

ORGANISED CRIME IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY WITH
SPECIFIC REFERENCE TO MOTOR VEHICLE THEFT

by

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I declare that “ORGANISED CRIME IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY WITH SPECIFIC REFERENCE TO MOTOR VEHICLE THEFT” is my work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

30 November 2007

.....
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DATE

SUMMARY

International police co-operation is a recipe for success in the fight against transnational organised crime. Such cooperation has never been without challenges, especially in the light of disharmonious national laws. SARPCCO has made promising advances towards the elimination of blockages which hamper police cooperation. The joint, bilateral, simultaneous operations which are continuously carried out and the transferring of skills through training are exemplary to the rest of the world. SARPCCO is, however, struggling to make serious inroads into the organised motor vehicle theft because of the problems in returning them to their lawful owners.

The objective of this study is to analyse the laws used by the SARPCCO member countries in fighting motor vehicle theft, transnational organised crime, recoveries, repatriation, prosecution and extradition of offenders. The SARPCCO member countries on which the analysis is done are Lesotho, South Africa, Swaziland and

Zambia.

KEY TERMS

Organised crime, transnational organised crime, organised criminal group or syndicate, motor vehicle theft, repatriation of exhibits, harmonisation of legislation, Southern African Regional Police Chiefs Co-operation Organisation, extradition of offenders, arrest and jurisdiction.

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CHAPTER ONE

INTRODUCTION

If criminals were to agree to commit crime only in their respective countries of birth or where they are permanently residing, it would not have been necessary to have an institution such as the INTERPOL, which deals with, amongst others, transnational organised crime. However, in their introductory remarks, Professors Phil Williams and Ernesto U Savona,¹ who are Professor of International Affairs at Pittsburgh University, Pennsylvania and Professor of Criminology at Trento University, Italy respectively, point out that transnational organised crime in Europe is one of the most serious threats posed by crime today, a threat which needs to be addressed by the international community.

Professor Jonathan Burchell who is a Professor of Criminal Law at the University of Cape Town (UCT) states that criminals do not respect geographical borders when committing crime. Borders which are porous, corrupt border officials and inefficient law enforcement assists the criminal in continuing with his trans-border criminal activities.² These activities are in effect, performed in a borderless world, while law enforcement officials are significantly constrained by having to operate in what is still a bordered world.³ Jeffrey Robinson argues that advancement in technology, contributed to organised crime. It took man thousands of years to move faster than the speed of a galloping horse; a century to move faster than the speed of a train; and a few decades to move faster than the speed of sound. Today satellites, faxes, cell phones, the Internet and e-mail enable us to send our voices, our images, our ideas and our money at the speed of light. According to him the planet has been reduced to the size of the screen of a computer.⁴

Organised crime is a very serious concern which affects States individually and collectively. It should never be underestimated. It has undergone a transformation of the kind that can no longer be understood as simply a local or national phenomenon.⁵ Jean Redpath⁶ joined other criminologists by advocating that technological advancement will make the policing organised crime ever more difficult and, as a result, force policymakers to

¹Williams and Savona *Organized Crime* vii. Professors Williams and Savona are hereinafter referred to as Williams and Savona.

²Burchell *Principles* 975. Professor Jonathan Burchell is hereinafter referred to as Burchell.

³Williams and Savona *Organized Crime* viii.

⁴Robinson *The Merger* 15. Jeffrey Robinson is an American author, who is writing about International organised crime from the United Kingdom.

⁵Williams and Savona *Organized Crime* 2.

⁶Redpath "Technological Advancement". Redpath is a research consultant attorney contracted to the Institute for Human Rights and Criminal Studies at Technikon SA now UNISA. In opening the 12th SARPCCO AGM, Lieutenant General (Rev) Ronnie Shikapwasha who is the Home Affairs Minister of Zambia said that organised crime has become sophisticated in technology hence the need to involve international law enforcement to track down perpetrators. See The Times of Zambia of 01-08-2007 page 1.

rethink their definitions of crime.⁷ No example has been given but this can be understood to refer to the situations where a syndicate member use technology to commit crime without necessitating her presence at the scene. He suggested that the alternative of rethinking the definition will involve unwarranted restrictions on the use of technology and the invasion of personal liberty. Fortunately, the law enforcement agencies have responded by establishing the International Criminal Police Organization in an effort to send a message to criminals that there are no safe havens left for them. It is encouraging to note that all the 184 Interpol member countries are connected to the I-24/7 system⁸ which gives law enforcement officials the edge over criminals as far as communications operations are concerned.

Professor Cowling of the faculty of Law at the University of Kwa Zulu Natal (UKZN) states that organised crime is an international phenomenon which recognises no borders, and the response to it should therefore also be transnational.⁹ Experience has taught us that although there is an effective mode of communication and transport, most criminals operate within the regions. This means that most criminals commit their criminal activities in a particular region like Southern Africa without moving their criminal activities to a different region, e.g., Europe, despite the fact that there are different communication systems and a variety of some modes of transport. The challenge posed by transnational organised crime can only be met if law enforcement authorities are able to better display the ingenuity and innovation, organisational flexibility and co-operation that characterise the criminal organisations themselves.¹⁰ It is for this reason that the police have established the Southern African Regional Police Chiefs Cooperation Organisation (SARPPCO)¹¹ structure to strengthen and complement the INTERPOL at regional level. It needs to be acknowledged that the resolutions adopted at SARPPCO are generally effective. If these resolutions are implemented to the letter, human security will be

⁷These criminologists include Jeffrey Robinson.

⁸The I-24/7 is an Interpol Secure Global Police Communications System, which was launched in 2003 to enable all member countries to securely communicate with one another. I stands for Information, 24 stands for 24 hours and 7 represent seven days a week. The report on this can be found in the Interpol Annual Report (2004) 2-5 as well as Interpol Annual Report (2005) 6-8.

⁹Cowling *Organised Crime* 350. Professor Cowling is hereinafter referred to as Cowling.

¹⁰Williams and Savona *Organized Crime* 82. UNODCCP *Protocols* iii, His Excellency, Dr. Kofi Atta Annan, hereinafter referred to as Annan, is the 7th Secretary General of the UN(1997-2006). The same sentiments of Annan that if crime crosses the borders, so must law enforcement, were highlighted by the Honourable Chief Justice Sakata who addressed the Ministerial meeting on 03-08-2007 during the 12th SARPPCO AGM at Lusaka where he stated that transnational crime could only be addressed through the cooperation of all the countries involved.

¹¹SARPPCO was established in terms of the SARPPCO Multi-lateral Agreement which was signed by Ministers responsible for policing in the SADC countries on 01-10-1997 at Harare. The Multi-lateral Agreement is a recognised Protocol, copies of which have been filed with the United Nations, the African Union and the SADC secretariat. Information about the formation, structures and activities is also accessible at <http://www.interpol.int/Public/Region/Africa/Committees/SARPPCO.asp> last visited on 24 September 2007. Similar information is dealt with by Msutu *Responses* 16, which is also accessible at <http://www.iss.co.za/Pubs/Monographs/No56/chap2.html> last visited on 24 September 2007 as well as Gastrow *Police Perceptions* 16. Adv. Peter Gastrow, hereinafter referred to as Gastrow, is the Director of ISS Cape Town. Snr Asst Comm. Frank Msutu was the Director of CID Zimbabwe, the first Head of Sub-Regional Bureau(SRB) Harare and the SARPPCO secretariat and now he is a crime researcher at ISS.

greatly enhanced in the Southern African Development Community (SADC).¹² Asst. Comm. Hussein Nassoro Laisseri¹³ of Tanzanian Police Force has correctly observed in his research on the subject of Police cooperation in Sub-Saharan Africa that not much has been written or specifically dedicated to these two organisations, namely, SARPCCO and East Africa Police Chiefs Cooperation Organisation (EAPCCO). This has limited his research from depending on reference books and he had to proceed with his study through interviews and other correspondences availed to him from both SARPCCO and EAPCCO Secretariats in Harare and Nairobi respectively.

The police will therefore have to join their concerted efforts in building on this noble vision of ensuring that they close the nets and restricting the unethical breeding fields for criminals who are preying on the communities which their agencies have vowed to protect. The recommendation of the Attorney-General of the Eastern Cape, and many others, who commented to the Parliamentary Committee that the Prevention of Organised Crime Bill 1998, now an Act, should only be used as a very specialised weapon in the hands of a very specialised prosecuting team, which has had every opportunity for careful preparation, still require implementation.¹⁴ This recommendation is strengthened by the observation by Williams and Savona,¹⁵ that the importance of basic in-service training, not only for the police but also for prosecutors and judges, should not be underestimated. The statement in Cowling's report that the National Organised Crime Secretariat existed since 2001 and that investigation teams include local prosecuting authorities or the National Prosecuting Authority,¹⁶ does not, in my view, reflect the correct position as there was no secretariat at national level. The process which was newly established in 2005, was frustrated by the lack of agreement between the major role-players, until it was saved by the intervention of National Commissioner Selebi of the South African Police Service(SAPS) on the 16-07-2006.¹⁷

¹²Southern African Development Community (SADC) was established on 17-08-1992 by ten countries which are founding members, to wit, Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe. The SADC Declaration and Treaty was signed on the same day and the Protocol became operational after thirty days as all the countries had signed which is more than the required 2/3 as stipulated in the Treaty. The Treaty can also be accessed at <http://www.tralac.org/scripts/content.php?id=439> last visited on 24 September 2007. The other SADC member countries that joined at a later stage are South Africa, Democratic Republic of Congo and Seychelles and Madagascar. See also Gastrow *Penetrating I* 16 and Laisseri *SARPCCO and EAPCCO* 24.

¹³Asst Comm. Hussein Nassoro Laisseri, Head of NCB-Interpol Dar Es Salaam, Tanzania conducted his research under candidate 90185 done with the University of Sussex in 2005. This statement appears in his preface and I have also observed that most library shelves have been fully stocked with written literature which is focused on countries outside Africa. The Sub Regional Bureaus were created in terms of Resolution AGN/63/P.Res/24 of the 63rd General Assembly of Interpol in Rome in 1997. The Sub Regional Bureau of Southern Africa, Harare started its operations on the 3rd February 1997, see also Msutu *Responses* 13. On the question of cooperation, Laisseri stated that, to allow police officials to be preoccupied with autonomy and sovereignty, is hindering progress to the jubilant of criminals. Should this be allowed, we will have failed those who are doing their best in attracting investment in the region.

¹⁴Cowling *Organised Crime* 373.

¹⁵Williams and Savona *Organized Crime* 71.

¹⁶Smit *Clean Money* CAP 5. See also <http://www.iss.co.za/Pubs/Monographs/No51/chap5.html> last visited on 24 September 2007.

¹⁷Redpath *The Scorpions* 82, stated that the two Directorates consisted of investigators seconded from SAPS, other government agencies and prosecutors. These operated until September 1999 when these members formed the Directorate of Special Operations (DSO) upon its establishment. The DSO is established in terms of s 7 of the National Prosecuting Authority Act 32 of 1998

As indicated by Charles Goredema, nobody would be interested in investing anything in a crime infested country. It is the responsibility of law enforcement agencies to ensure that a safe and secure environment is created in order to create conditions for growth and development by attracting greater investments and development assistance from international partners.¹⁸

The reason why motor vehicle theft as an example of organised crime is researched, is based on the fact that, a motor vehicle appears to be the most targeted commodity in the Sub-Region and further that a motor vehicle is considered as the second largest investment which the average household will make.¹⁹ Gastrow puts it that, vehicle theft and hijacking feature as the most popular activities of organised crime groups. According to him, this crime is also closely intertwined with trafficking in drugs, firearms, diamonds and other illegally obtained goods. He is of the opinion that stolen vehicles constitute a ready currency.²⁰ Over and above, Gastrow's survey found that the criminal activities that constitute the most serious threat to the nine SADC countries are theft and hijacking of motor vehicles.²¹ Motor vehicle theft is also one of the priority crimes of the SARPCCO.²² Unlike previous studies²³ which focused on organised crime in its broader facets, this research singles out motor vehicle theft as the focal commodity because it is a visible exhibit which, by its sight of having left some particular localities and finding its way in another country, serve as evidence to prove that the crime has crossed the border.

The existing laws of four of the countries which form part of Southern African Development Community will be examined. The management of motor vehicle exhibits, powers vested in the police officials or other office bearers and the influence that this has towards the stabilisation, reduction and ultimate eradication of motor vehicle crime within the jurisdiction of the Southern African Regional Police Chiefs Co-operation Organisation will also be analysed.

as amended.

¹⁸Goredema *Organised Crime* 4. Goredema is a Senior Research Fellow in the Organised Crime and Corruption Programme in Cape Town office of ISS.

¹⁹Smart, Nysschen and Bosman *Motor Law* 11. Smart was a Legal General Assistant Manager of AA of the RSA, while Nysschen was an attorney for AA and Bosman an Advocate of the High Court of the RSA.

²⁰Gastrow *Police Perceptions* 58.

²¹Gastrow *Police Perceptions* 54. See also <http://www.iss.co.za/Pubs/Monographs/No60/ExecSum.html> last visited on 24 September 2007. The nine countries referred to are Botswana, Lesotho, Malawi, Namibia, the RSA, Swaziland, Tanzania, Zambia and Zimbabwe.

²²The priority crimes of the SARPCCO as consolidated by the Head of the SRB, Harare, Commissioner Vilio Hanooshike Hifindaka in the SARPCCO 10 years Commemorative publication, July (2005) 7 are motor vehicle thefts, drugs and counterfeit pharmaceuticals, economic and commercial crimes, firearms and explosives, trafficking in gold, diamonds and other precious stones and metals, crimes against women and children, illegal immigrants and forged travel documents, wildlife crime and endangered species, trafficking in human beings and terrorism. It should be noted that SARPCCO has not adopted any resolution on priority crimes.

²³Previous studies on organised crime were conducted by the Institute for Security Studies (ISS) which are published and the reference numbers and the sources are accessible under <http://www.issafrica.org/index.php?link-id=3&slink-id=105&link-type=12&slink-type=...> last visited on 29 September 2007. and <http://www.issafrica.org...AF/profiles/southafrica/crime.htm> last visited on 26 December 2006.

Chapter two deals with the definitions of organised crime while in chapter three, the reasons as to why theft of motor vehicles is classified as organised crime are explained. Chapters four, five, six and seven are dedicated to the legal position in South Africa, Lesotho, Swaziland and Zambia respectively. The study will be concluded by an assessment of the levels of harmony or otherwise in the laws applied and the influence which this has on the successful achievement of the goals. Recommendations will also be made.

CHAPTER TWO

DEFINITION OF ORGANISED CRIME.

2.1. Introduction.

Organised crime is an elusive concept that lacks a generally accepted definition.²⁴ In any discussion about organised crime, the question that always arises is 'what constitutes organised crime'.²⁵ Jean Redpath agrees that organised crime is difficult to define.²⁶ In the preface remarks, Gastrow points out that there is no real clarity about what the term organised crime actually means. He argues that white collar crime and commercial crime which a number of people involved in perpetrating those crimes on an organised and sustained basis for profit proves that it is difficult to distinguish organised crime, from crimes such as, commercial crime and

²⁴Collins *Dictionary* 415, indicated that definition means the formal and concise statement of the meaning of a word, phrase, etc. the act of defining a word, phrase, etc.

²⁵Peter *Tanzania* 74, asked this question and thereafter found an answer in Tanzanian law.

²⁶Redpath *The Scorpions* 18.

white collar crime.²⁷

Professor Mahmoud Cherif Bassiouni and Dr. Eduardo Vetere²⁸ who are Professor of law at Depaul University, United States of America and the Director at the Center for International Crime Prevention, UN respectively, suggest that the fight against organised crime was started in 1975 and that they are part of the veterans who participated in that fight. They describe organised crime as the label given to a criminal phenomenon represented by certain groups engaging essentially in violent, profit-motivated criminal activity. According to Cowling, the fact that organised crime and criminal gangs by their nature are difficult to define, contributes to the absence of a universally acceptable definition.²⁹

The importance of determining a definition of organised crime is paramount for law enforcers as the lack of a definition tends to confuse operators. The absence of a definition of organised crime can create gaps and ambiguities for law enforcement agencies and crime researchers, which in turn makes it difficult to find information with which to put together a picture by which to assess the threat emanating from organised crime.³⁰

In this chapter, this question will be addressed with reference to the international, regional, foreign and local interpretation of how organised crime should be understood. In general, organised crime is multifaceted and can manifest itself in different ways.³¹ It should be noted in advance that there is no uniformly adopted definition on a global level.

2.2. Definition used by the United Nations (UN).

Charles Goredema³² states that although the existence of organised crime has been known for decades, no common definition has been adopted globally. The UN has not suggested a definition in any of its Conventions. It has managed to provide a definition of an organised criminal group under Article 2(a) of the United Nations

²⁷Gastrow *Penetrating I* ix.

²⁸Bassiouni and Vetere *Organized Crime* xxvi. It needs to be noted that this book was written before the Palermo Convention as reflected under footnote n 33 *infra*. They are hereinafter referred to as Bassiouni and Vetere. Andre Standing differed with the suggestion that the fight against organised crime was started in 1975 because according to him, President Hoover of the United States was already involved in the fight against organised crime in 1929, see *Standing Rival Views* 25. President Herbert Hoover was the 31st President of the United States of America(USA) between 1929-1933. See <http://www.whitehouse.gov/history/presidents/hh31.html> last visited on 29 September 2007.

²⁹Cowling *Organised Crime* 350.

³⁰Gastrow *Police Perceptions* 34.

³¹Recommendations of the Council of Europe: Committee of Ministers, 765th meeting of Ministers and Deputies (2001) at <http://www.coe.int/t/e/legal-affairs-co-operation/combating-economic-crime/1-standard-settings/Rec-2001-11.pdf> last visited on 11 October 2007.

³²Goredema *Organised Crime* 6.

Convention Against Transnational Organised Crime(2000), which is commonly known as the Palermo Convention.³³ This Article states that an organised criminal group is a structured group³⁴ of three or more persons, existing for a period and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention,³⁵ in order to obtain, directly or indirectly, a financial or other material benefit.

In a general comment, Williams and Savona made a similar statement to that of Goredema³⁶ in 1996 by stating that, the term organised crime has long been a source of controversy and contention, probably because of the different ways of approaching various features of the problem. They stated that experts are also concerned, however, with more controversial issues such as the size, structure and cohesion of criminal organisations. They concluded by saying that, on one end of the spectrum are those who see organised crime in terms of large hierarchical organisations that are structured rather like traditional corporations while on the other end are those who contend that, for the most part, organised crime groups tend to be loosely structured, flexible and highly adaptable. They believe that, in fact the real power and effectiveness of organised crime is found in these amorphous qualities. They argue that, rather than resembling a formal corporate structure, organised crime more closely resembles a social exchange network in the community.³⁷

A definition which is ascribed to the United Nations as quoted by Dr. Klaus Von Lampe is that “Organized crime is understood to be the large-scale and complex criminal activity carried on by groups of persons, however loosely or tightly organized, for the enrichment of those participating and at the expense of the community and its members. It is frequently accomplished through ruthless disregard of any law, including offences against the person and frequently in connection with political corruption.”³⁸ He also quoted the

³³United Nations Convention Against Transnational Organised Crime as adopted by the General Assembly in its resolution 55/25 of 15 November 2000. The purpose of this Convention is to promote co-operation to prevent and combat transnational organised crime more effectively. Betti *European Union* 3. European Parliament working paper, describe the Convention as representing the first attempt to include in one single binding document all the concepts and measures necessary to fight organised crime on a global scale. See also Redpath *The Scorpions* 82.

³⁴A structured group is defined in terms of Article 2(c) of the Convention 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.

³⁵The Convention establishes as serious offences (i) participation in an organised criminal group, (ii) the laundering of the proceeds of crime, (iii) corruption, and (iv) obstruction of justice.

³⁶Goredema *Organised Crime* 6.

³⁷Williams and Savona *Organized Crime* at 3 and 4.

³⁸Dr. Klaus Von Lampe is a lecturer from Free University, Berlin, Germany who collected more than 100 definitions from 84 sources in 19 countries and published them on internet <http://www.organised-crime.de/OCDEF1.htm> last visited on 29 September 2007. The definitions from Africa in this publication are those of Egypt, Tanzania and the RSA. It is hoped that there will be more definitions added as the writer has appealed for inputs from those who know of definitions that have not been recorded. It needs to be noted that the definition ascribed to the UN, Interpol and the RSA are not official definitions. Although the source of UN definition is referred to as United Nations 1975 page 8, the UN was still trying to find a definition in 2000. The Conventions, Declarations and other instruments found in the General Assembly from 1946-2006 are accessible at <http://www.un.org/Depts/dhl/resguide/resins.htm> last visited on 29 September 2007 and no definition of organised crime was adopted in any of these instruments. The definition of the

definition ascribed to the Interpol as any group having a corporate structure whose primary objective is to obtain money through illegal activities, often surviving on fear and corruption.

2.3. Definition used by the African Union (AU).

It has already been pointed out by Goredema that, no definition of organised crime has been adopted at regional level in Africa. His definition of organised crime is that it is a systematic criminal activity of a serious nature committed by a structured group of individuals or a corporate body in order to obtain, secure or retain, directly or indirectly, a financial or other material benefit.³⁹ In a clear demonstration of the lack of a generally accepted definition, Goredema has in another research defined organised crime as a serious crime that is motivated by financial or other material benefit, committed by a structured group of three or more persons, acting in concert and existing for a determinate period of time.⁴⁰ These definitions have been influenced by the definition of an organised criminal group of the United Nations. He coined the second definition to improve on his first one which did not have the element of period of existence of a criminal group. I prefer the second definition because it also accommodate a time factor which is important in terms of time frames of the acts for which a perpetrator can be prosecuted on.

2.4. Definition used by the Southern African Development Community (SADC).

The SADC, or its police body SARPCCO, has never attempted to define organised crime. This lack of uniform definition of organised crime in the SADC is pointed out by Gastrow,⁴¹ where he warns that the lack of a uniform understanding within the region about what is meant by the term organised crime, is likely to hamper police investigations at national level, as well as police co-operation at regional level. In his research, the only countries which submitted definitions of organised crime are Tanzania, the RSA, Swaziland and Zambia.⁴² Although the definitions were submitted, the information supplied is incorrect as only Tanzania has defined the

Interpol as provided by Paul Nesbitt, who was the Head of Organised Crime Group, and cited by Fenton Shea Bresler in 1993, is not an official definition as no resolution was adopted on that matter by the General Assembly of the Interpol.

³⁹Goredema *Legislation* 25. This definition was coined in 2001.

⁴⁰Goredema *Organised Crime* 6. This definition was coined in 2004.

⁴¹Gastrow *Police Perceptions* 34. See also <http://www.iss.co.za/Pubs/MONOGRAPHS/No60/chap4.html> last visited on 24 September 2007. Gastrow continues to raise a concern that, it is difficult, if not impossible, to compile reliable regional assessment of organised crime. The detectives might also adopt a conventional method of investigation on a particular suspect, instead of aiming at a much broader criminal group.

⁴²Gastrow *Police Perceptions* 31.

concept.⁴³ Andre Standing⁴⁴ based his research on the incorrect findings of Gastrow. Gastrow has correctly indicated further that a common understanding of what organised crime actually is, still has to be developed in the SADC region. He said further that, while very few in Southern Africa will doubt that organised criminal activity has increased over the past two decades or that it constitutes a threat, the statements made by public figures, and the research published on organised crime beg the question, “what do they mean by it?”. He asks whether the term might be used in Southern Africa merely as a catch-all phrase for all serious crimes that involve a degree of organisation and a profit motive. He convincingly concludes that, in short, the reality is that we do not know what exactly the various spokespersons and law enforcement agencies in Southern Africa mean when they refer to organised crime.⁴⁵

Tanzania still remains the only country in the SADC which has defined organised crime. It is defined in the Economic and Organised Crime Control Act,⁴⁶ as any offence or non-criminal culpable conduct which is committed in combination or from whose nature, a presumption may be raised that its commission is evidence of existence of a criminal racket in respect of acts connected with, related to or capable of producing the offence in question.

2.5. Definition used by South Africa.

South Africa (RSA) has not defined organised crime in any of its laws. Gastrow acknowledges, once more, that a generally accepted comprehensive definition of organised crime has yet to emerge in South Africa and internationally.⁴⁷

In a further research, Gastrow reported that the SAPS submitted the following as the definition of the RSA:

⁴³Adv. Gastrow was interviewed and he helpfully indicated that his report was based solely on the information supplied by the police representatives which were Snr Supt. Ronnel Van Wyk of SAPS (now ex-member), CIAC, Snr Supt. Dlodlu of Royal Swazi Police(RSP)(Complaints and Inspections section) and Snr Asst Comm. F A Ngulube(retired Director of CID) of Zambia Police Service(ZPS). In addition to the research that I conducted on the laws of these countries, I interviewed the officers who are the seniors of those who completed the questionnaires. I also interviewed Snr Supt. Van Wyk on 14-03-2007 and she indicated that she drafted the definition under the supervision of Asst Comm. (Dr.) Chris De Kock. De Kock, indicated on an interview that they took this definition from the European Union and that it was never adopted as an official definition, but that, it was applied in practice from 1999-2002 during the OCTA sessions.

⁴⁴Standing *Rival Views* 41-43. Andre Standing was a Middlesex University candidate for PhD in 2000 when he conducted a research on the alleged rapid increase in organised crime in the RSA.

⁴⁵Gastrow *Penetrating I* at 1-2.

⁴⁶13 of 1984. The definition is reflected in s 2(1) of the Economic and Organised Crime Control Act of the United Republic of Tanzania of 1984, which forms Cap 200 the Penal Code(CAP 200 R.E.2002). See also Peter *Tanzania* 73 as well as Gastrow *Police Perceptions* 34.

⁴⁷Gastrow *South Africa* 5. Also accessible at <http://www.issafrica.org/Pubs/monographs/No28/Definitions.html> last visited on 24 September 2007. The report also points out the confusion which the question of definition has caused to detectives tasked with the investigation of organised crime.

“Organised crime is the systematic commissioning of crimes motivated by a craving for profit and/or power.”⁴⁸

He states that Snr Supt Ronnel Van Wyk explained that within the parameters of this definition, a criminal group involved in organised crime needs to meet the following criteria:

1. The criminal group has to involve the collaboration of more than two (2) people,
2. It has to be suspected of involvement in serious criminal offences,
3. It has to have been involved in such serious criminal activity for a prolonged or indefinite period,
4. It has to be motivated by the pursuit of profit and/or power,
5. It should stimulate and/or employ commercial or businesslike structures,
6. By way of division of labour, group members should have their own appointed tasks,
7. It shall employ some form of discipline and control (disciplinary sanctions),
8. It should be engaged in money laundering,
9. It should use violence or other means for the purpose of intimidation,
10. It should attempt to exert influence on politics, media, public administration, judicial authorities or the economy (corruption),
11. Abuse of state, provincial and international borders.

(*Before a criminal group can be identified as an organised criminal organisation, at least six(6) of the criteria need to be fulfilled, including the first four. This definition caters for both criminal groups with exclusive identities and loosely-knit criminal coalitions.)

In fact, the RSA has only a description⁴⁹ of what organised crime comprises of and not a definition. The definition submitted by Snr Supt. Van Wyk above has no authority and does not reflect the correct position of the RSA. The description which has been given in terms of s 16(1) of the South African Police Service Act⁵⁰ stipulates that, circumstances amounting to criminal conduct or an endeavour thereto, as set out in subsection (2), shall be regarded as organised crime, crime which requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof. The circumstances as pointed out in subsec 1 are explained further in subsec 2(a) as circumstances which comprise criminal conduct or an endeavour thereto by any enterprise or group of persons who have a common goal in committing crimes in an

⁴⁸Gastrow *Police Perceptions* 32-33.

⁴⁹Collins *Dictionary* 427, define description as to give an account of representation in words. The act, process, or technique of describing. The definitions in the South African Police Service Act of 1995 appear only in s 1. Section 16(2)(a) is the only portion dealing with organised crime. The rest of the section (i.e., 16(2)(b) to 16(2)(j) deals with other crimes which were dealt with by the National specialised units which existed before restructuring. What happened is that immediately after the amalgamation of the eleven police agencies in the RSA, the Detective Service operated on two spheres which were a national sphere and a provincial sphere. The National sphere was called the National Crime Investigation Service. These specialised units were Commercial Crime units, Child Protection units, Diamond and Gold units, Anti-corruption units, Endangered species units, Aliens Control units, Stock Theft units, Vehicle Theft units, Anti-hijacking units, Taxi Violence units, Gang units, Firearms units, Murder and Robbery units and SANAB. For the prevention part, there were Special Task Force and National Intervention Unit. The Act is also accessible at <http://www.info.gov.za/gazette/acts/1995/a68-95.htm> last visited on 17 November 2007.

5068 of 1995.

organised manner.⁵¹

In terms of s 16(3) of the SAPS Act of 1995, where there is a dispute as to whether the criminal conduct or endeavour thereto is organised crime, the determination by the National Commissioner is conclusive. Law follows a precise path and a description which is dependent on the determination by the National Commissioner will therefore not assist the situation. I am of the view that this law is by no means clear on this issue, or certainly not as clear as it should be because, his/her instruction will only end up in the police circles, making such description an operational description for the police without any legal status nor influence to the prosecutors, judicial officers or in any way, affect the Prevention of Organised Crime Act (POCA) 121 of 1998.

The analysis of s 16(1) and 16(2) of the SAPS Act of 1995, is in my view, suggesting that the legislature intended to define organised crime as circumstances amounting to criminal conduct or an endeavour thereto, by any enterprise or group of persons who have a common goal in committing crimes in an organised manner. Although organised manner has not been defined, the ordinary interpretation is organised fashion because manner and fashion are synonyms.

In terms of the Policy of the Organised Crime Component⁵² of the SAPS, organised crime is explained as follows: “Organised crime means the circumstances amounting to criminal conduct or an endeavour thereto which requires national prevention or investigation or crime which requires specialised skills in the prevention and investigation thereof.”⁵³ In the introductory note of the Guidelines to the investigation of Organised Crime Projects Investigations by the Head of Organised Crime of the SAPS, the author stated as follows: “I have deliberately left the definition of Organised Crime because of the different understanding which created some confusion in the past. The United Nations defined organised criminal group in the UN Convention Against Transnational Organised Crime(2000) as: “a structured group of three or more persons, existing for a period and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” Emanating from this, one will not be wrong by defining organised crime as serious crime that is motivated by financial or other material benefit, committed by a structured group of two or more persons, acting in concert, and existing for a determinate period of time. The European Union defines organised crime as follows: “Organised Crime is the systematic commissioning of crimes motivated by a craving for

⁵¹While the SAPS Act of 1995 uses the term organised manner which has not been defined, the National Prosecuting Act 32 of 1998 uses the term organised fashion. Organised fashion is defined in s 7(1)(b) of the National Prosecuting Authority Act of 1998 as including 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. See also Redpath, *Restructuring* 56. The definitions of racketeering in terms of s 1(1) of POCA of 1998 as reflected in para 3 of 4.2.11 *infra* is synonymous with the definition of organised fashion. In fact, organised manner, organised fashion and racketeering activity are synonymous.

⁵²Section 3(18) of a Policy document of the Organised Crime Component as approved by the Divisional Commissioner of the Detective Service, SAPS (2004).

⁵³This is actually a description that emanates from s 16 of the SAPS Act 68 of 1995.

profit or power.”⁵⁴

In the draft Policy document of the Ports of Entry Component of the SAPS, Organised Crime has been defined as follows: “organised crime is seen as the systematic committing of serious crimes by organised criminal groups motivated by a craving for profit or power.”⁵⁵ It is clear that this component has, in order to pave a precise path, modified and transplanted the definition of the European Union.⁵⁶

Gastrow states that most syndicates consist of floating members who may be linked with, and working for a number of other syndicates at the same time, which is being described as involved in ‘disorganised’ organised crime.⁵⁷ He defines organised crime as any group of criminals that have a corporate structure, whose primary objective is to obtain money and power through illegal activities, often surviving on fear and corruption.⁵⁸ In another research, he borrowed the definition stating that 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.⁵⁹ I am unable to agree with the definitions proposed by Gastrow because the first one has an element of corporate structure whereas crooks do not always incorporate their structure and this definition will therefore exclude them. The second definition has all the elements required, but it is excluding a criminal group which may be composed of two people and an enterprise. I am in agreement with the observation by Standing, who has noted that this confusion has also surfaced in the SAPS.⁶⁰

The situation in the SAPS is that, it is guided by the crimes created by the POCA of 1998 to conclude that the crime committed constitute organised crime.⁶¹

⁵⁴Guidelines for the Organised Crime Project Investigation (OCPI) process, SAPS 2006. This definition is only used by the SAPS as a guide in order to determine as to whether organised crime appears, for operational purposes, to have been committed or not.

⁵⁵Section 4(10) of the draft Policy document of the Ports of Entry Component as circulated by the Divisional Commissioner of the Protection and Security Service, SAPS (2006).

⁵⁶See n 69 *infra*.

⁵⁷Gastrow *South Africa* 68. See also <http://www.iss.co.za/Pubs/Monographs/No28.html> last visited on 24 September 2007.

⁵⁸Gastrow *South Africa* 5. See also Standing *Rival Views* 43.

⁵⁹Gastrow *South Africa* 9. Standing *Rival Views* 44.

⁶⁰Standing *Rival Views* 42.

⁶¹The crimes created by the POCA are in ss 2, 4, 5, 6, 9, 54, 71,74 and 75. For the subsections see n 308 *infra*. My conclusion is that organised crime proper is the contravention of s 2 of the POCA of 1998.

2.6. Definition used by Lesotho.

Gastrow has correctly found that Lesotho does not have any law which specifically deals with organised crime.⁶² The country has not defined organised crime in any of its laws.

2.7. Definition used by Swaziland

According to Gastrow, Swaziland defines organised crime as any group of individuals whose primary activity involves violation of criminal laws to seek illegal profits and power, by engaging in racketeering activities, and when appropriate, engaging in intricate financial manipulations.⁶³ The term "Organised crime" consists of the following:

1. A group of people (criminals), more than one.
2. Participating in unlawful activities.
3. Seeking money and power.
4. Forms a syndicate, group, cartel, racket, mafia,⁶⁴ etc.
5. Money laundering.

This finding is incorrect because Swaziland has neither a law dealing with organised crime nor defined organised crime anywhere in its official records.⁶⁵

2.8. Definition used by Zambia.

Gastrow reported that Zambia defines organised crime as a structured group of three or more persons existing

⁶²Gastrow *Police Perceptions* 32. This statement is an honest representation of the state of affairs as confirmed by Asst Comm. Selete who is the Director of CID in the Lesotho Mounted Police Service (LMPS).

⁶³Gastrow *Police Perceptions* 33.

⁶⁴Mafia is described by Professor Chris Maina Peter of the University of Dar Es Salaam, in Peter *Tanzania* 73, as probably the world's best known organised crime group. Standing argued in *Standing Rival Views* 1 that organised crime has become a muddled analytical concept in mainstream discourse due to a combination of poor empirical research and popular misconceptions about notorious crime groups such as the American Mafia. He suggested that the term organised crime should be replaced with that of "illicit enterprise".

⁶⁵During the interview which I conducted in Angola on the 28-04-2006 and in Lesotho on 26-03-2007 with Asst Comm. Sithole, who is the Director of CID in the RSP, he indicated that there is no definition of Organised Crime in Swaziland and that Snr Supt Dluđu who supplied information is in agreement with him. This confirms that the findings by the ISS report does not represent the correct position. See *Ibid* n 43 *supra*.

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 any material benefit.⁶⁶ Gastrow was misdirected by the report of Snr Asst. Comm. Nguluve which resulted in the incorrect finding.⁶⁷

2.9. Definitions used by other countries.

There are more than 100 definitions from other countries, which are not the subject of this research.⁶⁸ Professor Bojan Dobovsek, a Professor of the Faculty of Criminal Justice and Security, University of Maribor, Slovenia, indicated in the introductory paragraph of a paper which was presented at the International Conference held in Slovenia between 14 and 16 November 1996,⁶⁹ that organised crime is a major problem in most European countries. In spite of the fact that there is no generally accepted definition of organised crime yet, the European Union (EU) has since defined organised crime as the systematic commissioning of crimes motivated by a craving for profit or power. This definition is a handy tool for the European Police (EUROPOL) organisation, which can now measure what they call organised crime.

The definition of organised crime has to be viewed with the understanding as pointed out by Professor Petrus C Van Duyne, who is a Professor at the University of Tilburg, Netherlands,⁷⁰ who said that all definitions that have been suggested thus far failed on one important point: they cannot be operationalised or used as an exclusive yardstick to determine organised crime. He said that they remain open concepts, unable to delineate the borders of the phenomenon and therefore cannot be considered a definition in the analytical sense of the word at all. He concluded that there is some irony in the fact that those who think they can define organised crime have never bothered to define licit 'organised industry' or 'organised trade'.

The Federal Bureau of Investigations(FBI) of the United States 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

⁶⁶Gastrow *Police Perceptions* 34.

⁶⁷It has been established from the laws of Zambia as well as an interview with the then Director of CID of Zambia, Commissioner of Police Roy Mvula. See n 43 *supra*.

⁶⁸*Op cit* n 38 *supra*. The definitions from these other countries have not been included in this report because of the volume which will require more space.

⁶⁹Dobovsek *Unify the Definition in Pagon Policing* <http://www.ncjrs.gov/policing/org323.htm>, last visited on 16 September 2007. Professor Bojan Dobovsek is hereinafter referred to as Dobovsek. The reason for the lack of the definition is cited as the quick development and changing of the forms in which organised crime appears.

⁷⁰Van Duyne *et al Changing Europe* 2.

country as a whole.⁷¹ In a different view, Raymond Kendall, who discusses international organised crime in general, indicated that “not all so-called organised crime groups are highly structured and regimented as those some traditionally think of.” In his discussion he has not attempted to differentiate between criminal gang, criminal group and criminal organisations, unlike those who confused themselves with these terms. He also did not define organised crime, but dealt with the criminal organisation. He categorised criminal organisation into four different groups, to wit, mafia type with structured hierarchies, internal disciplinary rules, code of ethics and diverse affairs; professional organisation where members specialise in one or two particular special fields of illegal activities, e.g., stealing of motor vehicles; all ethnic organised crime groups; and international terrorist organisation.⁷² Williams and Savona⁷³ support this argument by concluding that organised crime groups can vary considerably. Each group has to be understood on its own terms with its own strengths and weaknesses, and not thought of as fitting into a single model.

2.10. Conclusion.

As far back as 2001, a need to distinguish organised crime from other categories of crime with regional implications was identified. The issues that were suggested to the SARPCCO in order to be addressed by the organisation include the definition of organised crime for use within member countries and the common definition for the region.⁷⁴ By creating a common definition, the region will be able to draw a regional organised crime threat assessment. This shall also assist the investigators, who are assigned to address organised crime in their respective countries, where no proper definition exists. As indicated by Gastrow, the absence of a definition of organised crime can create gaps and ambiguities.⁷⁵ Gastrow is in line with the argument by Professor James O Finckenauer, a Professor of Criminal Justice at Rutgers University,⁷⁶ says that a clear and focused definition of organised crime is important as a legal definition for public policy and research. Professor Emil W Plywaczewski, a Professor of Criminal Law and Criminology at Bialystok University, Poland⁷⁷ stated that, the need for a definition of organised crime became all the more urgent with the formation of the Agency for Combating of Organised Crime in Poland. If he was writing from the RSA, his statement would have read, the need for a definition of organised crime became all the more urgent with the formation of

⁷¹This definition by the FBI is reflected under <http://www.fbi.gov/hq/cid/orgcrime/glossary.htm> last visited on 24 September 2007.

⁷²Kendall *Gangs* 253-254. Raymond Kendall was the Secretary General of Interpol from 1985-1995. He is now a Honorary Secretary General of Interpol.

⁷³Williams and Savona *Organized Crime* 2.

⁷⁴Gastrow *Police Perceptions* 76.

⁷⁵Ibid n 41 *supra*. Although Gastrow has hinted that one should never try to freeze the criminal activity into a legal definition, he is inclined to accept that there is a need to find a definition.

⁷⁶These arguments are quoted by Dr. Klaus Von Lampe under n 38 *supra*.

⁷⁷These arguments are quoted by Dr. Klaus Von Lampe as referred to in n 38 *supra*.

the Organised Crime Component in the RSA. Laisseri⁷⁸ observed the statement of Frederick T Martens⁷⁹ that definitions are central to the law as they are in fact its very essence and they provide the legal justifications for government to intervene and punish what is labeled as deviant behaviour. In his view, the lack of definition thwarts efforts to fight such crimes on a more collective basis.

