http://www.gov.za/sites/www.gov.za/files/Arms%20Commission%20Report_a.pdf accessed 14 December 2016

Ashton G 2012 *Has South Africa Become a Sunny Place for Shady People?* <http://sacsis.org.za/site/article/1281> accessed 26 August 2014

Barnard DK 2009 *Drug crime up since SANAB closed down – DA*
<http://www.da.org.za/newsroom.htm?action=view-news-item&id=73271>
accessed 28 October 2011

Bateman B 2017 *First on EWN: IPID Widens Probe into Phahlane, Hones in on Top Cop's Luxury Cars* <http://ewn.co.za/2017/01/25/first-on-ewn-ipid-widens-probe-into-phahlane-hones-in-on-top-cop-s-luxury-cars> accessed 07 February 2017

Beeld 2017 *Valke is Ystervuis wat Zuma en Vriende Veilig Hou*
<http://www.netwerk24.com/Stemme/Kommentaar/kommentaar-valke-ystervuis-wat-zuma-en-vriende-veilig-hou-20170126> accessed 26 January 2017

Bornman J 2017 *NPA Declines to Prosecute Phahlane*
<https://www.news24.com/SouthAfrica/News/npa-declines-to-prosecute-phahlane-20171107> accessed 17 November 2017

Burger J 2012 *How Poor Leadership Undermines the Work of the South African Police Service* <http://www.issafrica.org/iss-today/how-poor-leadership-undermines-the-work-of-the-south-african-police-service>
accessed 21 May 2014

Burger J 2013 *A Dysfunctional SAPS Intelligence Division Has Severe Implications for Reducing Crime* <https://issafrica.org/iss-today/a-dysfunctional-saps-intelligence-division-has-severe-implications-for-reducing-crime> accessed 09 February 2017

Burger J 2016 *Finally Good News from the SAPS* <https://issafrica.org/iss-today/finally-good-news-from-the-saps> accessed 09 February 2017

Burger J 2016 *Political Interference Weakening the Rule of Law in SA*
<https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-in-sa> accessed 09 February 2017

Burger J and Newham G 2014 *Are foreign-owned private security companies a threat to South Africa's national security?*
<http://www.issafrica.org/iss-today/are-foreign-owned-private-security-companies-a-threat-to-south-africas-national-security> accessed 21 May 2014

Business Report date unknown *Russia nuclear deal 'scares' critics*
http://www.iol.co.za/business/markets/south-africa/russia-nuclear-deal-scares-critics-1.1754798#.VJF_eyvoQfQ accessed 17 December 2014

Camerer L 1997 (ed) *Costly Crimes: Corruption and Commercial Crime in South Africa* <https://issafrica.org/research/monographs/monograph-15-costly-crimes-commercial-crime-and-corruption-in-south-africa-edited-by-lala-camerer> accessed 04 August 2017

Coetzer AL 2007 *The Legal History of In-Transit Robbery*
<http://www.nmmu.ac.za/documents/theses/ALCOETZER.pdf> accessed 02 July 2012

CNN 2014 *Mexico's President Pledges to Continue Fighting Cartels*
<http://edition.cnn.com/2011/12/04/world/americas/mexico-president-speech> accessed 02 November 2011

DA 2017 <https://www.da.org.za/2017/01/ipid-must-investigate-hawks-failure-probe-mahlobos-links-rhino-poacher/> accessed 26 January 2017

Dempster C 2002 *SA Vigilantes Fill Police Gap* <http://news.bbc.co.uk/1/hi/world/africa/1924142.stm> accessed 22 May 2014

DFA date unknown *Russian Federation* <http://www.dfa.gov.za/foreign/bilateral/russia.html> accessed 17 December 2014

Dolley C 2017 *"Backstabbing" and Bad Faith – the NPA and IPID War Intensifies* <https://www.news24.com/SouthAfrica/News/backstabbing-and->

bad-faith-the-npa-and-ipid-war-intensifies-20170907 accessed 21 November 2017

Dolley C 2017 *Mandela ordered select cops to infiltrate underworld, court hears* <http://www.news24.com/SouthAfrica/News/mandela-ordered-select-cops-to-infiltrate-underworld-court-hears-20170629> accessed 12 August 2017

Economist 1999 *Giulio Andreotti – lingering symbol of Italy* <http://www.economist.com/node/326049> accessed 02 November 2011

