

DEFINING ORGANISED CRIME: A COMPARATIVE ANALYSIS

by

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DECLARATION

I declare that **DEFINING ORGANISED CRIME: A COMPARATIVE ANALYSIS** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

.....
SIGNATURE
(MR S G LEBEYA)

10 September 2012
DATE

SUMMARY

The most challenging and spoken criminal phenomenon today is indisputably organised crime. It is a crime that both the general public, business community, commentators, researchers, scholars, journalists, writers, politicians, prosecutors, jurists and presiding officials debate with different interpretation and understanding of the concept as well as the manifestation of the phenomena. Debates on the subject have seen the dawn of rival terminologies of organised crime and crimes that are organised.

While the United Nations has not assisted the nations in finding a definition of what organised crime is, the confusion has spread throughout the globe and South Africa has not been spared the pandemonium.

The objective of this study is to comparatively assess the present understanding and setup in South Africa in comparison with Italy, Tanzania and the United States of America, identify the root causes of the confusion and find possible remedies to liberate the situation. The research concludes with the findings and recommendations.

KEY TERMS

Organised crime; transnational organised crime; organised criminal group; syndicate; racketeering; money laundering; criminal gang; organised crime offences; predicate offences; syndicated crime.

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CHAPTER ONE

THE CONCEPT OF ORGANISED CRIME

1.1 INTRODUCTION

The phenomenon of organised crime is high on the international plane. Although various jurisdictions raise concerns about the impact of the phenomenon, the interpretation of the concept differs from one jurisdiction to the other. Challenges of this nature are usually resolved by a precise definition. A definition will assist in ensuring that jurists, law enforcers and researchers have the same understanding in their interactions. This is paramount in ensuring international cooperation, which is a key to fighting transnational aspect of the phenomena.

Organised crime is described by Cressey as the most sinister kind of crime where the men who control it become rich and powerful by encouraging the needy to gamble, luring the troubled to destroy themselves with drugs, extorting the profits of honest and hardworking businessmen, collecting usury from those in a financial plight, maiming or murdering those who oppose them and bribing those sworn to destroy them.¹

The term organised crime has in recent years almost replaced other well-known phrases referring to aggravated forms of robberies such as bank robbery, truck hijacking and house robbery in the Republic of South Africa. However, this trend is not limited to South Africa. Fijnaut and Paoli state that organised crime has become a convenient tool to express the anxieties of the general population at living in the

¹Cressey *Theft of the Nation* 7.

ever more uncertain and insecure world of the late or post modern stage of modernity.² They point out that organised crime has become a popular topic in public debate since the eighties and in the political and scientific agenda all over Europe.³ This view is compatible with that of den Boer who states that organised crime has become a core element of international law enforcement vocabulary and rhetoric.⁴ Woodiwiss observes that most policy makers, commentators and media outlets around the world now use ‘organised crime’ as a term that is virtually synonymous with gangsters in general, or the mafia, or mafia-type organisations in particular.⁵

In his earlier edition, Abadinsky quoted Hogan as saying, “the problem to date has been the use of broad, general labels such as ‘organized crime’ without clearly defining the term and setting parameters on what is and what is not organised crime”.⁶ However, Van Duyne cautions that we need not label established crimes as organised crime as if having no “organised crime disease” is a loss of status.⁷ His observation is that organised crime is in many ways a strange concept. It is found in widely diverse contexts, being used as if it denotes a clear and well-defined phenomenon. He argues that nothing is further from the truth. According to him, the concept of organised crime has constantly been redefined and contains all sorts of implicit ideologies and myths. He concludes that when reviewing the literature on organised crime, one gets increasing doubts as to the scientific usefulness of the concept.⁸

²Fijnaut and Paoli *Organised Crime Concepts* 5.

³*Id* n 2 *supra* at 1.

⁴Allum *Defining Organized Crime* xv.

⁵Woodiwiss *The Strange Career* 3.

⁶Abadinsky *Organized Crime I* 1.

⁷Van Duyne *Medieval Thinking* 23.

Woodiwiss submits that some academics and professionals, writing about organised crime, usually refer to a certain type of criminal activity, which is synonymous with racketeering. He explains that, racketeering is usually understood to refer to such activities as dealing in stolen property, insurance frauds, fraudulent bankruptcies, securities frauds, credit frauds, forgery, counterfeiting, illegal gambling, trafficking in drugs or liquor, or various forms of extortion. His conclusion is that organised crime refers to a group of criminals or gangsters.⁹ Madsen simply states that the question of what exactly constitutes organised crime is far from having been satisfactorily solved on the academic level.¹⁰ Harding points out that over and above legal definitions, research contains yet little clear agreement regarding the more precise nature and structure of phenomenon, which is being referred to as organised crime.¹¹