The RSA should review s 16 of the SAPS Act of 1995 as it is no longer serving its purpose because of the restructuring that took place since its enactment. I am of the view that the SAPS Act of 1995 should not be the legislation to carry the definition of organised crime. The definition must be embodied in the POCA of 1998. It will assist law enforcement officers if organised crime was to be defined. I suggest the following definition to be considered for the RSA: “Organised crime is any serious crime which is systematically and persistently committed on a continuous basis or determinate period by a consciously concerted organised criminal group of two or more persons or a criminal enterprise, in pursuit of an undue financial or other material benefit”

The purpose of owning a motor vehicle is to enjoy its use. The thief should not be allowed to use a stolen motor vehicle while the owner is deprived of his rights over the vehicle. I agree with Commissioner Guliano Zaccardelli⁸⁰ that the most effective weapon against organised crime is an organised and co-ordinated response. Since organised crime operates in multiple jurisdictions and across international boundaries, law enforcement must continue working towards better coordination, more integration and an even sharper focus on the sharing of information and intelligence.⁸¹ It can only be hoped that the seriousness of the mind will encourage SARPCCO member countries to agree on a strategy that will help them meet their commitments to contribute to the international efforts of fighting organised crime.⁸²

⁷⁸Laisseri *SARPCCO and EAPCCO* 10.

⁷⁹Frederick T Martens is the former senior officer of the New Jersey State Police and the author of “Transnational Enterprise Crime: A Comparative Perspective” in Flood Susan (ed) *Illicit Drugs and Organised Crime, Issues of the Unified Europe* (University of Illinois Chicago 1992).

⁸⁰Zaccardelli was the Commissioner of Royal Canadian Mounted Police(2000-2006).

⁸¹*Id* n 82 *infra* at 2.

⁸²See executive summary in page 4 of the strategy in a police magazine titled “*Reducing the Threat and Impact of Organized Crime in Canadian Communities, A Medium-Term Strategy for RCMP, 2005-2008*” by the Royal Canadian Mounted Police.

CHAPTER THREE

CLASSIFICATION OF THEFT OF MOTOR VEHICLE AS ORGANISED CRIME.

3.1. Introduction.

Theft of motor vehicles by people who want to make profit out of them, the movements of motor vehicles across national borders into other countries and the involvement of hijackers who operate in groups suggest that some types of motor vehicle theft can also qualify as organised crime. Theft of motor vehicles has long been classified as organised crime by developed countries.⁸³ Dr. Don Weatherburn, a Director of Bureau of Crime Statistics and Adjunct Professor in the School of Social Science in New South Wales, Australia,⁸⁴ states that ordinary crime is sometimes made worse by the emergence of gangs or other kinds of criminal groupings and/or organisations.

In order to be able to follow the reasoning as to why some motor vehicle theft is being classified as organised

⁸³See n 101, 147, 148, and 155 for the United States, United Kingdom, Canada and Poland respectively.

⁸⁴Weatherburn *Australia* 70.

crime in this chapter, it is important to understand that the intention of the Parlemo Convention⁸⁵ was, amongst others, to criminalise participation in an organised criminal group.⁸⁶ Against this background, any person who takes part in committing criminal activities of an organised criminal group, commits organised crime. An organised criminal group which consists of three or more persons for the purpose of committing one offence is a sufficient element.⁸⁷ What is classified as organised crime in terms of the domestic law of one country, may not be in harmony with the requirements in another country. The following example illustrates the point: according to Tanzanian theory, if a motor vehicle is stolen in the RSA and found in Tanzania with someone who has never been to the RSA and is found guilty of theft but it is clear that he could not have stolen the car without help, would be considered as organised crime for the purpose of a sentence.⁸⁸ If the same facts are applicable where the theft took place in Tanzania and the suspect is convicted in the RSA, it will not be classified as organised crime.

The South African Insurance Association(SAIA) has indicated that 53%, 30% and 17% of the 2000/2001 stolen vehicles that ended in the market, across South African borders and chop shops respectively, suggest the existence of organised crime.⁸⁹ In 2005, the SAPS concluded that in view of the 60 000, 36 000 and 24 000 vehicles which have been resold, exported and chopped respectively, that vehicle theft is a market related crime in the RSA.⁹⁰

When assessing the definition of organised criminal group and serious crime, it is apparent that theft of a motor vehicle which is a serious crime⁹¹ becomes organised if it is committed by an organised criminal group or by any person who participates in the criminal activities of an organised criminal group.

3.2. Arguments for classifying theft of motor vehicles as organised crime.

In their introductory remarks, Brickell and Cole, point out that vehicle theft is a problem related almost exclusively to the twentieth century. They continued to say that there were individuals who were stealing horses, as a mode of transportation, because there was a ready market available and thieves were willing to gamble their lives for profit. They also went further and stated that the public in the United States considered automobile theft to be of minor importance which is a view shared by the courts. They admitted that auto

⁸⁵*Ibid* n 33 *supra*.

⁸⁶This is a recommendation in terms of Article 5 of the Parlemo Convention.

⁸⁷See Article 2(a) of the Parlemo Convention.

⁸⁸This are the provisions of s 2(3) of the EOCCA of 1984.

⁸⁹Gastrow *Police Perceptions* 80.

⁹⁰<http://www.saps.gov.za/-dynamicModules/internetSite/fagBuild.asp?myURL=259> last visited on 06 March 2007.

⁹¹Serious crime is defined as a conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

theft(auto mobile theft/motor vehicle theft) is one of the problematic and costliest offences to police, which the American public was faced with. They went on and said that between 75% - 80% of all reported cases are automobile offences. They concluded that professional auto theft rings are on the increase and often seemingly dare the police to do anything about their activities.⁹² Except that the problem of motor vehicle theft still continues to pose a challenge in the twenty first century, this observation, is in my opinion, true for the RSA today.

The former Minister of Safety and Security of the RSA, the late Honourable Steve Vukile Tshwete, stated in his opening address of the SADC Organised Crime seminar of February 2001 that the majority of the known syndicates operating in the RSA specialise in motor vehicle theft, drug-dealing, fraud, armed robbery and dealing in firearms. He indicated further that the successes achieved include the elimination of 366 organised crime groups, the prosecution of 233 organised crime syndicate leaders and 2334 ordinary syndicate members.⁹³ He advocated that, to avoid disastrous consequences, there should be political will to confront the phenomenon head-on with all the might and ruthlessness that can be summoned. Msutu made a similar statement when he said that in the Southern African region, there are several organised groups specialising in a variety of crimes, including armed robberies, motor vehicle thefts, drug trafficking, stock theft, firearms smuggling, illegal immigrants and trafficking in people, diamond smuggling and others.⁹⁴ Irish and Qhobosheane noted that some 83 crime networks were estimated to be involved in the vehicle related crime in 1997.⁹⁵ The networks which they are referring to are organised criminal groups.

Motor vehicle theft is sometimes committed by people for self use. The vehicle is stolen to be used as either a transport by the thief herself or the thief steals the motor vehicle in order to strip it for the parts to be fitted in her existing vehicle. Brickell and Cole⁹⁶ divide motor vehicle theft into instances where the vehicle is used and where the vehicle is stolen for profit. Temporary use, includes stealing the car temporarily for pleasure, such as, joyride, utilisation in other offences and transportation of a thief. Theft for profit, includes motor vehicle

⁹²Brickell and Cole *Vehicle Theft* 1-2. Although the Americans consider this crime as of minor importance, it is the one which generates more crime figures which makes it difficult to reconcile their views and a need to stamp out this scourge. The annual statistics of theft of motor vehicles in the USA for the period 1995-2004 are 1 472 441, 1 394 238, 1 354 189, 1 242 781, 1 152 075, 1 160 002, 1 228 391, 1 246 646, 1 261 226 and 1 237 114. The information on statistics by the US Department of Justice, Federal Bureau of Investigation (FBI), Uniform Crime Reports, is accessible at <http://www.auto-theft.info/Statistics.htm> last visited on 29 September 2007.

⁹³Tshwete *SADC Region* 11. Also accessible at <http://www.iss.co.za/Pubs/Monographs/No56/chap1.html> last visited on 24 September 2007.

⁹⁴Msutu, *Responses* 13. Also accessible at <http://www.iss.co.za/Pubs/Monographs/No56/chap2.html> last visited on 24 September 2007.

⁹⁵Irish and Qhobosheane *South Africa* 76. This refers to registered Organised Crime Project Investigations (OCPI).

⁹⁶Brickell and Cole *Vehicle Theft* 74-75.

stripping,⁹⁷ insurance fraud, car rental, salvage switch,⁹⁸ fraudulent documents, cloning,⁹⁹ ringing¹⁰⁰ and alteration of Vehicle Identification Numbers (VIN). I find that, it is in this second category, where organised crime features.

As early as 1971, organised motor vehicle theft was identified as a growing concern in New York. In response thereof, a unit called Auto Crime Unit was formed on 08-11-1971.¹⁰¹ The USA has already classified some motor vehicle theft as organised crime. This problem was not confined to one continent. In Europe, Dr. Matti Joutsen observed in 1995, that approximately two million motor vehicles were stolen in that continent alone and that over a half of these vehicles is untraced. He indicated that, while the thefts of motor vehicles were traditionally connected with joyriding, a significant number of stolen motor vehicles are also used in connection with burglaries or robberies. He concluded that these are the indications that a large proportion of these untraced motor vehicles have been driven across the border and that much of the trafficking is organised.¹⁰² Experience has taught that motor vehicles recovered from outside the country suggest that the borders are not crossed to steal a car for its parts or for personal transport. Criminals and criminal organisations are increasingly engaged in cross-border activity, both in response to market opportunities and as a means of reducing their vulnerability to law enforcement efforts.¹⁰³ One cannot, however, rule out the possibility that a thief can indeed steal a vehicle anywhere when the opportunity presents itself simply because of the unpredictable nature of a thief. The majority of motor vehicles, which are being recovered outside the borders are found with persons who have never crossed the borders. They usually buy these motor vehicles from specific persons.

Jenni Irish states that Interpol detected in the late 1980s that there is a problem with networks involved in motor vehicle crime across national borders. She further suggested that networks involved in these crimes

⁹⁷Brickell and Cole *Vehicle Theft* 275-276. Vehicle stripping is described as the removing of any part of a vehicle from the vehicle by a person who is unauthorised to do so.

⁹⁸Brickell and Cole *Vehicle Theft* 2, 78, 274. Salvage switch is described as entailing the switching of the vehicle's identification from wrecked or an inoperable vehicle, to a similar make and model of a stolen vehicle. They estimated that 3/4 of organised theft rings disposes of stolen vehicles and parts through salvage switch method, which is supplemented by alteration, counterfeiting and fictitious documents.

⁹⁹Brown *et al Organised Vehicle Crime* 1 describe cloning as a method of ringing a vehicle, which involves re-registering a vehicle by copying the identity of a similar (non-stolen) vehicle already on the road.

¹⁰⁰Brown *et al Organised Vehicle Crime* 1 describe ringing as theft and subsequent recycling of a stolen vehicle back into a legitimate market by changing the identity of a vehicle, thereby making it appear to be legitimate.

¹⁰¹Chief Antony Izzo *Organised Crime Control Bureau, Auto Crime Division* <http://www.NYDP-OrganisedCrimeControlBureau.htm>. last visited on 01 September 2006.

¹⁰²Joutsen 1996 *EJCPR* 15-39. Dr. Matti Joutsen is the European Union Co-ordinator of the Ministry of Justice of Finland and Director of Helsinki Institute for Crime Prevention and Control, affiliated with the United Nations(Heuni). See also the quotation and reference by Dobovsek at <http://www.ncjrs.gov/policing/org323.htm> last visited on 15 September 2007.

¹⁰³Williams and Savona *Organized Crime* 5.

include nationals from two or more countries.¹⁰⁴ She indicated that some trucks which were hijacked in the RSA in the late 2004, ended in Zambia and Democratic Republic of Congo, which are places where the markets are.¹⁰⁵ Luxury cars are allegedly smuggled at the back of the trucks which cross the border at the rate of 2000 motor vehicles per day. It is clear that not all the motor vehicles could be thoroughly checked without causing unnecessary clogging of the border post. She also answers the question of individuals who never cross the border with motor vehicles by stating that some individuals will leave the vehicles at the border and the vehicles will then be taken by someone else.¹⁰⁶ Truly speaking, most of the people cannot claim that they were unaware that the sellers are themselves thieves, because the purchase orders are usually made beforehand from people who are known to be crooks.

Adv. Leonard McCarthy,¹⁰⁷ states in his paper that an estimated two million duplicate or cloned vehicles, that is, several vehicles with the same registration plates and identification numbers, travel our roads. He went on and stated that the vehicle theft market appears to be stratified, with diverse ethnic syndicates commissioning the theft or hijacking of cars. In many instances, he said, the hijackers are African youths from our townships, responding to markets created by respected members of 'Society International'. These motor vehicles are primarily destined for export to South Africa's neighbouring countries, such as Mozambique, Zimbabwe and Zambia, where these syndicates have links. He said that very often, such syndicates are vertically integrated, like the Bulgarian syndicates, which export stolen vehicles to Eastern Europe. Vehicles are often treated as the currency used to pay for other contraband goods such as drugs and weapons, making it a rudimentary form of money laundering at the same time.

The theft of a motor vehicle across the border requires, amongst others, knowledge of the area where the motor vehicle is to be stolen, the type of motor vehicle in demand, the route to be followed, the time that the journey need to be undertaken, the existence of a tracker system in the car and the deactivation thereof, the corrupt officials who will be working at the borders, the officials who will register the vehicle and so forth, the mechanics to change the identification numbers in the form of engine number, chassis numbers and registration plates.¹⁰⁸ These arrangements involve a number of people even if it is a once off transaction. The experienced

¹⁰⁴Irish *Beit Bridge* 1. See also <http://www.issafrika.org/pubs/papers/109/Paper109.htm> last visited on 29 September 2007. She described illicit cross border trafficking in motor vehicles as referring to vehicles that are stolen, hijacked or fraudulently moved from one country to another for use or sale, either in the country that the vehicle crosses into, or for transportation to a third country where it is to be used or sold. Jennifer Irish, now Irish-Qhobosheane is an investigative researcher who works for Injobo Nebandla and has researched in Southern Africa. She is currently a project manager at, Aggravated robberies-Retail at Business Against Crime (BAC) South Africa.

¹⁰⁵Irish *Beit Bridge* 2. The markets referred to in crime are black markets.

¹⁰⁶Irish *Beit Bridge* 3.

¹⁰⁷Mc Carthy *Cross Border* at <http://www.inwent.org/ef-texte/crime/mccarthy.htm> last visited on 15 September 2007. Mc Carthy is the Head of the Directorate for Special Operations (DSO) which is commonly known as the "Scorpions" because of their logo which depicts a scorpion.

¹⁰⁸<http://europol.eu.int/index.asp?page=public.motorvehiclecrime> last visited on 22 August 2006. See also Irish *Beit Bridge*

thieves who are commonly referred to as finger-men¹⁰⁹ are used for their expertise by those who illegitimately export the motor vehicles to potential buyers elsewhere. Some of the buyers do not even know that the vehicles were stolen.

Information on the *modus operandi* is usually communicated by suspects to the police during interviews and interrogation or undercover operations.¹¹⁰ In cases where motor vehicles were intercepted, it has been found that the criminals were travelling in a group of more than one person. In hijacking cases, the majority of robbers operate in a group of more than one person.¹¹¹ From the reports consulted, one is yet to find the one where a hijacked motor vehicle is found in the possession of the same robber outside the country. Cowling¹¹² said that these groups vary greatly in terms of size, influence, nature and area of operation, but they all have one thing in common, namely, seeking profit through ongoing, structured and collective criminal activity run by an organisation of individuals as a business.

On the Vehicle Crime portion of the Interpol web, the first statement expressly indicates that vehicle crime is a highly organised criminal activity and affects all parts of the globe. It is stated further that both tactical and strategic intelligence suggests that trafficking in stolen motor vehicles is a significant worldwide issue. The report continued to state that there is also intelligence suggesting that organised criminal groups use motor vehicles as a means to settle other criminal debts or finance other crimes. While 3.8 million motor vehicles were recorded as stolen, more than 16 000 of these motor vehicles were recovered through the Automated Search Facility - Stolen Motor Vehicles (ASF-SMV) worldwide by the end of June 2007.¹¹³ Williams and Savona¹¹⁴ argue that, car theft is considered as an additional source of revenue and can help criminal groups to consolidate their position in certain countries.

3.

¹⁰⁹Finger-men is a slang used in referring to people who do the dirty work, such as pulling the trigger and robbing. Locally, they are sometimes referred to as "abo 7" signaling that sign seven with fingers is a sign language for a firearm. To have a finger in Northern Sotho is an idiom that means to steal.

¹¹⁰Undercover operations are authorised by the Director of Public Prosecutions (DPP) in terms of s 252A of the Criminal Procedure Act (CPA) 51 of 1977. This is an authority which allows the police to unconventionally play the games of criminals in the infiltration process for the purpose of gathering evidence. The Act is also accessible at <http://www.mcm-deat.gov.za/rights-process/acts/english/CriminalProcedureActof1977.pdf> last visited on 17 November 2007.

¹¹¹Robertshaw *et al Durban* 78. Rory Robertshaw, Antoinette Louw, Dr. Mark Shaw, Mduzuzi Mashiyane and Sid Bretell stated that hijackings were most likely to occur at intersections followed by drive ways or garages, or in the streets of a residential area. It is only at stop signs where some victims are hijacked by lone robbers. Robertshaw is an expert consultant for the UN Centre for Human Settlements; Antoinette Louw is the head of the Crime and Justice Programme at the ISS, Dr. Shaw is a research fellow at SAAA at Wits; Mashiyane is a former coordinator of the Community Safety Unit at IDASA and Bretell is a former member of the SAPS.

¹¹²Cowling *Organised Crime* 350.

¹¹³This report is accessible at <http://www.interpol.int/Public/contact.asp> last visited on 15 September 2007.

¹¹⁴Williams and Savona *Organized Crime* 28.

In trying to show the presence of organised crime in Johannesburg, Dr. Ted Leggett¹¹⁵ states that the organising principle of a community in the inner city of Johannesburg is organised crime. The research was conducted by approaching the people at their residential places. The questions asked focussed on criminal victimisation, opinions on safety and police performance and questions geared to evaluate community cohesion. Respondents were asked as to how safely do they feel walking in the area where they live in the day time and at night. They were also asked if they have been victims of these crimes and whether they reported the crime to the police. If this statement sounds exaggerated, it is possibly because of the limited sample of people interviewed. Although the sample used for the research was limited, 15% of those owners who were interviewed, had their motor vehicles stolen in 2002.¹¹⁶ The rate of recovery by the police was recorded as 30%. Some recoveries were done outside Johannesburg area which is considered as an indication that the motor vehicles are moved elsewhere for sale. What is of concern though, is the fact that out of the 30% recoveries, the arrest effected was 21% which leaves 79% unaccounted for. An inference which he has drawn is that the motor vehicles recovered, were found with innocent purchasers or they were found at chop shops or with drivers who knew nothing about the theft. The research found further that 75% of witnesses out of the 21% where arrests were effected, were induced to withdraw the cases through threats or offers of bribes which suggest the existence of organised activity.¹¹⁷ The research also found that 3% of the victims were hijacking victims of whom 97% were threatened with firearms. Most hijackings were observed to be committed by more than one assailant with the figures showing 31% and 66% consisting of two and three or more assailants respectively. Even though the hijacking victims have seen their assailants, only 10% of the hijacking cases resulted in arrests.¹¹⁸ This indicates that the hijacked motor vehicles are not kept by the hijackers, but that they are disposed of at some available markets. I am convinced and therefore agree with Leggett that hijackers do not keep the vehicles for themselves because of the risks. However, I am unable to agree with all the findings of the report because of the limited research samples utilised.¹¹⁹

Cowling¹²⁰ suggested, as an example, that the rise in car hijacking is directly linked to the number of chop shops that are capable of changing the identity of a vehicle in a matter of hours and reselling and exporting it

¹¹⁵Leggett *Rainbow* 59. Ted Leggett is a senior researcher, Crime and Justice Programme, ISS with a Juris Doctorate from New York University.

¹¹⁶Leggett *Rainbow* 83.

¹¹⁷Leggett *Rainbow* 84.

¹¹⁸Leggett *Rainbow* 85.

¹¹⁹The recovery of motor vehicles for 2002 under Table 3 *infra* is 51%, which is far higher than the 30% as observed by Leggett.

¹²⁰Cowling *Organised Crime* 352.

under cover of false documentation. The observation by Leggett¹²¹ is similar to that of Williams and Savona,¹²² who write about Europe, when they stated that more than 40% of stolen motor vehicles, which are permanently missing in Europe between 1989-1993, is an indication of the amount moved to other countries. They highlight that it is also a serious problem in many African countries.

The existence of gangs was already identified before the research by Leggett¹²³ in Alexandra and Soweto in 1992. Vivi Stavrou,¹²⁴ stated that the gangs that are based in Alex¹²⁵ tend to use Alex as a base from which to plan operations, mainly into the suburbs and industrial areas, as well as a return base from which to transform and transport stolen vehicles and fence the stolen goods. She reported that members of the gangs tend to direct 'operations' towards Sandton, unlike Soweto gangs who also operate within Soweto. It was also alleged, she said, that there is rife involvement of Whites and Indians in larger gangs which are involved in extensive networks of motor vehicle theft and theft of electronic and technical goods. The observations indicated that there is an involvement of the members of the SAP¹²⁶ with gangs in organised crime. In the Interpol Annual Activity report for 2004,¹²⁷ 1966 motor vehicles stolen in the RSA were reportedly recovered in 38 different countries. The thieves involved could not be ordinary ones who steal for the purpose of use, but organised crime must have been involved. The existence or involvement of a gang in motor vehicle theft *prima facie* indicates that the crime is organised. It can still be proved that the theft is not organised if it has been committed by an individual member outside the activities of the gang.

If an RSA court was to be called upon to determine whether theft of a motor vehicle is organised crime or not, it may, in its interpretation, consider foreign law in terms of the laws of interpretations.¹²⁸ When considering foreign law, the Tanzanian legislation could serve as a useful tool in interpreting motor vehicle theft as organised crime. In addition to the definition referred to above,¹²⁹ s 2(3) of this Economic and Organised Crime Control Act of 1984 states that, except where the nature or circumstances of an offence indicate otherwise,

121Leggett *Rainbow* 111.

122Williams and Savona *Organized Crime* 28. See also Bassiouni and Vetere *Organised Crime* 572.

123Leggett *Rainbow* 85.

124Stavrou *Alexandra Community* 65. Vivi Stavrou is a former Researcher at the Centre for the Study of Violence and Reconciliation. She is a Director of Christian Children's Fund in Angola.

125Stavrou *Alexandra Community* 65, reference to Alex is an acronym for Alexandra township which is close to Sandton. This is the place where Msomi gang under the leadership of Shadrack Mathews nicknamed "Prime Minister" was active in the mid 1950s. See also Gastrow *South Africa* 12-13, as well as Gastrow *Penetrating I* 6.

126SAP is an acronym for South African Police which refers to a police agency which was responsible for policing the portion of the RSA which excluded the homelands of Ka-Ngwane, Kwa-Zulu, Kwa-Ndebele, Gazankulu, Lebowa and Qwaqwa, and the 'independent states' of Transkei, Bophuthatswana, Venda and Ciskei (TBVC). The amalgamated organisation is the SAPS.

127Interpol Annual Activity Report (2004) 20.

128This is done in terms of s 39(2) of the Constitution of the Republic of South Africa Act 108 of 1996. The Constitution is also accessible at <http://www.concourt.gov.za/site/constitution/english-web/index.html> last visited on 17 November 2007.

129See n 46 *supra* for the definition of organised crime in Tanzania.

where two or more persons are proved to have been jointly involved in the commission of an economic offence, or where it appears to the court that the accused could not have committed the offence without the collaboration of a person or persons not known to the court, the commission of the offence is an organised crime for the purposes of a sentence. In that way classification of motor vehicle theft as organised crime can better be understood by interpretation used in this Tanzanian legislation. In simple language, when two robbers hijack a motor vehicle in Tanzania, they commit an act of organised crime which will not be the case in the RSA.

In order to understand the definition, it is necessary to also note that racket referred to in the Economic and Organised Crime Control Act of 1984 as criminal racket is defined in s 2(1) as any combination of persons or enterprises engaging, or having the purpose of engaging, whether once,¹³⁰ occasionally or on a continuing basis, in a conduct which amounts to an offence under this Act. The definition of a racket brought up a concept of combination which is being defined in s 2(1) of this Economic and Organised Crime Control Act of 1984 as persons who collaborate in carrying out and furthering the activities or purposes of a criminal racket even though such persons may not know each other's identity or the membership combination changes from time to time or one or more members may stand in a wholesaler-retailer or other arm's length relationship with others as to activities or dealings between or among themselves in an illicit operation.

Enterprise is defined in s 2(1) of the Economic and Organised Crime Control Act of 1984 as including any individual, partnership, corporation, association or other legal entity and any union or group of individuals associated in fact although not a legal entity, carrying on any business whether or not for profit.

According to Jai Banda,¹³¹ the conventional wisdom that organised crime is the preserve of structured hierarchies lauded over by godfathers is not substantiated in Malawi, where illicit activity is conducted by a complex and changing network of criminal groups and organisations. These organisations have generally involved themselves in a multiplicity of activities, including armed robbery; drug-trafficking; corrupt practices; motor vehicle theft; money-laundering and fraud.

Goredema¹³² stated that there appeared to be a consensus within law enforcement authorities in the SADC that, the theft of motor vehicles is a priority offence and that it is committed by organised criminal groups. He

¹³⁰For the RSA, the POCA of 1998 is not satisfied with one engagement but requires a pattern of such activities. See the elements in para 2 under 4.2.11 *infra*.

¹³¹Banda *Malawi* 61. Also accessible at <http://www.iss.co.za/pubs/monographs/No56/chapter 4.html> last visited on 24 September 2007. Jai Banda is a lawyer who practice in Malawi.

¹³²Goredema *Legislation* 194. See also <http://www.iss.co.za/pubs/monographs/No56/chapter 10.html> last visited on 24 September 2007.

further stated that many of these groups are prepared to use violence, sometimes with fatal results. He highlighted that at least three states which are Swaziland, Namibia and Lesotho,¹³³ have opted to supplement the common law crime of theft with legislation. He noted that the thrust of such legislation is to target the markets for stolen motor vehicles, as well as the proceeds of the disposal thereof.

In *Ntoyakhe v Minister of Safety and Security and others*,¹³⁴ a police Inspector of Queenstown who was the investigating officer of 16 cases of motor vehicle theft in which Mthetho had been implicated, testified to the effect that, according to reliable information received from informants, it appeared that the suspect operated as the head of a motor theft syndicate.¹³⁵ The *modus operandi* of Mthetho indicated that theft of motor vehicles is organised due to the fact that identifying numbers have been removed from the vehicle, the ownership could not be established and therefore stolen from an unknown person and he operated in the former Transkei and Ciskei, Western Cape, Gauteng, North West and the Eastern Cape, in particular Elliot and Queenstown. The four decisions held in this case are focussed on the sections of the CPA of 1977 which deals with the seizures and keeping of the exhibits. The important portion of this judgement is the obiter dictum by Erasmus J where he stated that he is satisfied that there is *prima facie* ample basis for the Investigator's claim that the vehicle is a stolen property. It is not, however, possible to ascertain the original owner thereof, due to the fact that identifying numbers have been removed from the vehicle. The Judge observed that he has made the case that the vehicle was stolen from some person unknown to the police and that consequently the vehicle may be forfeited to the State in terms of s 31(b) of the CPA of 1977.¹³⁶

Msutu¹³⁷ agrees with the argument that some motor vehicle thefts are organised. He points out that, the RSA is the country most affected as more than 100 000 motor vehicles are lost to crime syndicate connections per year. He observed that, while most vehicles are taken towards the north of Limpopo, there are those that are taken to the south. The *modi operandi* which Msutu identified are where the syndicates use forged registration books, forged travel documents, false number plates, false clearance certificates, corruption and anything else in their power to pass through the borders. His inference is that the introduction of the SARPCCO Motor Vehicle Clearance Certificate, the security features of the certificates and training of officials disrupted the activities of

¹³³What he omitted to mention, is the fact that Botswana has also supplemented its common law position by a legislation called Motor Vehicle Theft Act 17 of 1995.

¹³⁴2000 (1) SA 257 (E).

¹³⁵A syndicate is defined in Collins *Dictionary* 1564 as any association formed to carry out an enterprise or enterprises of common interest to its members. The Protection of Witness Act 112 of 1998 which refers to this term, is silent about the definition.

¹³⁶*Id* n 134 *supra* at 267.

¹³⁷Msutu *Responses* 19-20. Also accessible at http://www.iss.co.za/pubs/monographs/No56/chapter_2.html last visited on 24 September 2007. The statement regarding the movement of motor vehicles to the far north is supported by Irish at n 105 *supra*. The reason for the RSA experiencing the most stolen vehicles as compared to other SARPCCO member countries is the population of motor vehicles which is higher than others. On 30-09-2007, the population of vehicles in the RSA was 8 990 831 which is accessible at <http://www.enatis.com/images/stories/statistics/livevehclassprov20070930pdf> last visited on 04 November 2007.

the syndicates. He further observed that the latest trick was to have a reproduction of a registration book and licence plate from a foreign country for the kind of vehicle they intend to steal. A suitable vehicle is then stolen and its particulars are substituted with those on the registration book. This means, for example, that a stolen South African vehicle will bear a Zambian registration plate, complete with a Zambian registration book. His conclusion, which I disagree with, suggest that, the SAPS members will not bother stopping a foreign registered car unless their suspicions are raised by something else. According to him, there are also markets in Angola and the Democratic Republic of Congo (DRC), as some of these vehicles, after being registered in the RSA, have been intercepted while going north through Namibia and Kazungula in Botswana. This is a clear indication that theft of motor vehicles as discussed by Msutu is organised crime.

Msutu has quoted a number of operations carried out by the SARPCCO member countries in order to deal with transnational crime including motor vehicle theft.¹³⁸ Since his departure from SRB-Harare, the operations had continued.¹³⁹

Gideon Nkala,¹⁴⁰ an investigative journalist for Mmegi weekly paper in Botswana, paints a clear picture of the existence of criminal syndicates specialising in motor vehicles. He says that before the enactment of the Motor Vehicle Theft Act¹⁴¹ in Botswana, numerous criminal syndicates were involved in vehicle theft. Most of these have since disbanded as a result of the stringently applied penalties and the intensified joint operations by military intelligence and the police service in Botswana and across the borders. Common to all the known syndicates is the strong presence of foreigners, particularly South Africans. In one syndicate, which he calls 'Mophato', there were several South Africans, a Zambian, a Zimbabwean and some Batswana. While Mophato operated in Botswana, its leadership was in the RSA and its members in Botswana were mostly used for general reconnaissance in order to identify targets and to provide safe havens. The *modi operandi* used included bribing officials, advancing female officials to study the systems and perform regular surveillance in

¹³⁸Msutu *Responses* 17-18. The report of Msutu is limited to the period when he was in office.

¹³⁹The outcomes of the operations are summarised as follows: Voyager(V4) 1997:1576; Midas 1998:376; Atlantic 1998: 204; Sesani 1998/9: 466; Makhulu I 2000: 256; Makhulu II 2000: 275; Makhulu III 2001: 318; Mangochi I 2002: 79; Mangochi II 2002: 235; South Seas 2002: 31; Jingle Bells 2002: 55; Mangochi III 2003:198; Scorpion 2003:137; Jingle Bells 2004: 21; Mhakure I 2004: 7; Mhakure II 2004: 306; Mhakure III 2004: 220; Morogoro I 2005: 312; Morogoro II 2005:247; Morogoro III 2005/6:62; Palanca Negra I 2006: 325; Palanca Negra II 2006: 79; Palanca Negra III 2006: 191; Maluti 2007: 203; Thabana Ntlenyana 2007: 31 and Senqu 2007: 144. The operations until 2005 are reflected in the SARPCCO 10 years Commemorative publication July (2005). Some operations which were conducted until 2001 have also been quoted by Divisional Commissioner Johan Frederick De Beer, who is responsible for the Detective Service Division in the SAPS at <http://www.crimeinstitute.ac.za/2ndconf/papers/de-beer.pdf>, last visited on 30 September 2007 at 3-4. Irish *Beitbridge I* also reflect operation V4 in her paper. Operations were named and identified by means of phases such as Palanca Negra I which means Phase I of Operation Palanca Negra. This phase consisted of Lesotho, Mozambique, the RSA and Swaziland. Operations from 2007 are no longer identified in phases but independent names to ensure proper financing. Gastrow observed that since 1995, the SADC region has, amongst others, prioritised theft and smuggling of motor vehicles, See Gastrow *Penetrating I* 14.

¹⁴⁰Nkala *Botswana* 59-61. See also <http://www.iss.co.za/Pubs/monographs/No89/chap2.htm> last visited on 24 September 2007.

14117 of 1995.

order to study the movements of vehicles they intend to steal. This involved monitoring the owners over a long period to detect and establish a pattern of movement. Information is communicated to strategists in the RSA so that agreement can be reached on the times and places where the vehicles are most vulnerable to theft. The plan would also include an exit route for the stolen vehicles. Mophato's market is believed to be mainly in the RSA and to a lesser extent in Zimbabwe and Zambia. The syndicates target specific vehicles mostly being Toyotas, BMW and minibuses. Divisional Commissioner Johan Frederick De Beer confirmed in his paper that organised criminal groups in Southern Africa are especially involved in dealing with commodities including theft of motor vehicles and hijacking.¹⁴² Operation code-named Judas¹⁴³ is a clear indication that the problem of syndicates in motor vehicles was huge where even members of the then South African Police¹⁴⁴ were involved.

Max Peter Ratzel¹⁴⁵ reported in 2005 that, approximately 1.3 million motor vehicles were stolen each year in the European Union. The report shows that they recover 60-70% of these motor vehicles. They have developed a theory that non recovery of motor vehicles is an indication of the involvement of organised crime. What is worrying is the *modus operandi* which the syndicates are using which includes, the overriding of electronic anti-theft devices installed by manufacturers, which requires expertise and resources of organised crime, house breaking with the intention to steal the keys and robberies.¹⁴⁶ The National Crime Intelligence Service of the United Kingdom calls this crime organised vehicle crime,¹⁴⁷ which accounts for 20% of all recorded crime.

The Royal Canadian Mounted Police (RCMP) indicated in its 1998 report that organised crime and automobile theft is involved in exporting their stolen vehicles to destinations including Africa and that detection at the ports is difficult because of the many containers.¹⁴⁸ They observed that recovery decreases when the vehicle is sold abroad because of re-birthing.¹⁴⁹ The analysis of the foreword in the annual reports of the Canadian Intelligence

¹⁴²De Beer *Operations and Investigations* at <http://www.crimeinstitute.ac.za/2ndconf/papers/de-beer.pdf> at 3-4 last visited on 30 September 2007.

¹⁴³See Gastrow's case study number 5 at <http://www.issafrica.monographsno28/casestudyno1> last visited on 29 September 2007.

¹⁴⁴The South African Police existed before democratic dispensation in the RSA, see n 126 *supra*.

¹⁴⁵Ratzel is a Director of EUROPOL as in 2006.

¹⁴⁶See pages 21, 22 and 27 at <http://www.statewatch.org/news/2005/oct/europol-org-crim-public.pdf> last visited on 12 October 2007.

¹⁴⁷See Brown *et al Organised Vehicle Crime* 1-5 at <http://www.homeoffice.gov.uk/rds/pdfs04/r238.pdf> last visited on 12 October 2007.

¹⁴⁸See <http://www.rcmp-grc.gc.ca/crimint/sparkplug-e.htm> last visited on 13 October 2007.

¹⁴⁹See <http://www.crimecommission.gov.au/html/pg-vr.html> last visited on 12 October 2007. Vehicle re-birthing is the term identifying a process when a stolen vehicle is given a new identity, usually by changing its identification numbers and serial numbers. As the identity of a stolen car is a problem for thieves when trying to resell a vehicle, they replace the car's identity with that of a wrecked vehicle. By doing this, it can be claimed that the vehicle was repaired to a roadworthy condition. Vehicle re-birthing can also include vehicles that are being imported for reassembly or using the identities of imported vehicles. This is explained by the Australian Federal Police in dealing with Vehicle Organised Crime. In the report on Exploring the involvement of organised crime in motor vehicle theft by Wallace *Vehicle Theft* 15 as per <http://dsp-psd.pwgsc.gc.ca/Collection-R/statcan/85-563-XIE/0010485-563-XIE.pdf> last visited on 12 October 2007, the change of Vehicle Identification Numbers is called "Switching" or "re-Vinning" and the

report of 1999,¹⁵⁰ suggest that we shouldn't be surprised when the true face of organised crime does not show, it is a crime which to a large extent is invisible. It is invisible because its great strength is to be able to hide its face behind ordinary crime and by so doing ensure its great shield in its daily activities. I am in agreement with the arguments that most thefts of motor vehicles are committed by organised criminal groups.

Marnie Wallace, who is a Senior Policy Analyst, Canadian Center for Justice, stated that, auto theft was identified as the emerging priority under the National agenda to Combat Organised Crime. He pointed out that there is a relatively low-risk to the criminals and highly profitable activity, which is often used as a means of raising funds for criminal organisations.¹⁵¹ Wallace provides statistics showing that in 2002, more than 161 000 motor vehicles were stolen in Canada.¹⁵² He estimated that one fifth of these stolen motor vehicles were stolen by vehicle theft rings.¹⁵³ Organised vehicle theft rings are said to often work with each other and are not hampered by jurisdictional boundaries. As a result, the key success in the battle against organised vehicle theft, is collaborative and dedicated partnerships at all levels of the private and public sectors. In the Canadian quarterly Organised Crime report of April to June 2004,¹⁵⁴ motor vehicle theft was down by 5% when compared with the year 2002. The report suggested that while it is difficult to estimate the prevalence of organized vehicle theft, the number of stolen vehicles that are not recovered has been used as a proxy measure by the police. Vehicles stolen by organized crime groups are more likely to be exported overseas, stripped for the sale of parts or transported across Canada. The report further reflects on the arrest of the leader of the known organised crime syndicate of Hell's Angels, which is also involved in car theft. Although I do not believe that the proxy of non-recovery means that the vehicle has crossed the border, it serves as one of the persuasive indicators that the vehicle may have indeed crossed the border.

Jeffrey Robinson observed that Bulgarian criminals were stealing luxury automobiles to feed Russia's black market car salesmen with the product and that they were often paid with drugs that are cultivated throughout the former Soviet Union. He added that Polish gangs do exactly the same.¹⁵⁵ The causes of stolen motor vehicles being driven across the borders have some similarities all over. Joutsen¹⁵⁶ identified the opening of the

change of the chassis is called "Body-Switching".

150See <http://www.cisc.gc.ca/annualreports/documents/1999annualreport.pdf>. last visited on 10 March 2006.

151Wallace *Vehicle Theft* 1. This catalogue is accessible at <http://www.statcan.ca/daily/English/freepub/85-563-XIE/85-563-XIE2004.htm> last visited on 19 August 2006. Canada has published 24 topics dedicated to organised motor vehicle theft which is accessible at <http://www.statcan.ca/english/freepub/85-563-XIE/2004001.htm> last visited on 20 August 2006.

152During the same period, 109390 motor vehicles were reported stolen in the RSA as per table 3 *infra*.

153Wallace *Vehicle Theft* 5.

154See <http://www.yorku.ca/nathanson/CurrentEvents/2004Q2.htm> last visited on 16 June 2006.

155Robinson *The Merger* 181.

156Joutsen 1996 *EJCP* 20.

borders; the wide availability of high-status cars in Western Europe; the unmet demand for such cars in Central and Eastern Europe; the increasing purchasing power of many individuals in the ex-socialist countries; and the problems that law enforcement has in tracing stolen cars that disappear across borders as an explanation of much of the growth of this type of crime during the late 1980s and early 1990. These observations are, in my opinion, true in the SADC countries today.

3.3. Conclusion.

We cannot afford to ignore organised crime simply because its effects are not immediately apparent to our minds. While it is general knowledge that motor vehicle crime is committed by ordinary thieves, all the comments as aforesaid, suggest that motor vehicle theft is mostly committed by organised criminal groups. Regardless of the different terminologies used across the globe,¹⁵⁷ that is, bootleggers, butleggers, cartels, com-tsotsis, comrade criminals, conspirators, corporations, crime-entrepreneurs, criminal gang, criminal holding, criminal practitioners, criminal enterprise, criminal entrepreneurs, criminal syndicates, criminal society, enterprise, extortionists, firms, gangs, group of people, group, high-way men, hit-men, laundrymen, loan sharks, mafia, maguma-guma, makintsa, mobs, mobsters, networks, organisations, organised group, outfits, partnerships, pirates, professional criminals, racketeers, rackets, rings, secret society, skollies, smugglers, society international, street gangs, super gangs, syndicates, terrorists, traffickers, tsotsis, uncivil society or warlords, the fact remains that the crime as committed by syndicates is organised crime. Having said these, I conclude that motor vehicle theft is mostly an organised crime.

¹⁵⁷These are some of the terms which were discovered in various sources during this research.

CHAPTER FOUR

LEGAL FRAMEWORK OF MOTOR VEHICLE THEFT IN SOUTH AFRICA (RSA).