Egmont Group date unknown *About* <https://www.egmontgroup.org/en/content/about> accessed 04 April 2016

Ensor L 2017 *Security Agencies Weigh in on Problems with the FIC Amendment Bill* <https://www.businesslive.co.za/bd/national/2017-01-25-security-agencies-weigh-in-on-problems-with-the-fic-amendment-bill/> accessed 02 April 2017

ESAAMLG date unknown *Members and Cooperating Partners* <http://www.esaamlg.org/mcp/index.php> accessed 05 December 2014

Etheridge J 2017 *Former police commissioner had “no grudges” against ex-Mandela cop* <http://www.news24.com/SouthAfrica/News/former-police-commissioner-had-no-grudges-against-ex-mandela-cop-20170515> accessed 12 August 2017

Etheridge J 2017 *Former police commissioner never gave ex-Mandela cop clear mandate* <http://www.news24.com/SouthAfrica/News/former-police-commissioner-never-gave-ex-mandela-cop-clear-mandate-20170515> accessed 12 August 17

EWN 2011 *Three accused in Paparas drug trial acquitted* <http://ewn.co.za/2011/04/05/Three-accused-in-Paparas-drug-trial-acquitted> accessed 05 May 2014

EWN 2017 *Major General Berning Ntlemeza* <http://ewn.co.za/Topic/Major-General-Berning-Ntlemeza> accessed 03 January 2017

FATF 2003 *FATF 40 Recommendations* <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF> accessed 17 February 2012

FATF 2012 *The FATF Recommendations* <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> accessed 04 April 2017

FATF 2014 *What we do* <http://www.fatf-gafi.org/pages/aboutus/whatwedo/> accessed 19 November 2014

FATF 2017 *Countries: South Africa* [http://www.fatf-gafi.org/countries/#South Africa](http://www.fatf-gafi.org/countries/#South%20Africa) accessed 04 April 2017

FBI 2014 *Glossary of Terms: Organised Crime* <http://www.fbi.gov/about-us/investigate/organizedcrime/glossary> accessed 21 April 2014

FBI 2014 *Famous Cases & Criminals: Bonnie and Clyde* <http://www.fbi.gov/about-us/history/famous-cases/bonnie-and-clyde> accessed 22 August 2014

FIC 2017 *Compliance* <https://www.fic.gov.za/Compliance/Pages/Compliance%20Guidance.aspx> accessed 04 April 2017

FIC 2017 *Roadshows* <https://www.fic.gov.za/Resources/Pages/roadshows.aspx> accessed 04 April 2017

FIC date unknown *Combating Financial Crime in South Africa: Typologies Report*
https://www.fic.gov.za/Documents/FIC_Typologies_report_FINAL.pdf
accessed 07 December 2017

Fisher J 2010 *South Africa ex-police chief Selebi jailed for 15 years*
<http://www.bbc.co.uk/news/world-africa-10849335> accessed 28 October 2011

Galens M 2016 *Abrahams caused untold harm to the economy – Judge Kriegler*
<http://www.news24.com/SouthAfrica/News/abrahams-caused-untold-harm-to-economy-judge-kriegler-20161031> accessed 30 November 2016

Gastrow P 1998 *Organised Crime in South Africa: An Assessment of its Nature and Origins* <http://www.issafrica.org/uploads/Mono28.pdf> accessed 28 April 2014

Gastrow P 2001 *Triad Societies and Chinese Organised Crime in South Africa*
<http://www.issafrica.org/publications/papers/triad-societies-and-chinese-organised-crime-in-south-africa> accessed 14 May 2014

Gastrow P 2013 *Transnational Organised Crime: The stepchild of crime-combating priorities*
<http://www.issafrica.org/uploads/PolBrief46.pdf> accessed 21 May 2014

Ginindza B and Faku D 2014 *Russian Nuclear Deal “Scares” Critics*
http://www.iol.co.za/business/markets/south-africa/russia-nuclear-deal-scares-critics-1.1754798#.VJF_eyvoQfQ accessed 17 December 2014

Ginwala FN 2008 *Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions*
http://www.justice.gov.za/commissions/2008_ginwala.pdf accessed 18 August 2017

Goga K 2015 *The Business of (Dis)organised Crime in South Africa*
<https://www.issafrica.org/iss-today/the-business-of-dis-organised-crime-in-south-africa> accessed 03 November 2016