The law follows a precise path.¹² In order to ensure that subjects understand what the law proscribes, crimes are always defined, strictly interpreted and explained. As argued by Hallevey, the principle of legality in its modern meaning originates in the era of Enlightenment in the eighteenth century where it was developed.¹³ This principle means that an accused may not be found guilty of a crime and sentenced unless the type of conduct with which he is charged has been recognised by law as a crime; in clear terms; before the conduct took place; without the court having to stretch the meaning of the words and concepts in the definition to bring the particular conduct within the compass of the definition, and after conviction the

⁸*Id* n 7 *supra* at 23. According to Hill *Yakuza* 65, Yakuza has various groups such as the Yamaguchi-gumi, the Inagawa-kai and the Sumiyoshi-kai.

⁹Woodiwiss *The Strange Career* 7, Woodiwiss *Organized Crime* 10 and Woodiwiss *Dumbing Discourse* 2.

¹⁰Madsen *Organized Crime* 16.

¹¹Harding *Criminal Enterprise* 196.

¹²Law is defined in terms of section 2 of the Interpretation Act 33 of 1957 as any statute, proclamation, ordinance, Act of Parliament or other enactment having the force of law including our common law.

¹³Hallevey *The Principle of Legality* 8.

imposition of punishment also complies with the four principles set out immediately above.¹⁴ It is clear that a vague definition of the concept of organised crime may raise problems relating to the principle of legality and its corollaries of clarity and precision of criminal law. Accordingly, national legislators may have to complete and specify the definition.¹⁵

Robinson and Cahill explain that the principle of legality does not define a single legal rule but rather the overarching rationale that forms the basis for a collection of related rules. These rules include the prohibition against *ex post facto* laws, the constitutional invalidation of vague offences, the rule of strict construction of penal statutes, the statutory abolition of common-law offences and the bar to judicial creation of offences.¹⁶

According to Gallant, the rules that makes the principle of legality include the following: no act may be punished as a crime which was not criminal under a law applicable to the actor at the time of the act; no act may be punished by a penalty that was not authorised by a law applicable to the actor at the time of the act; no act may be punished by a court whose jurisdiction was not established at the time of the act; no act may be punished on lesser or different evidence than could have been used at the time of the act; no act may be punished except by a law that is sufficiently clear to provide notice that the act was prohibited at the time it was committed; interpretation and application of the law should be done on the basis of consistent principles; punishment is personal to the wrongdoer; collective punishments may not be done on the basis of consistent principles; and that everything not prohibited by law is permitted.¹⁷

¹⁴Snyman *Criminal Law* 36.

¹⁵Calderoni *Organized Crime Legislation* 41.

¹⁶Robinson and Cahill *Law without Justice* 96.

¹⁷Gallant *The Principles of Legality* 8.

Furthermore, Gallant points out that this principle is expressed in variety of versions, with different articulations including *nullum crimen sine lege* (nothing is a crime except as provided by law); *nulla poena sine lege* (no punishment may be imposed except as provided by law); *nullum crimen sine praevia lege* (nothing is a crime except by previously declared law); *nulla poena sine praevia lege* (no punishment may be imposed except by a previously declared law); *nulla poena sine crimen* (no punishment except for crime); *nullum crimen sine poena legali* (nothing is crime without a legal penalty); *nullum crimen nulla poena sine lege scripta* (nothing is a crime and nothing is punishable except by a written law); *nullum crimen, nulla poena sine praevis scripta* (nothing is a crime and nothing is punishable except by a previously declared written law).¹⁸

The principle of legality is a legal ideal that requires all law to be clear, ascertainable and non-retrospective. The explanation of these principles may be understood better by looking at Part III of the Rome Statute of the International Criminal Court. The description of the *nullum crimen sine lege* provides that (1) a person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court; and (2) the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted; and (3) this article shall not affect the characterization of any conduct as criminal under international

¹⁸Gallant *The Principle of Legality* 8-9. See also Dressler *Criminal Law* 39, Dana *The Principles of Legality in Customary International Law* at <http://asil.org/files/2010/abstract/Dana-Abstract-ASIL-ILTConference.docx> last visited on 02 November 2011, Snyman *Criminal Law* 36-37, Mare *Criminal Law and the Bill of Rights* which is accessible at <http://gnupalexis.saps.gov.za/nxt/gateway.dll/2b/zc/tna/doa/9eie/bt91a?f=document> last visited on 03 November 2011. It should be noted that Mare has preferred to use the term 'principle' while Snyman preferred 'rule'.

law independently of this Statute.¹⁹ The *nulla poena sine lege* provides that a person convicted by the Court may be punished only in accordance with this Statute.²⁰ The rule on non-retrospectivity *ratione personae* provides that (1) no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute; and (2) in the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.²¹