4.1. Introduction.

South Africans at all levels are concerned about the threat posed by organised criminal groups, especially where cash-in-transit heists, house robberies, hijacking of motor vehicles and robberies of business places are involved. When the arrests of the suspects involved in the aforesaid crimes have been effected, the terminology of the language changes and prosecutors, lawyers and presiding officials refer to these criminals as robbers involved in the said crimes and not organised criminal groups as expected. This could be attributed to the fact that there is no clear understanding as to the meaning of the term.¹⁵⁸

In South Africa, the Prevention of Organised Crime Act (POCA) 121 of 1998,¹⁵⁹ was promulgated to deal with suspects involved in some organised criminal activities. However, the common law crimes and existing legislation are applied parallel to the POCA of 1998. For that reason, when dealing with the laws applied in fighting organised crime which target motor vehicles as a central commodity, crimes such as theft, robbery, fraud, theft by false pretences, receiving stolen property knowing it to be stolen, contravention of the POCA of 1998, contravention of the International Trade Administration Act 71 of 2002, contravention of the National Road Traffic Act 93 of 1996, contravention of the National Road Traffic Regulations of 1999 and contravention of ss 36 and 37 of the General Law Amendment Act 62 of 1955 are used.

¹⁵⁸Since 1929, the world has been trying to understand and define the phenomenon which has unfortunately not yet been achieved. President Hoover of the USA, as he then was, is recorded as the first President to use the term organised crime when establishing a Wickersham Commission in 1929, which attempted to define organised crime. See Standing *Rival Views* 1.

¹⁵⁹*Ibid* n 4.2.11 *infra*.

The enactment of the POCA of 1998 was intended to deter people who participate in criminal organisation by making punishment upon conviction heavier, including the taking of the proceeds of their criminal activities, which in terms of the CPA of 1977, they would not have been able to take.¹⁶⁰ Unfortunately, the POCA of 1998 does not define organised crime.

4.2. Application of the criminal laws related to motor vehicle crime in South Africa.

4.2.1. Theft.

Professor C R Snyman, a Professor of Criminal and Procedural Law at the University of South Africa (UNISA)¹⁶¹ defines theft as follows: A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which belongs to, and is in the possession of another, or belongs to another, but is in the perpetrator's own possession, or belongs to the perpetrator, but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of such property. Burchell¹⁶² defines the crime as follows: theft consists in an unlawful appropriation with intent to steal of a thing capable of being stolen. Professor John R L Milton, an Emeritus Professor of Law and Fellow of the UKZN¹⁶³ defines theft as consisting in an unlawful *contrectatio* with intent to steal of a thing capable of being stolen. The Legal Service Division of the SAPS defines theft as consisting of the unlawful appropriation of moveable corporeal property belonging to another with intent to deprive the owner permanently of the property.¹⁶⁴

These definitions are applicable to the theft of a motor vehicle because, a motor vehicle qualifies as movable corporeal property or a thing capable of being stolen. Theft of a motor vehicle is prosecutable and justiciable in the RSA in terms of the common law crime of theft. Snyman¹⁶⁵ gives an example of a case of theft of a motor

¹⁶⁰The property which the law was able to take in terms of s 20 of the CPA of 1977 are exhibits.

¹⁶¹Snyman *Criminal Law* 469. Professor C R Snyman is hereinafter referred to as Snyman.

¹⁶²Burchell *Principles* 782.

¹⁶³Milton *Common Law* 59. Professor John R L Milton is hereinafter referred to as Milton.

¹⁶⁴Definitions of common law offences at <http://www.is.org.za/new-components/legal/legal-definitions.htm> last visited on 04 November 2007.

¹⁶⁵Snyman *Criminal Law* 491.

vehicle as *R v Laforte*¹⁶⁶ where a vehicle was removed from the garage without the owner's permission and after the involvement in an accident, the accused left it at the scene regardless of whether the vehicle is returned to the owner or not. The accused was convicted of theft even though he did not have the intention of permanently appropriating the vehicle. He was convicted of theft because he abandoned the vehicle.

The crime of theft of a motor vehicle will be committed where the four key elements which are, an act of appropriation, in respect of a motor vehicle, which is taken unlawfully and with the intention of permanently appropriating it, are present.¹⁶⁷ Any act, which is short of any of the abovementioned elements, will not qualify as theft. The essential elements of theft are, according to Burchell, the unlawfulness, appropriation, property and intention.¹⁶⁸ Snyman states that the four key requirements for the crime of theft are an act of appropriation, in respect of certain kind of property, which is committed unlawfully and intentionally.¹⁶⁹ Milton indicated the elements of theft as unlawful, *contrectatio*, intent to steal and property capable of being stolen.¹⁷⁰ The elements referred to by these writers are the same.

The different forms of theft are according to Snyman, the removal of property, embezzlement, arrogation of possession and theft of credit, including the unlawful appropriation of trust funds.¹⁷¹ The removal of property is committed when the thief removes property which is in the victim's possession and appropriates it. Embezzlement is committed when the thief removes the victim's property which is already in the thief's possession and control. Arrogation of possession occurs when the owner of property takes it from the lawful possessor without the latter's consent. Theft of credit occurs when the thief steals money in the form of credit which is usually the person who is keeping such money.¹⁷² Except the last mentioned form, all the other three are applicable in respect of theft of a motor vehicle.

An example of embezzlement in respect of a motor vehicle is the case of *S v Van Heerden*.¹⁷³ The facts of the case are briefly that, Mr. Van Heerden sold a tractor which was still under a hire-purchase from Standard National Industrial Credit Corporation Ltd (Stannic) to Mr. Mynhardt. He was convicted of theft against which he appealed. The court held, amongst others, that the appellant did not have a free right of disposal in respect of a tractor and was only entitled to a right of possession and enjoyment of the tractor until such time as he had

1661922 CPD 487.

167Snyman *Criminal Law* 475.

168Burchell *Principles* 785.

169Snyman *Criminal Law* 475.

170Milton *Common Law* 585.

171Snyman *Criminal Law* 475.

172Snyman *Criminal Law* 475.

1731984 (1) SA 667 (A).

paid the full purchase price. The court held further that, the fact that the appellant had used the tractor as an asset which he had exchanged for the assets which he received from Mynhardt in terms of the exchange transactions proved that he had used the tractor for his own purposes or, put otherwise, that he had appropriated it. The court ruled that the necessary intent had been proved and the State had therefore proved that the appellant had committed theft. This type of theft is commonly known as double-discounting. This case demonstrates that the person in whose name the vehicle is registered, is not necessarily the lawful owner, but the lawful possessor and user thereof.

One of the challenges in the prosecution of motor vehicle theft is the question of jurisdiction. If a motor vehicle is stolen in Cape Town and someone is caught in the act of driving it at Musina, then the question is where does one prosecute her and for which offence. The same question can be asked in respect of a motor vehicle stolen in Lusaka, Zambia and found at Johannesburg, RSA. In settling the question of jurisdiction, theft is considered as a continuing crime (*delictum continuum*) since its introduction in our law by Lord De Villiers through a decision in *R v Philander Jacobs*.¹⁷⁴ Professor Roger Whiting,¹⁷⁵ Professor of Law at Witwatersrand University (Wits) has also commented on this case when dealing with the issue of jurisdiction in cross-border thefts. He stated that the South African courts have long recognised theft as a continuing crime, meaning by this that a theft continues as long as the stolen property remains in the possession of the thief. In explaining the meaning of theft as a continuous crime, Burchell¹⁷⁶ indicated this as meaning that ‘the theft continues as long as the stolen property is in the possession of the thief or of some person who was a party to the theft or of some person acting on behalf of or even, possibly, in the interests of the original thief or party to the theft. This entails that, if a person steals the goods on foreign soil and brings them into the RSA, her theft will continue in the RSA. One of the significant consequences of this form of extended jurisdiction as pointed out by Burchell is that, even though the original appropriation took place outside the court’s jurisdiction, the thief may be tried at the place where she is found with the property. It makes no difference whether the taking was regarded as theft by the law of the place where the taking occurred.’¹⁷⁷

In *S v Kruger*,¹⁷⁸ the accused were convicted in the RSA for theft of stock which was stolen in Bophuthatswana.¹⁷⁹ The court held, amongst others that, a person who had in terms of the South African law

¹⁷⁴1876 Buch 171. See also Snyman *Criminal Law* 498 as well as Milton *Common Law* 628.

¹⁷⁵Whiting 1988 *SACJ* 119 at 119. Professor Roger Whiting is referred to hereinafter as Whiting.

¹⁷⁶Burchell *Principles* 795-796.

¹⁷⁷Burchell *Principles* 796, Whiting 1988 *SACJ* 119 at 119 and Milton *Common Law* 628. These writers make reference to *S v Kruger* 1989 (1) SA 785 (A).

¹⁷⁸1989 (1) SA 785 (A) 788.

¹⁷⁹Bophuthatswana was considered to be an independent state by the apartheid regime of the RSA whose rule ended on the 27-04-1994 when a democratic dispensation came into force.

committed theft in a foreign country, could be tried here, not because of the theft in the foreign country but because of his continued act of appropriation with the necessary intent, within the RSA. In cases of ‘bringing-in’,¹⁸⁰ the question of whether the accused committed theft in the foreign country had to be answered with reference to South African law; if the answer was affirmative then the only other question was whether the theft continued in the RSA. Milton stated that it is irrelevant whether the original *contrectatio* was a crime according to the law of the place where it occurred.¹⁸¹ This argument suggests that as long as the act takes place at another place, it does not have to be a crime but that when the possessor arrive in another jurisdiction, it is crime which starts to be committed in such latter jurisdiction.

In *S v Cassiem*,¹⁸² the learned Justice Mthiyane AJA, referred to Milton’s explanation in his judgement that “It has been accepted by our courts that theft is a ‘continuing crime;’ by this is meant that the theft continues as long as the stolen property is in possession of the thief or of some person who was a party to the theft or of some person acting on behalf of or even, possibly, in the interests of the original thief or party to the theft.” Milton argued that one of the requirements for the theft to be continuing is that, it must be a crime which has been committed in that first jurisdiction. Milton argues further that, perhaps the assumption is quite simply that one cannot speak of exercising jurisdiction in respect of the continuation here, of a crime committed elsewhere unless it had indeed been committed at such other place.¹⁸³ Where a person is found in possession of a motor vehicle in the RSA and it is proved that such motor vehicle was stolen in Lesotho, such possessor can only be convicted of theft, if it is proved that she is the one who stole it in Lesotho and continued the stealing in the RSA. If she is not the original thief and did not assist such original thief in stealing, she cannot be convicted of theft but may be convicted of contravention of s 36 or s 37 of the General Law Amendment Act.¹⁸⁴ Competent verdicts for theft¹⁸⁵ include common law receiving of stolen property knowing it to have been stolen and contravention of s 36 or 37 of the General Law Amendment Act of 1955.

In *S v Makhutla*¹⁸⁶ it was argued that, it had to be proved that the accused committed theft in Lesotho before he could be convicted of theft in the RSA on the basis of continuation of the crime. The facts of the case of Makhutla were that three accused committed robbery against Mr. Clement Leisoryare at Tsakholo, Mafeteng

¹⁸⁰This term refers to an act of bringing into the country property which was stolen elsewhere.

¹⁸¹Milton *Common Law* 628-629.

¹⁸²2001 (1) SACR 489 (SCA) 492*h-l*.

¹⁸³Milton *Common Law* 628, Whiting 1988 *SACJ* 119 at 121 and Burchell *Principles* 795. The arguments of these three writers concur with one another where they stated that, in a case where the person who is found in possession of such stolen property has no link whatsoever with the original thieves, the continuity of the crime has been severed. In such situations, the possessor is usually charged with possession of suspected stolen property.

¹⁸⁴62 of 1955.

¹⁸⁵The competent verdicts for theft are dealt with under s 264 of the CPA 51 of 1977. See also Milton *Common Law* 638.

¹⁸⁶1968 (2) SA 768 (O).

district, Lesotho on the 05 June 1967 and brought the goods to Bloemfontein, the RSA on the 06 June 1967. They were arrested and charged with robbery but convicted of theft as the magistrate had been under the impression that he could convict them of theft as it was a competent verdict on the charge of robbery. On appeal the court set aside the conviction on the basis of the lack of jurisdiction because robbery is not a continuing offence.¹⁸⁷ One of the accused namely, Makhutla, was charged *de novo* on the charge of theft. He raised a plea of *autrefois acquit*, but the court finally held that the first indictment disclosed no offence in the Republic as robbery was not a continuing offence. The court convicted him of theft. He appealed against this conviction but the court, as per Smit JP, dismissed the appeal and confirmed the conviction for theft on the basis that the accused brought the stolen goods in the jurisdictional area which supported the legal position that theft is a continuing crime.¹⁸⁸

It has always been very clear as reflected in *S v A*¹⁸⁹ that the continuation of the crime of theft is coupled with the same offender or participant in the original theft. In this case, Mr. Oshry argued on behalf of the accused that where a theft is committed outside Rhodesia, the offence becomes justiciable here only when the stolen property is physically brought into the country by the offender.

The high number of reported cases of theft of motor vehicles in its different faces, that is, fraud, theft or robbery, is still a major problem in the RSA. Some of the vehicles are found outside the country while others are intercepted at the borders. Some of the motor vehicles are not recovered at all and this suggests that they have either left the country or have been chopped down which is an indication of the existence of organised crime.¹⁹⁰ Underneath are tables showing the trends of theft of motor vehicles for the period 1985-2006:

Table 1: Motor vehicles stolen, hijacked and recoveries in the RSA for the period 1985-1993.¹⁹¹

Year	1985	1986	1987	1988	1989	1990	1991	1992	1993
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¹⁸⁷See also Whiting 1988 *SACJ* 119 at 120.

¹⁸⁸*S v Makhutla* 1969 (2) SA 490 (O) at 493.

¹⁸⁹1979 (4) SA 51 (R) 53.

¹⁹⁰Using the very same theory used by the European Union, see *Ibid* n 102 *supra*, one can reasonably draw an inference that organised crime took place. The crime figures of the stolen motor vehicles, reported to the SARPCCO AGM in 2006, as having been intercepted by the SAPS at the borders before they left the country was 1 199 for the period 01-07-2005 to 31-06-2006. Gastrow *Police Perceptions* 45, stated that during 2000 a total number of 115 646 motor vehicles were stolen and hijacked in the RSA. In fact these are the 2000/2001 annual statistics which are aligned to Government's financial year starting from April ending March of the following year. He has also repeated this information in Gastrow *Penetrating I* 105. This explains the difference with figures quoted as 108 957 in table 2 *infra*. The same applies to figures of hijackings which are reflected in Irish and Qhobosheane *South Africa 75 and 103* as 12 860 for 1996, 15 447 for 1999, 14 999 for 2000, 16 554 for 1996, 17 307 for 1997, 20 884 for 1998, 10 783 for 1999 and 65 528 for 2000 which represents motor vehicles separately and trucks included on the latter figures.

¹⁹¹This is a period of ten years before the SARPCCO was established which is also before democracy in the RSA. This information which comes from the motor vehicle circulation system of the SAPS is accessible for research by applying through the Divisional Commissioner. The monitoring of hijacking was started in 1990. Although Robertshaw, et al, *Durban 78*, finds it encouraging that 49% of the victims of motor vehicle theft had their stolen cars eventually recovered, the overall country figures show that the number of unrecovered vehicles is still unacceptably high in the period 1993-1997.

Stolen	42696	58119	59936	57851	58764	62950	63521	69171	84196
Hijacked						5699	7599	13371	15818
Total	42696	58119	59936	57851	58764	68649	71120	82542	100014
Recovered		29031	42329	28273	31619	38356	41837	39872	36342

Table 2: Motor vehicles stolen, hijacked and recoveries in the RSA for the period 1995-2001.

Year	1994	1995	1996	1997	1998	1999	2000	2001
Stolen	91788	90241	90502	91571	93714	89113	87898	89459
Hijacked	17580	18633	16850	18166	21843	21436	21059	20502
Total	109368	108874	107352	109737	115557	110549	108957	109961
Recovered	59372	49858	47033	48538	47845	47149	49913	53461

Table 3: Motor vehicles stolen, hijacked and recoveries in the RSA for the period 2002-2006.

Year	2002	2003	2004	2005	2006
Stolen	87719	84939	80367	78657	79878
Hijacked	21671	21368	16023	15461	14575
Total	109390	106307	96390	94118	94453
Recovered	55860	54189	62112	58420	72147

Dr. Lorraine Glanz¹⁹² stated, when referring to crime statistics, that the South African Police¹⁹³ reported for 1991, that a total of 1.7 million serious offences were recorded for the year excluding minor infringements of the law. An average of 195 motor vehicles were reported stolen every day. This is about 71 175 motor vehicle thefts per year. She further referred to crime statistics which were released on 07 July 1992 by Major-General C.P.J Serfontein which showed, amongst others, a 5% increase in theft of motor vehicles and a disturbing 52% increase in the so-called 'highjacking' of vehicles for the period January to June 1992 as compared to the same period in 1991. These statistics show that motor vehicle theft, in all its facets, has been a problem for some time.

In the SARPCCO operations code-named Operation Morogoro(2005), Palanca Negra(2006),¹⁹⁴ Maluti,

¹⁹²Glanz *Trends and Projections* 46. Dr Lorraine Glanz is the editor in chief and Programme Manager for HSRC's Cooperative Research Programme on Affordable Personal Safety.

¹⁹³An acronym of SAP is explained at n 126 *supra*. The statistics excludes the then homelands and TBVC states.

¹⁹⁴The Angolan Operation Morogoro was executed only in January 2006 and the results of Angola reflect the 2006 operations for both Morogoro and Palanca Negra. Both operations were never executed in Mauritius probably as a result of failure to repatriate the vehicles seized in Operation South Seas which took place in 2001. The successes of operation Morogoro have also been reported as 558 stolen motor vehicles recovered in page 25 of the Interpol Annual report 2005.

Thabana Ntlenyana and Senqu(2007), the vehicles stolen from the RSA were seized from the SARPCCO member countries as follows:

Table 4: Motor vehicles which were reported stolen in the RSA and seized in joint operations from 2005-2007.

Country											
Vehicles found in 2005	27	6	91	87	96	6	67	58	37	131	11
Vehicles found in 2006	15	4	87	30	82	6	64	24	18	69	13
Vehicles found in 2007	1	2	52	38	65	2	26	17	5	61	1
TOTAL	43	12	230	155	243	14	157	99	60	261	25

The assessment of the information on the arrest of suspects in the RSA, suggest that all the nationalities in the SARPCCO member countries contribute to the scourge of theft of motor vehicles in the RSA. While it is not clear as to who stole those vehicles found elsewhere, the figures of the suspects arrested in the RSA for the 2004/2005 and 2005/2006 financial years are as follows:

Table 5: Nationalities of suspects arrested for motor vehicle theft.

Nationality												
Number arrested	22	3	89	0	0	183	5	24 450	43	0	14	61

In *Khan v Minister of Law and Order*,¹⁹⁵ a built-up 1988 dolphin BMW, with registration NDB286T was seized by Sergeant Van Dyk from Mr. Khan in terms of s 20 of the CPA of 1977. As Mr. Khan was not prosecuted, he applied to court for an order to return the vehicle as provided for in s 31(1) of the CPA of 1977. He claimed to have bought a 1985 wreck and built-up the car. His supporting affidavit contained sufficient averments on which the court could order the initial seizure to be unlawful. If there was no one to oppose this application, the court would have had no option but to grant an order in his favour. Fortunately, the application was opposed and the court held that the respondent (Minister of Law and Order and the Police) bore the onus of proving on a balance of probabilities that the applicant was not entitled to the return of the said vehicle on the basis that the applicant's continued possession of the vehicle would be unlawful. It held further that the portion of the parts

¹⁹⁵1991(3) SA 439 (T). See also the discussion of the case by Professor Jean C Sonnekus, the Professor of Law at the University of Johannesburg (UJ), an Advocate of the High Court of the RSA and editor of the "Tydskrif vir Suid-Afrikaanse Reg" in Sonnekus 1991 TSAR 706-711.

identified on the car is proof that the stolen vehicle has been identified. It went further and held that the respondent had discharged the onus of establishing that the applicant's continued possession of the vehicle would have been unlawful and had to be dismissed.

4.2.2. Robbery.¹⁹⁶

Snyman defines robbery as consisting in the theft of property by unlawfully and intentionally using violence to take the property from somebody else or threats of violence to induce the possessor of the property to submit to the taking of the property.¹⁹⁷ Burchell defines this crime as consisting in the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from another.¹⁹⁸ Milton defines the crime as consisting in the theft of property by intentionally using violence or threats of violence to induce submission to its taking.¹⁹⁹ The Legal Service Division of the SAPS defines robbery as consisting of theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from another.²⁰⁰

The essential elements of robbery are theft, violence, submission and intention.²⁰¹ Milton simply puts the essential elements as theft, violence or threats, which causes submission to the taking and *mens rea*.²⁰² Snyman puts forward the elements of robbery as the theft of property, through the use of either violence or threats of violence, a causal link between the violence and the taking of the property, unlawfulness and intention.²⁰³

Robbery can thus be committed where the commodity which is being taken is a motor vehicle. The crime is commonly called hijacking of a motor vehicle. It is an aggravated nature of theft where victims may lose their lives. Snyman stated that the crime is customarily described as "theft by violence."²⁰⁴ Professor Anthony

¹⁹⁶According to Milton *Common Law* 644, this crime was called *rapina* in Roman Law and *raub* in Roman-Dutch law.

¹⁹⁷Snyman *Criminal Law* 506.

¹⁹⁸Burchell *Principles* 817.

¹⁹⁹Milton *Common Law* 642. In formulating his definition, Milton was aware of the definition by Gardiner and Lansdown from the 1st ed (1919) to the 6th ed (1957) where it was stated that robbery is theft, from the person of another, or in his presence if the property stolen is under the immediate care and protection; accompanied by actual violence or threats of violence to such a person or his property or reputation intentionally used to obtain the property stolen or prevent or overcome resistance to its being stolen. Milton's definition was cited in the cases of *S v Mokoena* 1975(4) SA 295 (O) at 296F, *S v Benjamin* 1980 (1) SA 950 (A) at 958H and *S v L* 1982 (2) SA 768 (ZH) at 770A. In the last mentioned case the court also commented that this definition had attracted an important body of judicial approval.

²⁰⁰Definitions of common law offences at <http://www.is.org.za/new-components/legal/legal-definitions.htm> last visited on 04 November 2007. This definition lacks the element of unlawfulness.

²⁰¹Burchell *Principles* 818.

²⁰²Milton *Common Law* 647.

²⁰³Snyman *Criminal Law* 506.

²⁰⁴Snyman *Criminal Law* 475.

Minnaar submitted that hijacking has become a crime of prominence in the 1990's in some countries, notably the RSA and the USA. He indicated further that it is a crime which in recent years has not only increased dramatically, but has also been associated with higher levels of violence in its perpetration.²⁰⁵

Richard Brussow and Melinda Brussow,²⁰⁶ who are members of the National Hijack Prevention Academy close corporation in the RSA, described vehicle hijacking as a form of the subcategories of armed robbery, which does not constitute a different crime from armed robbery. They explain that, perpetrators would consequently be charged with “robbery with aggravating circumstances” in court and not with “vehicle hijacking.” Consequently, robbery with aggravating circumstances can be defined as the unlawful, intentional and violent removal and appropriation of movable corporeal property belonging to another. The victim’s resistance has to be overcome and the property obtained by the use of violence against her person.

If the victim is first injured by the perpetrator and then dispossessed of property while being physically incapacitated, armed robbery is likewise committed.²⁰⁷ It is however, unnecessary for the victim to be physically incapacitated. In the absence of actual physical violence, a threat to commit violence against the victim is sufficient. The threat of violence may be of an express or implied nature. A vehicle hijacking act neatly fits the above definition with the property involved being specifically a motor vehicle of some kind. Leggett²⁰⁸ describes hijacking as a brutal form of robbery. He reported that hijacking seems to be a group activity as most of these cases involve more than one assailant.

For the purpose of a sentence, the RSA has classified robbery into two categories. These categories are common robbery and robbery under aggravating circumstances.²⁰⁹ Section 51(2)(b) of the Criminal Law Amendment Act²¹⁰ provides that if a person has been convicted of an offence referred to in Part III of Schedule 2, there is a minimum sentence. The crimes referred to here include robbery.²¹¹ In a case where a person is

²⁰⁵See <http://www.crimeinstitute.ac.za/projects/orgcrime.sa.htm>, last visited on 15 September 2007. Professor Anthony Minnaar was then a Senior Researcher at the Institute for Human Rights and Criminal Justice Studies at Technikon Southern Africa. He is now a Professor at UNISA.

²⁰⁶Brussow and Brussow *Hijack 1* at <http://www.matrix.co.co.za/content/hijack-guidelines.htm> last visited on 16 September 2007. Richard Brussow is a former detective in the SAPS.

²⁰⁷Snyman *Criminal Law* 507.

²⁰⁸Leggett *Rainbow* 59.

²⁰⁹Section 1(1)(b) of the CPA 51 of 1977 defines aggravating circumstances in relation to robbery or attempted robbery as meaning, the wielding of a firearm or any other dangerous weapon; the infliction of grievous bodily harm; or a threat to inflict grievous bodily harm by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.

²¹⁰105 of 1997.

²¹¹See also Barrow *Procedure* 196 as well as Sloth-Nielsen & Ehlers *Sentences* 5. Owen Barrow is an Advocate of the High Court of the RSA. Julia Sloth-Nielsen is a Professor of Law at the University of Western Cape (UWC). Louise Ehlers is an officer at the Criminal Justice Initiative, Open Society Foundation of South Africa.

convicted of robbery when there are aggravating circumstances or involving the taking of a motor vehicle a court must impose the minimum sentences of 15, 20 and 25 years imprisonment for first, second and third or a subsequent offender respectively. A person charged with robbery may, amongst others, be convicted of either theft, receiving stolen property knowing it to be stolen or contravention of ss 36 or 37 of the General Law Amendment Act of 1955.²¹²

As regard jurisdiction, a person who commits robbery in another jurisdiction cannot be prosecuted outside that jurisdiction on the basis of continuing to possess the stolen property. The basis of this position lies in the decision taken in Makhutla's case to the effect that robbery is not a continuing offence.²¹³ Milton submitted that robbery is always theft.²¹⁴ He however, qualifies his statement by stating that, although theft is a continuing crime, it seems anomously, that robbery is not.²¹⁵

4.2.3. Receiving stolen property knowing it to be stolen.

The crime of receiving stolen property knowing it to be stolen is a common law crime.²¹⁶ A person commits the crime of receiving stolen property knowing it to be stolen if he unlawfully and intentionally receives into his possession property knowing, at the time he does so, that it has been stolen.²¹⁷ Burchell, Milton and the Legal Service Division of the SAPS share the same definition and have defined the crime of receiving stolen property as consisting of unlawfully receiving possession of stolen property knowing it to have been stolen.²¹⁸

The essential elements of this crime are unlawfulness, receiving, stolen property and intention.²¹⁹ Although a person can be charged directly with theft, it is always preferable that the person is charged with a more specific type of crime, hence the charge of receiving stolen property knowing the same to have been stolen. The crime requires that the recipient must have known that the property has been stolen.²²⁰ The goods stolen may have

²¹²The conviction of a person on a different charge than the one originally advanced is in terms of the competent verdicts and robbery is specifically dealt with under s 260 of the CPA 51 of 1977. In *R v Cornelius* 1953 (3) SA 723 (T) at 723, the accused who was charged with robbery was on appeal convicted of theft. In this case, the position was still that, a conviction of receiving stolen property knowing it to be stolen is not competent on a charge of robbery. See also Milton *Common Law* 186.

²¹³*Op cit* n 188 *supra*.

²¹⁴Milton *Common Law* 581.

²¹⁵Milton *Common Law* 647 and 659.

²¹⁶The statutory version of this crime is referred to at 4.2.4 *infra*.

²¹⁷Snyman *Criminal Law* 510. This is the definition of the crime of receiving stolen property knowing it to be stolen.

²¹⁸Burchell *Principles* 806, Milton *Common Law* 662 and the Definitions of common law offences at <http://www.is.org.za/new-components/legal/legal-definitions.htm> last visited on 04 November 2007.

²¹⁹Burchell *Principles* 806, Snyman *Criminal Law* 510 and Milton 666 and 669. Milton qualifies the receiving element as receiving possession and intention as *mens rea*.

²²⁰The case of *S v Kumbe* 1962 (3) SA 197 (N) is an example of a case in which an accused was acquitted after conviction of theft in circumstances where he unknowingly bought stolen dresses from a thief.

been stolen through either theft, house breaking and theft, robbery or theft by false pretences.²²¹ The knowledge requirement is satisfied with mere *dolus eventualis* which means that it is sufficient that the receiver was aware of the possibility that the property might be stolen and despite this decided to receive it. Watermeyer CJ decided in *R v Patz*²²² that it is improbable that the jury ever had occasion to apply the incorrect principle that strong suspicion allied to wilful abstention from enquiry is the legal equivalent of knowledge. Milton and Cowling concluded that, proving this common law crime is an onerous task and very difficult in that, one must prove that a person in whose possession property was found, knew that it was stolen property.²²³ Snyman states that for the accused to be convicted on this crime, it must be proved that the goods are stolen, otherwise the accused ought to be convicted of contravention of section 36 of the General Law Amendment Act of 1955.²²⁴

The question of receiving stolen property knowing it to be stolen, has received attention in *R v Markins Motors (pty) Ltd*,²²⁵ where Leal, who was a director of Markins Motors of Durban, was convicted of theft of motor vehicle and fined thirty pounds. He appealed against the judgement and on appeal, the court, as per Schreiner J decided that, where a man has strong suspicion that the goods he is receiving are stolen, the factor of wilfully refraining from making inquiries, to avoid confirmation of his suspicion which he fears, can only attribute to his dishonest resolve not to take the risk of changing his suspicion into certainty; that being so, in the circumstances his state of mind amounted to an actual belief that the scooter had been stolen. The appeal was thus dismissed, which decision facilitates that a person who wilfully refrains from making enquiries to confirm the suspicion that property is stolen, is reasonably demonstrating guilty mind. This decision was followed by that of *S v Patel*²²⁶ where the Federal Supreme Court of Southern Rhodesia in confirming the conviction of receiving property knowing it to have been stolen in respect of 300 bags of cement, conceded that the mental element is satisfied where X has a strong suspicion that the goods are stolen and he wilfully refrains from making enquiries in order to avoid confirmation of his suspicion. Beadle CJ referred to these two cases (Markins Motors and Patel) in *S v Ushewokunze*²²⁷ where it was concluded that, if on a charge of receiving stolen property well knowing the property to be stolen the State shows that the accused, when he received the stolen goods, must have foreseen the real possibility that the goods had been stolen and did not care whether the goods had been stolen or not, that is sufficient to prove of guilty knowledge.²²⁸

²²¹Burchell *Principles* 807 and Snyman *Criminal Law* 511. In the case of *Vilakazi n 257 infra* at 702, Broome JP stated that the goods fall into the category of stolen goods irrespective of the manner in which they were stolen.

²²²1946 AD 845 at 861.

²²³Milton and Cowling *Statutory Offences* J6-1.

²²⁴Snyman *Criminal Law* 513. In his argument, Snyman refers to the case of *S v Sepiri* 1979 (2) SA 1168 (NC) 1173 D-E.

²²⁵1959 (3) SA 508 (A) 517(A-B). See also the explanation in Milton *Common Law* 669-672.

²²⁶1964 (4)SA 34 (FC).

²²⁷1971 (2) SA 360 (RA).

²²⁸Snyman *Criminal Law* 512 quotes the cases of Patel, Markins, Patz and Ushewokunze in raising the same argument.

The burden placed upon the State to prove that a person knew that the vehicle which she is receiving is stolen, is lightened by the supplementary presumption created in terms of the CPA of 1977.²²⁹ This section states that where property is received from a person under the age of eighteen years, receipt is presumed to be with knowledge of the theft. Amongst the fifteen decisions held by the court in *S v Manamela*,²³⁰ includes a ruling on the question of infringement of the Bill of Rights, on whether the limitation of the presumption of innocence could be justified. It was decided that, although there was little doubt that the effective prosecution of thieves and receivers dealing in stolen property was a pressing social need and that there were important reasons of public policy for a statutory offence which penalised those who were not dealers, but who formed a link in the chain of disposal of stolen goods by deliberately or negligently failing to establish the provenance of goods they acquired outside of ordinary commercial channels, the level of crime did not on its own justify any infringement of the Bill of Rights, no matter how invasive.²³¹ It needs to be noted that the onus that was placed upon the accused by the statute to prove that she had a reasonable cause to believe, was declared unconstitutional in the case of *Manamela*²³² and replaced the reverse onus with the evidential burden.²³³

Snyman went further and said that receiving stolen property knowing it to have been stolen coincides with theft. The competent verdicts of receiving stolen property knowing it to be stolen include theft and contravention of s 37 of the General Law Amendment Act of 1955.²³⁴ The coincidence with the crime of theft is confirmed by Burchell who pointed out that, while it is not true to say that every receiver is also guilty of theft, this is true of nearly every receiver.²³⁵ Milton stated that this crime nearly always constitutes theft.²³⁶

4.2.4. Contravention of s 36 of the General Law Amendment Act.²³⁷

This section provides that, any person who is found in possession of any goods, other than stock or produce as defined in s 1 of the Stock Theft Act 57 of 1959, in regard to which there is reasonable suspicion that they have

²²⁹This is s 240(3) of the CPA of 1977.

²³⁰2000 (3) SA 1 (CC).

²³¹*Id* n 230 *supra* at 4.

²³²*Ibid* n 230 *supra* 5-6.

²³³See also Burchell *Principles* 808 as well as Milton and Cowling *Statutory Offences* J7-1-2. The section was not struck out but only modified by reading in the words necessary to create evidentiary presumption.

²³⁴The competent verdicts for receiving stolen property knowing it to have been stolen are dealt with under s 265 of the CPA 51 of 1977. See also Milton *Common Law* 674.

²³⁵Burchell *Principles* 808. This is confirmed in *Ex parte Minister of Justice: in Re R v Maserow and Another* 1942 AD 164 where it was said that not every thief is a receiver, but in law every receiver is a thief.

²³⁶Milton *Common Law* 581 and 669.

²³⁷62 of 1955. The heading of this offence is called Failure to give a satisfactory account of possession of goods.

been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.²³⁸

This crime has been enacted to counter the defenses which the thieves, who are recipients of stolen property were advancing that, they didn't know that the property was stolen. The elements of this crime are the goods, found in possession of, a reasonable suspicion that the goods have been stolen and inability to give a satisfactory explanation of the possession.²³⁹ The elements of this offence were also enumerated in the case *R v Hunt*²⁴⁰ as a finding of the accused in possession of goods, a suspicion that the goods had been stolen, reasonableness of the suspicion and inability of the accused at the time of the finding to give a satisfactory explanation of his possession. This crime can be committed where property involved is a motor vehicle. On prosecution, the onus is still on the State to prove that the accused was unable to give a satisfactory account of such possession.

This offence has already been examined and passed the constitutional test in *Osman v Attorney-General, Transvaal*²⁴¹ where the court unanimously held as per Madala J that the provisions of s 36 do not violate any of the rights contained in s 25(2)(c) and s 25(3)(c) of the interim Constitution.²⁴² This means that, the section does not violate the right to remain silent, the right not to be compelled to make any confession or admission and the right to be presumed innocent.²⁴³ It needs to be mentioned that this section does not create a presumption and that there is no onus on the accused to prove that his account is or was satisfactory. It is the State which must prove that the explanation is unsatisfactory.²⁴⁴ The explanation, which is to give a satisfactory account of such possession, may be given at the time of arrest or in court.²⁴⁵ Failure to give an explanation to the person who finds the accused in possession of the goods and inability to "there and then" give a satisfactory account of such possession is not in itself an offence as decided in *R v Armugan*.²⁴⁶ As decided in *S v Nader*,²⁴⁷ all what is needed is that the explanation must be such that, could it reasonably be believed, it would provide a

²³⁸See also Snyman *Criminal Law* 513.

²³⁹Snyman *Criminal Law* 513. In *S v Du Preez* 1998 (2) SACR 133 (C) at 134, the court held that the offence of contravention of s 36 of the Act entailed the following elements: (a) that the accused had to be found in possession of property of a particular nature, (b) the existence of a reasonable suspicion, while the accused was still in possession of the property, that it was stolen, and (c) an inability on the part of the person thus found in possession to furnish a satisfactory explanation therefor.

²⁴⁰1957 (2) SA 465 (N).

²⁴¹1998 (2) SACR 493 (CC).

²⁴²The interim Constitution refers to the Constitution of the Republic of South Africa Act 200 of 1993. See also Milton and Cowling *Statutory Offences* J6-2 and J6-8. The Act is also accessible at <http://www.concourt.gov.za/site/constitution/english-web/index.html> last visited on 17 November 2007.

²⁴³Snyman *Criminal Law* 514.

²⁴⁴Milton and Cowling *Statutory Offences* J6-8.

²⁴⁵Snyman *Criminal Law* 516. In this regard Snyman refers to the case of *S v Khumalo* 1964 (1) SA 498 (N).

²⁴⁶1956(4) SA 43 (N).

²⁴⁷1963 (1) SA (O).

satisfactory explanation for the possession of the goods. In *R v Malakeng*,²⁴⁸ the court held, as per Bresler J, that it is open to an accused person, on a charge of being in unlawful possession of goods in contravention of s 36 of the General Law Amendment Act of 1955, to give an explanation of his possession for the first time in court. In *R v May*,²⁴⁹ the court held through De Villiers JP that, this account does not have to be given at the time when X is found in possession, but it may be given at his trial so that if at any time he is able to give satisfactory account, he is not guilty.

The importance of getting an explanation at the time of arrest is found in *S v Kane*²⁵⁰ where it was held that, if X furnished an explanation of his possession at the time of his arrest which differs materially from an explanation given in court, the court may conclude that he has not furnished a satisfactory account of his possession.

4.2.5. Contravention of s 37 of the General law Amendment Act.²⁵¹

This section provides that, any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in s 1 of the Stock Theft Act of 1959, without having reasonable cause for believing at the time of acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorised by the owner thereof to deal with or dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory. In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession will be sufficient evidence of the absence of reasonable cause.²⁵²

Like s 36 of the General Law Amendment Act of 1955, a motor vehicle can be the property in question. This offence, which is commonly referred to as statutory receiving, has been enacted to ensure that where a person was charged with common law receiving of stolen property, the difficulties of proving that the person in whose possession the stolen goods were found knew that they were stolen, is diminished. This is so because in the contravention of this section, the state will only need to prove that the accused acquired or received stolen goods into his possession. Once the state has discharged this onus, the burden shifts to the accused to prove that

²⁴⁸1956 (4) SA 662 (T).

²⁴⁹1924 OPD 274. Also see commentary on this case in Milton and Cowling *Statutory Offences* J6-1.

²⁵⁰1963 (3) SA 404 (T) 406-407.

²⁵¹62 of 1955. The heading of this offence is called Absence of reasonable cause for believing goods properly acquired. It is referred to by Burchell *Principles* at 808 as statutory receiving. See also Milton and Cowling *Statutory Offences* J7-3.

²⁵²See also Milton and Cowling *J7-3* and Snyman *Criminal Law* 517.

she had reasonable cause for believing that she obtained them lawfully.²⁵³ Milton and Cowling remarked that, dealing in stolen property is a scourge in our society. The practice involves massive corruption and immorality that can permeate and perversely normalise itself in every area of society. The public perception that stolen goods are easily disposed of in our country, insidiously encourages serious and often violent crimes including car-jacking, mugging, robbery and theft.²⁵⁴ They stated further that the legislature has put s 37 of the General Law Amendment Act of 1955 in place in an endeavour to put effective means to eradicate the market in stolen property. This section facilitates for convictions in cases where the *mens rea* required in the common law crime of receiving could not be proven.

Trollip J enumerated the elements of this offence in *S v Kaplan and others*,²⁵⁵ that the State has first to prove beyond a reasonable doubt that (1) the goods in question were not stock or produce; (2) they had been stolen; (3) the accused in some manner acquired them or received them into his possession; (4) otherwise than at a public sale as defined; (5) from some other person, known or unknown, who was not necessarily the thief. The onus is then on the accused to prove on a balance of probabilities that (a) at the time of such acquisition or receipt he in fact believed (i) that the goods were the property of the person from whom he received them or (ii) that he was authorised by the owner to deal with or dispose of them and (b) he held such belief for reasonable cause.

The appellant in *R v Mdhletshe*²⁵⁶ paid the full price for the five stolen jerseys. Although Mdhletshe had honestly believed that the seller was entitled to sell the jerseys to him, the court found that he had not proved on a balance of probability, that in all the circumstances there were reasonable grounds for the belief that the articles belonged to the person from whom they had been received, or that such person had been authorised by the owner to deal with them. The important element here is the reasonableness of her belief and not the honest state of mind. The fly notes in *R v Vilakazi*²⁵⁷ correctly stated that s 37 of the General Law Amendment Act of 1955 was intended to cover, *inter alia*, cases where the accused receives stolen property directly from the thief but the Crown is unable to prove knowledge of the theft.

In *S v Ghoor*,²⁵⁸ it was held that, when a purchaser is charged with contravention of this section, the onus placed on him is to prove on a balance of probabilities that he believed that the stolen property which he purchased was the property of the seller or that he had the owner's consent to sell it and that he has based such belief on

²⁵³Snyman *Criminal Law* 518.

²⁵⁴Milton and Cowling *Statutory Offences J7-1*.

2551964 (4) SA 355 (T) at 357-358.