Goga K and Goredema C 2012 *Cape Town's Balancing Act between Political Power and Organised Crime* <http://www.issafrica.org/iss-today/cape-towns-balancing-act-between-political-power-and-organised-crime> accessed 21 May 2014

Goredema C 2012 *Transnational Crime in our Time: Exposes Areas and Red Flags* <http://www.issafrica.org/iss-today/transnational-crime-in-our-time-exposed-areas-and-red-flags> accessed 21 May 2014

Goredema C 2012 *The Challenges of Curbing Illicit Financial Flows from Africa* <http://www.issafrica.org/iss-today/the-challenges-of-curbing-illicit-financial-flows-from-africa> accessed 21 May 2014

Hefer JJF 2004 *Commission of Inquiry into Allegations of Spying against the National Director of Public Prosecutions, Mr BT Ngcuka: First and Final Report* http://www.justice.gov.za/commissions/comm_hefer/2004%2001%2020_hefer_report.pdf accessed 13 December 2016

Henda M 2010 *Drug-Related Crime in Cape Town* <http://www.issafrica.org/iss-today/drug-related-crime-in-cape-town> accessed 21 May 2014

Herman P 2017 *Zuma Defends Shaun Abrahams' Fitness as NPA Head* <http://www.news24.com/SouthAfrica/News/zuma-defends-shaun-abrahams-fitness-as-npa-head-20171110> accessed 24 November 2017

HM Government date unknown *National Fraud Authority* <https://www.gov.uk/government/organisations/national-fraud-authority> accessed 08 November 2017

HM Government 2013 *Serious Organised Crime Strategy* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf accessed 08 November 2017

HMIC 2009 *Getting Organised: A Thematic Report on the Police Service's Response to Serious and Organised Crime*
<https://www.justiceinspectors.gov.uk/hmicfrs/media/getting-organised-20090330.pdf> accessed 08 November 2017

Hübschle A 2010 *Dispelling Popular Organised Crime Myths*
<http://www.issafrica.org/iss-today/dispelling-popular-organised-crime-myths> accessed 21 May 2014

Hübschle A 2010 *Organised Crime in Southern Africa*
<http://www.iss.co.za/uploads/OrgCrimeReviewDec2010.pdf> accessed 01 August 2011

ICFP date unknown *About the ICFP* <https://www.icfp.co.za/about-icfp> accessed 07 December 2017

ICFP date unknown *History of the ICFP* <https://www.icfp.co.za/history-icfp> accessed 07 December 2017

ICFP 2017 *Professional Body Recognition and Professional Designation Registration* <https://www.icfp.co.za/article/professional-body-recognition-and-professional-designation-registration.html> accessed 07 December 2017

IEC 2014 *National and Provincial Election Results*
<http://www.elections.org.za/resultsnpe2014/> accessed 01 June 2016]

INTERPOL date unknown *Crime Areas: Organised Crime*
<http://www.interpol.int/Crime-areas/Organized-crime/Organized-crime> accessed 21 April 2014

INTERPOL date unknown *Member Countries: South Africa*
<https://www.interpol.int/Member-countries/Africa/South-Africa> accessed 23 July 2017

INTERPOL date unknown *Notices* <https://www.interpol.int/INTERPOL-expertise/Notices> accessed 23 July 2013

ISS 2012 *South African Crime Quarterly* 39
<https://issafrica.org/research/south-african-crime-quarterly/south-african-crime-quarterly-39> accessed 23 July 2013

Jamal S 2016 *Seriti Commission of Inquiry whitewash – findings are a ‘joke’: Critics* <https://www.timeslive.co.za/news/south-africa/2016-04-22-seriti-commission-of-inquiry-whitewash---findings-are-a-joke-critics/> accessed 03 October 2017

Kohler Barnard D 2009 *Drug Crime Up Since SANAB Closed Down* <http://www.politicsweb.co.za/news-and-analysis/drug-crime-up-since-sanab-closed-down--da> accessed 29 March 2017

KPMG 2017 *KPMG South Africa Leadership Changes and Key Findings Arising from KPMG International’s Investigation* <https://home.kpmg.com/za/en/home/home/press-releases/2017/09/kpmg-international-media-statement.html> accessed 26 November 2017