The principle of legality sets limitations on the formation, creation and interpretation of criminal law.²² Hallevy explains that the principle of legality is one of the four fundamental principles of criminal law that emanates from the criminal law theory called the supra-principle of free choice.²³ The supra-principle of free choice requires that the individual has a real possibility to choose between what is permitted and forbidden, which simply means choosing to commit a specific offence or not to commit it. He submits that the principle of legality has four secondary principles, which are sources of the criminal norm, applicability of criminal norm in time, applicability of criminal norm in place and interpretation of the criminal norm.²⁴

The principle of legality was expressed in *S v Masiya*²⁵ where the court dealing with the definition of common law rape held, amongst others, as follows:

The principles – in terms of which the accused ought not to be convicted of an offence that

¹⁹Article 22 of Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 which is also accessible at <http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF-7-5752-4-BE94-OA655EB30E16/o/Rome-statute-English.pdf> last visited on 22 June 2011.

²⁰Article 23 of Rome Statute of the International Criminal Court.

²¹Article 24 of Rome Statute of the International Criminal Court.

²²Wallace and Roberson *Criminal Law* 34.

²³Hallevy *The Principle of Legality* 3-4. The other three principles of criminal law are the principle of conduct, the principle of culpability and the principle of personal liability.

²⁴*Id* n 23 *supra* at 5 and 6-7.

²⁵2006 (2) SACR 357 (T) at 360.

did not exist at the time of the commission of the deed, and ought to benefit from the least severe punishment where the punishment had changed between the time of commissioning of the offence and the time of sentencing – were not applicable and need not be considered as an obstacle to the extension and development of the definition of rape, since no new crime had been created. The unlawful deed that the accused had committed had simply been given another name, and it had never been a requirement that an accused should know, at the time of committing an offence, whether it was a common law or statutory offence, or what legal terminology was used in naming it. Furthermore, the accused had in fact been charged with rape, which satisfied the requirement of section 35(3)(l) of the Constitution that the accused had the right not to be convicted of an offence that was not an offence at the time of its commission. An accused also need not be aware at the time of committing an offence what precise sentence might be imposed and, in *casu*, the possibility of a life sentence existed irrespective of whether the deed committed was held to be rape or indecent assault. Regarding the sentence to be imposed, the accused's right to benefit from the least severe prescribed sentence, if same had been changed since the date of commission of the offence, was protected by section 35(3)(n) of the Constitution. Accordingly, this was not a consideration to be given any weight in deciding whether the definition of rape was to be extended or not.

Although it has become a norm to refer to the embodiments of the principle of legality as principles of legality, some jurists refer to this as rules or components. Sowle refers to them as components of the principle of legality and lists four as follows: (1) Judges should not create new crimes; (2) The criminal law should operate only prospectively; (3) Crimes must be defined with sufficient precision to serve as a guide to lawful conduct (i.e. there must be adequate notice); and (4) Crimes must be defined with sufficient precision to confine the discretion of police and prosecutors.²⁶

²⁶Sowles at <http://www.Kentlaw.edu/faculty/SSowle/class/criminal-law/ppt/legality/ppframe.htm> last visited on 03 November 2011.

While the principle of legality is forming the foundation of criminal law in the United States, it is to a certain extent the same in South Africa by respecting the rule against the application of laws with retrospective effect, which is expressed in section 35(3)(l) of the Constitution of the Republic of South Africa Act of 1996.²⁷ This section states the following:

Every accused person has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.

Essentially, this principle provides that an accused person may not be found guilty of a crime and sentenced unless the type of conduct with which he or she is charged with has been recognised by law as a crime before the conduct took place; and in clear terms; and the particular conduct of the accused can be brought under the definition of the crime without interpreting the words or concepts in the definition too widely; and after conviction, the imposition of punishment also complies with the above-mentioned four principles. In terms of this principle, conduct that constitutes organised crime, must be defined clearly and unambiguously and should be interpreted strictly.

Fijnaut and Paoli state that despite more than three decades of passionate and occasionally acrimonious debates, it is still unclear whether organised crime involves sets of criminalised activities or groups of people engaged in crime.²⁸ Von

²⁷108 of 1996. See also Snyman *Criminal Law* 39 and 42 as well as Burchell *Principles* 105. With regard to the United States, the United States Constitution has incorporated this principle in Article 1 ss 9 and 10 - see also Hallevy *The Principle of Legality* 13-14. As confirmed in *Seluka v Suskin and Salkow* 1912 TPD 258 at 270, the facts of the case are briefly that the plaintiff's donkeys were stolen and sold to the defendant who bought them for cash in *bonafide* belief that the seller is the lawful owner. The question that the court had to decide upon was whether, under section 5 of the Prescription Amendment Act 26 of 1908, the owner is entitled to claim back his property, namely, the donkeys and their foals, or whether section 5 allows the purchase to set up the defence that the owner's claim is prescribed. The court held that it is the duty of the courts to interpret the law (*jus dicere*) and not to legislate (*jus facere*); see also Cockram *Interpretation of Statutes* 1.