2561957 (3) SA 291 (N).

²⁵⁷1959 (4) NPD 700 at 700.

2581969 (2) SA 555 (A).

reasonable grounds. Milton and Cowling stated the elements as acquired or received into his possession; otherwise than at a public sale or in a manner justified by law; stolen goods; which were not stolen stock or produce; from some other person; without reasonable cause for believing that the goods were the property of such person or that such person was authorised by the owner to deal with or dispose of the goods.²⁵⁹

The case of *S v Mani*²⁶⁰ is a typical example where the accused was convicted of contravention of this s 37 of the General Law Amendment Act of 1955 instead of the main charge of theft. The facts of the case are briefly that, an assistant constable Mani in the SAPS, stationed at Port Elizabeth, appeared before the Port Elizabeth regional court on a charge of theft of a motor vehicle, to wit, an Opel Kadett sedan, belonging to one Mr. Cala, who was robbed at his Brighton Beach home by two men. He was charged, in the alternative, with unlawfully receiving stolen property, to wit, the motor vehicle as aforesaid in contravention of s 37(1), read with s 37(2) of the General Law Amendment Act of 1955. He pleaded not guilty to both the main and the alternative count, but he was, however, convicted of the main charge of theft and sentenced. The counsel for the defence conceded that, defence must have been aware at some stage that the motor vehicle found in his possession was stolen. The accused had changed his version of defence and ended up saying that he bought the motor vehicle from his colleague Zungu. In his judgment, the magistrate stated that, even if a person was not involved in the original removal of the goods, as long as he participates in the disposal thereof, he is just as guilty as the original thief.²⁶¹ He appealed against this conviction and sentence. The High Court set aside the conviction for theft and substituted it with a conviction for acquiring or receiving stolen goods in contravention of s 37(1), read with s 37(2) of the General Law Amendment Act of 1955.²⁶²

4.2.6. Fraud.

Snyman defines fraud as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.²⁶³ Burchell phrases his definition of fraud as consisting in unlawful making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.²⁶⁴ Milton defines it as consisting in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.²⁶⁵ The

²⁵⁹Milton and Cowling *Statutory Offences* J7-3.

²⁶⁰2002 (2) SACR 393(E).

²⁶¹*Id* n 260 *supra* at 398 para I.

²⁶²*Id* n 260 *supra* at 400.

²⁶³Snyman *Criminal Law* 520. This definition is shared by the Legal Service Division of the SAPS, see definitions of common law offences at <http://www.is.org.za/new-components/legal/legal-index.htm> last visited on 05 October 2007.

²⁶⁴Burchell *Principles* 833.

²⁶⁵Milton *Common Law* 702.

crime of fraud will be applicable in respect of a motor vehicle where the owner has been misled into parting with her motor vehicle through the misrepresentation by the fraudster. The crime is also committed in circumstances where the registered owner disposes of the vehicle and defrauds the title holder by reporting that the vehicle has been stolen. This is indeed the common way in which registered owners take their vehicles across the border and thereafter reporting theft in what is commonly known as hoola-hoop.²⁶⁶ The elements of this crime are unlawful, misrepresentation, prejudice and intention.²⁶⁷ Snyman adds to these, the element of potential prejudice while Milton adds the element of causing.²⁶⁸ This crime is the same species as theft by means of false pretences. Not all fraud cases can amount to theft by false pretences.²⁶⁹ Milton argues that theft overlaps with fraud.²⁷⁰

Irish and Qhobosheane estimated that 20% of hijacked motor vehicles are thought to be fraudulent.²⁷¹ They cited an example of some syndicates who use the report of a hijacking as a means of registering a car previously stolen or hijacked. Criminals then produce papers of a car that has been stolen or written off from the owner, hijack or steal a car that is the same model and colour as the papers they have purchased, file off the chassis and engine number and, using the papers they have bought, report that they were hijacked. Shortly afterwards one of their group reports having seen a suspected stolen vehicle. When the police find that it fits the description of the 'hijacked' vehicle, they then give a clearance certificate for re-registering of the vehicle. They said that registering is sometimes done within a day, something suggesting police involvement.²⁷²

4.2.7. Theft by false pretences.

A person commits theft by means of false pretences if he unlawfully and intentionally obtains movable, corporeal property belonging to another with the consent of the person from whom he obtains it, such consent being given as a result of a misrepresentation by the person committing the crime, and appropriates it.²⁷³ Burchell defines it thus, theft by false pretences is committed by any person who unlawfully, with intent to steal and by means of a misrepresentation appropriates property capable of being stolen.²⁷⁴ Milton defines the

²⁶⁶Hoola-hoop is a method of fraud whereby the owner of a motor vehicle which is still under Hire Purchase or Lease contract, allows the vehicle to pass over to another person and go to fraudulently claim from her insurance company that the motor vehicle has been stolen. This include the take-over of instalment. See Phandahanu Consulting(Pty) Ltd: *Fraud Investigator :Fraud Scams 1: Hoola Hoops* at <http://www.fraudinvestigator.co.za/fraud-scams.htm> last visited on 07 October 2007.

²⁶⁷Burchell *Principles* 835.

²⁶⁸Snyman *Criminal Law* 520 and Milton *Common Law* 707.

²⁶⁹Snyman *Criminal Law* 533.

²⁷⁰Milton *Common Law* 580.

²⁷¹Irish and Qhobosheane *South Africa* 104.

²⁷²Irish and Qhobosheane *South Africa* 108.

²⁷³Snyman *Criminal Law* 532.

²⁷⁴Burchell *Principles* 797.

crime thus, theft by false pretences is committed by any person who unlawfully, with the intent to steal, and by means of a misrepresentation effects a *contrectatio* of property capable of being stolen.²⁷⁵

The essential elements of this crime are those for theft with an additional element of misrepresentation such as required in the crime of fraud.²⁷⁶ Milton also mentions the essential elements as those of theft²⁷⁷ with an additional one of effecting (a causation requirement).²⁷⁸ A motor vehicle can be stolen by means of false pretences as it is a movable and corporeal property.

Broome JP stated in the case of Vilakazi²⁷⁹ that, theft by false pretences is a type of theft. He said further that, it is true that it is sometimes regarded as a separate offence and so charged, but it may properly be charged as theft. Although a person can be charged directly with theft, it is always preferable that the person is charged with a more specific type of crime, hence the charge of theft under false pretences. The *modus operandi* which was used by a certain syndicate in Pretoria was to phone people who advertise their vehicle for sale. The syndicate will then pretend to test the vehicle by driving it and thereafter, disappear with the car, which constitutes theft by false pretences.

Snyman,²⁸⁰ Milton²⁸¹ and Burchell²⁸² point out that all cases of theft by false pretences are at the same time also fraud. Burchell questions the reasons why our law should retain this curious hybrid and argued that it is unnecessary to recognise a separate crime of theft by false pretences, since the crimes of theft and fraud adequately protect the gullible persons who believe the lies of confidence tricksters.²⁸³ Milton states that every conceivable case of theft by false pretences is also a case of fraud, though obviously not every case of fraud is a case of theft by false pretences.²⁸⁴ Thus, all cases of theft by false pretences are both theft and fraud. It follows that in this ambit the crimes of theft and fraud overlap. In *S v Stevenson*,²⁸⁵ the question arose as to whether the offence of theft by false pretences was still part of our law, but it was, unfortunately, not answered. The facts of the case were that, an appellant was convicted on two counts of theft of motor vehicles from two different car-

275Milton *Common Law* 754.

276Burchell *Principles* 798.

277Milton *Common Law* 754. Snyman states that criminal law would be none poorer if this crime were discarded.

278Milton *Common Law* 757.

279*Id* n 257 *supra* at 701-702.

280Snyman *Criminal Law* 533.

281Milton *Common Law* 581 and 755. Milton chose to use the term *simpliciter* instead of fraud at 581.

282Burchell *Principles* 797.

283Burchell *Principles* 797.

284Milton *Common Law* 755.

2851976 (1) SA 636 (T) 637.

hire companies by giving different false names. Instead of being returned on the 02 August 1974, the cars were found in abandoned circumstances on the 16 August 1974. Justice Hiemstra declared, in this case that, the Attorney-General of Transvaal had assured him that he never allowed anyone to be indicted with such an offence. The court expressed a view, however, that there was no need for the offence in our law. Milton, on the other hand, does not question the existence of the crime but indicates that it is not clear how the crime became part of our law.²⁸⁶ The crime remains part of our law until it is repealed. I am in agreement with the arguments that our law would be no poorer without the separate crime of theft by false pretences for in all cases theft or fraud may be charged and I am therefore of the view that this crime should be repealed.

4.2.8. Contravention of the Provisions of the National Road Traffic Act (NRTA).²⁸⁷

Section 68(2) of the NRTA of 1996 criminalises some activities involving the registration number of a motor vehicle. This is the number allocated by the licensing authority which is used to identify a vehicle. Section 68(2)(a) of the NRTA of 1996, provides that, no person shall falsify or counterfeit or, with intent to deceive, replace, alter, deface or mutilate or add anything to a registration number or a registration mark or a similar number or mark issued by a competent authority outside the Republic. Section 68(2)(b) of the NRTA of 1996, which is a continuation of subsec 2(a) provides that, no person shall be in possession of such number or mark, which has been falsified or counterfeited or so replaced, altered, defaced or mutilated or to which anything has been so added.

After licensing a motor vehicle, the authority issues a certificate of registration. This certificate certifies the vehicle in question as having been registered with such licensing authority. Section 68(3) of the NRTA of 1996 criminalises some activities involving these certificates. Section 68(3)(a) of the NRTA of 1996 prohibits any person from falsifying or counterfeiting or, with intent to deceive, replacing, altering, defacing or mutilating or adding anything to a certificate, licence or other document issued or recognised in terms of this Act. To be in possession of any item referred to in subsec 3(a) is proscribed as an offence in terms of subsec 3(b) of the NRTA of 1996.

The use of a certificate, licence or other document issued or recognised in terms of this Act by any person, of which he or she is not the holder, is punishable in terms of s 68(4)(a) of the NRTA of 1996. Section 68(4)(b) of the NRTA of 1996, prohibits a person to permit any other person to use such a certificate, licence or other document of which he or she is the holder.

²⁸⁶Milton *Common Law* 757.

²⁸⁷93 of 1996. In this Act, the focus will be on s 68 which is relevant in the fight against the theft of motor vehicles. Most of its provisions are similar to those of the RTA of 1965 of Swaziland as referred to at n 523 *infra*.

The most crucial portion of this Act is s 68(6) of the NRTA of 1996. No person shall in terms of s 68(6)(a) of the NRTA of 1996, falsify, replace, alter, deface, mutilate, add anything to or remove anything from, or in any other way tamper with the engine or chassis number of a motor vehicle, which is done with intent to deceive. The prohibition goes on to prevent any person, who in terms of s 68(6)(b) of the NRTA of 1996, without lawful cause, to be in possession of a motor vehicle of which the engine or chassis number has been falsified, replaced, altered, defaced, mutilated, or to which anything has been added, or from which anything has been removed, or has been tampered with, in any other way.²⁸⁸

The burden to prove the contravention of ss 68(2)(a), 68(2)(b), 68(3)(a), 68(3)(b) 68(6)(a) and 68(6)(b) of this Act is simplified in that, once the State proves that the actions as aforesaid took place, the burden is shifted to the accused to discharge it in terms of s 68(7) of this Act. Any person, who is convicted of contravention of an offence under subsecs 2, 3, 4 or 6 of s 68 of the NRTA of 1996, will in terms of s 89(3) of the said Act, be liable to a fine or to imprisonment for a period not exceeding three years. In terms of s 89(7) of the NRTA of 1996, the Magistrate's court is, notwithstanding anything to the contrary in any law contained, competent to impose any penalty provided for in the NRTA of 1996.

4.2.9. Contravention of the National Road Traffic Regulations of 2000.²⁸⁹

The National Road Traffic Regulations of 2000 have been made in terms of s 75(5) of the NRTA of 1996, which directs that a regulation may provide for penalties for contravention thereof. The nature of the penalty is further restricted under subsec 5(a), which states that, in the case of contravention of the regulations made under subsecs (1)(d), (1)(l) or (1)(n) upon conviction, the sentence shall not exceed a fine or imprisonment for a period of six years. Subsection 5(b) clearly states that in the case of a contravention of any other regulation, the penalty shall not exceed a fine or imprisonment for a period of one year. All the regulations that are referred to below,²⁹⁰ fall in the category of subsec 5(b) where the penalty shall not exceed a fine or imprisonment of one year.

Regulation 3 directs that, every motor vehicle in the Republic shall, whether or not it is operated on a public road, be registered by the title holder thereof. It is not expected that there should be a vehicle which is registered in the name of a fictitious person. If a person is found in possession of a motor vehicle which has

²⁸⁸See the case of Marranic as referred to at n 371 *infra*.

²⁸⁹National Road Traffic Regulations of 2000 were published in GN R225 GG 20963 of 17 March 2000 and came into operation on 01-08-2000. Under this point, Regulations refers to National Road Traffic Regulations of 2000. These regulations are also accessible at <http://www.transport.gov.za/library/legislation/2000/notice-nrta.html> last visited on 17 November 2007.

²⁹⁰The regulations referred to are regs 3, 7, 8, 12, 48, 50, 54, 56, 65 and 84.

been reported stolen and when requested to prove that she bought it, points out to a nonexisting person, she will have herself to blame for failing to ascertain the true identity of the seller. Such a person must not, in a well-informed court, successfully claim to be an innocent buyer.²⁹¹

Regulation 7(1) places an obligation on manufactures, builders and importers to register motor vehicles upon completion of manufacture, building or date of arrival of importation of such motor vehicles. In order to be able to register a vehicle, reg 8(2)(h) requires a SAPS clearance of the motor vehicle as contemplated in reg 8(2)(d) and regs 9(c), 12(c), 12A and 43(3).

In a case where a motor vehicle to be registered was previously registered in another country, additional requirements are stipulated in reg 12, which include an application for the registration of a motor vehicle acquired outside the borders of the Republic. Over and above the requirements and documents referred to in reg 8, the documents will be accompanied by written proof of compliance with the provisions of customs and excise legislation; the documents relating to the registration and licensing of the motor vehicle concerned issued in the country where such a motor vehicle is registered; and a SAPS clearance certificate of the motor vehicle. Unfortunately the Act does not include a SARPCCO clearance certificate²⁹² as part of the documents from other countries in a case where such countries are the SARPCCO member countries.

Snr. Supt. Solomon Mantswe of Botswana Police Service (BPS) observed that corrupt officials connive with criminals and issue the SARPCCO motor vehicle clearance certificates for stolen motor vehicles, thus violating the Standard Operating Procedure (SOP) of the Organisation.²⁹³ In an encouraging best practice move, the BPS published information about the SARPCCO motor vehicle clearance certificate, as part of crime prevention tips,²⁹⁴ which helps to educate the community. The harmonisation of legislation and the implementation of the Motor vehicle clearance certificate by member countries were also emphasised by Msutu during his address of the Africa National Conference on the implementation of the United Nations Programme of Action on Small

²⁹¹An innocent buyer is a common terminology which refers to a person who claim to have innocently acquired a stolen motor vehicle without the knowledge of the theft thereof.

²⁹²SARPCCO Motor Vehicle Clearance Certificate is a document which has been designed and approved by Resolution 15 of the 4th SARPCCO AGM which was held in 1999. Divisional Commissioner Johan Frederick De Beer of the Detective Service, SAPS states that a vehicle clearance certificate which is tamper proof and not easily falsified has been developed by the SARPCCO, in co-operation with business partners. He states further that, the certificate has been put in use throughout the region in an effort to stem the illicit importation/exportation of stolen vehicles in the region. See De Beer *Operations and Investigations 2* which is accessible on <http://www.crimeinstitute.ac.za/2ndconf/paper/de-beer.pdf>. last visited on 19 August 2007.

²⁹³See Corruption Hampers the SARPCCO at <http://www.gov.bw/cgi-bin/news.cgi?d=20050330> last visited on 30 September 2007. A Standard Operating Procedure on cross border motor vehicle theft investigations and return of stolen motor vehicles to their lawful owners is a process adopted as Resolution 9 by the 4th SARPCCO AGM in 1999.

²⁹⁴<http://www.crimewatch.org.bw/public.html> last visited on 20 August 2006.

Arms.²⁹⁵ Bassiouni and Vetere²⁹⁶ correctly state that, harmonisation of national legislation is the premise on which the whole process of co-ordinating national efforts at least to check, if not to eliminate, the phenomenon on which transnational organised crime is based.

One of the methods used by the criminals in stealing motor vehicles is to use fictitious or duplicated registration plates as indicated by Msutu.²⁹⁷ In terms of reg 48, no person shall manufacture or sell number plates unless such person is registered as a manufacturer of number plates in terms of these regulations. This provision ensures that there is control over the manufacturing and that only authorised persons may manufacture number plates.

Subregulation 2 of reg 50 places certain obligations on manufactures of number plates in an attempt to stamp out theft of motor vehicles, which are: keeping a register of number plates manufactured, which register shall contain the licence number brought onto the number plate concerned; the date of manufacture of the number plate; the chassis number of the vehicle to which the number plate concerned is fitted; the acceptable identification of the person to whom the number plate concerned is sold; and such additional information as required by the chief executive officer. I am of the view that this subregulation is ineffective because of the difficulties in policing it by visiting these manufacturers.

To prevent fraud and the so-called hoola-hoop, reg 54 was crafted to place an obligation on the owner to report the theft of her motor vehicle within 24 hours to the SAPS after she has become aware of such theft. Those who were taking their insured motor vehicles across the border, selling them and coming to report theft are firstly faced with the problem of running late on reporting within this prescribed period of 24 hours as the buyer will probably indicate the date and time of purchase. When investigation is conducted, the police will obtain the record of the movement of the suspect as well as a statement from the buyer in such foreign country.

Every vehicle which has to be registered, must in terms of reg 56, bear identification numbers. The nature of the numbers are indicated under subreg 1 as a chassis number of not more than 17 alphanumerical characters which will be cut, stamped, embossed on or permanently affixed to such motor vehicle and, if applicable, an engine number of not more than 20 alphanumerical characters which must be similarly, affixed to the engine of such a motor vehicle. These identification numbers form the basis on which ownership could be established.

²⁹⁵Msutu *Priorities* at <http://www.saferafrika.org/DocumentsCentre/Conference/saferafrika/National/Africaconfmarch2002/6march.php> last visited on 11 September 2007.

²⁹⁶Bassiouni and Vetere *Organised Crime* 499.

²⁹⁷Msutu *Responses* 20.

An obligation is also placed upon the title holder of a motor vehicle, which does not bear either a chassis number or an engine number, or both, or the chassis and engine numbers appear on another motor vehicle, to tender such a motor vehicle to the SAPS in terms of subreg 3. If the SAPS is satisfied that the title holder is legally entitled to the motor vehicle in question, it will issue a new chassis or engine number or a new chassis and engine number, whatever the case may be, in terms of subreg 4. The number issued by the police is called South African Police Service Vehicle Identification Number(SAPSVIN). The police are presently more strict in allocating these numbers, unlike in the past where vehicles, which were tampered with, were issued with SAPSVIN and sold to the public at a public auction. This was stopped precisely because the thieves would buy these scrap cars and steal other cars and then engrave the information which came with a shell which was issued with a SAPSVIN. The SAPS is as a result crushing all vehicles which are unidentifiable as well as its own unserviceable fleet.²⁹⁸

Regulation 65 controls the exportation of vehicles by owners who are not manufacturers or builders. If the owner of a motor vehicle, other than a manufacturer or a builder of a new motor vehicle, intends to export such motor vehicle, such owner must in terms of subreg 1, notify the appropriate registering authority thereof on a prescribed form.²⁹⁹ The registering authority must then update the particulars pertaining to such motor vehicle in the register of motor vehicles. The implication of this regulation is that a person from outside the RSA cannot legally purchase a vehicle from the owner without the necessary clearance certificate. Once a potential seller approaches the registering authority, the latter will issue the necessary forms requesting the SAPS to examine the vehicle and report its findings. The police will ultimately issue a SARPCCO motor vehicle clearance certificate, if such a vehicle is to be sold in the SARPCCO member's country.³⁰⁰

The RSA does not import secondhand motor vehicles. Regulation 84 was put in place in order to prevent the illegal entrance of some secondhand motor vehicles from elsewhere. There were some people who, because of the low prices of imported secondhand vehicles, committed some irregularities in an attempt to own these vehicles. This regulation is aimed at curtailing this phenomenon by prescribing the circumstances under which these secondhand motor vehicles may be operated on a public road. These motor vehicles may only be used under a temporary or special permit.

In terms of reg 84(1), a temporary permit may be issued for a motor vehicle in order to be registered, licensed

²⁹⁸Unserviceable fleet refers to motor vehicles which the police were using in the execution of their duties and found to be no longer useable and need to be scrapped. See the process of allocation of numbers by Swaziland in terms of s 31 of the RTA of 1965 under n 521 *infra*.

²⁹⁹The prescribed form is MVR1A or CNV.

³⁰⁰Although the police will issue a SARPCCO clearance certificate, it is not specifically stipulated that a SARPCCO clearance certificate should be issued. A SARPCCO clearance certificate has thus not been given legal status.

and operated on a public road. These temporary or special permits were then irregularly used to facilitate the movement of these vehicles to the other SADC countries which were ultimately driven through the South African roads. The misuse of this regulation was tested in *Clearing Agents v MEC Transport*³⁰¹ where temporary or special permits were being issued to imported vehicles, which were destined for neighbouring States.³⁰² The court ruled as per Cachalia JA, that these vehicles are not entitled to be issued with permits.

4.2.10. Contravention of the International Trade Administration Act(ITAA).³⁰³

Section 6(1)(a) of the ITAA of 2002 enables the Minister to permit or prohibit the importation of goods of a specified class or nature into the Republic. Failure to comply with the stipulated prohibition is punishable on conviction with a fine not exceeding R500 000-00 or to imprisonment for a period not exceeding ten years.³⁰⁴ The court convicting the accused may declare the goods so imported, forfeited to the state. The Magistrate's court has extended jurisdiction to pass this judgement in terms of s 56 of this Act.

The Minister of Trade and Industry has in terms of s 6 of the ITAA of 2002, prescribed³⁰⁵ that goods described in Schedules 1, 2 and 3,³⁰⁶ shall not be imported into the RSA. An exception is by virtue of an import permit issued in terms of s 6 of the said ITAA of 2002, in which such goods are specifically described. The Notice further prescribes that all second-hand or used goods, including waste and scrap of whatever nature, shall not be imported into the RSA except by virtue of an import permit issued in terms of s 6 of the said ITAA of 2002.³⁰⁷

There is an exception built into this prohibition. This exception,³⁰⁸ provides that no import permit shall be necessary for the importation into the RSA of new and used or second-hand goods (excluding, amongst others, used or second-hand motor vehicles) imported as household or personal effects for the personal use of a South African citizen returning to the Republic or by a person entering the Republic for purposes of either permanent or temporary residence. This simply means that importation of used or second hand motor vehicles are

³⁰¹2007 SCA 35 (RSA) case number 659/05 not reportable.

³⁰²Botswana, Lesotho and Swaziland.

³⁰³71 of 2002. This Act is accessible at <http://www.info.gov.za/gazette/acts/2002/a71-02.pdf> last visited on 17 November 2007.

³⁰⁴Section 54(1)(a) read with S 55(1) (a) of the ITAA of 2002.

³⁰⁵This is under I(a) of Government Notice R3 of 2 January 2004.

³⁰⁶Schedule 1 as reflected in Government Notice R3 of 2 January 2004, includes motor cars, other motor vehicles principally designed for the transport of persons and goods but excluding vehicles exported by diplomatic and foreign representatives and new vehicles exported by local manufacturers or their appointed agents.

³⁰⁷This is under I(b) of Government Notice R3 of 2 January 2004.

³⁰⁸See II(b) of Government Notice R3 of 2 January 2004.

prohibited, but that an exception may be given as personal belongings to the people who are coming to stay permanently in the Republic or representatives of the country returning home. Just like in the case of the regulations above,³⁰⁹ no provisions have been made for a SARPCCO clearance certificate in case such a vehicle was previously registered in the SARPCCO member countries.

4.2.11. Contravention of the Prevention of Organised Crime Act (POCA).³¹⁰

Organised crime is not a common law crime but a statutory offence. The POCA of 1998 has in certain sections, proscribed some activities as offences.³¹¹ The only portion of the Act which is organised crime proper is s 2 which deals with prohibitions regarding racketeering activities. Subsections (a)- (c) deals with property generated by racketeering enterprise; subsecs (d)-(f) deals with participation in the enterprise while subsec (g) deals with conspiracy or attempt to violate subsecs (a)- (f). The three basic elements of organised crime comprise a pattern of racketeering activities, an enterprise and accused.

These basic elements of organised crime can be briefly explained as follows:

- ↪ There must be at least two offences which are classifiable as a pattern of racketeering activities;
- ↪ The criminal group must be linked in some way to what should be an enterprise which is an organising principle; and
- ↪ Because organised crime has to be committed by an organised criminal group, there must always be more than one accused.

Section 2(1)(e) of the POCA of 1998, provides that any person who, whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity commits an offence. It is important to note that the definition of enterprise includes any individual,³¹² 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

³⁰⁹*Op cit n 292 supra.*

³¹⁰121 of 1998. This Act is also accessible at <http://www.info.gov.za/gazette/acts/1998/a121-98.pdf> last visited on 17 November 2007.

³¹¹These sections are 2(1)(a), 2(1)(b), 2(1)(c), 2(1)(d), 2(1)(e), 2(1)(f), 2(1)(g), 4(a), 4(b), 5(a), 5(b), 6(a), 6(b), 6(c), 9(1)(a), 9(1)(b), 9(1)(c), 9(2)(a), 9(2)(b), 54(9)(a), 54(9)(b), 71(3)(b), 74(3), 75(1), 75(2) and 75(3).

³¹²An enterprise is defined in s 1(1) as including 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. The individual whose job may be to receive stolen motor vehicles, can only be charged in terms of racketeering if a link can be established with another person who committed the offence concerned. There are three elements in this section, to wit, enterprise, accused and pattern of racketeering activity. This portion was explained by Michael Johnson from the United States Department of Justice, Office of Overseas Prosecutorial Development, Assistant and Training (OPDAT) during his lecture of Organised Crime and Racketeering Course for investigators and Prosecutors of the SAPS and NPA on the 30-08-2006, Pretoria. Michael Johnson was then the legal advisor of the NPA of the RSA.

entity.³¹³ Bassiouni and Vetere³¹⁴ cautioned that organised crime should not be confused with occasional criminal activities of otherwise legitimate enterprises, which they describe as corporate or organizational crime. A pattern of racketeering activity is defined in s 1(1) of the POCA of 1998 as 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 the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1. The offences in Schedule 1 include robbery, theft, fraud as well as contravention of s 36 and 37 of the General Law Amendment Act of 1955, which are offences applicable as regard to motor vehicles crime under focus.

Burchell stated that, although the RSA had an array of criminal offences such as fraud, receiving stolen property, extortion, obstruction of the course or administration of justice and assisting or furthering the commission of these crimes by others, co-perpetrators, attempts and incitement to commit crime, accessory after the fact, it has nevertheless, enacted the POCA of 1998.³¹⁵ He identified some key features of the organised crime as the presence of a structured group or enterprise; continuity; systematic criminal activity; and pursuit of common criminal goal.³¹⁶ As regards racketeering, he stated that there are three common elements of racketeering, namely, the existence of an enterprise, a pattern of racketeering activities and that the accused participated in the conduct, directly or indirectly of this enterprise's affairs.³¹⁷ He stated further that the prosecution of racketeering contains special elements of pattern of racketeering, enterprise, fault(intention or negligence) and two predicate offences.³¹⁸

From the elucidation above, any person who conducts or participates directly or indirectly in connection with theft, robbery, fraud, or contravention of ss 36 or 37 of the General Law Amendment Act of 1955 can be charged in terms of s 2 of this Act in a case where the property concerned is a motor vehicle. However, a person shall only be charged with committing an offence contemplated in this subsection if a prosecution is authorised in writing by the National Director of Public Prosecutions(NDPP) in terms of subsec 4.

Unfortunately, very few suspects have since the enactment of legislation been prosecuted in the RSA.³¹⁹ What

³¹³Section 1(1) of the POCA of 1998.

³¹⁴Bassiouni and Vetere *Organised Crime* xxvi.

³¹⁵Burchell *Principles* 970.

³¹⁶Burchell *Principles* 974-975.

³¹⁷Burchell *Principles* 977.

³¹⁸Burchell *Principles* 982.

³¹⁹The number of prosecutions generated by the Organised Crime Component and authorised by the NDPP through the Organised Crime Section of the National Prosecuting Service was 21 as on 02-11-2007. As on the 15-07-2006 only two cases were successfully prosecuted in terms of racketeering as referred to in s 2 of the POCA of 1998.

was happening in reality was that the police would obtain an authority³²⁰ to purchase stolen vehicles from individuals who are known to be members of a criminal group, but when the project was terminated and a group is arrested, they were charged with either theft, robbery, fraud or contravention of ss 36 or 37 of General Law Amendment Act of 1955 as the case may be. When these cases are taken to court, the investigators had to go to the ordinary prosecutors who did not have a written authority to prosecute in terms of s 2(4) of the POCA of 1998.

In *S v Dos Santos and others*,³²¹ Dos Santos who managed Tony's Auto Spares was convicted on count 1 which was contravention of s 2(1)(e) of the POCA of 1998 and counts 3, 14, 24, 51 and 58 which were contraventions of s 21(b) of the Diamonds Act 56 of 1986. On the question of whether offences referred to in Schedule 1 for the purpose of proving racketeering refers to cases for which the accused has been convicted on, Le Grange AJ stated that he is of the view that the legislature could not have intended that the word "offence" as stated in the definition of "a pattern of racketeering" to mean a conviction. If that was the intention of the legislature, he said, it would have expressly stated it. This therefore means that the conviction on count 1 is not based on the five other counts that he was convicted of, but that it includes other transactions of which he was not convicted of. I am, however, of the view that one cannot read the pattern in the allegations that have not passed the scale of justice through a conviction.

Any person who is convicted of an offence referred to in s 2(1)(e) of the POCA of 1998, shall in terms of s 3(1)(a) of the POCA of 1998, be liable to a fine not exceeding R1 000 million, or a period up to imprisonment for life. Section 3(1)(b) of the POCA of 1998 suggests that the penal jurisdiction of the regional court shall, if the case merits a sentence in excess of its normal penal jurisdiction, but not exceeding a fine of R100 million or a period of 30 years imprisonment, have jurisdiction to impose such penalty even though that penalty exceeds the normal penal jurisdiction of that court. It means that the regional court has penal jurisdiction of up to R100 million fine or up to 30 years imprisonment. If the crime merits sentence in excess of R100 million or 30 years imprisonment, the case shall be committed to High Court for sentence.³²²

Any person who, in contravention of the provision of s 2(1)(i) of the POCA of 1998, receives or retains any property derived from a pattern of racketeering activity shall be guilty of an offence. It does not matter whether the property was derived directly or indirectly. The provision of this subsection allows prosecution for theft of a

³²⁰The authority referred to here is given by the DPP in terms of s 252A of the CPA 51 of 1977. The Criminal Justice System is indicted to prove that it is not doing injustice to the community of this country who ensured the passing of the POCA legislation. This good weapon is in my opinion highly under utilised to the detriment of the victims of crime.

³²¹2005, case no 32/2005 (C) reportable.

³²²As appearing from the wording of this subsection the district court has no jurisdiction to try the suspects in terms of s 2 of the POCA of 1998.

motor vehicle whether in the form of theft, fraud, contravention of ss 36 and 37 of the General Law Amendment Act of 1955 or robbery.³²³

A person who, in contravention of the provision of s 2(1)(g) of the POCA of 1998, conspires or attempts to violate any of the provisions of paras (a), (b), (c), (d), (e) or (f), whether it is within the Republic or elsewhere, shall be guilty of an offence. This offence is generally referred to as conspiracy.³²⁴ In my view, this is one of those devices which has been put in place by the legislator to ensure that the law enforcement community is armed with the modern legal tool to match or outperform the criminal enterprise. Burchell argues that it is unnecessary to have the crimes of conspiracy and attempt in terms of the POCA of 1998 because they arise from the common law.³²⁵

It is unfortunate that our prosecutors have not been using this legislation but still choose to charge criminals with existing crimes. This situation is further exacerbated by a need to obtain authority from the NDPP in terms of s 2(4) of the POCA of 1998 in order to institute proceedings in terms of this Act. That is in itself, a cumbersome and time-consuming exercise in the light of a marathon to secure more convictions for less serious offences. The NDPP also finds it necessary to have proper and quality control over prosecutions under this section. This provision was of course, inherited from the United States which requires the jury to decide whether prosecution should be instituted or not.³²⁶

The acquisition, possession and the use of the proceeds of unlawful activities are criminalised in terms of s 6(a), 6(b) and 6(c) of the POCA of 1998 respectively. The accused should, however, know or ought reasonably to have known that the property is or forms part of the proceeds of unlawful activities of another person. A stolen motor vehicle satisfies the requirement of property. A person who is convicted for contravention of this section must in terms of s 8(1) of the POCA of 1998, be sentenced to a fine not exceeding R100 million or to imprisonment for a period not exceeding 30 years. A regional court shall in terms of s 76(1) of the POCA of 1998 have penal jurisdiction to impose any penalty mentioned in ss 8 or 71 (3) (b) of this Act, even though that penalty may exceed the normal penal jurisdiction of that court. This subsection can effectively deal with owners of scrap yards who acquires stolen motor vehicles from thieves.

³²³Penalty is the same as that provided for contravention of s 2(1)(e) of the POCA of 1998, *op cit* n 322 *supra*.

³²⁴As in the case of contravention of s 2(1)(i) in n 323, penalty is the same as indicated for contravention of s 2(1)(e) of the POCA of 1998.

³²⁵Burchell *Principles* 978. It needs to be noted that conspiracy in terms of s 18(2) of the Riotous Assemblies Act 17 of 1956 remains in force as it was not amended by the POCA of 1998. It has to be kept in mind the conspiracy in terms of the POCA of 1998 is concerning violation of the POCA of 1998 only, while conspiracy in the Riotous Assemblies Act of 1956 concern conspiracy in general.

³²⁶This was explained by Michael Johnson, see n 312 *supra*.

Section 9(1)(a) of the POCA of 1998, is concerned with participation in or membership of a criminal gang.³²⁷ In terms of s 10(3) of this Act, if a court, after having convicted an accused of any offence, other than an offence contemplated in Chapter 4,³²⁸ finds that the accused was a member of a criminal gang at the time of the commission of the offence, such finding shall be regarded as an aggravating circumstance for the purpose of sentencing. Any person who actively participates in or is a member of a criminal gang³²⁹ and who wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang,³³⁰ shall be guilty of an offence. A person, who is so convicted, shall be liable to a fine, or to imprisonment for a period not exceeding six years in terms of s 10(1)(a) of the POCA of 1998. If the offence, for example, robbery of a motor vehicle, was committed on the premises or grounds of, or within 500 metres of a school, or any other educational institution, during hours in which the facility is open for classes or school related programmes or when minors are using the facility, such fact shall be regarded as an aggravating circumstance. Upon conviction, the accused shall be liable to a fine, or to imprisonment for a period not exceeding eight years.³³¹

According to Professor Stefano Betti, Professor in New Media theory and technology at the university of del Molise, Italy,³³² Article 5 of the UN Convention Against Transnational Organised Crime requires the adoption of at least two criminal offences, namely, making it an offence to participate in a criminal gang, and agreement with one or more other persons to commit a serious crime. In this regard, s 2(1)(g) of the POCA of 1998, fulfils the second requirement of the offence, but the first one remains unfulfilled because it does not prohibit the mere participation in a syndicate or a criminal gang. Snyman³³³ stated in the discussion of the crime of participation in criminal gang that, it is clear that the mere membership or active participation in a criminal gang is not an offence in terms of s 9(2)(a) of the POCA of 1998. The membership or active participation must

³²⁷Criminal gang is defined in terms of s 1(1) of the POCA of 1998 as including any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. The interpretation of a criminal gang is explained under s 11 of the POCA of 1998 which stipulates that the court may have regard to the following factors, namely that such person admits to criminal gang membership; is identified as a member of a criminal gang by a parent or guardian; resides in or frequents a particular criminal gang's area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known members of a criminal gang, has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with usual criminal gang activities; is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.

³²⁸This Chapter deals with offences relating to gang activities.

³²⁹The legislator should have defined criminal gang or group for the purpose of the whole Act and not a chapter dealing with criminal violent gangs only as indicated under n 327 *supra*.

³³⁰Cowling observed that the definition of a criminal gang member which is an import from the United States is problematic and has been criticised by many of those who commented, as vague and ambiguous. See Cowling 1998 *SACJ* 372.

³³¹The magistrate's court shall have jurisdiction to pass this sentence in terms of s 76(2) of the POCA of 1998 for contravention of s 9(1)(a), 9(1)(b), 9(2)(b) and 9(2)(c) of the POCA of 1998.

³³²Betti *European Union* 12.

³³³Snyman 1999 *SACJ* 214.

be coupled with support of gang activities which advantages it or a threat of violence or other criminal act.

The relevancy of s 9(1)(a) of the POCA of 1998, as regard to the crime of motor vehicle such as hijacking, is, in my view, limited to instances where it is committed at or near the school premises. It is also applicable in cases where the convict has been found guilty of any crime involving a motor vehicle and it is proved that she belonged to a criminal gang. The membership of a criminal gang alone, serves as aggravating circumstances for the purpose of meting out the sentence.

In terms of s 9(1)(b) of the POCA of 1998, any person who actively participates in or is a member of a criminal gang and who threatens to commit, bring about or perform any act of violence or any criminal activity by a criminal gang or with the assistance of a criminal gang, shall be guilty of an offence and be liable on conviction to a fine, or to imprisonment for a period not exceeding six years.³³⁴ If the offence was committed on the premises or grounds of, or within 500 metres of a school, or any other educational institution, during hours in which the facility is open for classes or school related programmes or when minors are using the facility, such fact shall be regarded as an aggravating circumstance and the convict shall be liable to a fine, or to imprisonment for a period not exceeding eight years. These provisions are designed to discourage people from belonging to a criminal gang and even more so, the disruption of school education.³³⁵

Section 9(1)(c) of the POCA of 1998 states that any person who actively participates in or is a member of a criminal gang and who threatens any specific person or persons in general, with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence, shall be guilty of an offence and be liable on conviction to a fine, or to imprisonment for a period not exceeding six years. Snyman stated that it is difficult to understand how one can become a member of a criminal gang without at the same time conspiring with the gang. Accordingly, s 9(1)(c) of the POCA of 1998 is in his view, already covered by other laws, to wit, conspiracy.³³⁶

Section 9(2)(a) of the POCA of 1998 is still dealing with gang related activities. It provides that any person who performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity shall be guilty of an offence and be liable on conviction to the same punishment as indicated under s 9(1)(c) of the POCA of 1998 above.

³³⁴The sentence is prescribed in terms of s 10(1)(a) of the POCA of 1998.

³³⁵Kinnes *Criminal Empires* 4. He refers to the definition of a criminal gang as consisting of an organised group of members which has a sense of cohesion, is generally territorially bound, which creates an atmosphere of fear and intimidation in the community and whose members engage in gang-focused criminal activity either individually or collectively. Irvin Kinnes is an independent researcher specialising in gangs, youth crime and policing in the Western Cape.

³³⁶Snyman 1999 *SACJ* 219. See similar argument by Burchell *Principles* 978 at n 325 *supra* .

Section 9(2)(b) of the POCA of 1998 stipulates that any person who incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about, perform or participate in a pattern of criminal gang activity,³³⁷ shall be guilty of an offence and be liable on conviction to a fine, or to imprisonment for a period not exceeding three years in terms of s 10(1)(b) of this Act.

Section 9(2)(c) of the POCA of 1998 provides that, any person who intentionally causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang, shall be guilty of an offence and be liable on conviction to a fine, or to imprisonment for a period not exceeding three years in terms of s 10(1)(b) of this Act. The gang can be formed for the purpose of stealing motor vehicles in any form. Snyman argues that s 9(2)(b) and (c) of the POCA of 1998 come out as crimes already criminalised in terms of s 18(2) of the Riotous Assemblies Act of 1956 which suggest that it was unnecessary to have this crime.³³⁸

4.3. Utilisation of criminal processes in finalising criminal offences.

4.3.1. Securing the attendance of the syndicate in court.

The CPA of 1977 directs that the attendance of the accused in court will be secured by means of arrest, summons, written notice and indictment.³³⁹ It has never posed any problem in securing court attendance by an accused who is in the Republic. The same applies to organised crime syndicates who are involved in motor vehicle crime.

The only challenge is where the suspect who is outside the country has to be prosecuted. This calls upon the application of extradition³⁴⁰ treaties.³⁴¹ The laws applied in the RSA are mainly in terms of Extradition Act³⁴² and International Co-operation in Criminal Matters Act (ICCMA).³⁴³ The RSA has, amongst others, entered into extradition treaties with Lesotho and Swaziland in terms of the Extradition Act of 1962.

³³⁷The pattern shall for the purpose of this research refers to crimes affecting motor vehicles.