Luck R 2014 *Walking a fine line between crime prevention and protection of rights* <http://www.saflii.org/za/journals/DEREBUS/2014/6.pdf> accessed 05 December 2016

Madzima J 2009 *The Politics of Organised Crime in Africa* <http://www.issafrica.org/iss-today/the-politics-of-organised-crime-in-africa> accessed 21 May 2014

Mail and Guardian 2014 *SA, Russia agree to \$50-billion nuclear deal* <http://mg.co.za/article/2014-09-23-sa-russia-agree-to-50-billion-nuclear-deal> accessed 17 December 2014

Mail and Guardian 2016 *Special Report on the Arms Deal* <http://mg.co.za/specialreport/the-arms-deal> accessed 14 December 2016

Mail and Guardian 2016 *Editorial: Arms deal gets a coat of whitewash* <https://mg.co.za/article/2016-04-21-editorial-arms-deal-gets-a-coat-of-whitewash> accessed 29 September 2017

Mail and Guardian 2017 *Johan Booysen* <https://mg.co.za/tag/johan-booyesen> accessed 29 September 2017

Mashego A 2015 *Richard Mdluli Milks the System* <http://citypress.news24.com/News/Mdluli-milks-the-system-20150614> accessed 09 February 2017

Mashida E 2013 *What is RICA?* <http://www.polity.org.za/article/what-is-rica-2013-08-23> accessed 24 November 2016

Mashike L 2007 *Former Combatants' Involvement in Crime and Crime Prevention* <http://www.csvr.org.za/docs/combatants261107.pdf> accessed 19 July 2012

Matheza T 2009 *Security Threat Posed by Organised Crime: Money Laundering a Formidable Challenge in East and South* <http://www.issafrica.org/iss-today/security-threat-posed-by-organized-crime-money-laundering-a-formidable-challenge-in-east-and-southe> accessed 21 May 2014

Matheza T 2011 *Why Taxation Matters* <http://www.issafrica.org/iss-today/why-taxation-matters> accessed 21 May 2014

Maughan K 2016 *NPA Plays Political Games at Inopportune Time* <https://mg.co.za/article/2016-02-18-npa-plays-political-games-at-inopportune-time> accessed 29 September 2017

McLennan P 2012 *Effective Taxation Critical to Nation Building* <http://www.issafrica.org/iss-today/effective-taxation-critical-to-nation-building> accessed 21 May 2014

Merten M 2017 *FIC Amendment Bill: It Was Always about “Politically Exposed Persons”* <https://www.dailymaverick.co.za/article/2017-01-26-fic-amendment-bill-it-was-always-about-politically-exposed-persons/#.WOEODG997IU> accessed 02 April 2017

Merten M 2017 *Ntelemeza: Saga of Hawks Head’s unlawful appointment ends – at a cost to the general* https://www.dailymaverick.co.za/article/2017-09-19-ntlemeza-saga-over-hawks-heads-unlawful-appointment-ends-at-a-cost-to-the-general/#.WcH-O03_rmR accessed 20 September 2017

Mkhabela M 2017 *Shaun Abrahams a “lighty” next to judges who say Zuma must be prosecuted* https://www.news24.com/Columnists/Mpumelelo_Mkhabela/abrahams-a-lighty-next-to-judges-who-say-zuma-must-be-prosecuted-20171201 accessed 03 December 2017

Mngadi M 2017 *Another delay in “Cato Manor death squad” case* <https://www.news24.com/SouthAfrica/News/another-delay-in-cato-manor-death-squad-case-20170929> accessed 24 November 2017

Munusamy R 2016 *Captura Continua: Guptas Triumph as ANC Shuts Down State Capture Probe* <http://www.dailymaverick.co.za/article/2016-06-01-captura-continua-guptas-triumph-as-anc-shuts-down-state-capture-probe/#.V06ZTvl97IU> accessed 01 June 2016

National Treasury 2017 *Media Statement: FATF Outcome of Plenary Discussion on South Africa’s 12th Mutual Evaluation Follow-up Report* http://www.treasury.gov.za/comm_media/press/2017/2017022701%20-%2012th%20Mutual%20Evaluation%20Follow-up%20report.pdf accessed 02 April 2017

Newham G 2016 *Why the SAPS Needs Better Crime Intelligence*
<https://issafrica.org/iss-today/why-saps-needs-better-crime-intelligence>
accessed 07 February 2017

News24 2017 *News24 Showcase: Unmasking Cape Town's underworld*
<http://showcase.news24.com/cape-town-underworld/> accessed 11 August 2017

News24 2017 *Articles relating to Andre Lincoln*
http://www.news24.com/Tags/People/andre_lincoln accessed 12 August 2017

Ngoepe K 2016 *Hawks Allegations against Gordhan Baseless – Former Top Judge* <http://www.news24.com/SouthAfrica/News/hawks-allegations-against-gordhan-baseless-former-top-judge-20160825> accessed 26 January 2017

NPA 2007 *Glen Agliotti Pleads Guilty* <http://www.npa.gov.za/UploadedFiles/Glen%20Agliotti%20Pleads%20Guilty.pdf> accessed 06 May 2014

NPA 2016 *Annual Report: National Director of Public Prosecutions: 2015/16* <https://www.npa.gov.za/node/32> accessed 28 July 2017

NPA date unknown *Asset Forfeiture Unit* <https://www.npa.gov.za/node/13> accessed 26 November 2017

NPA date unknown *Office for Witness Protection* <https://www.npa.gov.za/node/15> accessed 13 April 2017

Omarjee L 2017 *Public Protector 'plotted' with presidency on SARB mandate* <http://www.fin24.com/Economy/public-protector-plotted-with-presidency-on-sarb-mandate-report-20170912> accessed 03 October 2017

Pech K date unknown *Executive Outcomes – A corporate conquest*
<http://www.issafrica.org/uploads/PEACECHAP5.PDF> accessed 20 May 2014

Peyper L 2016 *Zuma Faces Court Action If He Sits On Banks Bill*
<http://www.fin24.com/Economy/zuma-faces-court-action-if-he-sits-on-banks-bill-20160923> accessed 02 April 2017

Peyper L 2017 *SA Faces Public Rebuke Over FIC Bill Delay*
<http://www.fin24.com/Economy/sa-faces-public-rebuke-over-fic-bill-delay-20170103> accessed 02 April 2017

Quintal G 2016 *Gupta Report to be Tabled at ANC NEC*
<http://www.news24.com/SouthAfrica/News/gupta-report-to-be-tabled-at-anc-nec-20160525> accessed 01 June 2016

Rahlagla M 2017 *People are trying to discredit the public protector*
<http://ewn.co.za/2017/09/13/people-are-trying-to-discredit-the-public-protector> accessed 03 October 2017

Redpath J 2002 *Leaner and Meaner: Restructuring the Detective Service*
<https://issafrica.org/research/monographs/monograph-73-leaner-and-meaner-restructuring-the-detective-service-jean-redpath> accessed 01 August 2017

Redpath J 2004 *The Scorpions: Analysing the Directorate of Special Operations* <https://issafrica.s3.amazonaws.com/site/uploads/Mono96.pdf> accessed 12 December 2016

Redpath J 2012 *Failing to Prosecute? Assessing the States of the National Prosecuting Authority in South Africa*
<https://issafrica.org/research/monographs/failing-to-prosecute-assessing-the-state-of-the-national-prosecuting-authority-in-south-africa> accessed 10 October 2017

Reinares F and Resa C 1997 *Transnational organised crime as an increasing threat to the national security of democratic regimes: assessing political impacts and evaluating state responses*
<http://www.nato.int/acad/fellow/97-99/reinares.pdf> accessed 06 November 2011

Sabinet 2016 *FICA Bill Returned to Parliament for Reconsideration*
<http://www.sabinetlaw.co.za/finances/articles/fica-bill-returned-parliament-reconsideration> accessed 02 April 2017

Sabinet 2016 *Parliament Passes Financial Intelligence Centre Bill*
<http://www.sabinetlaw.co.za/finances/articles/parliament-passes-financial-intelligence-centre-bill> accessed 02 April 2017

Sabinet 2017 *Financial Centre Amendment 2015*
<http://www.sabinetlaw.co.za/finances/legislation/financial-intelligence-centre-amendment-2015> accessed 02 April 2017

Sabinet 2017 *Parliament Gives Green Light to FICA Bill*
<http://www.sabinetlaw.co.za/finances/articles/parliament-gives-green-light-fica-bill> accessed 02 April 2017

SADC date unknown *Police: SARPCCO*
<http://www.sadc.int/themes/politics-defence-security/police-sarpcco/>
accessed 23 July 2017