³³⁸Snyman 1999 *SACJ* 219.

³³⁹The method of securing the attendance of the accused person in court are reflected in s 38 of the CPA of 1977. The details of how each method is applied is dealt with in chapters 5,6,7 and 21 of the CPA of 1977.

³⁴⁰Extradition is defined by Dugard *International Law* 155 as the delivery of an accused or a convicted individual to the state on whose territory he happens for the time to be. Professor John Dugard, hereinafter referred to as Dugard, is a Professor of Public International Law at the University of Leiden.

³⁴¹Treaty is defined under Article 2(1)(a) of the Vienna Convention on the law of Treaties 1969(VC) as an international agreement concluded between States in written form and governed by International law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designations.

³⁴²67 of 1962.

³⁴³75 of 1996.

The extradition treaty between the RSA and Swaziland,³⁴⁴ prescribes extraditable offences under Article 2 as those crimes punishable by a maximum sentence of imprisonment for a period of six months or more or by a more severe penalty.³⁴⁵ Theft of a motor vehicle is in both countries punishable with a maximum of more than six months imprisonment. In the RSA there is no specific punishment prescribed by law for theft of a motor vehicle, but the nature of the sentence is governed by the sentencing jurisdiction of the court. The lowest court, which is the District court, has a maximum sentencing jurisdiction of three years imprisonment and R60 000 00 fine.³⁴⁶

The extradition treaty between the RSA and Lesotho,³⁴⁷ prescribes extraditable offences under Article 2 as those conduct which constitute an offence under the laws of both contracting parties that are punishable by deprivation of liberty for a term of one year or more or by a more severe punishment. The offences referred to exclude political ones.³⁴⁸ Theft of a motor vehicle is in both countries punishable with a deprivation of liberty for a term of one year or a more severe punishment.

There is no extradition agreement between the RSA and Zambia. It is no longer necessary to enter into one because the SADC Protocol on Extradition (SADCPE)³⁴⁹ of offenders came into operation on 17 August 2006.

Extradition of offenders and the return of exhibits in the SARPCCO member countries are governed by the principles of the SADCPE. Article 2 of the SADCPE stipulates that each State Party agrees to extradite any person within its jurisdiction who is wanted for prosecution or the imposition or enforcement of a sentence in the Requesting State for an extraditable offence. The extraditable offences, which the parties agree to, include

³⁴⁴The extradition treaty between the RSA and Swaziland is reflected in Proclamation R292, GG 2179 of 04-10-1968. See also Dugard *International Law* 160.

³⁴⁵Extraditable offence is defined in s 1 of the Extradition Act of 1962 as any offence which in terms of the law of the Republic and of a foreign state concerned is punishable by a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more.

³⁴⁶Section 92 of the Magistrate's Court Act 32 of 1944. This is also accessible at <http://www.doj.gov.za/2004dojsite/ab-doicd/2001-courtstructures.htm> last visited on 10 September 2007.

³⁴⁷The extradition treaty between the RSA and Lesotho is reflected in Proclamation R644 GG 26375 of 28 May 2004. This treaty replaced the previous one which was published under Proclamation 7 GG 17739 of 29 January 1997 where the extraditable offences were mentioned by name and in that one theft was clearly indicated as one of them. The Treaty is also accessible at <http://www.info.gov.za/gazette/regulation/2004/26375a.pdf> last visited on 18 November 2007.

³⁴⁸See s 15 of the Extradition Act of 1962 as well as Article 3 of the 1968 Treaty between the RSA and Swaziland as referred to under n 344 *supra*.

³⁴⁹The Protocol was signed on the 03rd October 2002 at Luanda, Angola by fourteen member countries which are Republic of Angola, Republic of Botswana, Democratic Republic of Congo(DRC), Kingdom of Lesotho, Republic of Malawi, Republic of Mauritius, Republic of Namibia, Republic of Seychelles, Republic of South Africa, Kingdom of Swaziland, United Republic of Tanzania and Republic of Zimbabwe. The two countries which did not sign on the said date were Republic of Zambia and Republic of Mozambique which signed at a later stage. This information can also be accessed on <http://www.sadc.int/english/documents/legal/protocols/extradition.php#25> last visited on 05 August 2007. The DRC, Mozambique, Seychelles and Zimbabwe are required to ratify the Protocol.

offences that are in terms of Article 3, punishable under the laws of both State Parties by imprisonment or other deprivation of liberty to a period of at least one year or by a more severe penalty. Motor vehicle theft is generally understood to refer to the stealing of motor vehicles through the use of force, deceit or other means and is considered as crime by all the four countries under the focus which are also SARPCCO member countries. Crimes where motor vehicles are involved, fall within the ambit of the SADCPE.

Article 19 also puts to rest any confusion which might arise as a result of the disharmony with any other treaty or bilateral agreement governing treaties. It provides that the provisions of such other treaties or agreements will be complementary to the provisions of this Protocol and shall be construed and applied in harmony with this Protocol. This Protocol is therefore the Supreme Protocol on extradition matters in the SADC in that, in the event of any inconsistencies, the provisions of this Protocol shall prevail.

The SADCPE provides that the State Parties may in terms of Article 5 refuse the extradition on the grounds, amongst others, that the person requested is a National of the Requested State. This is in any event, more accommodating than most individual Extradition Acts which totally refuse the extradition of their own nationals.

4.3.2 Management of exhibits.

Each country has got its own way of managing exhibits. An exhibit is defined by Walker as a document or thing shown to a witness and referred to by him in evidence or in an affidavit.³⁵⁰ According to Collins English dictionary, an exhibit is a document or object produced in court and referred to or identified by a witness in giving evidence.³⁵¹ In this research exhibit is restricted to a motor vehicle. The existence of international organised motor vehicle crime surfaces through the exhibits which are motor vehicles. It is a motor vehicle which has been stolen in one country and found in another that suggests the existence of a syndicate. A motor vehicle serves as trail of the movement of organised crime syndicates. Experience has shown that the repatriation of exhibits, specifically, motor vehicles, pose a serious challenge in some SARPCCO member countries.³⁵²

Article 15 of the SADCPE which deals with the surrender of property attempts to address this concern. It provides that all property found in the Requested State that has been acquired as a result of the offence and that

³⁵⁰Walker and David *Companion to Law* 451.

³⁵¹Collins *English Dictionary* 543.

³⁵²See table 7 *infra*.

may be required as evidence will, if the Requesting State so requests, be surrendered if extradition is granted. Even if the extradition is not carried out as agreed on, the Requested State may surrender the said property.³⁵³ The safety mechanism built in this Article is found in ss 3 and 4 which stipulate that the property may also be retained by the Requested State or temporarily handed over. When the rights of third parties so require, any property so surrendered will be returned to the Requested State after the completion of the proceedings, if the State so requests.³⁵⁴

In the RSA, the management of exhibits is governed by the CPA of 1977. This Act does not only deal with exhibits belonging to foreign nationals, but it does in fact deal with all exhibits in general.

4.3.2.1. Seizure and safe keeping of exhibits.

The management of exhibits starts with the seizure by the State in the RSA. The State may seize any thing which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere; which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or which is intended to be used or is on reasonable grounds believed to be used or intended to be used in the commission of an offence.³⁵⁵

A thing which is seized in terms of s 20 of the CPA of 1977 is an exhibit. It is clear from the wording of this section that the offence committed or the offence for which the item may afford evidence of the commission, could have been committed within the country or outside the country. This therefore means that when a crime is committed in Angola, the exhibit can be seized in the RSA. A suspect can thus not use a stolen motor vehicle in the RSA. Even though a motor vehicle is in the possession of a second person, it can still be seized in terms of this section. If a motor vehicle is reported stolen, it does not matter whether you bought it or not, it will remain stolen property and therefore subject to this section. The exhibit may be seized with or without a search warrant.³⁵⁶ The exhibit can also be seized when effecting arrest.³⁵⁷

4.3.2.2. Disposal of exhibits.

³⁵³Section 2 of Article 15 of the SADCPE.

³⁵⁴No request has been found where a motor vehicle is required as an exhibit in another member country. What is apparent is the request of owners to obtain their vehicles through the courts of other SARPCCO member countries.

³⁵⁵Section 20 of the CPA of 1977. See a similar provision in respect of Lesotho at n 454 *infra*.

³⁵⁶Seizure with or without a search warrant are regulated by ss 21 and 22 of the CPA of 1977.

³⁵⁷Section 23 of the CPA of 1977.

The critical issue within the SARPCCO member countries is the disposal of exhibits seized. In the RSA, the disposal of exhibits is regulated by ss 30, 31, 32, 33, 34, 35 and 36 of the CPA of 1977.

Where an exhibit is a stolen or suspected stolen property, the police may, if the person from whom it was seized consents, deliver it to the person from whom the exhibit was, in the opinion of the police, stolen. This person will be warned to keep such an exhibit available for production in court at any resultant criminal proceedings if required to do so.³⁵⁸ The police are given some discretionary powers in that they have to formulate an opinion as to whether the person, to whom they are to hand over the exhibit, is the one from whom it was stolen. In other words, they have to be satisfied that the person is the owner or is the person entitled to possess such an exhibit. In simplifying the administration of this subsection, the Police have designed and use a form SAPS 299. This form has to be signed by the person from whom the exhibit was seized, the person to whom the exhibit is handed over and a police officer who witnesses the agreement. This form forms part of evidence in court and it serves as proof that the exhibit exists or existed and that if required, it can be produced.³⁵⁹

If an exhibit could not be disposed of by handing it to a person from whom it was stolen, the police will give it a distinctive identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require.³⁶⁰ This subsection gives the police another discretionary power in that they will retain it in police custody or make other arrangements with regard to the custody thereof as the circumstances may require. What the police will not do, is to exercise a reckless discretion of handing the property to the suspect with the hope that such suspect will be turned into a good Samaritan and bring the exhibit or bring it in the same condition as it was. It needs to be kept in mind that the suspect would not want to keep an exhibit for the sake of keeping it, once she becomes aware that she may possibly lose the same in the subsequent proceedings.

An exhibit which was kept by the police will, if there are no criminal proceedings instituted or if the criminal proceedings are instituted, but it appears that such an exhibit is not required for the purpose of either evidence or an order of court, be returned to the person from whom it was seized if such person may lawfully possess it. If the person from whom it was seized may not lawfully possess it, the police will return it to the person who

³⁵⁸Section 30(b) of the CPA of 1977.

³⁵⁹The application of these sections which deals with exhibits are also contained in the police directives called Standing Orders of the SAPS. Standing Order 328 and 328A deal with exhibits. If for some reason the property is no longer available s 300 of the CPA 51 of 1977 can also be used to award compensation to the person who suffered damage or loss of property as a result of criminal conduct.

³⁶⁰This is in s 30(c) of the CPA of 1977 and the guideline to the police are in Standing Order 328 of the SAPS. The identification mark referred to in the CPA is called SAPS 13 reference number and the camp where motor vehicles are kept is commonly known as the 13 and all exhibits and found property in police custody have SAPS 13 number. The person from whom the exhibit is taken, must in terms of s 19 of the National Instruction 2 of 2002 be given acknowledgment of receipt by the police on a prescribed form called Property Acknowledgment of Receipt Register which is SAPS 13(b).

may lawfully possess it.³⁶¹ A motor vehicle is not released to the suspect before it is clear that such suspect is entitled to possess the vehicle. In *Ntoyakhe*,³⁶² the police officer testified in court that he could not return the vehicle to an applicant and thereby openly allow the unlawful act of possession of a stolen vehicle to continue. The members of the SAPS exercise discretion in this regard. What they will normally do is to consult the Public Prosecutor if there is an arrest effected to establish whether the exhibit will be required in court or not. It is not the prosecutor who makes a decision, but the police.

The release of motor vehicle exhibits has received attention from the South African courts in many a case. In some cases the courts had ordered the release of vehicles to the persons from whom they were seized. In *Tsiane v Minister of Safety and Security*,³⁶³ the police seized Tsiane's motor vehicle on the 25-04-2000 on a reasonable suspicion that it was stolen.³⁶⁴ The engine of the motor vehicle was original and not reported stolen. However, the chassis number although corresponding with the engine number, was welded on the chassis which created this suspicion. Ownership of the possible stolen motor vehicle could not be established. The police kept the vehicle until 10-09-2003, and argued that should they give it to the applicant, they would commit a crime by placing a stolen vehicle in his possession. The court held that the vehicle should be returned to the applicant. It is submitted that the court made a correct decision because the police could not establish that the vehicle is stolen.

In a similar case of *Booi v Minister of Safety and Security*,³⁶⁵ the police seized the motor vehicle at Maseru border post on suspicion that it is stolen, because the plate of the chassis number was welded on the chassis. The defence stated that the motor vehicle was involved in an accident and welding was done during panel beating. The court ordered the release of the vehicle to the person from whom it was seized. It may be accepted, although it is not based on merits, that the order was correctly handed down on the basis that, after a year, no effort was carried out in the investigation.

A different scenario is in *Choonara v Minister of Safety and Security*,³⁶⁶ where the court ordered the release of a Chevrolet motor vehicle, whose engine and chassis numbers were tampered with. The registration documents at the registering authority were also missing from the file. There was confirmation that the motor vehicle was stolen and the release was based on the period of detention of the motor vehicle by the police. This decision

³⁶¹Section 31(1)(a) of the CPA of 1977. This section is similar to s 53 of the CPEA of 1981 of Lesotho as referred to at n 461 *infra*.

³⁶²*Id* n 134 *supra*, at page 261(H-I).
3632004 (1) SACR 470 (T).

³⁶⁴The seizure was based on s 20 of the CPA 51 of 1977.
3651995 (2) SACR 465 (O).
3661992 (1) SACR 239(W).

does not, in my view, support the efforts in fighting organised motor vehicle crime. It was clear that the vehicle was stolen in the USA, shipped to the RSA, the engine and chassis numbers changed, the vehicle registered with the registering authority and the documents were made to disappear to clean the trail. The State has an onus to prove that the motor vehicle is stolen property. In the case of Khan,³⁶⁷ it was held that the onus to prove on a balance of probabilities that the possession is unlawful rests on the State. The applicant was said to be entitled to the motor vehicle unless the State proves that possession was unlawful.

If the investigating officer does not know the person who may reasonably possess the exhibit, or no person may lawfully possess it, it shall be forfeited to the State.³⁶⁸ The provision of this section also allows the police to use reasonable judgement in exercising discretion. It needs to be noted that the police may, in exercising this discretion, keep in mind the provisions of s 232 of the CPA of 1977, which authorises any court to allow any party to produce as evidence, a photograph in lieu of such article notwithstanding that such article is available and can be produced in evidence.³⁶⁹ The court may indeed require the production of the article if there is good cause shown. The person who may lawfully possess the exhibit is notified by registered post to collect her article within thirty days, failing which may result in the exhibit being forfeited to the State.³⁷⁰

A case which supported the efforts of the police is that of *Marranic Development (Pty)Ltd and Useful Trading 16 (Pty)Ltd v Minister of Safety and Security*.³⁷¹ The appellant in this matter sought the return of two heavy load semi-trailers which were seized and impounded by members of the SAPS on 08-07-2004 because they had identical registration numbers. The High court refused the application on the basis of s 68(6) of the NRTA of 1996, in that the registration and chassis numbers of both vehicles had been falsified and that the return to the appellant would have entailed a contravention of s 68(6)(b) of the NRTA of 1996, which requires that there must be lawful cause for the possession of any vehicle. The Supreme Court of Appeal confirmed the refusal by the High Court.

In *Basie Motors BK t/a Boulevard Motors v Minister of Safety and Security*,³⁷² the appellant bought two motor vehicles from Mr. Abdul Usman who owned a motor dealership in Vereeniging and Gaborone, Botswana. The SAPS issued police clearance certificates confirming that the vehicles were not stolen in the RSA. Both vehicles were later seized as their chassis numbers were tampered with. It was alleged that they were stolen in

³⁶⁷*Ibid* n 195 *supra*. This case is also commented on by Du Toit *et al Commentary* at 2-10A.

³⁶⁸Section 31(1)(b) of the CPA of 1977.

³⁶⁹The evidence of a photograph is classified as real evidence as explained by Professor Hoffmann and Zeffertt *Evidence* 406 and 407. This is also dealt with in the Law of Evidence Act 45 of 1988. Zeffertt is a Professor of Law at Wits.

³⁷⁰Section 31(2) of the CPA of 1977. The police use SAPS 136 as indemnity when the goods are released.

³⁷¹2006 SCA 20 (RSA).

³⁷²2006 SCA 35 (RSA).

Japan and chassis numbers altered in Dubai, but the police could not prove that any theft has been reported. The court ordered the release of the vehicles.

In a case where an exhibit is in respect of a crime committed outside the Republic, the magistrate may on application and if satisfied that the offence is punishable with death or imprisonment of twelve months or more or fine of R500-00 or more in such other country, order that the exhibit be delivered to a member of the police force established in such country who may thereupon remove it from the Republic.³⁷³ The South African laws give the police the necessary powers to exercise discretion which can be interpreted as demonstrating confidence in the organisation. It can further be seen in the trust which it extends to members of police agencies in other countries by choosing them as the agency to which the exhibits can be handed over. It is submitted that the emulation of this trust by other jurisdictions could go a long way in ensuring speedy repatriation of exhibits.

Management of exhibits affecting the SARPCCO member countries has also received attention by the Council of Police Chiefs (CPC). The laws dealing with management of exhibits, specifically motor vehicles belonging to foreign nationals are based on the Standard Operating Procedure (SOP).³⁷⁴

Amongst the important aspects of the SOP is s 1 which stipulates that, each member's country shall appoint a senior officer as Vehicle Theft Liaison Officer to manage the process of having a vehicle stolen in one member's country, returned to its legal owner. This officer is also obliged to assist the police in a member country in investigating and/or prosecuting matters arising from the seizure of such vehicle.

In a case where a vehicle is seized by the police in a member's country and such vehicle has been stolen or suspected to be stolen in another member's country, this information must be relayed to the Vehicle Theft Liaison Officer who will convey the information via Interpol channels to his counterpart in the country where the theft occurred. This report has to be done within 48 hours or as soon as it is reasonably practicable.³⁷⁵ The Vehicle Theft Liaison Officer who received notification from his counterpart must in terms of s 4(1) of the

³⁷³Section 36(1) of the CPA of 1977.

³⁷⁴The Standard Operating Procedure on Cross Border Motor Vehicle Theft Investigation and Return of Stolen Motor Vehicles to their Lawful Owners, was developed in line with Article 5(3) of the SARPCCO Multilateral Agreement (MLA). In adopting Resolution 9 of the 4th AGM 1999, the CPC directed that the SOP must be implemented immediately.

³⁷⁵Section 2 of the SOP. The provisions of these agreements indicate that as a collective the countries agree on the areas that need joint efforts. This is in line with the objectives of the organisation which are the promotion, strengthening and perpetuating of co-operation and fostering joint strategies for the management of all forms of cross-border and related crimes with regional implications; the preparation and dissemination of information on criminal activities to contain crime in the region; the reviewing of joint crime management strategies; ensuring efficient management of criminal records and joint monitoring of cross-border crime; formulation of regional training policies and strategies; and making recommendations to the governments of member countries in relation to matters affecting regional policing.

SOP, acknowledge receipt within 48 hours or as soon as it is reasonably practicable and indicates when the requested action can be expected to be fulfilled. Section 4(2) requires that the Vehicle Theft Liaison Officer should ensure that the request receive immediate attention and that the lawful owner is informed about the recovery. The two liaison officers must, in writing, communicate at least every second week.

The provisions of s 8 of the SOP is the one which is causing a lot of discomfort between some member countries. It requires that a vehicle so seized should not be released from police custody until such time as the Vehicle Theft Liaison Officer has had the opportunity of notifying his counterpart of the intended release and the reason thereof. This provision is subject to the exception where the release is absolutely necessary, e.g., when required by law or court order. Where such notification is not possible before the release of the vehicle, such notification must be given as soon as possible thereafter.

The dilemma of the so-called “innocent buyer” is covered by s 301 of the CPA of 1977.³⁷⁶ I submit that innocent purchasers should not be protected at the expense of innocent victims. They should indeed be protected against crooks who defrauded them. In the light of the operation of the SARPCCO clearance certificates, and the existence of I-24/7 which assist in identifying stolen vehicles, no one should be able to plead that he is an innocent buyer because the status can be confirmed with the authorities before the deal is concluded. Where the innocent buyer is able to lead the police to the person from whom she acquired the exhibit, the matter is simple because she should sue that person if the deal was, in anyway, bad in law. Where the innocent buyer is unable to lead the police to the person from whom she has acquired the exhibit, she has herself to blame.

4.4. Conclusion.

Although existing laws used are fairly effective in combatting organised crime, some changes are still needed. Theft under false pretences and receiving stolen property knowing it to be stolen, no longer serve a purpose in dealing with organised motor vehicle theft.

The POCA of 1998 is a powerful ‘cannon’ which is, in my opinion, rusting because of underutilisation. The purpose of the POCA of 1998 is to deal with organised crime and dismantle the criminal groups or enterprise or neutralise the syndicates. The interpretation of enterprise needs to be refined to discriminate the enterprise

³⁷⁶This section states that compensation to an innocent purchaser of property unlawfully obtained, is applicable where a person who is convicted of theft or of any other offence whereby he has unlawfully obtained any property, and it appears to the court on the evidence that such person sold such property or part thereof to another person who had no knowledge that the property was stolen or unlawfully obtained, the court may, on the application of such purchaser and on restitution of such property to the owner thereof, order that, out of any money of such convicted person taken from him on arrest, a sum not exceeding the amount paid by the purchaser be returned to him.

which the Act is concerned about. The United States laws from which part of the provisions of POCA were taken from, have two definitions of enterprise. In Title 18 of the United States Code, Section 1961(4) which is titled The Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970, an enterprise is defined as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.³⁷⁷ In Title 21 of the United States Code, Section 848(c) which is titled The Continuing Criminal Enterprise Act, a criminal enterprise is defined as any group of six or more people, where one of the six occupies a position of an organizer, a supervisory position, or any other position of management with respect to the other five, and which generates substantial income or resources, and is engaged in a continuing series of violations of Sub-chapters I and II of Chapter 13 of Title 21 of the United States Code.³⁷⁸ Although the RSA has taken over the definition of enterprise from the United States, what we should have transplanted is, in my opinion, a definition of criminal enterprise.³⁷⁹ In commenting about the relationship between the RICO of the USA and the POCA of the RSA, Burchell agreed that there are potential problems in simply transferring penal norms from a developed country to a developing one.³⁸⁰

It is important to note that the Tanzanian's Economic and Organised Crime Control Act [CAP 200 R.E. 2002] stipulates under s 4 of First Schedule that a person is guilty of the offence of leading organised crime who intentionally or wilfully organises, manages, directs, supervises or finances a criminal racket; knowingly incites or induces others to engage in violence or fraud or intimidation for the purpose of promoting or furthering the objects of a criminal racket; knowingly furnishes advice, assistance or direction in conduct, financing, execution or management of the business or affairs of a criminal racket with intent either to reap profit or other benefit from such act or to promote or further the criminal objectives of the criminal racket; or being a public official, and in violation of his official duty, or not being a public official, intentionally promotes or furthers the objectives of a criminal racket by inducing or committing any act or omission. The element cited by Bassiouni and Vetere³⁸¹ under characteristics 9, organised criminal group is that they are frequently, but not invariably, centralised and organised in a hierarchical structure with a single leader at the top.

The issue of leadership of a criminal organisation was captured in the Preamble of the POCA of 1998. This shows that the legislature had the problem of leadership of a criminal group in mind. It is not clear though as to

³⁷⁷The contents are also accessible on <http://www.fbi.gov/hq/cid/orgcrime/glossary.htm> last visited on 24 September 2007.

³⁷⁸The contents of this Statute can also be assessed on <http://www.law.cornell.edu/uscode18/usc-sec18-00001961----000-.html> last visited on 24 September 2007.

³⁷⁹The objective of applying the POCA is to dismantle criminal enterprise as referred to in n 377 *supra* and not legitimate businesses.

³⁸⁰Burchell *Principles* 976.

³⁸¹Bassiouni and Vetere *Organised Crime* xxvii-xxviii. This may be what the South African Government was expecting hence the classification of leaders and runners in a syndicate.

why it has only criminalised management of activities and not leadership thereof. Professor Ronald Louw has also noted that the Preamble to the Act acknowledges a rapid growth of organised crime, money laundering and criminal gang activities both nationally and internationally. He continued to say that the Act further acknowledges that our common law and statutory law fail to deal adequately with such criminal activities partly because of the difficulty of proving the involvement of crime leaders in particular criminal activity.³⁸² Cowling³⁸³ states that those persons heading up modern organised crime syndicates are invisible and largely untouchable. At the end of the day, one is confronted with a situation where the leaders and upper echelons of the organised crime hierarchy can spend a lifetime directing criminal activities without directly committing any criminal offences. The POCA of 1998 should, in my view, be amended in order to define organised crime, syndicate and criminalise leadership of a syndicate.

There is a need to re-examine the laws in order to find jurisdiction in cases where the suspect was found in possession of stolen property elsewhere and the authorities in such country are unreasonably refusing to prosecute the suspect.

Although the RSA does not import second hand motor vehicles, the exception³⁸⁴ should have created a room for such exceptional vehicles which might emanate from the SARPCCO member countries. As of now, no provisions have been made for a SARPCCO motor vehicle clearance certificate in case such a vehicle was previously registered in the SARPCCO member countries. The ITAA of 2002 should, in my view, be amended to cover the SARPCCO motor vehicle clearance certificates.

The poor detection and prosecution of theft of motor vehicles, reduces the risk to potential perpetrators. The crime figures showing 89% of undetected motor car theft cases and 3.1% of prosecutions, as observed by Adv. Martin Schonteich, is a serious challenge on the part of crime fighters to prove that they are not losing the battle.³⁸⁵

³⁸²Louw *Specific Crimes* 116. The late Ronald Louw was a Professor of Law at the UKZN.

³⁸³Cowling *Organised Crime* 351. It will be seen from the Government Programme of Action that when dealing with organised crime, the focus is on the leaders of the syndicates and the runners. For the period July to November 2005, 97 syndicate leaders and 228 runners were arrested. See objective 2 on organised crime syndicates from <http://www.info.gov.za/aboutgovt/poa/report2005/jcps06.htm> last visited on 30 September 2007. The emphasis on the discrimination between leaders and runners in a syndicate is a clear indication that the Government is searching for a provision which punishes one for being a leader of a syndicate. This provision is unfortunately nowhere in our law. The RSA punishes the management of some operations of an enterprise in terms of s 2(1)(f) of the POCA of 1998 and obtaining or controlling an interest in the enterprise in terms of s 2(1)(f) of the Act but fails to punish leadership thereof.

³⁸⁴*Op cit* n 307 *supra*.

³⁸⁵Schonteich *Crime Fighters* 12. Martin Schonteich is an Advocate of the High Court of the RSA and a senior researcher in the Crime and Justice Programme at ISS.

CHAPTER FIVE

LEGAL FRAMEWORK OF MOTOR VEHICLE THEFT IN LESOTHO.

5.1. Introduction

Professor Sebastian Poulter stated that the legal system of the Kingdom of Lesotho applies both the common law and the statutory laws.³⁸⁶ According to Justice WCM Maqutu of Lesotho, Roman Dutch Law has been the common law of Lesotho since 1884. He went further to say that criminal law as presently practised in Lesotho had been made entirely in reliance on text books from the RSA.³⁸⁷ These laws are bound together in volumes of

³⁸⁶Poulter *Legal Dualism* 3 and 4 as well as Kasozi *Law of Lesotho* 5. The late, Professor Sebastian Poulter of the University of Lesotho was an Advocate in Lesotho.

³⁸⁷WCM Maqutu J of the High Court of Lesotho, made an introductory comment in the book *Criminal and Procedure through cases by the Honourable Justice MP Mofokeng of Lesotho* which is the first publication by a Mosotho. This book which was first published in 1985 and its second edition in 1997 deals with Lesotho's decided cases from 1926-1997.

books titled the Laws of Lesotho. Criminal offences used by Lesotho to deal with motor vehicle crime are theft, robbery, fraud, contravention of the Motor Vehicle Theft Act (MVTA) 13 of 2000, the Road Traffic Act (RTA) 8 of 1981, contravention of s183(2) of the Criminal Procedure and Evidence Act (CPEA) 7 of 1981, contravention of s 343 of the CPEA 7 of 1981 which is receiving of property which has been obtained through the commission of an offence, and contravention of s 344(1) of the CPEA 7 of 1981 which is possession of property which has been obtained through the commission of an offence. The country does not have a law which is dedicated to specifically deal with organised crime.

5.2. Application of the criminal laws related to motor vehicle crime in Lesotho.

5.2.1 Theft.

Theft is a common law crime, and can also be committed in terms of statutory provisions.³⁸⁸ George Kasozi³⁸⁹ defines theft as consisting in an unlawful *contrectatio* with intent to steal a thing capable of being stolen. The intention, must, as he puts it, be to deprive the owner or possessor permanently of the full benefits of ownership.³⁹⁰ The competent verdicts of this crime as reflected in s 192 of the CPEA of 1981, include receiving stolen goods knowing the same to have been stolen or contravention of ss 343 or 344(1) of the CPEA of 1981. In *Mohapi v Rex*,³⁹¹ the court of appeal substituted receiving stolen property which is a competent verdict of the crime of theft in terms of s 188 of the CPEA of 1981 for theft as passed by the lower court.

Lesotho has criminalised theft of a motor vehicle in a statute called the Motor Vehicle Theft Act (MVTA) of 2000.³⁹² The Act is silent about repealing the common law crime, however, the prosecuting authorities will normally use a more specific charge of contravention of statutory offence than a common law crime. Before its promulgation, theft of a motor vehicle was always prosecuted in terms of common law crime as evidenced by the case of Mohapi above. The facts of this case were briefly that, a 1978 VW kombi belonging to Silas Seiphemo was stolen on the 22-09-1978 in Johannesburg and found in possession of Mohapi on 29-03-1979 at Masianoking. The engine number was altered from SFAS 229656 to SFAS 229666. The original plate of TJ 855779 was replaced with LA 6963. The original registration LA 6963 was issued to T Moroahane in respect of a 1975 VW kombi which was transferred to Raymond Madonsela on 09-05-1978. Mohapi stated that he bought

³⁸⁸This crime appears in Schedule I Part I and II, as well as Schedule II Part XVI of the Schedules to the CPEA of 1981 as theft, whether under common law or a statutory provision.

³⁸⁹George William Kikonyogo Lubuye Kasozi is a senior legal advisor in the Ministry of Justice, Human Rights and Rehabilitation in Lesotho. He is a Ugandan national who also presided as magistrate in Uganda. He edited this book about the laws of Lesotho which was written by some Basotho judges and magistrates.

³⁹⁰Kasozi *Law of Lesotho* 89.

³⁹¹CRI/A/83/79 LLR.

³⁹²13 of 2000. The Act is dealt with under 5.2.4 *infra*. See also n 113 *supra*.

the stolen vehicle from Madonsela at the end of 1978 for R1 200-00 which he did not have a receipt of. He did not check the registration number nor compare it with the numbers on the vehicle. In passing judgement, the court, in its able and helpful reasons, referred to the case of Markins³⁹³ where it said that, if Mohapi had contacted Moroahane whose name and address appeared on the registration book, he could not have failed to have revealed the true position. To refrain from making enquiries will not avail the receiver of stolen property.

In *Thobei v Rex*,³⁹⁴ the Resident magistrate had found that he does not have jurisdiction over the case where Tsokolo Thobei stole goods from the South African Railway goods shed at Boesmanskop in the RSA. However, Evans J ruled, on appeal that, theft is a continuing offence and the appellant was thus convicted. In *Khiba v Rex*,³⁹⁵ the court decided as per Justice Rooney that theft by false pretences is always theft simpliciter.

Theft of motor vehicles in Lesotho is considered to be at all time low. In 2005 there were 255 cases of motor vehicle theft whereas the figure increased to 438 in 2006.³⁹⁶ These assessments may assist management in appreciating a holistic picture when cases of possession of stolen vehicles are included.

5.2.2. Theft by false pretences.

According to Kasozi,³⁹⁷ this crime exists in Lesotho. He enumerated the elements of this crime as follows:

1. The representation must be made.
2. The representation must be one of fact not opinion.
3. The representation must be made to the person from whom the property is obtained, however, it could be made to a member of the general public.
4. The fact represented must be either past or present, not future act.
5. The accused must foresee that the representation may be false.
6. The goods must be obtained through the misrepresentation.
7. There must be fraudulent intention.
8. There must be a *contrectatio* of the thing.

However, Mofokeng J argues that theft by false pretences is theft.³⁹⁸ In his argument, he cited the RSA case of

³⁹³*Ibid* n 225 *supra*.

³⁹⁴CRI/A/35/1969.

³⁹⁵1980 (1) LLR 12 (CAHC).

³⁹⁶These figures are referred to in the minutes of the 10th SARPCCO AGM page 132 and 11th SARPCCO AGM page 90 for 2005 and 2006 respectively. The 2006 has correctly considered the recovered vehicles which were stolen from the RSA.

³⁹⁷Kasozi *Law of Lesotho* 89.

³⁹⁸Mofokeng *Law through Cases* 380.

*Ex Parte Minister of Justice: in re: R v Gesa*³⁹⁹ where it was indicated that theft by false pretences is always theft *simpliciter* admits of no doubt. I am in agreement with the argument of Mofokeng J and believe that the existence of this crime as a separate discipline is unnecessary in Lesotho.

5.2.3 Robbery.

Robbery is a common law crime.⁴⁰⁰ The reason behind some car thieves turning to robbery of motor vehicles to secure their income, is according to Antony Albekker, the increased risk and reduced rewards for car theft.⁴⁰¹ The competent verdicts of this crime as reflected under s 185 of the CPEA of 1981 include theft, offence under s 343 of the CPEA of 1981, receiving stolen goods knowing them to have been stolen or receiving goods in contravention of s 344(1) of the CPEA of 1981. Brickell and Cole⁴⁰² describe robbery as theft of goods or money from a person by placing him in fear, either by actual or implied threats of physical harm. The goods in respect of the crime of motor vehicles as described by Brickell and Cole is a motor vehicle. The MVTA of 2000 has proscribed an act of robbery of a motor vehicle as an offence. The Act is silent about the question of repealing of a common law robbery which connotes that the Act has not changed the common law position. Just like in the common law crime of theft as indicated above, the prosecuting authorities will normally use a more specific charge of a contravention of statutory offence than a common law crime in respect of robbery.

5.2.4. Fraud.

Fraud is a common law crime.⁴⁰³ The competent verdicts of fraud as reflected under s 184 of the CPEA of 1981, is any other offence. Where fraud is involved, the common method used by the owner is the so-called hoola-hoop,⁴⁰⁴ which also finds application in Lesotho.

5.2.5. Contravention of the provisions of the Road Traffic Act (RTA).⁴⁰⁵

3991959 (1) SA 234.

400Robbery also appears in Schedule I Part I and II, Schedule II Part XVI and Schedule III of the Schedules to the CPEA of 1981.

401Altbekker *Cars* 14. Stopping theft by devices does not stop motor vehicle crime, but shifts the crime to hijacking because the markets still exist. Albekker is a freelance researcher specialising in criminal justice.

402Brickell and Cole *Vehicle Theft* 177.

403It forms part of crimes in Schedule I Part II and Schedule II Part XVI of the Schedules to the CPEA of 1981.

404See n 266 *supra*.

4058 of 1981. A bus, motor cycle, commercial vehicle, combination of motor vehicles, tractor, motor car and a vehicle have been defined in this Act. A vehicle is defined as a device designed or adapted principally to travel on wheels or crawler tracks, but does not include any device (other than a tram-car) moving exclusively on rail. Three months before this Act, motor vehicle was already defined in terms of s 2 of the Road Transport Act 6 of 1981 as any vehicle self propelled by mechanical or electrical power but excluding any vehicle running on a specifically prepared way such as a railway and such other vehicles as the Minister may, from time to time by notice in the Gazette, declare not to be a motor vehicle for the purpose of this Act. See also the definition of motor vehicle

The RTA of 1981 strengthens the hands of law enforcement agencies in the fight against motor vehicle crime. The requirements for registration of a new motor vehicle include a certificate from the police of the place where a motor vehicle in question was acquired to the effect that the motor dealer is known to them and licenced as such.⁴⁰⁶ In the case of a used motor vehicle which is being registered by a motor dealer, the requirements include, a previous registration certificate; a certificate from the registering authority of the place where the motor vehicle was acquired to the effect that, the previous registration certificate was issued by that authority, the motor vehicle in question is registered in the name of the person from whom the vehicle is acquired, that the person has given the registering authority notice of transfer of ownership to the person acquiring the vehicle; and a certificate from the police of the place where the motor vehicle is acquired that the vehicle is not suspected of having been unlawfully acquired.⁴⁰⁷ In all other cases where vehicles have been imported in Lesotho, a certificate from LMPS⁴⁰⁸ to the effect that the vehicle is not suspected of having been unlawfully acquired as well as a Customs certificate are the prerequisite for registration.

The purpose of owning a motor vehicle is to enjoy its use. The thief should not be allowed to use a stolen motor vehicle while the owner is deprived of his rights over the vehicle. I agree with Commissioner Zaccardelli⁴⁰⁹ that the most effective weapon against organised crime is an organised and co-ordinated response. Since organised crime operates in multiple jurisdictions and across international boundaries, law enforcement must continue working towards better coordination, more integration and an even sharper focus on the sharing of information and intelligence.⁴¹⁰ It can only be hoped that the seriousness of the mind will encourage SARPCCO member countries to agree on a strategy that will help them meet their commitments to contribute to the international efforts of fighting organised crime.⁴¹¹

In terms of s 9(3) of this Act, a person who, without the written permission of the registering authority, alters, obliterates or causes the alteration or defacement of any identification number or mark used for registration pursuant to this Chapter is guilty of an offence and liable to M2 000 and two years imprisonment.

A person who is driving or found in possession of a motor vehicle bearing registration number other than that

under n 409 *infra*. The Road Traffic Act of 1981 is also accessible at <http://www.commonlii.org/ls/legis/num-act/rta1981111.pdf> last visited on 13 November 2007. The Road Transport Act of 1981 is also accessible at <http://www.commonlii.org/ls/legis/num-act/rta1981187.pdf> last visited on 13 November 2007.

⁴⁰⁶These are the provision of s 7(2)(b) of the RTA of 1981.

⁴⁰⁷These are the provisions of s 7(2)(c) of the RTA of 1981. The places from where the vehicle may have been acquired are classified as prescribed territory in s 2 of this Act, and they are Botswana, the RSA, Namibia, Angola, Malawi, Zambia, Zimbabwe, Mozambique and Swaziland. This certificate is coincidentally, a sort of a SARPCCO clearance certificate as the latter succeeded the Act.

⁴⁰⁸The ideal situation is that all the motor vehicles registered in Lesotho, will have been cleared by the police. In clearing those vehicles coming from the SARPCCO member countries, a SARPCCO clearance certificate is a requirement in terms of the SOP.

⁴⁰⁹*Ibid* n 82 *supra*.

⁴¹⁰*Ibid* n 81 *supra*.

⁴¹¹*Ibid* n 82 *supra*.

issued by a registering authority for such a vehicle, is guilty of an offence. Upon conviction such person will, in terms of s 10(2) of this Act, be liable to M2 000 and two years imprisonment.⁴¹²

Section 14(1) prohibits any person from using false or producing a false document or furnish false information for the purpose of registering a vehicle. The perpetrator is liable on conviction to M2 000 and two years imprisonment.⁴¹³

Section 15(1) of this Act stipulates that, any person driving or found in possession of a motor vehicle or trailer the chassis or engine numbers or other identification mark of which has been obliterated or tampered with otherwise than by a registering authority, is guilty of an offence and liable on conviction to a fine of M2 000 and to imprisonment for a period of two years. A person so accused may raise a defence that the trailer or motor vehicle was purchased from outside Lesotho and that such obliterations or tampering was done by a lawful authority of the place where the vehicle was purchased. It is further acceptable to prove that she did not know or could not have known that the number had been tampered with. As Brickell and Cole⁴¹⁴ indicated, a Vehicle Identification Number (VIN) is a good characteristic used to identify vehicles. Armed with a combination of this peace of legislation and the MVTA of 2000, I am of the convinced that the LMPS have the necessary legal tools to stamp out motor vehicle crime.

5.2.6. Contravention of the provisions of the Motor Vehicle Theft Act (MVTA).⁴¹⁵

Section 3(1) of the MVTA of 2000 provides that any person who steals a motor vehicle, or receives a motor vehicle knowing or having reason to believe it to be a stolen motor vehicle, is guilty of an offence. Upon conviction, such a convict will be liable to imprisonment for a period not less than eight years, but not exceeding sixteen years without the option of a fine. If the convict is a second or a subsequent convict for a similar offence, such convict will be sentenced to imprisonment for a period not less than ten years, but not

⁴¹²See also s 9 of the MVTA of 2000 under n 434 *infra*.

⁴¹³See s 8 of the MVTA of 2000 under n 433 *infra* which although it does not refer to tampering for the purpose of registration, it in essence deals with the same crux of the offence of tampering. Once more, the punishment is differing.