SAPS 2009 *Profile – Directorate for Priority Crime Investigation*
http://www.saps.gov.za/_dynamicModules/internetsite/OPbuildBP3.asp?myURL=132 accessed 28 October 2011

SAPS 2014 *SAPS Strategic Plan 2014-2019*
https://www.saps.gov.za/about/stratframework/strategic_plan.php
accessed 01 August 2017

SAPS 2016 *Annual Report 2015/16* <https://www.saps.gov.za/about/stratframework/annualreports.php> accessed 28 July 2017

SAPS 2017 *Crime Situation in South Africa: Nine months of 2016/2017: 1 April 2016-31 December 2016* <https://www.saps.gov.za/services/crimestats.php> accessed 28 July 2017

Schönteich M 2014 *Strengthening prosecutorial accountability in South Africa* <https://issafrica.s3.amazonaws.com/site/uploads/Paper255.pdf> accessed 15 August 2017

Seriti LW 2015 *Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package* http://www.gov.za/sites/www.gov.za/files/Arms%20Commission%20Report_a.pdf accessed 14 December 2016

Serrao A 2017 *IPID Believes McBride Is Target of Crime Intelligence Plot* <https://www.news24.com/SouthAfrica/News/ipid-believes-mcbride-is-target-of-crime-intelligence-plot-20170826> accessed 21 November 2017]

Serrao A 2017 *Mdluli Has Earned a Full Salary during Suspension* <https://www.news24.com/SouthAfrica/News/mdluli-has-earned-a-full-salary-during-suspension-20170403> accessed 19 November 2017

Serrao A and Myburgh P 2016 *Exclusive: IPID to Charge Acting Police Commissioner* <http://www.news24.com/SouthAfrica/News/exclusive-ipid-to-charge-acting-police-commissioner-20161123> accessed 09 February 2017

Shange N 2017 *Former Hawks Head Ntlemenza Gets Marching Orders* <https://www.businesslive.co.za/bd/national/2017-09-19-former-hawks-boss-placed-on-retirement-at-lower-rank-says-police-minister/> accessed 20 September 2017

Shaw M 1998 *Organised crime in post-apartheid South Africa*
<https://issafrica.org/research/papers/organised-crime-in-post-apartheid-south-africa> accessed 10 November 2016

Shaw M 2012 *Leadership Required: Drug Trafficking and the Crisis of Statehood in West Africa* <http://www.issafrica.org/uploads/PolBrief37.pdf> accessed 21 May 2014

Shaw M 2013 *The evolution of organised crime in Africa: Towards a new response* <http://www.issafrica.org/uploads/Paper244.pdf> accessed 21 May 2014

Singh K 2016 *State Capture by Guptas is Nothing New - SACP*
<http://www.news24.com/SouthAfrica/News/state-capture-by-guptas-is-nothing-new-sacp-20160323> accessed 01 June 2016

Smith P 1999 *Nats were in Bed with Mafia Boss*
<http://mg.co.za/article/1999-02-05-nats-were-in-bed-with-mafia-boss> accessed 16 September 2014]

Standing A 2003 *Rival Views on Organised Crime*
<http://www.iss.org.za/uploads/Mono77.pdf> accessed 07 March 2012

Tandwa L 2017 *HSF Wants Ntelemza Ruling to be Executed Urgently*
<http://www.news24.com/SouthAfrica/News/hsf-wants-ntlemeza-ruling-to-be-executed-urgently-20170327> accessed 28 March 2017

Tham M 2017 *SARS Wars: KPMG Report – the Firm, the Lawyers, the Auditor and the Blame Game* <https://www.dailymaverick.co.za/article/2017-10-03-sars-wars-kpmg-report-the-firm-the-lawyers-the-auditor-and-the-blame-game/#.WhriSVWWbIU> accessed 26 November 2017

The Presidency 2016 *President Zuma Refers FICA Amendment Bill to National Assembly* <http://www.gov.za/speeches/fica-amendment-bill-30-nov-2016-0000> accessed 02 April 2017

Torkelson E 2011 *The Challenge of Organised Crime and Urbanisation*
<http://www.issafrica.org/iss-today/the-challenge-of-organised-crime-and-urbanisation> accessed 21 May 2014

Torkelson E 2011 *Too Many Loopholes: Smuggling Human Beings in Southern Africa* <http://www.issafrica.org/iss-today/too-many-loopholes-smuggling-human-beings-in-southern-africa> accessed 21 May 2014

United Nations 1990 *Guidelines on the Role of Prosecutors*
<https://www.un.org/ruleoflaw/blog/document/guidelines-on-the-role-of-prosecutors/> accessed 20 December 2016

United Nations 2000 *Press Release L/T/3459* <http://www.un.org/News/Press/docs/2000/20001215.lt4359.doc.html> accessed 25 February 2014

United Nations General Assembly 1994 *Report of the World Ministerial Conference on Organised Transnational Crime*.
<https://www.imolin.org/imolin/naples.html> accessed 21 October 2016

United Nations General Assembly date unknown *Resolution 55/61: An effective international legal instrument against corruption*
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/55/61
accessed 10 December 2014

United Nations General Assembly date unknown *Resolution 58/4: United Nations Convention against Corruption*
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/58/4
accessed 10 December 2014

UNODC date unknown *Status of Treaties*
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en accessed 28 October 2014

Wiesel D.L. and O'Connor Shelley T 2004 *Organised Gang Units: Form and Function in Community Policing*
<https://www.ncjrs.gov/pdffiles1/nij/grants/207204.pdf> accessed 01 August 2017

Winkler H 2016 *How the State Capture Controversy has Influenced South Africa's Nuclear Build* <http://www.fin24.com/Opinion/how-the-state-capture-controversy-has-influenced-south-africas-nuclear-build-20160527> accessed 01 June 2016

FILM

Warner Bros. 2001. *Ocean's Eleven*

LIST OF ABBREVIATIONS

ACU – Anti-Corruption Unit

AFU – Asset Forfeiture Unit

AML – Anti-Money Laundering

CARA – Criminal Assets Recovery Account

CIMC – Crime Information Management Centre

CPA – Criminal Procedure Act 51 of 1977

CPS – Crown Prosecution Service

CPSI – Crown Prosecution Service Inspectorate

DPCI – Directorate for Priority Investigations (“Hawks”)

DPP – Director of Public Prosecutions

DSO – Directorate for Special Operations (“Scorpions”)

ESAAMLG – Eastern and Southern Africa Money-Laundering Group

FATF – Financial Action Task Force

FICA – Financial Intelligence Centre Act 38 of 2001

FBI – Federal Bureau of Investigations

FIC – Financial Intelligence Centre

FUL – Freedom Under Law

HLRA – Harvard Law Review Association

HSF – Helen Suzman Foundation

ICD – Independent Complaints Directorate

ICFP – Institute of Commercial Forensic Practitioners

IGI – Inspector-General of Intelligence

IPID – Independent Police Investigative Directorate

LCN – La Cosa Nostra

MCC – Ministerial Coordinating Committee

MI – Military Intelligence

MVS – Multidisciplinary Vetting Structure

NCB – National Central Bureau

NCIS – National Criminal Intelligence Service

NCCS – National Crime Combating Strategy

NDPP – National Director of Public Prosecutions

NICOC – National National Intelligence Coordinating Committee

NIA – National Intelligence Agency

NPA – National Prosecuting Authority of South Africa

OCGM – Organised Crime Group Mapping

OCIU – Organised Crime Investigation Unit

OCPI – Organised Crime Project Investigation

OCTA – Organised Crime Threat Analysis

ODCCP – Office for Drug Control and Crime Prevention

OECD – Organisation of Economic Cooperation and Development

OSEO – Office for Serious Economic Offences

PEP – Politically Exposed Persons

POCA – Prevention of Organised Crime Act 121 of 1998

POCDATARA – Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004

PRECCA – Prevention and Combating of Corrupt Activities Act 12 of 2004

ROCU – Regional Organised Crime Units

RICA – Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002

RICO – Racketeer Influenced and Corrupt Organisations Act 1970

SANAB – South African Narcotics Bureau

SAP – South African Police Force

SAPS – South African Police Service

SARPCCO – Southern African Regional Police Chiefs Cooperation Organisation

SASS – South African Secret Service

SOCA – Serious Organised Crime Agency

SSA – State Security Agency

SVC – Serious Violent Crime

UK – United Kingdom

UKHTC – UK Human Trafficking Centre

UN – United Nations

UNODC – United Nations Office on Drugs and Crime

US – United States

USA – United States of America