⁴¹⁴Brickell and Cole *Vehicle Theft* 5.

⁴¹⁵13 of 2000. See also Sakoane *Lesotho* 147. The MVTA 13 of 2000 was published in the GG 92 of 26 October 2000. The Act defines motor vehicle in s 2 as any vehicle designed or adapted for propulsion or haulage on a road by means of mechanical or electrical power without the aid of rails, and includes any trailer. This definition is a carbon copy of the definition in s 2 of the Motor Vehicle Theft Act 17 of 1995 (Cap 09:04) of Botswana laws. It differs with the definition of Swaziland as reflected under s 2 of the Theft of Motor Vehicle Theft Act 16 of 1991 below. The analysis of these three laws suggest that Swaziland enacted its law in 1991, in 1995 Botswana enacted its law using the Swaziland law as the source of reference and improving in a number of areas; then Lesotho copied the Botswana law deviating by including ss 4, 13 and 20 dealing with theft of motor vehicle parts, dereliction of duty by public officials and the regulations respectively. Dereliction by public officers emanate from s 13 of Swaziland TMVA of 1991 whereas the theft of parts emanate from Botswana's s 11 which covers the dealing in motor vehicles as well as the dealing in parts. Lesotho separated the theft of parts from the theft of motor vehicles. See also the definition of vehicle under n 402 *supra*.

exceeding twenty years without the option of a fine.

It is interesting to note that ss 3 of Lesotho MVTA of 2000 and the Swaziland Theft of Motor Vehicles Act (TMVA)16 of 1991 criminalise theft, but the sentences are heavier in Lesotho than in Swaziland. It is, however, in Swaziland where there are fewer thefts of motor vehicles compared to Lesotho. Even in Namibia, s 15 of the Motor Vehicle Theft Act 12 of 1999 has lighter sentences for both hijacking and theft than in Lesotho. A Dutch police official was quoted by Scheptyki as follows: “If we arrest a drug dealer in the Netherlands, he will be given a penalty of a maximum of six months in prison. If we arrest him in Germany, we will get maximum of six years. We arrest them in Germany. It is better I think.”⁴¹⁶ There is a growing perception which is observed from regular contact with the other SARPCCO member countries that, if a stolen vehicle is recovered in Swaziland, Botswana or Namibia the suspect will probably be prosecuted and the exhibits returned to their lawful owners. The chances of prosecution or handing over the motor vehicle to the lawful owner in respect of motor vehicles found in Lesotho, are however, slim. The Dutch police official’s observation can therefore not be a complete authority on its own. It appears that, it is not the penal provision that deters the crooks, but how one applies such law. Weatherburn⁴¹⁷ found during the survey in Australia that the threat of tougher sanctions does not appear to deter people from crime, but only where the perceived risk of apprehension for offending is reasonably high.

The traditional approach to combat organised crime, particularly by strengthening the law enforcement capacity, has often led to only superficial disturbances of criminal operations achieving only minor reduction in the total volume of illegal activities. In the RSA, the police call this type of policing a disruptive operation. They do so while continuing with the investigation through an organised crime approach. Bassiouni and Vetere⁴¹⁸ argue that, if they are not accompanied by a range of other measures, criminal sanctions have a limited deterrent effect and only marginally affect illegal activities. They cited some other measures which include restrictions of civil rights, special investigation methods and the shifts of the burden of proof.

On the question of whether the States which are soft on crime are the targets of transnational organised crime, some researchers⁴¹⁹ reached similar conclusions. Transnational organised crime is a virulent phenomenon that readily exploits any weakness found in global law enforcement capacity.⁴²⁰ Betti⁴²¹ stated that criminal groups

⁴¹⁶These arguments are reflected in the report of Professor Elrena Van der Spuy of the UCT in Van der Spuy *Regionalism* 48-49, which is accessible at <http://www.iss.co.za/pubs/ASR/6No6/VanderSpuy.html> last visited on 20 September 2007.

⁴¹⁷Weatherburn *Australia* 120.

⁴¹⁸Bassiouni and Vetere *Organised Crime* 741.

⁴¹⁹Betti, Bassiouni, Vetere and Weatherburn.

⁴²⁰UNODC, *Development* 26.

⁴²¹Betti *European Union* 5.

are finding themselves free to move within an area where they can easily exploit loopholes and divergences in national legal systems. He states further that some scholars have even described the current opportunities for offenders to take advantage of discrepancies in domestic systems as ‘regime shopping’.

Hijacking of a motor vehicle is criminalised and punishable separately. Brickell and Cole⁴²² describe “hijacker” as a “highwayman” or a robber who seizes the goods of bootleggers or rum runners, or who seizes by force a part of their trade. Their explanation ends by indicating that hijacking includes the crime of robbery. Leoschunt and Burton⁴²³ describe car hijacking as a situation where someone, using force or the threat of force, takes your vehicle or a vehicle belonging to your household, when you are in the vehicle or next to the vehicle. The Lesotho law, as indicated above, provides that where violence or threat of violence is used in the course of stealing such a motor vehicle, the penalty will be for a period of imprisonment of not less than fifteen years, but not exceeding twenty five years without the option of a fine. The section goes further to say that if the threat or violence used involved the use of a firearm or other offensive weapon, the penalty will be imprisonment for a period not less than fifteen years, but not exceeding thirty years without the option of a fine.⁴²⁴

Unlike in Swaziland, the involvement in organised crime is punishable with the same penalty as the person who commit the theft itself. In terms of this section, any person who procures, incites, hires, commands or instigates another to commit an offence of theft or receiving or hijacking as indicated above, shall be liable on conviction to the same sentence that is prescribed for the perpetrator self.⁴²⁵

The theft or receipt of motor vehicle parts is criminalised under s 4 of the MVTA of 2000 and is punishable with imprisonment for a period not less than six years, but not exceeding eight years without the option of a fine. The second or subsequent perpetrators are exposed to imprisonment for a period not less than eight years, but not exceeding sixteen years without the option of a fine. Where violence was involved, the punishment is between fifteen years and twenty years imprisonment without the option of a fine. Any person who procures,

⁴²²Brickell and Cole *Vehicle Theft* 177. This explanation is associated with Webster, as Brickell puts it.

⁴²³Leoschunt and Burton *Victimisation* 62. Burton is an independent research consultant specialising in criminal justice. The information is also accessible at <http://www.cjcp.org.za/Final.RichReward.pdf> last visited on 16 September 2007.

⁴²⁴Section 2 of the MVTA of 2000. Hijacking of motor vehicles have been criminalised separately in Lesotho which is more advanced than its older Swaziland counterpart law.

⁴²⁵This s 3(4) of the MVTA of 2000 differs with s 15 of the TMVA of 1991 of Swaziland law because the latter provides twice the penalty of the perpetrator self. The sentences must run consecutively and should not be suspended like in Swaziland. The constitutionality of a similar provision failed the test in *Moatshe v The State; Motshwari and Another v The State* 2004 (1) BLR 1 (CA) 17 where the Appeal Court Acting President Patric Tebbut who passed judgement on 25-07-2003 stating that s 3(5) of the Motor Vehicle Theft Act of 1995 of Botswana which provides that, any sentence imposed in respect of an offence under this section shall be consecutive to and not concurrent with any other sentence imposed on the same accused person is declared as being in conflict with s 7(1) of the Constitution. In general, presiding officials would in appropriate cases order that several sentences of imprisonment should run concurrently. Comments and full text on this case can be respectively accessed at <http://www.gov.bw/cgi-bin/news.cgi?d=20030205> and <http://www.saflii.org/bw/cases/BWCA/2003/20> last visited on 30 September 2007. This case may be handy for future judgements in Lesotho.

incites, hires, commands or instigates another to commit an offence of theft or receiving or hijacking for the parts, shall be liable on conviction to the same sentence that is prescribed for the perpetrator self.

The legislature has simplified the tasks of proving the accused guilty of the crime in court in terms of s 5 of the MVTA of 2000,⁴²⁶ by inserting a presumption which shifts the onus of proof to the accused. This is so in that, a person is presumed to have committed an offence of theft or receiving as indicated above if the following are present:

- she is found in possession of a motor vehicle which is reasonably suspected to be stolen;
- she is found in possession of a motor vehicle of which the engine or chassis number or registration marks or numbers of motor vehicle or other identification marks of the motor vehicle have been altered, disfigured, obliterated or tampered with in any manner;
- she possesses forged registration book, papers or other document of registration or ownership in relation to that motor vehicle;
- she has imported the motor vehicle or parts thereof into Lesotho in contravention of any law for the time being in force relating to the importation of motor vehicles or parts thereof.

In order to strengthen its ability to police this MVTA of 2000, the legislature has created an obligation on the part of motor vehicle dealers or garage operators to report any suspected stolen motor vehicle.⁴²⁷ In terms of this obligation, any motor dealer, or manager of a motor dealer's business, who discovers or has reasonable grounds to suspect that the registration number, engine or chassis number of, or any other identification marks on a motor vehicle or motor vehicle engine or parts delivered or received by him in the course of business has been altered, disfigured, defaced, obliterated or tampered with in any manner, shall forthwith report the matter to the nearest police station and the police shall, unless a satisfactory explanation is obtained, without a warrant, seize that motor vehicle. Failure to comply with this obligation by any such motor vehicle dealer or manager is an offence which is punishable on conviction with imprisonment for a period not less than five years or to a fine not less than M15 000 or to both such fine and imprisonment. Vehicle Identification Numbers (VIN) are seen to be important and they have, as far back as 1901, been considered to be the primary source of identification and numbers of record.⁴²⁸

There is an obligation placed on both the seller and purchaser of a motor vehicle.⁴²⁹ In terms of the provisions

⁴²⁶This s 5 of this Act corresponds with s 4 of Swaziland TMVA of 1991 both dealing with presumptions. They only differ with some wording and not material content. See n 500 *infra*.

⁴²⁷This is s 6 of the MVTA of 2000 and it is, except some minor deviations, corresponding with s 6 of Swaziland's TMVA of 1991 as referred to at n 502 *infra*..

⁴²⁸Brickell and Cole *Vehicle Theft* 5.

⁴²⁹This is governed by s 7 of MVTA of 2000 of Lesotho which corresponds with s 7 of the TMVA of 1991 of Swaziland.

of this section, a person who sells, transfers or otherwise disposes of a motor vehicle commits an offence if at the time of the sale, disposal or transfer of the motor vehicle, he does not furnish the purchaser or transferee with a document effecting the sale or disposal or transfer of such motor vehicle. This section goes further to state that, any person who purchases or receives a motor vehicle commits an offence if at the time of purchasing or receiving the motor vehicle, he does not demand from the seller or transferee, a document effecting the purchasing or receiving of such motor vehicle. Any person who contravenes the provisions of this subsec 1, shall be guilty of an offence and liable on conviction to imprisonment for a period not less than two years or a fine not less than M6 000 or to both.⁴³⁰

Section 7(2) of the MVTA of 2000, provides that regardless of the provisions of subsec 1 as indicated above, where a motor vehicle is purchased from a motor vehicle dealer, a declaration (or certification) by that dealer specifying the dealer's name and address of place of business and stating that the vehicle has been lawfully sold to the purchaser shall be sufficient defence.⁴³¹ In the case of a motor vehicle purchased outside Lesotho, the declaration or certificate is produced to and stamped by a customs officer at the point of entry into Lesotho and within seven days of the importation, the purchaser must presents the vehicle together with the declaration (or certificate) to a police station for verification by the police. In the case of a motor vehicle purchased in Lesotho, the purchaser present the vehicle together with the declaration (or certificate) to a police station within seven days of the purchase for verification by the police.

In terms of s 7(3) of the MVTA of 2000, a dealer who refuses or fails to issue a declaration or certificate as required or issues a false declaration or certificate is guilty of an offence and liable on conviction to imprisonment for a period not less than three years or to a fine not less than M5000. Sakoane⁴³² says that the significance of these provisions is that they compel sellers and buyers of vehicles to get proper and authentic documents for vehicles and keep the records of the identity and address of persons they engage with in business.

See n 503 *infra*.

⁴³⁰While this section speaks of punishment not less than two years, its counterpart in Swaziland speaks of punishment not exceeding two years. The working of the whole of both Acts follow this pattern and can be clearly observed that the drafters of the Lesotho version had the Swaziland version in front and continued to improve in areas where it appears that the Swaziland version will not effectively cater for the needs of Lesotho.

⁴³¹This portion differ only in phraseology to its Swaziland counterpart on subsec 4 in that the latter speaks about sufficient which insinuates sufficient proof of purchase or sale while the former categorically stipulates that it is sufficient defence which exculpate the purchaser against theft. If the vehicle is proved to be stolen, the seller shall be guilty of an offence in terms of s 7(4) of the MVTA of 2000. Section 7(2) of the MVTA of 2000 received the attention of Sakoane of Law Reform Commission, Lesotho in Sakoane *Lesotho* 147.

⁴³²Sakoane *Lesotho* 147.

Section 8 of the MVTA of 2000,⁴³³ provides that any person who knowingly alters, tampers with or repairs any part of a motor vehicle or assist in altering, tampering with or repairing any part of a motor vehicle, engine or part is guilty of an offence. The convict shall be punishable with an imprisonment for a period of nine years or a fine of M15 000. The section goes further to stipulate that, anyone who, while carrying out any repairs or other work on a motor vehicle, alters, obscures or obliterates the engine, chassis number or such other identification mark, shall report the matter to the nearest registration authority for the necessary changes. Failure to do so is punishable with imprisonment for a period of nine years or a fine of M15 000.

Section 9 of the Lesotho law (MVTA), like s 10 of Swaziland law (TMVA), prohibits the use of false registration plates on a motor vehicle or the use of motor vehicle without registration plates. This is punishable upon conviction, with imprisonment for a period not less than five years or fine not less than M7000-00 or both.⁴³⁴ It provides further that any person who is in possession or manufacture or causes to be manufactured any identification plate, a key, instrument, stamp, book or other document used or likely to be used in the commission of an offence under this Act, is guilty of an offence and punishable on conviction, with imprisonment for a period not less than three years or a fine not less than M6 000 or both. The manufacturing, cutting or causing to be cut any identification plate or a key, without keeping records as required is similarly punishable with imprisonment for a period not less than three years or a fine not less than M6 000 or both.

The competent verdicts⁴³⁵ for theft or receiving of stolen vehicle knowing it to have been stolen, robbery of a motor vehicle, altering, obscuring, obliterating the identification of a motor vehicle, or conspiring, inciting, hiring, directing or instigating the commission of an offence, are an attempt to steal a motor vehicle; attempt to receive a motor vehicle knowing or having reason to believe it to be stolen; conspiracy with any other person in the commission of an offence; and selling, disposing of a thing having reason to believe it to be stolen. The penalty for contravention of any of these competent verdicts is a fine not less than M10 000 or imprisonment not less than five years or both.

Section 12 of the MVTA of 2000, prohibits the activities of stealing and selling of motor vehicles. Any person who engages in stealing and selling of, or other fraudulent dealing in motor vehicles is guilty of an offence and liable on conviction to imprisonment for a period not less than fifteen years, but not exceeding thirty years and

⁴³³This section corresponds with s 9 of TMVA of 1991 of Swaziland as referred to under n 506 *infra*. See also s 9 (3) of the RTA of 1981 in a paragraph between n 411 and n 412 *supra*.

⁴³⁴It is not clear as to why in this section the amount of fine is also reflecting the fractions of Maloti when it was not the case in all the other sections. The section itself correspond with s 9 of Swaziland's TMVA of 1991 as referred to under n 507 *infra*. The proscription is compatible with that in s 10(2) of the RTA of 1981 under n 412 *supra*.

⁴³⁵The competent verdicts are reflected in s 11 of the MVTA of 2000 and correspond with s 5 of the Swaziland TMVA of 1991, as referred to at n 501 *infra*. These competent verdicts is an indication that the person who commits the common law crimes of theft, robbery, fraud and receiving stolen property in terms of statutory offence need to be charged only in terms of the MVTA of 2000.

a fine not less than M100 000 or in default thereof to imprisonment for a period of ten years. In addition, the convict will forfeit to the Crown of all the assets traceable to such business.⁴³⁶

Just like its Swaziland counterpart,⁴³⁷ public officers⁴³⁸ are compelled in terms of s 13 of the MVTA of 2000 to participate in the fight against vehicle crime. Failure or negligence to carry out her duty under this Act or any law regulating the registration or importation of motor vehicles is an offence and is punishable on conviction to a fine not less than M12 000 or imprisonment not exceeding six years or both.⁴³⁹ If a motor vehicle is proved to be a stolen, the person guilty of contravening that section shall be liable to be sentenced as an accomplice to the theft or any other offence involving that motor vehicle. In a case where a public officer who is convicted under this section is shown to have intentionally failed or neglected his duty, he shall in addition to any sentence imposed under this Act be summarily dismissed from the public service with loss of benefits.

What is important here is the obligation placed upon police officials to seize a vehicle of which the numbers are tampered with, obliterated, disfigured, defaced in terms of s 6 of the MVTA of 2000. Registration authority and its officials are obliged by the provisions of s 8(2) of the MVTA of 2000 to amend the particulars of a motor vehicle as submitted to it by a dealer who is equally compelled to submit such vehicle to the police and the registering authority. In any event, the vehicle shall start at the police station before it goes to the registering authority. I am of the view that, it only needs the public officials to effectively enforce these provisions, and the presence of motor vehicles of which identifiers have been tampered with, which the suspects insists on claiming ownership, shall be drastically reduced if not disappearing completely. I therefore concludes that, the first area of ensuring clean enforcement is the public servants, starting from customs officials to registering officials.

5.2.7. Contravention of s183(2) of the Criminal Procedure and Evidence Act (CPEA).⁴⁴⁰

As indicated in the introductory remarks above, Lesotho does not have specific legislation dealing with organised crime. Organised criminal activities are dealt with under s 183(2) of the CPEA of 1981, which states that any person who conspires with any other person to aid or procure the commission of an offence; or incites, instigates, commands or procures any other person to commit an offence, whether at common law or against a

⁴³⁶This section corresponds with s 8 of Swaziland's TMVA of 1991. See n 505 *infra*.

⁴³⁷Section 13 of the TMVA of 1991 of Swaziland as referred to under n 509 *infra*.

⁴³⁸Public officer is defined in terms of s 154(1) of the Constitution of Lesotho of 1993 as a person holding or acting in any public office. The Constitution is also accessible at <http://www.southernafricalawcenter.org/files/tbl-s5107SAPublications/FileUpload5913/8/Lesotho.pdf> last visited on 12 November 2007.

⁴³⁹This is the only section which starts with a punishment by referring to a fine and also prescribing maximum sentence whereas the rest starts with an imprisonment term and prescribe minimum sentence.

⁴⁴⁰7 of 1981.

statute or statutory regulation, is guilty of an offence. Upon conviction, he is liable to the same punishment to which a person convicted of actually committing that offence would be liable. In addition, s 194 of the CPEA of 1981 provides that two or more persons may be convicted of the same crime of theft or receiving of stolen property knowing the same to have been stolen.

5.2.8. Contravention of s 343 of the Criminal Procedure and Evidence Act (CPEA) of 1981.

Section 343 of the CPEA of 1981 provides that any person who is found in possession of goods in regard to which a reasonable suspicion exists that they have been stolen and who is unable to give satisfactory account of such possession, is guilty of a crime. Upon conviction, the person is punishable with the penalties applicable to theft.⁴⁴¹

5.2.9. Contravention of s 344 of the Criminal Procedure and Evidence Act (CPEA) of 1981.

Section 344 of the CPEA of 1981 provides that any person who in any manner, other than in a public sale, acquires or receives stolen goods into his possession from any other person, without having reasonable cause at the time of such acquisition or receipt, to believe that such goods are the property of the person from whom he receives them, or that such person has been duly authorised by the owner to deal with or dispose of them, is guilty of an offence. Proof of reasonable cause rests with the person who is receiving the property in question. The person will, if convicted, be liable to the penalties which may be imposed on a conviction for receiving stolen property knowing it to be stolen.⁴⁴²

In *Sekoekoana v Regina*,⁴⁴³ Elyan J stated that, in order to prove the offence of which appellant is convicted of as receiving stolen property, it is vital to establish that the goods were stolen, the accused received them and that he knew at the time when he received them that the goods were stolen. An example of a case where the accused was convicted of receiving stolen property knowing it to have been stolen is *Meyer v Rex*⁴⁴⁴ where a complainant identified his vehicle which was stolen at Jeppe hostel, RSA on 24-10-1974. The applicant had produced documents suggesting to be agreement of purchase dated 29-03-1969. The court observed that the vehicle is a 1971 model and the agreement cannot be a genuine document but fictitious and was duly convicted.

⁴⁴¹This section is a carbon copy of s 36 of the General Law Amendment Act of 1955 as referred to at 4.2.4 *supra*.

⁴⁴²This section correspond with s 37 of the General Law Amendment Act of 1955 as referred to at 4.2.5 *supra*, albeit, before its amendment in 2000.

⁴⁴³1958 HCTLR 48 at 49-50. See also Mofokeng *Law Through Cases* 120.

⁴⁴⁴CRI/A/42/77. This case is unreported and has been quoted by Judge Mofokeng *Law Through Cases* 308.

A plea of an innocent buyer is supposed to be always a weaker defence because of ss 343 and 344 in the same way as its South African version as reflected in ss 36 or 37 of the General Law Amendment Act of 1955.⁴⁴⁵

5.3. Utilisation of criminal processes in finalising criminal offences .

5.3.1. Securing the attendance of the syndicate in court.

The police are in terms of s 14 of the MVTA of 2000⁴⁴⁶ empowered to, without a warrant, stop, search and arrest any person found driving, or in possession, or in charge or control of a suspected stolen motor vehicle. The suspect so arrested shall be taken to the nearest police station as soon as possible. If the suspect is detained, she may apply to be released on bail as provided in s 15 of the MVTA of 2000 which is similar to the provisions reflected in s 18 of the Swazi TMVA of 1991. This section provides that the suspect who is charged for theft, hijacking or receiving stolen motor vehicle knowing it to have been stolen, shall not be granted bail which is less than half the value of the vehicle in question. The release on own cognisance is totally prohibited.⁴⁴⁷

With regard to extradition, Lesotho has the Fugitives Offenders Act⁴⁴⁸ in place. A bilateral extradition agreement has been entered into between Lesotho and the RSA. As regards extraditable offences, they are those offences, which are punishable with 12 months imprisonment or more.⁴⁴⁹ Lesotho is bound by the Extradition Act of Zambia in terms of which the offenders may be returned.⁴⁵⁰ The treaty indeed includes the conditional handing over of the exhibits. However, in February 2000, the Court of Lesotho refused to extradite four Lesotho nationals who were wanted for murder, burglary, theft, armed robbery and attempted murder to the RSA on the basis that the agreement was not yet incorporated in their domestic law.⁴⁵¹ Bassiouni and Vetere⁴⁵² stated that the rationale for international cooperation to deal with transnational criminal organisation is very powerful. These organisations are not only becoming stronger and more diverse, but they are engaging more and more frequently in systematic forms of cooperation designed to further their criminal activities, extend the

⁴⁴⁵See 4.2.4 and 4.2.5 *supra*.

⁴⁴⁶This section corresponds with s 16 of TMVA of 1991 of Swaziland at n 528 *infra*.

⁴⁴⁷Some senior officials indicated on 2007-03-29 that the bail provision is not applied. 44838 of 1967.

⁴⁴⁹*Ibid* n 344 *supra*.

⁴⁵⁰See paragraph with n 612 read with n 614 *infra*.

⁴⁵¹Sakoane *Lesotho* 159. The case cited by Sakoane is *DPP v Tsoenyane and Others* CR 299/99 (unreported), 25 February 2000.

⁴⁵²Bassiouni and Vetere *Organised Crime* 496.

reach of illicit markets and expand their capacity to infiltrate legitimate business. According to their observation, it will be extremely difficult for any single Government, no matter what means and resources it has at its disposal, to develop an adequate response without some form of International cooperation. It is for this reason that countries should cooperate in order to defeat the adversary, the criminal.

5.3.2. Management of exhibits in Lesotho.

Management of exhibits belonging to the Lesotho nationals and those of foreign nationals are governed by CPEA of 1981.⁴⁵³

5.3.2.1. Seizure and keeping of exhibits.

In general, the police are empowered to seize an article which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within Lesotho or elsewhere, or which may afford evidence of the commission of such offence.⁴⁵⁴ It is clearly unambiguous from the wording of this section that the offence committed or suspected to have been committed, could have occurred within Lesotho or outside the country. Because an exhibit includes a motor vehicle, this therefore means that when a crime is committed in the RSA, the exhibit can be seized in Lesotho by the LMPS. A suspect could thus not freely use a stolen vehicle in Lesotho.

The police are further, specifically empowered in terms of s 14 of the MVTA of 2000 to seize a suspected stolen motor vehicle regardless of whether or not the suspect stole it herself or received it knowing or having reason to believe it to be stolen or even if she assisted in stealing the vehicle. The vehicle so seized shall be taken to the nearest police station as soon as possible. What happens in practice is that the suspect is taken together with the exhibit to the nearest police station. The Act is silent as to what the police must do with the suspect and the exhibits at the police station,⁴⁵⁵ but s 52 of the CPEA of 1981 then becomes applicable.⁴⁵⁶ A vehicle can also be seized by the police in terms of s 14(2) of the RTA of 1981 where the vehicle was registered using false documents or information.

5.3.2.2. Disposal of exhibits.

⁴⁵³This Act is to a very large extent similar to the CPEA 67 of 1938 of Swaziland as per n 532 *infra*.

⁴⁵⁴These are the provision of s 52 of Lesotho's CPEA of 1981. This section correspond with s 20 of the CPA of 1977 of the RSA at n 355 *supra*.

⁴⁵⁵The difference between this s 14(2) of MVTA of 2000 and the Swaziland's s 16(2) of the TMVA of 1991 is that the latter provides that the police shall deal with it in accordance with the law where as the former is silent. The Lesotho law has followed the wording of the Botswana's MVTA 17 of 1995.

⁴⁵⁶See para 1 under n 5.3.2.2 *infra*.

In Lesotho the disposal of exhibits is regulated by ss 52, 53, 54, 55, 57, 58 and 324 of the CPEA of 1981. Section 52 of CPEA of 1981 directs that if the article seized is stolen property, the police may with the consent of the person from whom it was seized, deliver it to the person from whom, in the opinion of the police, it was stolen. If the police decide to hand it over to the victim, all they need to do is to warn such person, to keep it and produce it for resultant criminal proceedings, if required to do so. The police can also exercise the discretion to give the exhibit a distinctive mark, retain such an exhibit in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require.⁴⁵⁷ It is interesting to note the sweeping powers given to the police in terms of exercising discretion. Before the fingers are pointed at Justice, as is usually the case, one need to assess whether the discretion vested in the police are being maximally exercised or not.

The international trend today is to admit evidence of photographs and video recordings. Sir Richard May and Steven Powles, quoted Sir Joselyn Simon who said that the law is now bound to take cognisance of the fact that mechanical means replace human effort, and thus, photographs and video recordings were admitted in the nineteenth and twentieth centuries respectively.⁴⁵⁸ The admissibility of a photograph as real evidence is, of course, based on its authenticity.⁴⁵⁹ Lesotho does not have a provision in its law which authorises any court to allow any party to produce a photograph as evidence in lieu of such an article. Senior Resident Magistrate Molefi Eviristus F Makara,⁴⁶⁰ as he then was, made it clear in interpreting this issue that, where it is difficult or impossible in the circumstances of a particular case to bring the items before court, a photograph might be relevant. He went further to state that the conditions which must be satisfied before a photograph or a film is admitted as evidence is that, the photographic picture or film sought to be handed in as an exhibit, must indicate a date or place where it was taken, and the photographer himself or someone conversant with photography must confirm or verify that the photograph is realistic.

In an instance where an exhibit was kept by the police and no criminal proceedings are instituted or if the criminal proceedings are instituted, but it appears that such an exhibit is not required for the purpose of either evidence or an order of court, it will be returned to the person from whom it was seized if such person may lawfully possess it. If the person from whom it was seized may not lawfully possess it, the police will return it to the person who may lawfully possess it.⁴⁶¹ The biggest challenge which the LMPS is faced with, is the number

⁴⁵⁷The contents of this section corresponds with s 30 of the CPA of 1977 of the RSA as referred to at 4.3.2.2 *supra*.

⁴⁵⁸May and Powles *Evidence* 15.

⁴⁵⁹May and Powles *Evidence* 17.

⁴⁶⁰Makara *Evidence* 140. Makara is now the Chief Magistrate in Lesotho.

⁴⁶¹This is s 53 of Lesotho's CPEA which is a carbon copy of s 31 of CPA of the RSA. See n 361 *supra*.

of motor vehicles which are found in the possession of suspects where the identifications have been irretrievably obliterated. In such instances the origin of the motor vehicle is unknown and as such, they are being given back to the persons from whom they were seized. Professors Milton and Cowling argue that the person from whom the goods were received could be known or unknown and would not necessarily be the thief.⁴⁶²

During operation Palanca Negra I,⁴⁶³ 36 of the 137 motor vehicles found in Lesotho had their identifiers irretrievably obliterated. These vehicles, which were clearly stolen, were handed back to the persons from whom they were confiscated. The crooks appear to have identified this loophole in the enforcement process and are keen to exploit it. Similar to the RSA provision, this section also allows the police to exercise discretion. The police use their judgement in identifying the person who may lawfully possess the exhibit. The person who may lawfully possess the exhibit is notified by registered post to collect her article within thirty days failing which, may result in the exhibit being forfeited to the Crown.⁴⁶⁴

It has been observed during Operations Palanca Negra I, Palanca Negra II, Palanca Negra III, Maluti, Thabana Ntlenyana and Senqu that a number of motor vehicles of which the identification numbers have been irretrievably obliterated were being seized. The figures showing how this *modi operandi* surfaced are as follows:

Table 6: Number of seized motor vehicles with irretrievably obliterated identification numbers.

Country where the motor vehicles were seized						
Operation Palanca Negra I, II and III	36	5	2	7	13	0
Operations Maluti, Thabana Ntlenyana and Senqu	16	2	2	8	3	3

Where criminal proceedings have been instituted and the exhibit is needed in court, it will be taken to court. If the exhibit is bulky, the police will in terms of s 54 of the CPEA of 1981, keep the item. The disposal is the same as in the RSA. The judge may then, at the conclusion of the case, issue a disposal order in favour of either returning it to the person from whom it was seized if such person may lawfully possess such an exhibit or if such person is not entitled to the item or may not lawfully possess such an item, return to any person entitled to

⁴⁶²Milton and Cowling *Statutory Offences J7-6*.

⁴⁶³See n 139 *supra*. The minutes of the 11th SARPCCO AGM 2006 page 90 show that of the 233 recovered motor vehicles, 75 were released on court orders while 67 were pending investigation after identification and 55 pending.

⁴⁶⁴Forfeiture of the article in Lesotho is to the Crown while in the RSA it is to the State because of their Kingdom and Republic status respectively.

it. If no person is entitled to the item, or cannot be traced, or is unknown, or cannot lawfully possess it, the presiding officer shall declare such an item as forfeited to the Crown.⁴⁶⁵ In order to issue a decree, the court may hear additional evidence. The court does not have to wait for the conclusion of a case, but it may make an order at any stage of the criminal proceedings.⁴⁶⁶

To forfeit the exhibit to the Crown as required by s 56 of the CPEA of 1981⁴⁶⁷ discourages organised crime as it sends a message that crime does not pay. In their concluding assessment, Bassiouni and Vetere says that there is no doubt that organised crime groups, whether operating exclusively within the confines of a given state or in more than one state, and whether active in purely internal activities or in transnational ones, are profit motivated. They argue that the most effective way of combatting organised crime is by depriving the criminals of their profits.⁴⁶⁸ This statement is echoed by Cowling who submits that organised crime groups vary greatly in terms of size, influence, nature and area of operation but they all have one thing in common, namely, seeking profit through ongoing, structured and collective criminal activity run by an organisation of individuals as business.⁴⁶⁹

As regards to motor vehicle exhibits, s 14 of the MVTA of 2000 provides that if a seized vehicle is required for prosecutions in respect thereof, the court shall not release the vehicle until the conclusion of such proceedings. The exception is that, within six months of the conclusion of the prosecution or the date of seizure, whichever of the two is the latter, the exhibit may be released by the court upon application. The application must be supported by satisfactory documentary proof of lawful ownership or lawful possession thereof.⁴⁷⁰ In case of such exhibit being unclaimed for a period of six months after the conclusion of the court case, it shall be handed over to the police for disposal as unclaimed property in terms of s 19 of the MVTA of 2000. In practice, the vehicle exhibits are not physically taken to court, but are kept in the police pounds and only the documents are used as proof of the existence of the vehicle in which an order is sought.

Section 17 of the MVTA of 2000 which deals with compensation to the victim is similar to s 300 of the CPA of 1977 of the RSA. Compensation may include any other loss attributable to the offence. This therefore means

⁴⁶⁵Section 56 of Lesotho's CPEA of 1981 which has the same provision as s 34 of the CPA of 1977.

⁴⁶⁶This section corresponds with s 34 of CPA of 1977 of the RSA as referred to at n 465 *supra*. The motor vehicles whose identifications have been tampered with beyond recognition are supposed to be dealt with in terms of this section. Where the cases are not taken to court, the discretion rests with the police. There is a need to therefore charge the suspects so that their cases could be decided by court.

⁴⁶⁷See n 465 *supra*.

⁴⁶⁸Bassiouni and Vetere *Organised Crime* xlvii-xlviii.

⁴⁶⁹Cowling *Organised Crime* 350.

⁴⁷⁰The difference with Swaziland law is that in terms of s 16(4) of the TMVA of 1991, the court shall listen to the police or owner before it releases the vehicle in ex-parte application after oral evidence.

that travelling, hotel accommodation expenses as well as the value of the motor vehicle at the time of theft can be included. The assets derived from crime are dealt with under s 18 of the MVTA of 2000.

In Lesotho, the motor vehicles which have been seized by the police during joint operations are often unconditionally released by court orders to the persons from whom they have been seized. The person in whose custody the motor vehicle is released, is entitled to the unlimited use of the motor vehicle thereof. In some cases the vehicles are released by the police until the owner comes for identification. What these possessors do, is to absent themselves on the day when the other person who claims ownership has arrived in the country for identification. The process is ultimately delayed before it goes to court. In *Thabang Mahloko and Commanding officer (RCTS) and others*,⁴⁷¹ a Toyota Hi-Ace minibus which was stolen from Mr Makhubela in Makapanstad, RSA was confiscated by the police during operation Palanca Negra I. The vehicle was identified by the lawful owner. The suspect who was not arrested, applied for a court order for the release of the vehicle. The application was not opposed and the owner was not informed.⁴⁷² The court granted an order for the release of the vehicle. It appears as if the laws of Lesotho correspond to a large extent with the South African laws.

The doctrine of an innocent buyer is dealt with under s 323 of the CPEA of 1981.⁴⁷³ It is provided that when a person is convicted of theft or any other offence whereby she has unlawfully obtained any property and it appears to the court through evidence that she sold the property or part of it to any other person who had no knowledge that it was stolen or unlawfully obtained, the court may order compensation to such innocent buyer from the money which was confiscated during arrest. This section is supposed to be a tool to be used in alleviating the hardship which the innocent buyers find themselves in, but it is unfortunately talking about compensation from the money seized during arrest. If no money or insufficient money was seized, the innocent buyer has no effective remedy. Nevertheless, she can still request an order for compensation in terms of s 321 of the CPEA of 1981 which provides that compensation may upon conviction, where an amount of compensation does not exceed the court's jurisdiction or an amount of M400, be ordered.

When a person is convicted of theft or receiving property knowing the same to have been stolen or otherwise unlawfully obtained, the court may on application by the owner or his representative, restore the property to such an owner or his representative. In terms of this section the insurance company can indeed request restoration.⁴⁷⁴ What appears to be strange in s 324 of the CPEA of 1981 is subsec 3(b) which provides that if it appears that the property stolen or received or otherwise unlawfully obtained has been transferred to an

⁴⁷¹CC1670/2006.

⁴⁷²The police runs a risk of being sued by the owner as an obligation is placed on their shoulders in terms of s 8 of the SOP of the SARPCCO.

⁴⁷³See n 544 *infra* in respect of Swaziland.

⁴⁷⁴Section 324(1) of the CPEA of 1981.

innocent purchaser for value who has acquired a lawful title thereto, the court shall not award or order the restitution of the security or property. It therefore suggests that all what a crook needs to do, is to create a second layer of a coverup and then the receiver becomes an owner with the right to title. While it may be protecting innocent buyers, this section appears in my opinion, to be out of line with the laws of acquisition of ownership.

The Commissioner of Police is empowered to cause to be published in the Gazette and at least one newspaper circulating in Lesotho, the particulars of unidentified vehicles.⁴⁷⁵ The Commissioner is further empowered thereafter to forfeit these unclaimed vehicles to the Crown. These vehicles will then be dealt with as the Commissioner may direct, which discretion includes sale by means of a public auction.

5.4. Conclusion.

The LMPS does not oppose interim court orders, or implement the provisions of s 8 of the SOP which require that a Motor Vehicle Liaison Officer should inform his counterpart about the intended release. The MVTA of 2000 may need to be harmonised with that of Swaziland by inserting a provision similar to s 16(5) of the TMVA of 1991 of Swaziland which compels the court to apply the *audi alteram partem* rule by clearing the issue of objections with the police or witnesses.⁴⁷⁶ Section 321(3)(b) of the CPEA of 1981 appears to be out of line with the laws of acquisition of ownership.

The laws of Lesotho do not make provision for the production of photographs in lieu of an exhibit and the law could be more enriched by making the necessary amendments. Instead of being silent, provisions for the production of photographs should have been made in the CPEA of 1981.

The RTA of 1981 and the MVTA of 2000 deals with the same concerns but the latter has neither amended nor repealed the former which has the potential of creating legal uncertainties especially when the suspect might like to be charged in terms of the former with the lighter sentences when the King prefers to charge her with the latter which carries heavier punishment. Revisiting this legislation may also assist in consolidating the parallel definitions of the same articles.

The under-staffing of the country's courts with three(3) chief magistrates and ten(10) magistrates also pose a

⁴⁷⁵This is in terms of s 19(2) of the MVTA of 2000. Although the Act ends with the provisions that the Minister may promulgate the Regulations in terms thereof, such Regulations were not in place as on 04-08-2006.

⁴⁷⁶Rule 12 of the Rules of Court of Lesotho allows delivery of plea or entering appearance to oppose the application.

challenge in that the magistrates,⁴⁷⁷ one per district, are unable to speedily deal with all types of criminal cases. Attempts to prioritise cases where foreign vehicles are involved, may further frustrate the system.

CHAPTER SIX

LEGAL FRAMEWORK OF MOTOR VEHICLE THEFT IN SWAZILAND.

6.1 Introduction.

The scourge of theft of motor vehicles has not spared the Royal Kingdom of Swaziland. Simon Pillinger⁴⁷⁸ indicated that its use for illicit purposes as a transit country between the RSA and Mozambique is an ongoing cause of concern. He further indicated that Swazi criminal groups are mainly involved in trafficking of narcotics, dealing in stolen vehicles and exporting compressed dagga(marijuana). Although Pillinger reports that there appears to be four to five organised networks in Swaziland that are involved in trafficking of vehicles from the RSA, he correctly points out that the majority of stolen vehicles are destined for Mozambique. They enter Swaziland through its porous borders with the RSA.⁴⁷⁹ The vehicles which come through the border are associated with corruption by officials who are bribed by drivers and let them go unhindered. Once in Swaziland, they are registered and taken to Maputo with legitimate papers for disposal. He observed that some of the vehicles are said to enter through what is known as “*deur die draad*.”⁴⁸⁰ In observing the number of stolen motor vehicles found in Swaziland, I am of the view that the estimated number of syndicates by Pillinger is an underestimation.

Criminal offences in terms of Swaziland laws concerning motor vehicle crimes are robbery, theft, receiving stolen goods knowing them to have been stolen, fraud, contravention of the Theft of Motor Vehicle Act (TMVA)⁴⁸¹ and contravention of the RTA.⁴⁸²

6.2. Application of the criminal laws related to motor vehicle crime in Swaziland.

⁴⁷⁷Dzimba and Matoane *Stock Theft* 10.

⁴⁷⁸Pillinger *Swaziland* 95 and 96. Pillinger is the CEO of Strategic Research Consultants (Pty)Ltd in Swaziland.

⁴⁷⁹Pillinger *Swaziland* 103. This explains why there are so many vehicles which are seized in Swaziland and the country is still not considered as a marketplace. The reason for differing with Pillinger's estimation is that, the PCC reported during the 12th SARPCCO AGM, in Lusaka, Zambia from 28-07-2007 to 03-08-2007 that they have identified 66 motor vehicle theft syndicates through the Regional Organised Crime Threat Analysis (ROCTA) that operate in the region.

⁴⁸⁰“Deur die draad” is an Afrikaans sentence which literally mean “through the fence”.

⁴⁸¹16 of 1991.

⁴⁸²6 of 1965. The definitions and elements of the common law crimes will not be repeated here as they have been dealt with in Cap 4 *supra*.

6.2.1. Theft.

Theft is a common law crime and can also be committed in terms of statutory provisions. The parallel existence of the common law and statutory law crime on theft of motor vehicles was confirmed by S B Maphalala J in *Giyani Dlamini v The Attorney General*.⁴⁸³ Theft of motor vehicles was already a problem as far back as 1987. In *Lucas Special Lukhele vs The King*⁴⁸⁴ Dunn J stated that there were far too many cases of car theft in that country and that such cases call for custodial sentences. Lukhele was prosecuted and convicted separately on five counts of theft of motor vehicles which were found at the same place and time during arrest and sentenced to a total of 22 years imprisonment. The sentence was found to be excessive and it was directed that the sentences run concurrently which resulted in the sentences being reduced to 13 years imprisonment.

In *The King vs Boy Fana Motsa*,⁴⁸⁵ the accused was convicted on one count of theft of a Toyota Cressida motor car which was stolen in Johannesburg on the 04-02-1986 and found in his possession at Lomahasha on 01-03-1986. Rooney J did not deal with the circumstances why the accused was convicted of theft and not possession of stolen property, but focused on the circumstances around the deviation of the magistrate from imposing the mandatory custodial sentence. My view is that, this was the application of the doctrine of continuing nature of the crime of theft.⁴⁸⁶

As regards theft of a motor vehicle, Swaziland has criminalised the act of stealing of a motor vehicle in terms of s 3(1) of the TMVA of 1991.⁴⁸⁷ Although the Act is silent about repealing the common law crime, the prosecuting authorities will use a more specific charge of contravention of a statutory offence than common law crime.

6.2.2. Robbery.

Robbery is a common law crime in Swaziland. The competent verdicts of this crime include theft.⁴⁸⁸ In *R vs Siphon Mfanimpela Mbhamali and others*,⁴⁸⁹ the court reiterated that robbery consist in the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from another. In this

4832000 SZHC 7.

484Civ. App. Case No. 27/89 SZHC at 12.

485Review Case No. 3/90, SZHC.

486The discussion of theft as continuing crime under reference n 174 *supra* is applicable.

487See n 498 *infra*.

488Competent verdict for this crime appears under s 183(1) of the CPEA of 1938.

489CR. Trial No. 29/90 SZHC at 9.

case, the accused Sipho Mfanimpela Mbhamali, Stanley Gabheni Mbokazi and Bongani Norman Dlamini were jointly charged with six counts which included robbery involving the removal by the accused of a motor vehicle from Nimrod Ndzimadze after he was shot and killed; theft of a motor vehicle in the RSA on the 31-01-1989; and Contravention of s 25(f) of the RTA of 1965⁴⁹⁰ in that they operated a vehicle bearing a registration number not allotted to it. The three accused were traveling in a white Toyota Stallion which was stolen in the RSA. The vehicle's registration number belonged to a vehicle of Lydia Simelane. Simelane's vehicle had already been written off, but its registration number was not cancelled at the Central Motor Registry, hence re-birthing. The accused borrowed the vehicle from Brenda Dlamini, whom they believed to be the owner. The accused stopped a Toyota Corolla which was in fact an unmarked police car. But when they realised that it was the police, they drove away and the three members chased the vehicle until it came to a collapsed bridge. When the police approached the car, the accused fired at them and killed Sergeant Ndzimandze. The accused abandoned their Stallion and took the Corolla. The accused were not convicted of robbery but theft on the grounds that they abandoned the Corolla in circumstances which indicated recklessness as to whether or not the vehicle would be recovered by the owner.

In *The King vs Moses Dube and others*,⁴⁹¹ the accused were convicted of robbery of E338 700 and a white Ford Granada motor vehicle with registration number SD030KM, which was the property of the Bank of Credit and Commerce International Ltd (BCCI). The vehicle was taken by using violence. *The King vs Douglas Richard Simelane and another*,⁴⁹² suggests that the challenge of robbery of motor vehicles existed for sometime which was considered by the Senior magistrate in passing a sentence.

6.2.3. Receiving stolen goods knowing them to have been stolen.

The crimes of theft and receiving stolen goods knowing them to have been stolen are each a competent verdict of joint charges of theft and/or receiving stolen property knowing it to have been stolen.⁴⁹³ Swaziland has also criminalised receipt of stolen motor vehicle knowing the same to have been stolen. Section 3(1) of the TMVA of 1991 states that any person who steals a motor vehicle or receives a motor vehicle knowing it to be stolen is guilty of an offence and liable on conviction to imprisonment for not less than two years in respect of first offender without the option of a fine or five years in respect of subsequent offender without the option of a fine.

⁴⁹⁰6 of 1965. See 6.2.6 *infra*.

⁴⁹¹Crim. Case No. 95/87, SZHC.

⁴⁹²Review Case No. 106/87, SZHC.

⁴⁹³Section 191 of the CPEA of 1938.

6.2.4. Fraud.

Fraud is a common law crime.⁴⁹⁴ A competent verdict of fraud is given as any other crime.⁴⁹⁵ Although Lydia Simelane⁴⁹⁶ was not charged with fraud for replacing her car with a stolen one, she could have also been charged with such crime as the elements of fraud were present.

6.2.5. Contravention of the provisions of the Theft of Motor Vehicle Act (TMVA).⁴⁹⁷

In terms of s 3(1) of the TMVA of 1991, any person who steals⁴⁹⁸ a motor vehicle⁴⁹⁹ or receives a motor vehicle knowing it to be stolen, is guilty of an offence. This section has removed the distinction between theft itself and receiving of stolen property knowing the same to have been stolen. A person who is convicted of this offence will be sentenced to two years or five years imprisonment without the option of a fine for the first offender and subsequent offender respectively. If the accused was a motor vehicle dealer, she will also lose her dealer's licence. A person will still be convicted of theft even if the owner is found to be someone other than the one initially thought to be the owner.

It is not a cumbersome process to prove that the accused is guilty in terms of s 4 of the TMVA of 1991⁵⁰⁰ because there is a presumption which shifts the onus of proof to the accused. This is so in that, a person is presumed to have committed an offence of theft or receiving as indicated above if the following are present:

- ↯ she is found in possession of a motor vehicle which is reasonably suspected to be stolen,
- ↯ the engine or chassis number or registration marks or numbers of motor vehicle or other identification marks of the motor vehicle have been altered, disfigured, obliterated or tampered with in any manner,
- ↯ she possesses a forged registration book, papers or any other document of registration or ownership in relation to that motor vehicle,

⁴⁹⁴As a common law crime, the definition is the same as those reflected at 4.2.1 *supra*.

⁴⁹⁵Competent verdict is any other crime in terms of s 182 of the CPEA of 1938.

⁴⁹⁶*Id* n 489 *supra* at 11.

⁴⁹⁷16 of 1991.

⁴⁹⁸The word steal has not been defined in the Act and therefore takes the ordinary meaning.

⁴⁹⁹A motor vehicle is defined in terms of s 2 of the TMVA 16 of 1991 as any vehicle self-propelled by mechanical or electrical power adapted or intended to be used on roads for the purpose of conveying persons or goods and shall include any part of such vehicle.

⁵⁰⁰This section correspond with s 5 of the MVTA of 2000 of Lesotho as discussed under n 426 *supra*.

- she has imported the motor vehicle into Swaziland in contravention of any law for the time being in force relating to the importation of motor vehicles.

The competent verdicts⁵⁰¹ for theft or receiving of stolen vehicle knowing it to have been stolen, dealing and manufacturing of false keys, books and stamps are attempt to steal a motor vehicle, attempt to receive a motor vehicle knowing the same to have been stolen; conspiracy to commit an offence in terms of ss 3, 8 and 11 of the TMVA of 1991; and selling, disposing or assisting in disposing or stealing a motor vehicle knowing it to have been stolen. The penalty for contravention of any of these competent verdicts is a fine not exceeding E10 000 or imprisonment for a period not exceeding five years.

In order to strengthen its ability to police the TMVA of 1991, the Legislature has created an obligation on the part of motor vehicle dealers or garage operators to report suspected stolen motor vehicles.⁵⁰² In terms of this obligation, any motor vehicle dealer, or manager of a garage or person who carries on the business of repairing or servicing motor vehicles, who discovers or has reason to suspect that the registration number, engine or chassis number of, or other identification marks on, the motor vehicle delivered to him for sale, repair or service have been altered, disfigured, defaced, obliterated or tampered with in any manner, shall forthwith report the matter to the nearest police station. The police shall, unless a satisfactory explanation is obtained, without a warrant, seize such motor vehicle. Failure to comply with this obligation by any such motor vehicle dealer, manager of a garage or person who carries on the business of repairing or servicing motor vehicles, is a crime which is punishable on conviction with a fine not exceeding E5 000 or to imprisonment for a period not exceeding two years or both such fine and such imprisonment.

A person who sells, transfers or otherwise disposes of a motor vehicle, commits an offence if at the time of the sale, disposal or transfer of the motor vehicle she does not furnish the purchaser or transferee with a document effecting the sale or disposal or transfer of the motor vehicle thereof.⁵⁰³ This section also obliges every person who purchases or receives a motor vehicle to demand from the seller or transferor, a document effecting the purchasing or receiving of the motor vehicle, at the time of purchase or receipt. Any person who fails to furnish or demands such documents shall be liable on conviction to a fine not exceeding E5 000 or imprisonment not exceeding two years.

⁵⁰¹Section 5 of the TMVA of 1991. This section correspond with s 11 of MVTA of 2000 of Lesotho as referred to under n 435 *supra*.

⁵⁰²Section 6 of the TMVA of 1991.

⁵⁰³Section 7 of the of the TMVA of 1991. This section correspond with s 7 of the MVTA of 2000 of Lesotho as referred to under n 429 *supra*.

Section 7(4) of the TMVA of 1991 provides that regardless of the provisions of subsecs (1) and (2) as indicated above, where a motor vehicle is sold by or purchased from a motor vehicle dealer, a declaration or certification by that dealer specifying the dealer's name and address of place of business stating that the vehicle has been lawfully sold to the purchaser shall be a sufficient defence. In the case of a motor vehicle purchased outside Swaziland, the declaration or certificate must be produced to and stamped by a customs officer at the point of entry into Swaziland. Such documents shall, within three days of the importation, be presented by the purchaser of the vehicle together with a motor vehicle concerned to a police station for verification by the police.⁵⁰⁴ In the case of a motor vehicle purchased in Swaziland, the purchaser presents the vehicle together with the declaration (or certificate) to a police station within three days of the purchase for verification by the police.

In terms of s 7(5) of the TMVA of 1991, a dealer who does not issue a declaration or who issues a false declaration or a person who does not submit a declaration under this section to a customs officer or police station as prescribed commits an offence and is liable on conviction, to a fine not exceeding E5 000 or imprisonment not exceeding two years. Regardless of the provisions of s 7(5) of the TMVA of 1991, s 7(6) of this Act provides that, if the motor vehicle sold or purchased is proved to be a stolen vehicle, the accused person or dealer shall be liable to a sentence of a fine not exceeding an amount of E10 000 or imprisonment for a period not exceeding five years.

The activities of stealing and selling of motor vehicles are proscribed.⁵⁰⁵ It is provided that any person who engages in stealing and selling of, or other fraudulent dealing in motor vehicles is guilty of an offence and liable on conviction to a fine not exceeding E30 000 or imprisonment for a period not exceeding fifteen years and the forfeiture to the Crown of all assets traceable to the dealing. Although Swaziland has no organised crime legislation, the proceeds of motor vehicle crime are effectively dealt with in terms of this section.

An act of altering, tampering with or repairing any part of a motor vehicle or assisting in altering, tampering with or repairing any part of a motor vehicle so as to conceal or disguise the identification of a motor vehicle used in the commission of another offence, is prohibited.⁵⁰⁶ A person who is convicted of this offence is liable to a fine not exceeding E5 000 or imprisonment not exceeding two years.

⁵⁰⁴This section may need to be amended to accommodate the SAPRCCO Clearance Certificate. See n 576 *infra* in respect of similar provisions in Zambia.

⁵⁰⁵These are the provisions of s 8 of the TMVA of 1991. This section is similar to s 12 of MVTA of 2000 of Lesotho as referred to under n 436 *supra*.

⁵⁰⁶Section 9 of the TMVA of 1991. This section correspond with s 8 of the MVTA of 2000 of Lesotho as referred to under n 433 *supra*.

The use of false registration marks is an offence.⁵⁰⁷ Section 10 of this Act provides that any person who, on any road, drives or is in control of a motor vehicle which bears false or no registration marks, commits an offence and is liable on conviction to a fine not exceeding E5 000 or imprisonment for a period not exceeding two years. Possession or manufacturing or causing to be manufactured of a key, stamp, book or other documents or gadget used or likely to be used in the commission of an offence under this Act, is an offence which in terms of s 11, is punishable with a fine not exceeding E10 000 or imprisonment for a period not exceeding five years.

Public officers⁵⁰⁸ are compelled to participate in the fight against vehicle crime.⁵⁰⁹ Failure or negligence to carry out their duty under this Act or any law regulating the registration or importation of motor vehicles is an offence and is punishable on conviction with a fine not exceeding E5 000 or imprisonment for a period not exceeding two years. If a motor vehicle is proved to be a stolen motor vehicle, the person who is guilty of contravening this section, shall be liable to be sentenced as an accomplice to the theft or any other offence involving that motor vehicle. In a case where a public officer who is convicted under this section is shown to have intentionally failed or neglected his duty, he shall in addition to any sentence imposed under this Act, be summarily dismissed from the public service with loss of benefits.

To ensure that the penalties serve as a means of deterrence, the Act provides that penalties are neither as a whole nor in part, to run concurrently or to be suspended in case where a person is convicted for the contravention of s 3 or 6 and sentenced for more than one offence.⁵¹⁰ Such sentences shall run consecutively until the full term is served. Section 15 of the TMVA of 1991 deals with the involvement in some sort of organised crime, which is more severely punishable than the people who commit the theft itself. In terms of this section, any person who procures, incites, hires, commands or instigates another to contravene s 3 of this Act commits an offence and is liable on conviction to twice the sentence which is prescribed under s 3 of this Act.

⁵⁰⁷Section 10 of the TMVA of 1991. See a similar provision in terms of s 9 of the MVTA of 2000 of Lesotho as referred to at n 434 *supra*.

⁵⁰⁸A public officer is interpreted in s 2 of the TMVA of 1991 as having the same meaning assigned to it under the Civil Service Order, 1973 and includes a police officer. Public officer is defined in terms of s 2 of the Civil Service Order, 1973 as any holder of any public office and includes any person appointed to act in any such office.

⁵⁰⁹Section 13 of the TMVA of 1991. See similar section and provision under n 437 *supra* in respect of Lesotho.

⁵¹⁰Section 14 of the TMVA of 1991.

6.2.6. Contravention of the provisions of the Road Traffic Act (RTA).⁵¹¹

In terms of s 2 of the RTA of 1965, a motor vehicle, motor cycle, motor tricycle and motor car are defined severally.⁵¹² The definition of motor vehicle differs from that in the TMVA of 1991. Although the purpose of these two Acts are not the same, it is advisable that the same definition is used.⁵¹³

Operation of an unregistered or unlicensed motor vehicle on a public road is prohibited,⁵¹⁴ but this prohibition does not include Ngwenyama⁵¹⁵ or a person driving a vehicle on his instruction. Any person, who is the owner of a motor vehicle, is compelled to register the vehicle in her name within seven days of acquisition of ownership.⁵¹⁶ A temporary permit can be given for a vehicle, which is not licenced, to be driven on a public road for the purpose of testing it or reaching a place of repair or storage, an examiner or a weighbridge.⁵¹⁷ Where the owner has altered the particulars of the vehicle, it is considered as unregistered and must then be registered within seven days.⁵¹⁸ Stolen and unfit vehicles shall be deregistered upon submission of documents and in case of theft, an affidavit to the effect that the complainant has lost all hope of recovery.

There is a prohibition on the disposal of a motor vehicle not registered and licensed in the name of the owner. After the disposal, notice must be given to the registrar within seven days. The owner is also compelled to give registration documents to the new owner within seven days. Failure to comply with this provision, is an

⁵¹¹16 of 1965.

⁵¹²Motor vehicle means a self propelled vehicle; or trailer; or vehicle having pedals and an engine as an integral part of the vehicle, or attached to it and which is designed or adapted to be propelled either by means of those pedals or that engine or both, but does not include fire engine; roller; or vehicle propelled by electrical power derived from storage batteries and which is pedestrian-controlled; or vehicle weighing not more than 225 kg and specially designed and constructed and not merely adapted, for the use of a person suffering from some physical defect or disability and used solely by that person. Motor car means a motor vehicle, other than a motor cycle or motor tricycle, designed or adapted solely or principally for the conveyance of persons not exceeding nine in number. Motor cycle means a motor vehicle having two wheels irrespective of any side car attached to the vehicle. Motor tricycle means a motor vehicle, other than a motor cycle with a side car or a tractor, which has three wheels, and is designed to be driven by the type of controls usually fitted to a motor cycle.

⁵¹³The purpose, as reflected in the introductory notes of the RTA of 1965 is to regulate motor and other vehicles and traffic on public roads while in the Theft of Motor Vehicle Act of 1991 is to provide for the offence of theft of motor vehicles and for other matters related thereto.

⁵¹⁴Section 6 of the RTA of 1965.

⁵¹⁵The RTA of 1965 does not define Ngwenyama. Ngwenyama is defined in s 114(1) of the Constitution of Swaziland Act 50 of 1968 as the person appointed as Ngwenyama under Swazi law and custom and includes any person for the time being exercising the functions of the Ngwenyama under Swazi law and custom.

⁵¹⁶Section 7 of the RTA of 1965. The date of acquisition is explained as the date in which vehicle was brought into Swaziland or the date of completion of assembling. Owner excludes the Minister, the Ngwenyama or such other person whose name the Minister may publish in the Gazette.

⁵¹⁷Section 15 of the RTA of 1965.

⁵¹⁸Section 17 of the RTA of 1965.

offence.⁵¹⁹ This is an effective tool to ensure that all the sales of vehicles are documented.

An important portion of this Act is an obligation placed on both the registrar⁵²⁰ and the owner of a motor vehicle to ensure that a motor vehicle which bears no special number or mark, or of which the number or mark has been obliterated or defaced, is not registered. The registrar shall cause such vehicle to be allocated identification marks by the registrar who shall cause them to be embossed, cut or attached permanently to the vehicle. In the case of obliteration or defacement, the registrar is obliged to provide a full description of the vehicle and particulars of applicant to the nearest police station.⁵²¹

Any person who alters, obliterates, effaces, or causes the alteration, obliteration or effacement of an identification number or mark used for the purposes of registration under Part III, is guilty of an offence and liable on conviction to a fine of R200-00 or six months imprisonment.⁵²²

A person who, whether in writing or by drawing or in any other manner, counterfeits, or with intent to deceive, substitutes, alters, defaces, mutilates or adds anything to a registration mark or similar mark issued by a competent authority outside Swaziland, commits a crime.⁵²³ Any person who, while knowing that a mark has been counterfeited or so substituted, altered, defaced, mutilated or added to, operates vehicle with such mark on a public road shall be guilty of an offence.⁵²⁴

A prohibition has been placed upon any person who counterfeits, or on any person, who with the intention to deceive, alters, defaces, mutilates or adds anything to a certificate, licence or any other document as approved in terms of this Act. It is provided that any person who, while knowing that a certificate, licence or a recognised or approved document has been counterfeited or altered, defaced, mutilated or added to, uses such document as aforesaid shall be guilty of an offence.⁵²⁵ An offence is also committed by any person who, while knowing the

⁵¹⁹The facts in this paragraph are based on s 21 of the RTA of 1965. Ngwenyama and some government institution are not excluded. Section 34 supplements the documentation process as it compels dealers to keep a register of all vehicles acquired and disposed of.

⁵²⁰A registrar is defined in s 3 of the RTA of 1965 as a public officer who is designated by the Minister by notice in the Gazette as the Registrar of Road Traffic.

⁵²¹This paragraph is based on s 31 of the RTA of 1965. It is in harmony with the SAPSVIN of the SAPS as referred to in n 298 *supra*.

⁵²²This is s 31(3) and (4) of the RTA of 1965 which was promulgated probably at the time when Swaziland was still using the South African rands, but this should read E200-00 as it could be observed from s 169 of the Road Traffic Regulations, 1966 which speak of elimalangeni and not rands.

⁵²³These are the provisions of s 121(1) (a) of the RTA of 1965 which are in harmony with s 68(2)(a) of the NRTA of 1996 of the RSA as referred to in para 1 at n 287 *supra*.

⁵²⁴These are the provision of s 121(1) (b) of the RTA of 1965 which are in concord with s 68(2)(a) of the NRTA of 1996 of the RSA. The sentence in respect of contravention of s 121 is in terms of subsec 4, a fine not exceeding R 400-00 or imprisonment for one year or both. See para 1 at n 287 *supra*.

⁵²⁵These are the provisions of s 121(2) (a) and (b) of the RTA of 1965 which are in harmony with s 68(3)a) and (b) of the NRTA of 1996 of the RSA as referred to in para 2 of n 287 *supra*.

irregularities of such documents, lends or permits to lends such a certificate, licence, or other document to another person.⁵²⁶

6.3. Utilisation of criminal processes in finalising criminal offences.

6.3.1. Securing the attendance of the syndicate in court.

In general, any peace officer may, without a warrant, arrest any person who is found in possession of suspected stolen property.⁵²⁷ Any police officer may, without a warrant, search and arrest any person found in possession of a motor vehicle if he has reasonable grounds to suspect that the person has stolen such motor vehicle or has received such motor vehicle knowing it to be stolen or has assisted in the stealing thereof.⁵²⁸ The suspects who have been arrested for contravention of the TMVA of 1991 must in terms of s 16(3) of the same Act, be brought before court within 72 hours by an official of the rank of sergeant or above. Unlike the search, seizure and arrest there is a classification of police official on the basis of rank. The difference with the South African law is that, suspects are brought to court within 48 hours and there is no restriction on the rank which means that even student constables can bring the suspects to court. The alternative method of securing the attendance of the accused in court is by means of serving a summons, which is issued by the clerk of court.⁵²⁹

Swaziland has the Extradition Act⁵³⁰ in place. *The King vs John Madlopha and another*,⁵³¹ is an example of early cooperation between the RSA and Swaziland. In this case, Patrick Nhlabatsi was arrested by the then SAP and handed over to the Royal Swazi Police (RSP) together with an amount of R40 000-00. The suspects were convicted of robbery of cash because they were found in possession of cash which was part of the robbery committed at the bank.

6.3.2. Managements of exhibits.

Management of exhibits is generally governed by the Criminal Procedure and Evidence Act (CPEA) of 1938,⁵³²

⁵²⁶These are the provisions of s 121(3)(a) and (b) of the RTA of 1965 which are in harmony with s 68(4)(a) and (b) of the NRTA of 1996 of the RSA as referred to in para 3 at n 287 *supra*.

⁵²⁷Section 23(1)(b) of the CPEA of 1938.

⁵²⁸Section 16(1) of the TMVA of 1991. See a similar provision in respect of s 14 of the MVTA of 2000 of Lesotho as referred to at n 446 *supra*.

⁵²⁹Section 117 of the CPEA of 1938.

⁵³⁰13 of 1968.

⁵³¹Crim. Case No. 96/87. This case is linked with the case of Dube *Ibid* n 491 *supra*. The amount of money stolen is reflected as E338 701 which differs with E1000-00 as compared with the Dube case. There is some error in one of these cases.

⁵³²67 of 1938. The Act is, to a very large extent, similar to the CPEA of 1981 of Lesotho as referred to at n 453 *supra*.

which deals with exhibits belonging to both locals and foreign nationals. The TMVA of 1991 also direct some aspects of management of motor vehicles as exhibits.

6.3.2.1. Seizure and keeping of exhibits.

A police official of the rank of Inspector or above can, without a warrant, search any person suspected to be in possession of stolen property. The property so seized must be taken before the magistrate without delay.⁵³³ On the arrest of any person on a charge or an offence relating to property, the property in respect of which the offence is alleged to have been committed will be seized by the person effecting arrest. An arresting person, as aforesaid, is empowered by s 52(1) of the CPEA of 1938 to seize such a thing and deliver it or cause it to be delivered to the magistrate within such time as in all circumstances of the case is reasonable.⁵³⁴

Management of motor vehicle exhibits is dealt with in terms of s 16 of the TMVA of 1991. A police official is empowered by s 16(1) of the TMVA of 1991 to, without a warrant, search and arrest any person found in possession of a motor vehicle if he has reasonable grounds to suspect that the person has stolen the motor vehicle or that she received the motor vehicle knowing it to be stolen. The same will apply if the person is suspected to have assisted in the stealing of that motor vehicle. Such police official shall seize from that person, the motor vehicle in question and any document in relation to such motor vehicle.

In terms of s 16 of the TMVA of 1991 exhibits seized and the person arrested are taken to the nearest police station as soon as possible. The police can only keep the vehicle in their custody for a period of 72 hours. Within a reasonable time, which is not exceeding the period of 72 hours, they shall bring the vehicle to court for a warrant for further detention of that motor vehicle. In practice the police don't take these motor vehicles to court as some of them are towed while others are not in a drive-able condition. They only produce applications to the court indicating that the motor vehicle in question is in police custody. Once a warrant for further detention has been issued, anyone who claims ownership, must apply to the court within six months of the seizure with a view to securing the release of that motor vehicle.

In terms of s 16(5) of the TMVA of 1991, the court shall hear from the police if they have any objection to the release. This implies that the police will not be surprised by a court order as they will have been given an opportunity to advance reasons why the motor vehicle should not be released. A third party can similarly tender evidence to prevent the release of a vehicle by the court. The vehicles in police custody could thus not be irresponsibly released as the complainant(owner) is given a hearing regarding any objections to release the

⁵³³Section 47 of the CPEA of 1938.

⁵³⁴This section itself does not indicate that the arresting person must or may seize the property, it only talks about handing it over to the magistrate. It shall have to be read with s 47 as referred in n 533 *supra*.

motor vehicles.⁵³⁵

For the court to issue a further detention warrant, all that the police needs to show, is that there is a discrepancy in the ownership or in the lawful possession of such a motor vehicle. The acquittal of a suspect in respect of a motor vehicle or the declination to prosecute by the DPP is not considered as sufficient grounds for any court to order the release of the motor vehicle. Before the court can order the release, there must be documentary proof of ownership or lawful possession.⁵³⁶

A person who is convicted for theft or receiving a motor vehicle knowing that it has been stolen, or any of the competent verdicts will, in addition to a sentence, have her licence endorsed and further suspended for double the period of a sentence of imprisonment.⁵³⁷ It does not matter if she has paid a fine or not for an endorsement. Should the driver's licence be endorsed three times under this Act, the person is disqualified from driving a vehicle for life.

When bail is fixed for theft or receiving a motor vehicle knowing the same to have been stolen or any of the competent verdicts, the court is compelled to fix an amount of not less than half of the amount fixed as sentence for that offence.⁵³⁸ What is totally prohibited is a free bail (release on own recognisance).

The unclaimed motor vehicles are published in the Government Gazette and newspapers and forfeited to the Crown after six months. Forfeiture or release to the person from whom the motor vehicle was confiscated is done only with a court order. Police are not given discretionary powers on matters of forfeiture to the Crown. The Minister of Transport has discretionary powers to see how this disposal should be done. The crushing of motor vehicles forfeited to the state could thus be sanctioned by the Minister in terms of s 16(8) of the TMVA of 1991.

6.3.2.2. Disposal of exhibits.

An article seized in terms of s 52(1) of the CPEA of 1938, will be given an identification mark by the person seizing it. The magistrate shall in terms of subsec 3 of s 52 of the CPEA of 1938, cause the property or thing so seized to be detained in such custody as he may direct until the conclusion of a summary trial or of any

⁵³⁵This provision is an *audi alteram partem* rule that can enhance Lesotho's MVTA of 2000 as referred to on the notes below n 476 *supra*.

⁵³⁶This is a provision of s 16(7) of the TMVA of 1991.

⁵³⁷Section 17 of the TMVA of 1991.

⁵³⁸Section 18 of the TMVA of 1991.

investigation that may be held in respect of it. The police have a pound like the RSA where stolen motor vehicles are kept. What they will do is to seize a vehicle, keep it in the pound and obtain a detention warrant from the magistrate. The powers bestowed upon the police are limited; they do not use discretion as to what to do with the property, but the magistrate does.

If there will be proceedings in respect of which the property will be required as evidence, the magistrate shall, cause it to be further detained in a like manner for the purpose of its production in evidence at such trial.⁵³⁹ The police will then keep the motor vehicle in the pound.

When the Attorney-General declines to prosecute, or at the conclusion of the summary trial in the case where prosecution was instituted, the magistrate will direct that such thing be returned to the person from whom it was taken unless he is obliged to deal with it otherwise in terms of other laws.⁵⁴⁰ The police are not given discretionary powers to dispose of property. S W Sapire ACJ stated in *Benson Zulu v Attorney General and Another*⁵⁴¹ that the police have adopted a policy of not returning stolen motor vehicles which have been recovered and which are in their possession, save in terms of an order of the court. He said further that, cases are usually referred to the Attorney General who consent to the return. In this case, the police kept the vehicle without arresting or charging anybody. The judge found that there are no provisions empowering them to do so.

Section 84 of the CPEA of 1938 is concerned with property produced by a witness during preparatory examination, which is to be used in trial as an exhibit. The magistrate will cause such an exhibit to be marked for future identification. Such an exhibit may also include a motor vehicle.

The court which convicts a person for an offence that has caused damage or loss of property belonging to another, may after conviction and upon application by the person who suffered such damage or loss or by any other person on her behalf, award her compensation.⁵⁴² In determining the amount of compensation to be awarded, an affidavit, evidence from the hearing, further evidence or agreement between the victim and convict

⁵³⁹Section 54(4) of the CPEA of 1938.

⁵⁴⁰Section 52(5) of the CPEA of 1938.

⁵⁴¹[1997] SZHC 2. The law appears to be disempowering the police and as a result, they did what appears to be in the interest of law enforcement which is unfortunately not legalised. This decision is based on the case of *Minister van Wet en Orde v Erasmus en Ander* 1992(3) SA 819 (A) where the court held amongst others that; the return of the vehicles to the respondents was not unlawful; for the purposes of s 13(1)(a) the legality of the possession of an article had to be judged with reference to the criminal law, so that the possessor was entitled to be in his possession unless such possession constitute crime according to criminal law. This therefore means that if unlawfulness can be proved, the vehicles will not be returned. Swaziland should create a crime of receiving stolen property without making sure whether it is stolen or not. If this is created, the court will find that giving the vehicle back will be in commission of crime in terms of such portion.

⁵⁴²This is the provision of s 321(1) of the CPEA of 1938. See a similar provision in s 175 of the Criminal Procedure Code of Zambia as referred to under n 596 *infra*.

may be taken into consideration.⁵⁴³

Similar to s 323 of the CPEA of 1981 of Lesotho, the doctrine of an innocent buyer is dealt with under s 322 of the CPEA of 1938. It provides that if any person has been convicted of theft or any other offence whereby he has unlawfully obtained any property or part of it from any other person who had no knowledge that it was stolen or unlawfully disposed, the court may order compensation to such an innocent buyer from the money, which was confiscated during the execution of an arrest. Although there are no provisions specifically stating that the police shall seize money found with the suspect, this section seems to be allowing such action.

When a person is convicted of theft or receiving property knowing the same to have been stolen or otherwise unlawfully obtained, the court may on application by the owner or his representative, restore the property to such owner or his representative.⁵⁴⁴ In terms of this subsection, the insurance company can indeed request restoration. The court does not necessarily have to wait until it pronounces a conviction, but may from time to time award writs of restitution or order restitution of such property in a summary manner. This section states that in every case, the court before which such person is tried for any such offence may from time to time award writs of restitution in respect of such property or order the restitution in respect of such property or order the restitution thereof in a summary manner.⁵⁴⁵

Similar concerns that appeared in s 324(3) of Lesotho's CPEA of 1981, are reflected in s 322(3) of this CPEA of 1938. It provides that if it appears, before any award is made, that any valuable security has been *bona fide* paid or discharged by any person liable to the payment thereof or, being a negotiable instrument, has been *bona fide* taken or received by transfer or delivery by any person for a just and valuable consideration without notice or without any reasonable cause to suspect that it had by any offence been stolen or otherwise unlawfully obtained has been transferred to an innocent purchaser for value who has acquired a lawful title thereto, the court shall not award or order the restitution of such security or property. This means that if property is sold to someone who does not know that it is stolen property, such recipient is a concealment layer which can become the owner with a right to title. In my view, this section appears to be in conflict with the laws of acquisition of ownership.

The court may at the conclusion of proceedings in respect of which any property was taken or produced in court, order the disposal thereof.⁵⁴⁶ If an order is not made, the property may upon application, be returned to the person from whose possession it was obtained unless it was proved during the trial that such person is not

⁵⁴³It means that the owner of a vehicle can claim the damage of the value of the vehicle at the time of its loss.

⁵⁴⁴Section 323(1) of the CPEA of 1938. Section 323 of the CPEA of 1981 of Lesotho is dealt with in the first paragraph after reference n 473 *supra*.

⁵⁴⁵Section 323(2) of the CPEA of 1938.

⁵⁴⁶Section 324(1) of the CPEA of 1938.

entitled to the property. If no application is made after three months of conclusion of trial, the property is vested in the Government. Awards or orders may be made subject to security *de restituendo*.⁵⁴⁷

6.4. Conclusion.

The police have been vested with limited powers to use their discretion in managing exhibits. They involve the magistrate in this regard and I think that their service delivery can be even better enhanced if they are given discretionary powers.

Section 322(3) of the CPEA of 1938 may need to be amended to make provision for compensation to the victim of property if such property is to be transferred to an innocent buyer. This shall then satisfy both the innocent buyer and the innocent victim.

The causing of the embossment of identification numbers by any other in terms of s 31 of the RTA of 1965 is, in my view, opening an opportunity for thieves to steal vehicles and allocate numbers themselves. The best practice, is in my view, to let this exercise undertaken by manufactures or their agents.

CHAPTER SEVEN

LEGAL FRAMEWORK OF MOTOR VEHICLE THEFT IN ZAMBIA.

⁵⁴⁷Section 324(2) of the CPEA of 1938. This provision is in harmony with s 325 of Lesotho's CPEA of 1981.

7.1 Introduction.

Zambia has codified its laws in a series of 26 volumes of books titled the Laws of the Republic of Zambia.⁵⁴⁸ In addition to the Penal Code that forms the basis of criminal law in Zambia, the other sources of criminal law are customary law and other provisions.⁵⁴⁹ The Penal Code⁵⁵⁰ has no specific portion which is dedicated for the organised crime. The counselling of another to commit crime, is a crime in terms of s 23 of the Penal Code. This crime is normally associated with the elements of organised crime. Further more, the following constitute crime affecting motor vehicles in terms of the Penal Code: theft, robbery, false pretences, receiving stolen property knowing the same to have been stolen, possession of suspected stolen property without reasonable cause and possession of property which has been stolen or feloniously obtained outside the country without lawful excuse.⁵⁵¹

7.2. Application of the criminal laws related to motor vehicle crime in Zambia.

7.2.1. Theft.

Theft is committed when a person who fraudulently or without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen.⁵⁵² A thing capable of being stolen is every inanimate and movable thing whatever is the property of any person.⁵⁵³ A motor vehicle fits this description of a thing capable of being stolen. A person who commits the felony of theft is punishable upon conviction with imprisonment for a period of five years, unless another sentence is provided due to the nature of the thing stolen.⁵⁵⁴ As regards the theft of a motor vehicle,⁵⁵⁵ a specific punishment is created, which provides that for the first conviction, the convict shall be liable to a sentence not less than five years, but not exceeding fifteen years imprisonment. In the case of second or subsequent conviction, the convict shall be liable to imprisonment for a period not less than seven

⁵⁴⁸These laws can also be accessed at <http://www.hurid.org.zm/Zambian-Const.htm>, last visited on 18 February 2007.

⁵⁴⁹Hatchard and Ndulo *Criminal Law in Zambia* 6. Hatchard is a Barrister at Law at Middle Temple and he was a senior lecturer at the University of Zambia (UNZA) before he took up a position as senior lecturer at University of Buckingham. Ndulo is a Professor of Law at the UNZA and an Advocate of the High Court of Zambia.

⁵⁵⁰The Penal Code Act constitutes Cap 87 of these Laws and it is in Volume VII of the 1996 Edition (Revised).

⁵⁵¹The sections where these crimes are described are referred to under 7.2.1 to 7.2.7 *infra*.

⁵⁵²This definition of theft emanates from s 265(1) of the Penal Code. Hatchard and Ndulo *Criminal Law in Zambia* 61, elucidate that, a person steals in either of these two ways, fraudulent taking or fraudulent conversion of property.

⁵⁵³Section 264(1) of the Penal Code. Hatchard and Ndulo *Criminal Law in Zambia* 65, simply state that every inanimate thing, irrespective of value, provided that the thing is movable and belongs to someone is capable of being stolen.

⁵⁵⁴Section 272 of the Penal Code.

⁵⁵⁵Motor vehicle is defined in terms of s 2 of the Roads and Road Traffic Act (CAP 766) as any mechanically propelled vehicle intended for use, or capable of being used, on roads unless such vehicle shall have been specifically excluded by regulation from this definition.

years, but not exceeding fifteen years.⁵⁵⁶ Twaambo Sibajene⁵⁵⁷ states that discovering what makes criminals commit theft will enable law enforcement bodies to create an atmosphere which is less conducive to the commission of theft by negating the factors found to motivate crime in Zambia.

7.2.2. Robbery.

Any person who steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of robbery.⁵⁵⁸ A person convicted of robbery is punishable with imprisonment for a period of fourteen years. In cases where the thief is armed with an offensive weapon or instrument, or being together with one person or more, steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence, is guilty of aggravating robbery. A person convicted of aggravated robbery is punishable with imprisonment for life. The court may sentence the accused to a lesser term, but not lesser than fifteen years.⁵⁵⁹ In *Kenneth Mtonga and Victor Kaonga v The People*,⁵⁶⁰ the offenders were alleged to have robbed Mable Mandela of her motor vehicle on 19-10-1994. As the appeal was based solely on the grounds of the excessiveness of the sentence, the court decided, as per Ngulube CJ that, it was important to impose a sentence which would be aimed at protecting members of the public and further deter persons who may be tempted like the accused person to commit such offences. It concluded that it is unable to say that the sentence was either wrong in principle or was so manifestly excessive that it must come for appeal as a sense of shock. In *Simon Mudenda v The People*,⁵⁶¹ the accused who was convicted for robbery with aggravating circumstances, was in terms of s 294(2) of the Penal Code sentenced to death. On appeal, the court decided through Chitengi J, that, the extenuating circumstances envisaged in s 201(1) of the Penal Code of Zambia specifically exclude the application of s 201(1) to armed robbery. The difference between robbery in terms of s 292 and 294 of the Penal Code is that the former is a common robbery whereas the latter is an armed robbery.

7.2.3. False Pretences.

False pretences is an offence of any representation made by words, writing or conduct of a matter of fact, either

⁵⁵⁶Section 281A of the Penal Code. Zambia has not promulgated specific legislation or devoted a Chapter in its Penal Code to deal with motor vehicle theft. This section has been inserted to deal with theft of motor vehicles.

⁵⁵⁷Sibajene *Theft in Zambia* iii. Sibajene was a candidate for Bachelor of Laws (LLB) degree at UNZA. The background of the candidate is also recorded at <http://www.graduates.com/vg.aspx?i=2910770> last visited on 23 September 2007.

⁵⁵⁸This is a definition of robbery as reflected in s 292 of the Penal Code.

⁵⁵⁹These are the provisions of s 294 read with s 26(2) of the Penal Code.

⁵⁶⁰2000 ZR 33 (SC).

⁵⁶¹2002 ZR 76 (SC).

past or present, which the person making it knows to be false or does not believe to be true.⁵⁶² A person convicted of false pretences is punishable with imprisonment for a period of three years. The other form of an offence of pretences is where a person wilfully procures for himself or any other person any registration, licence or certificate under any Act by false pretences. A person convicted of this latter form of false pretences is punishable with imprisonment for a period of one year.⁵⁶³ This provision is a good tool to prevent people from registering motor vehicles using fake SARPCCO motor vehicle clearance certificates.

A motor vehicle wholly manufactured or assembled in Zambia requires a certificate by the manufacturer or assembler before registration. In any other case a customs clearance certificate is required.⁵⁶⁴ A registration book of any motor vehicle shall be received in any court on production by any person and without further proof as prima facie evidence of the facts therein stated.⁵⁶⁵ This acceptance of registration book, may tempt criminals to commit the crime of false pretences before a motor vehicle is registered.

7.2.4. Receiving stolen or unlawfully obtained property or like offences.

Receiving of stolen property, which includes a motor vehicle, by a person who knows or has reason to believe that such property has been feloniously obtained, is an offence which is punishable with seven years imprisonment.⁵⁶⁶ The Supreme Court of Zambia had an opportunity to deal with the distinction between theft, receiving stolen property knowing it to have been stolen and retaining stolen property knowing it to have been stolen in *George Nswana v The People*.⁵⁶⁷ The facts of this case are briefly that the applicant, George Nswana, was found in possession of a stolen Datsun Bluebird motor vehicle, registration AAF 2945, which was fitted with a false registration AAF 4265 which belonged to someone's Toyota Vannetta. He advanced two different defences stating that he borrowed the car from Mbavu, his employer and that he was driving the car for him. The car was found two days after the theft and it was established that Mbavu is nonexistent because the police failed to trace him. The court held that the inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the

⁵⁶²This definition comes from s 308 of the Penal Code. The Penal Code does not deal with general fraud or fraud involving motor vehicles. When one reads the felonies and misdemeanors grouped under False Pretences in Cap XXX, ss 308 to 317 of the Penal Code, fraud should have been created, but other terminologies such as cheating have been used. Differentiation of false pretences and fraud shall pose a problem if the legislature was to pass a separate law dealing with general fraud.

⁵⁶³This is s 316 of the Penal Code.

⁵⁶⁴Section 66(3) of the Roads and Road Traffic Act (CAP 766) of the Laws of Zambia. The provision relating to Customs Clearance Certificate is similar to the one applied in Lesotho as discussed at the paragraph 1 of 5.2.5 *supra*.

⁵⁶⁵These are the provisions of s 253(2) of the Roads and Road Traffic Act (CAP 766) of the Laws of Zambia, which appear to have been passed at the time when fraud was not a common occurrence.

⁵⁶⁶This emanates from s 318(1) of the Penal Code.

⁵⁶⁷1988-89 ZR 174 (SC).

person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case indicate that the applicant cannot reasonably claim to have been in innocent possession, he is either the thief, a receiver or a retainer. The distinction which the court drew is that, a receiver receives with guilty knowledge at the time of receipt while the offence of retaining involves guilty knowledge of theft, but acquired after the receipt of the property. The conviction for theft of a motor vehicle was substituted by a conviction for the offence of retaining stolen property contrary to s 318(1) of the Penal Code which relates to the applicant's guilty retention of the stolen car.

7.2.5. Possession of suspected stolen property without reasonable cause.

Any person who is having in her possession anything which may be reasonably suspected of having been stolen or unlawfully obtained, is guilty of an offence if, when brought before court, is unable to give an account to the satisfaction of the court of how she came by the same.⁵⁶⁸ My view is that, the evidence in the case of Nswana⁵⁶⁹ is better fitting this crime than the one he is convicted of. Nswana could not offer a satisfactory account of his possession as Mr Mbavu was found not to exist.

7.2.6. Possession or receiving goods stolen or feloniously obtained outside Zambia.

Where a person, without lawful excuse, has knowingly or having reason to believe the same to have been stolen or obtained in anyway whatsoever, outside the country in such circumstances that, if the act had been committed in Zambia, the person would have been guilty of an offence, such person commits a crime.⁵⁷⁰ This offence is punishable with seven years imprisonment. Attempt to commit any offence as well as conspiracy are crimes punishable in terms of s 389 and 394 of the Penal Code respectively.

7.2.7. Contravention of the Road Traffic Act (RTA).⁵⁷¹

The legislature has put mechanisms in place to manage and control the registration of motor vehicles by

⁵⁶⁸Section 319(a) of the Penal Code.

⁵⁶⁹*Ibid* n 567 *supra*.

⁵⁷⁰Section 320 of the Penal Code. Section 59(1) of the Extradition Act (CAP 94). See also n 585 *infra* of the Laws of Zambia provides that where any citizen of the Republic does any act outside the Republic, which constitutes an offence for which she would be liable to extradition but for the fact that she is a citizen of the Republic, she shall be guilty of the like offence and be liable on conviction to like punishment as if the act were done within Zambia. This provision is in line with s 6 of the Penal Code. Extradition is unnecessary under these circumstances. An example of prosecution in terms of the provisions of s 320 of the Penal Code is *The People v Yunos Bagas* case no SP2/16 /2007 held at Lusaka District Court in respect of a Mercedes Benz which was stolen in the RSA as per Goodwood CAS 344-11-2004(unreported).

⁵⁷¹11 of 2002. This Act can also be accessed at <http://www.lexadin.nl/legis/nofr/oeur/lxwezam.htm> last visited on 06 August 2007.

assenting the RTA, 2002 on 31 December 2002.

Section 10(1) of the RTA of 2002 provides that, when a motor vehicle⁵⁷² is imported into Zambia, the owner⁵⁷³ or person in charge of the vehicle produce a declaration under the Customs and Excise Act in respect of such vehicle to the Customs Officer at the port on entry. If the Customs official is satisfied that the declaration complies with the requirements, he shall in terms of subsec 2, issue a Customs Clearance Certificate.⁵⁷⁴ Subsection 3 requires the owner or person issued with such Customs Clearance Certificate to submit the vehicle to Interpol officer within 30 days for an Interpol Clearance Certificate. The Interpol officer shall verify the engine number, chassis number, colour and any other identification of the motor vehicle and if satisfied of the authenticity, issue an Interpol Clearance Certificate. Motor vehicles, which are acquired in Zambia, must in terms of subsec 4, be submitted to Zambia Police Headquarters, Lusaka within 30 days of such acquisition together with the letter of sale and change of ownership certificate for Interpol clearance. Failure to comply with any of these requirements or supplying false declaration to the Customs Officer is punishable with a fine not exceeding 200 000 penalty units or imprisonment not exceeding five years or both such fine and imprisonment.

Section 11(3)(a)(i) of this Act, requires the manufacturer's certificate⁵⁷⁵ before such motor vehicle could be registered by a licencing officer. In the case of motor vehicle manufactured elsewhere, a certificate from the customs is required in terms of s 11(3)(a)(ii) of this Act.⁵⁷⁶ This section, is in my view, a very good piece of legislation which can be transplanted in other SARPCCO member countries.

There is an obligation on the seller of a motor vehicle to deliver a letter of sale and a certificate of change of ownership in terms of s 12 of the RTA of 2002. The letter shall contain full names and physical address of the seller as prescribed in terms of s 10 of this Act.

⁵⁷²A motor vehicle is interpreted in s 2 of the RTA of 2002 as meaning any mechanically propelled vehicle intended for use, or capable of being used, on roads unless such vehicle shall have been specifically excluded by regulations from this definition.

⁵⁷³An owner is interpreted in terms of s 2 of the RTA of 2002 as meaning in relation to a vehicle other than a registered motor vehicle or trailer, the person having habitual possession and control thereof, and, in relation to a registered motor vehicle or trailer is registered: provided that in the case of a hire-purchase agreement "owner" means the person in possession of the vehicle under that agreement.

⁵⁷⁴A customs clearance certificate is described in s 11(5)(a) of the RTA of 2002 as a certificate given by or on behalf of the Commissioner, Customs and Excise of the Zambia Revenue Authority setting out particulars as may be prescribed and certifying that all customs formalities have been complied with in respect of the said motor vehicle or trailer.

⁵⁷⁵A certificate of local manufacture or assembly is interpreted in terms of s 11(5)(b) of the RTA of 2002 as a certificate given by or on behalf of the manufacturer or assembler of the motor vehicle or trailer setting out particulars of the manufacturer or assembler and such other particulars as may be prescribed and certifying that the motor vehicle or trailer has been wholly manufactured or assembled in Zambia.

⁵⁷⁶A SARPCCO Clearance Certificate is not included in the documents required in case of motor vehicles imported from the SARPCCO member countries. See the comments under n 504 *supra* in respect of similar requirements for Swaziland.

When ownership of a motor vehicle is transferred to a new owner, it shall be registered by the new owner within 14 days. It is not clear as to how this section is reconcilable with s 10 that requires 30 days of clearance process above. The licencing officer shall in terms of s 13(1)(b) of this Act, consult the registered owner before registering it in the name of the new owner.

In a case where a motor vehicle is permanently sent out of Zambia, the person who at material time is the owner of such motor vehicle or trailer, shall in terms of s 25(1) of this Act, notify the licencing officer of the district in which the vehicle or trailer is registered and deliver up the registration book to the licencing officer within 14 days.

A person who manufactures or is in willful possession or willfully affixes false licence or token to any vehicle, or a token which belongs to another vehicle, commit an offence which is punishable in terms of s 44 of the RTA of 2002 with a fine not exceeding 20 000 penalty units or imprisonment for a period not exceeding five years. For subsequent offences, the maximum punishment is raised up to 500 000 penalty units or 10 years or both.

In terms of reg 18 of the Roads and Road Traffic Act (International Circulation) Regulations Annex 5, the identification marks of vehicles in international traffic shall comprise a chassis number, engine number, make and trade mark. The law is unfortunately silent about a situation where identification numbers have been removed or are not available.

7.3. Utilisation of criminal processes in finalising criminal offences.

7.3.1. Securing the attendance of the syndicate in court.

The attendance of an accused person is secured by means of arrest and summons. A police official may without a warrant, arrest any person in whose possession anything is found which may reasonably be suspected to be stolen property. The same applies to any person who may reasonably be suspected of having committed an offence with reference to such a thing, which thing in this instance, shall be a motor vehicle. A person who is found in possession of a motor vehicle reported as stolen elsewhere, can thus be arrested without a warrant in terms of these provisions.⁵⁷⁷ An arrested person is expected to be brought to the magistrate's court or officer in charge of a police station without unnecessary delay.⁵⁷⁸ The time of appearing in court is within 24 hours or as

⁵⁷⁷These methods are reflected in ss 91 and 100 read with s 26 of the Criminal Procedure Code (CAP 88) of the Laws of the Republic of Zambia, 1996.

⁵⁷⁸Section 30 of the Criminal Procedure Code.

soon as practicable.⁵⁷⁹

Prosecution in court is conducted by the police officials, who have in terms of s 86(2) of the Criminal Procedure Code been appointed by the DPP. The DPP is empowered by Article 58(2) of the Constitution of the Republic of Zambia⁵⁸⁰ to institute criminal proceedings against any person before any court. These powers to institute criminal proceedings were also confirmed by the court in *The People v Kambarage Mpundu Kaunda*.⁵⁸¹

Zambia has the Extradition Act⁵⁸² in place. Extradition can only be carried out in respect of extraditable offences. These offences are those which are punishable under the laws of the requesting country and those of Zambia by imprisonment for a maximum period of not less than four months and one year respectively.⁵⁸³ The offences include those concerning theft of motor vehicles which are the subject of this research. Unfortunately, an extradition out of the country will not be granted in respect of Zambian citizens unless the relevant extradition provisions provide otherwise.⁵⁸⁴ Criminals can be prosecuted for crimes committed elsewhere. The Penal Code provides that when an act, which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, any person who does or makes any part of such acts may be tried and punished under this Code in the same manner as if such acts had been done wholly within the jurisdiction.⁵⁸⁵ A person found in possession of a stolen motor vehicle could thus be prosecuted using this section. If the motor vehicle was hijacked and it can be proved that the suspect was involved in the hijacking, this clause can still be applied and extradition will not be necessary.

Section 6 of the Penal Code is one of the important mechanism put in place by the legislature to circumvent the usual defence of lack of jurisdiction. It is in line with the limitations referred to by Bassiouni and Vetere.⁵⁸⁶ The two writers claims that organised crime and its manifestations have emerged as one of the alarming challenges, particularly as organised crime groups have demonstrated their capacity to expand their activities beyond national boundaries and to evade the state's efforts to control them.⁵⁸⁷ This section is geared for this eventuality.

⁵⁷⁹Section 33 of the Criminal Procedure Code.

⁵⁸⁰CAP 1 of the Laws of the Republic of Zambia, 1996.

⁵⁸¹1990-92 ZR 30 (HC) at 34 F.

⁵⁸²The Extradition Act is in Cap 94 of the Laws of the Republic of Zambia, 1996.

⁵⁸³Section 4(1) of the Extradition Act.

⁵⁸⁴Section 34 of the Extradition Act. This law takes the civil law approach which finds extra-territorial jurisdiction as opposed to common law approach. See also Dugard *International Law* 159 regarding the approaches.

⁵⁸⁵These are the provisions of s 6 of the Penal Code. They may be handy for other jurisdictions whose vehicles are found elsewhere and the authorities are reluctant to conduct prosecutions.

⁵⁸⁶Bassiouni and Vetere *Organised Crime* 741.

⁵⁸⁷Bassiouni and Vetere *Organised Crime* xvii.

7.3.2. Management of exhibits.

Management of exhibits is governed by the Criminal Procedure Code in Zambia.

7.3.2.1. Seizure and keeping of exhibits.

If a search warrant was issued in terms of s 118 of the Criminal Procedure Code, the item seized will be taken to the court which requested the seizure. The exhibit so brought before court, will be detained until the conclusion of the case or the investigation.⁵⁸⁸ Although this section provides that the exhibits are kept by court, in practice, the exhibits are kept at the police station and the reports are sent to court.

7.3.2.2. Disposal of exhibits.

In a case where no person is committed for trial, the court will direct that such a thing be restored to the person from whom it was taken, unless the court sees fit or is authorised or required by law to dispose of it otherwise.⁵⁸⁹ This is a portion of the law which causes some friction between the countries where the motor vehicles have been stolen and the Zambian authorities. It appears as if the investigators of cases tend to accept the explanations of the persons from whom the vehicles are seized to the effect that they have bought these motor vehicles from their owners. The owners are then assumed to have sold the motor vehicles and fraudulently claimed payment from the insurance companies by means of the so-called hoola-hoop scam. It follows that failure to oppose applications for court orders is failure to apply the *audi alteram partem* rule, which somewhat heightens these concerns.⁵⁹⁰

The *audi alteram partem* rule was dealt with in *Zinka v The Attorney-General*.⁵⁹¹ Without dealing with the details of the case, the court held, amongst others that, where there was no express statutory provision to exclude the *audi alteram partem* rule and a power was being used to limit or remove a fundamental right, there was a rebuttable presumption that it was necessary to give prior notice and an opportunity to be heard. The fundamental rights as enumerated in the Constitution of Zambia include the protection of property in Article 18.

⁵⁸⁸Section 121(1) of the Criminal Procedure Code.

⁵⁸⁹Section 121(3) of the Criminal Procedure Code.

⁵⁹⁰This information was noted from presentations at the SARPCCO meetings and the discussion on 21-04-2006 with Deputy Commissioner Roy Mvula, the then Director of CID. By then there was a list of 193 vehicles stolen in the RSA, found in Zambia and released back to the persons from whom they were confiscated. Zambia is not alone as it seems to share this practice with Lesotho.

⁵⁹¹1990-92 ZR 70 (SC). With this case at Zambia's finger tips, it is difficult to reconcile with a decision to release the vehicles without informing the owners from the RSA.

Silungwe CJ stated when delivering the judgement in this Zinka case that, in order to establish that a duty to act judicially applies to the performance of a particular function, it was necessary to show that the functioning is analytically of a judicial character or that it involves the determination of a *lis inter partes*. However, he said that, a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiry or where a decision entails the determination of disputed question of law and fact. He went further and stated that, *prima facie*, moreover, a duty to act judicially will arrive in the exercise of a power to deprive a person of his livelihood; or of his legal status where that status is not merely terminable at pleasure; or deprive a person of liberty or property rights or any other legitimate interest of expectations or to impose a penalty. He also quoted Lord Wright in *General Medical Council v Spackman*⁵⁹² where he said that if the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice. Wright concluded that the decision must be declared to be no decision.

The failure to subpoena the owner of a vehicle to come and defend the case for an application of a court order is tantamount to deprivation of the right to be heard. In a different environment, Atkins stated in his report on insurance fraud that in one instance in the United Kingdom, a certain individual was convicted for arranging a total loss of a vehicle which he has insured with eleven different insurance companies from which he has lodged the claims.⁵⁹³

It would appear that the provision of the Criminal Procedure Code which states that a photograph may be admissible in court if it is relevant to the issue in any criminal proceedings is underutilised.⁵⁹⁴ The requirement for introducing evidence of a photograph is that, it shall be accompanied by an affidavit of the person who processed it. The court may, of course, summon the person who took the photograph to give oral evidence. Due to the fact that the Evidence Act⁵⁹⁵ is silent about photographs of exhibits, this section appears to be the one which can be used to present photographs of motor vehicles instead of physical vehicles.

In a case where an accused is convicted of an offence, compensation may be ordered by court in terms of s 175(1) of the Criminal Procedure Code. This section states that when an accused person is convicted by any court of any offence, which is not punishable by death, the court may order the convicted person to pay

5921943 AC 627.

593Atkins 1990 *BML* 227-229 at 228.

594This is s 193 of the Criminal Procedure Code.

595Evidence Act 8 of 1967 (CAP 43) of the Laws of Zambia, Revised edition (1996) Vol IV.

compensation to the person who has suffered loss or damage as a result of such offence.⁵⁹⁶ It is comforting to note that subsec 2, comes to the rescue of innocent buyers. It states that, when a person is convicted of any offence under Chapter XXVI to Chapter XXXI of the Penal Code,⁵⁹⁷ the power of the court as referred to in subsec 1 shall be deemed to include the power to award any compensation to any *bona fide* purchaser of any property in relation to the offence in question. Award to an innocent buyer as indicated here, is done where property is restored to the possession of the person entitled thereto.

It may not always be possible to prove that theft or receiving of stolen property while knowing the same to have been stolen took place. In such cases, the court can still order that such illegal conversion or receipt be restored.⁵⁹⁸ When a person is charged with an offence, the court may order that property found on him be restored to the person who is entitled thereto.⁵⁹⁹ Upon conviction of a suspect on the charge of stealing property, such property will be restored to the owner or his representative.⁶⁰⁰ An innocent purchaser of stolen goods can be rewarded by court against the money seized from the accused upon arrest.⁶⁰¹

If the exhibits which were tendered as evidence in court remain unclaimed for twelve months after conclusion of the proceedings, they will be disposed of by either destroying, selling or in such other manner as the court may direct.⁶⁰² In case where the court is satisfied that it would be just and equitable so to do, it may order that exhibits tendered as evidence in criminal proceedings be returned to the person who appears to be entitled thereto.⁶⁰³ The order given under the last-mentioned subsection is final and will bar any person from claiming ownership of such thing by virtue of any title arising prior to the date of such order.⁶⁰⁴ The court shall give such an order subject to the conditions as it may see fit to impose. If upon arrest of a fugitive the police seize exhibits, such exhibits may be extradited to the country requesting extradition of the suspect on condition that the exhibits shall be returned.⁶⁰⁵

⁵⁹⁶This provision is the same as s 300 of the CPA 51 of 1977 of the RSA. This order is however, given subject to the limit of 50 Kwacha. This amount of compensation was not revised as in 1996. See similar compensatory provisions in s 321(1) of CPEA of 1938 of Swaziland under n 542 *supra* which are similar to s 325 of the CPEA of 1981 of Lesotho.

⁵⁹⁷The offences under these chapters are reflected in the First Schedule of the Criminal Procedure Code, Vol. IV as including theft, robbery, obtaining by false pretences, cheating, fraud, receiving goods stolen outside Zambia, failing to account for property suspected to be stolen, receiving or retaining stolen property, obtaining registration by false pretences and forgery.

⁵⁹⁸Section 178 of the Criminal Procedure Code. This restoration is obviously done to the lawful owner.

⁵⁹⁹Section 179 of the Criminal Procedure Code. This provision includes stolen motor vehicles.

⁶⁰⁰Section 180(1) of the Criminal Procedure Code.

⁶⁰¹Section 180(3) of the Criminal Procedure Code. Similar provisions are applicable in Lesotho and Swaziland under ss 323 of CPEA of 1981 and 322 of CPEA of 1938 respectively as discussed at a paragraph between n 544 and n 545 *supra*.

⁶⁰²Section 355(1) and (2) of the Criminal Procedure Code.

⁶⁰³Section 355(3) of the Criminal Procedure Code.

⁶⁰⁴Section 355(4) of the Criminal Procedure Code. While Judges may differ reasonably, one takes it that reasonable judgements come standard with Judges and that no questionable conditions will be attached to the judgements.

⁶⁰⁵Section 29(3) of the Extradition Act (CAP 161) of the Laws of Zambia.

Williams and Savona⁶⁰⁶ have correctly observed that market opportunities, profiteering and less vulnerability to risk by law enforcement promote transnational organised crime. I am of the view that this theory is true in the SARPCCO member countries in that more and more stolen motor vehicles are impounded in jurisdictions where the rate of arrest is very low and repatriation is not smooth. Those who are supposed to be the suspects in custody are the ones who are applicants in civil cases, resulting in the police being defensive and having to prove why they are not entitled to the vehicle instead of having an offensive approach where they should be the accused in criminal courts. In support of this view, the figures of motor vehicles stolen in the RSA and found in other member countries for the period 01-07-2005 to 30-06-2006 are as follows:

Table 7: Motor vehicles stolen in the RSA and found elsewhere for the period 01-07-2005 to 30-06-2006.

Country											
Impounded	60	62	231	39	30	225	33	164	24	141	32
Repatriated	55	13	22	18	0	13	23	87	11	32	6
Pending	5	49	209	21	30	212	10	77	13	109	26

These figures suggest that there are markets for stolen motor vehicles in Lesotho, Mozambique and Zambia.

7.4. Conclusion.

One of the obstacles which has been identified in the criminal justice process is the unopposed court orders in terms of s 121(3) of the Criminal Procedure Code. To labour under the misconception that every car found is the subject of insurance fraud undermines the quality of investigations, which results in the applications for court orders to release the motor vehicles not contested.⁶⁰⁷ The contention of subscribing to this notion has, in my view, no basis and must therefore not only fail, but be seen to be failing. It is believed that if the statements

⁶⁰⁶*Ibid* n 103 *supra*.

⁶⁰⁷I am inclined to believe that the failure to oppose applications is a *bonafide* omission which is not influenced by corruption. Redpath *Restructuring* 45 and v, suggested that organised crime, more often than not, operates with the assistance of corrupt police officers.

submitted by members during the confiscation of motor vehicles are filed in the dockets before submission to the DPP, the latter will have sufficient evidence to make an informed decision. It is also important to note the observation by Irish that there were also known cases where people from a neighbouring country have ordered a stolen vehicle in advance. In such cases, the vehicle may be pre-registered in a neighbouring country or registered immediately after it is hijacked or stolen. The stolen vehicle then crosses the border using the new registration papers.⁶⁰⁸

The SAPS has opposed numerous cases in court which resulted in decisions such as *Ntoyakhe*⁶⁰⁹ and *Khan*,⁶¹⁰ which paved the way for legal certainty. This is a method which can be applied successfully by the Zambian Police officers. The Zambian Police are even in an advantageous position not to be surprised by court orders, because they are appointed as prosecutors and should therefore be in a position to oppose these applications. The prosecutor in the case of *Nswana*⁶¹¹ and other cases has proved that if the State machinery is supplied with information, it will apply the law and oppose the applications.

The Extradition Act of Zambia is applicable to countries which are members of the Common Wealth. No amendments have been made since 1996 when the latest edition of the laws of Zambia were printed. The countries which are not members of the Common Wealth, like the RSA, are not covered in terms of this Act. For the purpose of assistance to other law enforcement agencies, Zambia has enacted the Mutual Legal Assistance in Criminal Matters Act.⁶¹² In terms of this Act, an item requested and seized by the police will be sent to the requesting State on such conditions as the Attorney-General may determine.⁶¹³ The SARPCCO member countries, where this Act is applicable include Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the RSA, Swaziland, Tanzania and Zimbabwe. Democratic Republic of Congo and Angola are not included.⁶¹⁴

⁶⁰⁸*Irish Beit Bridge 2.*

⁶⁰⁹*Ibid* n 134 *supra*.

⁶¹⁰*Ibid* n 195 *supra*.

⁶¹¹*Op cit* n 567 *supra*.

⁶¹²19 of 1993. This constitutes Cap 98 of the Laws of the Republic of Zambia, 1996 Edition (Revised).

⁶¹³Section 18 of the Mutual Legal Assistance in Criminal Matters Act of 1993.

⁶¹⁴Section 5 of the Mutual Legal Assistance in Criminal Matters Act of 1993.

CHAPTER EIGHT

FINAL CONCLUSION.

8.1. General

Organised crime is not defined in any of the South African legal systems that have been discussed in this dissertation. In fact, Tanzania is the only country in the SARPCCO member countries which has defined organised crime. When the SARPCCO members are talking about organised crime, they do so with different understanding, because there is no uniformly accepted definition in both the Sub-Region and the Region as a whole. The arguments advanced by various experts tip the scale in favour of adopting a uniform definition of organised crime for the region.

The argument that motor vehicle theft should be classified as organised crime is supported by a number of reasons. The following reasons were discussed in this dissertation:

- stolen motor vehicles which are not recovered⁶¹⁵
- the recovery of stolen motor vehicles at the borders points to the transnational nature of the

⁶¹⁵See n 145 and n 190 *supra*.

crime⁶¹⁶

- ↯ the high number of motor vehicles recovered elsewhere⁶¹⁷
- ↯ the report by the SAIA which indicates that 60 000 stolen motor vehicles were smuggled across the borders of the RSA⁶¹⁸
- ↯ chop shops⁶¹⁹
- ↯ hijackers who operates in groups⁶²⁰
- ↯ a suspect who could not have committed the crime on his own⁶²¹

It is clear that a definite need exists that legislation from the SARPCCO countries should be harmonised. Harmonisation will prevent the exploitation of the situation by criminals.

The creation of laws with differing definitions of the same objects and similar activities is as confusing as the lack thereof. A motor vehicle has in some countries, been defined differently in the laws dealing with motor vehicles and these definitions may need to be revisited.⁶²²

The provision of s 8 of the SOP of SARPCCO which requires that a vehicle so seized shall not be released from police custody until such time as the Vehicle Theft Liaison Officer has had the opportunity of notifying his counterpart of the intended release and the reason thereof, is still a thorny issue. This provision is subject to an exception where the release is absolutely necessary, e.g. when required by law or court order. The custodian of these vehicles appears to be using this exception as a norm instead of using it only in exceptional cases. This resolution which is necessarily causing a lot of discomfort between some member countries need to be fully implemented.

The Prevention of Organised Crime Act of 1998 (RSA), does not contain a provision to enable the courts to punish individuals who are mere leaders of criminal syndicates. In order to enhance the Act, it is advisable to amend the Act and further define a leader and a syndicate which have not been defined anywhere in the laws of the RSA.⁶²³ It might also serve a good purpose to redefine “criminal gang” which should include criminals not

616See n 190 *supra*.

617See table 7 *supra*.

618*Ibid* n 89 *supra*.

619*Ibid* n 89 *supra*.

620See n 111 *supra*.

621See the Tanzanian theory at n 126 *supra*.

622See n 402 and n 409 *supra*.

623See the discussion under n 380 *supra*.

intended for violent gang activities.

Cases of theft of motor vehicles are supposed to be taken from the premise that ownership is the most complete real right that a legal subject can have regarding a thing. It is based on the entitlements to control, use, encumber, alienate and vindicate.⁶²⁴ Ownership is terminated either through death of the owner, object no longer exist through destruction, loss of physical control coupled with the intention to relinquish it or operation of law.⁶²⁵

Although it has been established that the porous borders promote transnational crime, the tightening thereof by law enforcement when the leaders advocate the smooth facilitation of movement of persons in the SADC, will not take us much further.⁶²⁶ Jonny Steinberg stated that the border between the RSA and Lesotho is by its nature porous and that the role of borderline patrol cannot possibly be to seal it.⁶²⁷ He correctly pointed out that the long and deep layers of inter connectedness confer a great deal of moral responsibility on the RSA in regard to the future of Lesotho.⁶²⁸ As most people in the SADC have close relatives on the other side of the border which is usually a walking distance through the fenceless borderlines, the solution lies in the statement of Annan who said that, if crime crosses the borders, so must law enforcement.⁶²⁹

There are some countries which believes that when joint operations are conducted, the purpose of their members is to find only vehicles stolen from their respective countries. Upon their return from the operations, some members are asked by senior officers as to how many vehicles, which have been stolen from their country, were recovered. If the answer is none, then the operation is considered unsuccessful. This mentality needs to change. All countries should be proud to recover stolen vehicles regardless of the country from which they were stolen. It does not matter where one has committed theft, such thief remains a thief that deserve punishment.

There is a correlation between the repatriation, prosecution and the increase of theft of motor vehicles. In countries where criminals are prosecuted vigorously the number of thefts of motor vehicles decreases

⁶²⁴Van der Walt and Pienaar *Property* 46-47.

⁶²⁵Van der Walt and Pienaar *Property* 183.

⁶²⁶Solomon *Movement* 1. Hussein Solomon is a Senior Researcher, Human Security Project, ISS.

⁶²⁷Steinberg *Border* 7. Dr. John Steinberg is a freelance journalist and researcher who specialises in the field of crime and criminal justice operating from the RSA.

⁶²⁸Steinberg *Border* 11.

⁶²⁹*Op cit* n 10 *supra*.

drastically. This observation is not confined to the SARPCCO member countries only. Williams and Savona⁶³⁰ points that where there is low apprehension, prosecution and conviction rate of auto thieves, in the United States this crime is a booming industry with high profits and low risks. Furthermore, similar observations were made by the Right Honourable David Blunkett who stated that to achieve the aim of curbing organised crime, we need the success on reducing the profit incentive, disrupting activities and increasing the risk.⁶³¹

According to Irish and Qhobosheane⁶³² organised crime groups rely on the existence of market and the principle of supply and demand. Pillinger said that the market for stolen South African motor vehicles lies in Mozambique from where many are smuggled to other parts of Southern Africa.⁶³³ However great the challenge may be, it is the responsibility of the SARPCCO member countries to make theft of a motor vehicle in the region a risky and unprofitable undertaking.

According to Dr Wright, Ward and Burgers motor vehicle theft is the most pervasive crime in South African society, where some owners are either hurt or killed in the process. They are of the view that the most promising means to limit this crime is to “contaminate” the vehicles with microdots.⁶³⁴

8.2. Recommendations.

In order to achieve the goal of addressing organised motor vehicle crime effectively, the following are recommended:

8.2.1. Amendment of the POCA of 1998.

The POCA of 1998 of the RSA should be amended to include the following:

- ↪ Create a provision to define and punish persons who are leaders of criminal

⁶³⁰Williams and Savona *Organized Crime* 28 and similar arguments by Schonteich *Crime Fighters* 12 at n 151 and Wallace *Vehicle Theft* 1 at n 385 *supra*.

⁶³¹Blunkett *One Step Ahead* 3. David Blunkett was the Secretary of State for Home Department by command of Her Majesty. The report is accessible at <http://www.archives2.official-documents.co.uk/document/cm61/6163/6167.pdf> last visited on 17 June 2007.

⁶³²Irish and Qhobosheane *South Africa* 71.

⁶³³Pillinger *Swaziland* 103.

⁶³⁴Cambray *Science in Africa* at <http://www.scienceinAfrica.co.za/2005/november/microdot.htm> last visited on 27 October 2007. Contaminate is a terminology used by criminals to refer to those vehicles which have been sprayed with the invisible microdots making the vehicle identifiable even after removing the primary identification numbers. Dr Garth Cambray is the director and co-founder of Makana Meadery which is a Rhodes University company. Dr Graham Wright is the Deputy Chief Executive Officer and Chief Executive leader, Violent Organised Crime, BAC, RSA. Fouche Burgers is a Project Manager at BAC.

syndicates⁶³⁵

- Review the definition of enterprise in s 1(1)(v) of this Act in order to ensure that the enterprise which is being referred to is a criminal enterprise that exclude legitimate enterprises
- Define organised crime in order to create certainty for law practitioners and enforcers. I propose the following definition: “Organised crime is any serious crime which is systematically and persistently committed on a continuous basis or determinate period by a consciously concerted organised criminal group of two or more persons or a criminal enterprise, in pursuit of an undue financial or other material benefit”
- Define a syndicate⁶³⁶ or criminal group.⁶³⁷ This can also be done by amending the definition of criminal gang in s 1(1) of this Act to be inclusive of other criminal groups who are presently excluded through restrictive interpretation
- To provide for better mechanisms of dealing with organised crime in cases where it is not always easy to prove as to who else participated in the syndicate, a provision similar to that of s 2(3) of the Tanzanian Economic and Organised Crime Control Act (CAP 200) which states that, except where the nature or circumstances of an offence indicate otherwise, where two or more persons are proved to have been jointly involved in the commission of an economic offence, or where it appears to the court that the accused could not have committed the offence without or collaboration of a person or persons not known to the court, the commission of the offence is an organised crime for the purposes of sentence⁶³⁸
- Empower the law enforcement officials with greater and more effective powers in the interrogation of suspects and to compel them to produce evidentiary material or information⁶³⁹

8.2.2. Amendment of the SAPS Act of 1995.

Section 16 of the SAPS Act of 1995 should be reviewed and be aligned with the restructured units of the SAPS. This section should not define organised crime but refer to the definition

⁶³⁵See the argument under n 617 *supra*.

⁶³⁶The word syndicate is reflected in the Schedule of offences in respect of which a witness or related person may be placed under protection in the Protection of Witness Act 112 of 1998 but it is not defined.

⁶³⁷An opportunity to define a syndicate and group of persons was missed in the Protection of Witness Act 112 of 1998 as referred to in s 18(a). The terminology group of persons could have also been defined in the South African Police Service Act of 1995.

⁶³⁸See n 126 *supra*.

⁶³⁹Goba *Namibia* 129.

which shall have been created in the POCA of 1998.

8.2.3. Legalisation of SARPCCO Motor Vehicle Clearance Certificate.

The SARPCCO should assess the effectiveness of a SARPCCO clearance certificate and propose to their respective countries to give it legal status or legislate its application in their domestic laws.⁶⁴⁰

The purpose of owning a motor vehicle is to enjoy its use. The thief should not be allowed to use a stolen motor vehicle while the owner is deprived of his rights over the vehicle. As stated by Commissioner Zaccardelli,⁶⁴¹ the most effective weapon against organised crime is an organised and co-ordinated response. Since organised crime operates in multiple jurisdictions and across international boundaries, law enforcement must continue working towards better coordination, more integration and an even sharper focus on the sharing of information and intelligence.⁶⁴² It can only be hoped that the seriousness of the mind will encourage SARPCCO member countries to agree on a strategy that will help them meet their commitments to contribute to the international efforts of fighting organised crime.⁶⁴³

8.2.4. Adoption of a provision to allow extra-territorial jurisdiction.

The RSA should adopt a provision similar to s 6 of the Penal Code of Zambia that would extend their jurisdiction in order to prosecute the suspects who are found anywhere in possession of motor vehicles stolen from their respective countries.

8.2.5. Promotion of scientific marking of motor vehicles.

The spraying of motor vehicles with microdots which will simplify the identification of stolen motor vehicles is recommended.

8.3. Conclusion.

⁶⁴⁰A provision similar to s 10 of the RTA of 2002 of Zambia as referred to under 7.2.7 *supra*, is sufficient and can be supplemented by an internal instruction to the NCB Lusaka (Interpol) to the effect that, when a motor vehicle involved is from the SARPCCO member's country, a SARPCCO Clearance Certificate must be produced. Another equally important provision is s 7(2) of the MVTA of 2000 of Lesotho as referred to at n 425 *supra*.

⁶⁴¹*Ibid* n 82 *supra*.

⁶⁴²*Ibid* n 81 *supra*.

⁶⁴³*Ibid* n 82 *supra*.

The purpose of owning a motor vehicle is to enjoy its use. The thief should not be allowed to use a stolen motor vehicle while the owner is deprived of his rights over the vehicle. I agree with Commissioner Zaccardelli⁶⁴⁴ that the most effective weapon against organised crime is an organised and co-ordinated response. Since organised crime operates in multiple jurisdictions and across international boundaries, law enforcement must continue working towards better coordination, more integration and an even sharper focus on the sharing of information and intelligence.⁶⁴⁵ It can only be hoped that the seriousness of the mind will encourage SARPCCO member countries to agree on a strategy that will help them meet their commitments to contribute to the international efforts of fighting organised crime.⁶⁴⁶

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⁶⁴⁴*Ibid* n 641 *supra*.

⁶⁴⁵*Ibid* n 82 *supra*.

⁶⁴⁶*Ibid* n 82 *supra*.

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ABBREVIATIONS USED IN THE REPORT.

AC	Appeal Court.
ACJ	Acting Chief Justice.
AD	Appellate Division.
Adv	Advocate.
AGM	Annual General Meeting.
AHSI	African Human Security Initiative.
AJ	Acting Judge.
AJA	Acting Judge of Appeal.
ASF-SMV	Automated Search Facility - Stolen Motor Vehicles.
AU	African Union.
BAC	Business Against Crime.
BCCI	Bank of Credit and Commerce International Ltd.
BLR	Botswana Law Reports.
BML	Business Man's Law.
Buch	Buchanan's Reports.
CA	California.
(CA)	Court of Appeal.
CAHC	Criminal Appeal, High Court.
CAP(Cap)	Chapter.
CAS	Crime Administration System.
CC	Constitutional Court.
CIAC	Crime Information Analysis Center.
CID	Criminal Investigation Department.
CIV/T	Civil Trial.
CIV/APN	Civil Application.

CJ	Chief Justice.
CJCP	Centre for Justice and Crime Prevention.
CNV	Change of Particulars of/Notice in respect of Motor Vehicle.
CPA	Criminal Procedure Act.
CPC	Council of Police Chiefs.
CPD	Cape Provincial Division.
CPEA	Criminal Procedure and Evidence Act.
CR	Criminal Law Reports.
CRI	Criminal.
CRIM	Criminal.
CR APP REP	Criminal Appeal Reports.
CRI/A	Criminal Appeal.
Dr	Doctor.
DRC	Democratic Republic of Congo.
E	Elimalangeni.
EAPCCO	East Africa Police Chiefs Cooperation Organisation.
EJCPR	European Journal on Crime and Policy Research.
EOCCA	The Economic and Organised Crime Control Act.
EU	European Union.
FC	Supreme Court of the Federation of Rhodesia and Nyasaland.
GG	Government Gazette.
GN	Government Notice.
HC	High Court.
HCTLR	High Commission Territories Law Reports.
HSRC	Human Sciences Research Council.
ICPO	International Criminal Police Organisation.
IDASA	Institute for Democracy in South Africa.
IDOC	Investigative Directorate for Organised Crime.
IDSEO	Investigative Directorate for Serious Economic Offences.

Interpol	International Criminal Police Organisation.
ISS	Institute for Security Studies.
ITAA	International Trade Administration Act.
J	Judge.
JA	Judge of Appeal.
JP	Judge President.
LLR	Lesotho Law Reports.
LMPS	Lesotho Mounted Police Service.
M	Maloti.
MEC	Member of Executive Council.
MLA	Multi Lateral Agreement.
MVRIA	Application for Initial Registration of a Motor Vehicle.
MVTA	Motor Vehicle Theft Act.
N	Natal.
NCB	National Central Bureau.
NCIS	National Criminal Intelligence Service.
NDPP	National Director of Public Prosecutions.
NEPAD	New Economic Partnership for Africa's Development.
NPA	National Prosecuting Authority.
NPD	Natal Provincial Division.
NSW	New South Wales.
NRTA	National Road Traffic Act.
O	Orange Free State.
OCTA	Organised Crime Threat Analysis.
OPDATO	Office of Overseas Prosecutorial Development, Assistance and Training.
Para	Paragraph.
Paras	Paragraphs.
PCC	Permanent Co-ordinating Committee.
POCA	Prevention of Organised Crime Act.

R	Rand.
RA	High Court of Rhodesia, Appellate Division.
RAU	Rand Afrikaans University.
RCMP	Royal Canadian Mounted Police.
Reg	Regulation.
Regs	Regulations.
RICO	The Racketeer Influenced and Corrupt Organizations Act.
ROCTA	Regional Organised Crime Threat Analysis.
RSP	Royal Swazi Police.
RTA	Road Traffic Act.
s	Section.
SA	South African Law Reports.
SACJ	South African Journal on Criminal Justice.
SACR	South African Criminal Law Reports.
SADC	Southern African Development Community.
SADCPE	SADC Protocol on Extradition.
SAIIA	South African Institute for International Affairs.
SANAB	South African Narcotics Bureau.
SAPS	South African Police Service.
SAPSVIN	South African Police Service Identification Number.
SARPCCO	Southern African Regional Police Chiefs Co-operation Organisation.
SC	Supreme Court.
SCA	Supreme Court of Appeal.
Snr Asst Comm	Senior Assistant Commissioner.
Snr Supt	Senior Superintendent.
SOP	Standard Operating Procedures.
SRB	Sub-Regional Bureau.
ss	Sections.
Stannic	Standard National Industrial Credit Corporation Ltd.

Subreg	Subregulation.
Subsec	Subsection.
Subsecs	Subsections.
SZHC	Swaziland High Court.
T	Transvaal.
TSAR	Tydskrif vir die Suid-Afrikaanse Reg.
UCT	University of Cape Town.
UJ	University of Johannesburg.
UKZN	University of Kwa Zulu-Natal.
UN	United Nations.
UNISA	University of South Africa.
UNODC	United Nations Office on Drugs and Crime.
UNODCCP	United Nations Office for Drugs Control and Crime Prevention.
UNZA	University of Zambia.
US	University of Sussex.
USA	United States of America.
UWC	University of Western Cape.
VC	Vienna Convention.
VIN	Vehicle Identification Number.
VIS	Vehicle Identification Section.
Vol	Volume.
Wits	University of the Witwatersrand.
ZPS	Zambia Police Service.
ZR	Zambian Law Reports.

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