²⁸Fijnaut and Paoli *Organised Crime Concepts* 7.

Lampe states that even after decades of debate, there remains a great deal of uncertainty and confusion about the nature of organised crime. He refers to Becker's famous phrase 'organised crime is what people so label'.²⁹ According to him, there seems to be no easy solution to the task of defining the concept of organised crime. Until an all-encompassing and universal definition is found, all attempts to define organised crime would have to be arbitrary and would in some way or other contradict existing perceptions of organised crime.³⁰

The word crime in the concept of organised crime is not difficult to understand, but what is difficult is the word 'organised'. A criminal act is defined as unlawful and culpable conduct, which is subjected to a penalty by the State.³¹ Masango points out that there are many definitions of crime. In support of this submission, he states that a crime is conduct which common law or statute law prohibits and expressly or impliedly subjects to a punishment which is remissible (excusable) by the State alone and which the offender cannot avoid by his own act once he has been convicted.³² Burchell defines crime as any conduct which is defined by law to be a crime and for which punishment is prescribed.³³ In his later version, he submits that in every society certain forms of conduct are so deeply disapproved of as to cause the community to believe that some form of retaliation should be taken against those who engage in such conduct, which is thought to deserve such retaliation is called crime and the retaliation is called punishment.³⁴ Blum defines crime as an act committed, or omitted, in violation of a public law forbidding or

²⁹See <http://freenet-homepage.de/kvllampe/lauhtm01.htm> last visited on 09 May 2009 and the Concept of Organised Crime in Historical Perspective by Von Lampe at <http://www.organized-crime.de/fpok01.htm> last visited on 09 May 2009.

³⁰Von Lampe *Concept of Organized Crime* paragraph 5 at <http://www.organized-crime.de/organizedcrimetheory.htm> last visited on 22 December 2007.

³¹Snyman *Criminal Law* 4, Levi *Financial Crime* 53 and Philcox *Organized Crime* 3.

³²Masango *Criminal Law* 5.

³³Burchell *Criminal Law* 1.

³⁴Burchell *Principles* 4.

commanding it.³⁵

Crime is a “socio-political artifact” because what the legislature will label as criminal may differ from one period in history to another and from one society to another, since legislatures are influenced by ideals, needs and values governing a particular society at a given time.³⁶ The conduct, which is punishable by the state, is proscribed in common law and statute. Conformingly, crime means conduct which is prohibited by statute or common law and for which the actor may be sentenced to imprisonment, with or without a fine.³⁷

The confusion regarding the meaning of organised crime is exacerbated by the indiscriminate use of the concept organised crime. His Excellency, President (Dr) Thabo Mbuyelwa Mbeki, as he then was, for example, told the joint sitting of Parliament that the government will intensify intelligence work with regard to organised crime, building on the successes that have been achieved in the last few months in dealing with cash-in-transit (CIT) heists, drug trafficking and poaching of game and abalone.³⁸ Mr Charles Nqakula MP, the Honourable Minister for Safety and Security at the time, included armed robberies (robberies at financial institutions, at shopping malls and of cash-in-transit, and hijacking of vehicles) in his description of organised crime.³⁹ Although both were referring to organised crime, they had different crimes in mind.

³⁵Blum *et al Criminal Law* 115. See American Jurisprudence: 2008 2nd: A modern Comprehensive Text Statement of American Law: State and Federal: Vol 21: Creditors' Bills to Criminal Law ss 1 to 832 (Thomson West Danvers 2008) at 115.

³⁶Rabie and Maré *Punishment* 5.

³⁷Chapter 609.02 subdivision 1 of Minnesota Statutes of 2006.

³⁸See State of the Nation Address (SONA) by Mbeki, which is accessible at <http://www.info.gov.za/speeches/2007/07020911001001.htm> last visited on 25 November 2007. He was referring to bank robberies, CIT and other violent crimes.

³⁹These figures are in essence successes for aggravated robberies as supplied by the Detective Service.

The Presidency reported that Big Business expressed satisfaction with progress in key areas such as organised violent crime and the re-engineering of the Criminal Justice System (CJS).⁴⁰ The South African government also monitors the issues relating to organised crime in Program 2 of the government Program of Action (PoA).⁴¹ It is clear from these examples that while they all referred to “organised crime”, they all gave different interpretations of the concept. Just as Mensa-Bonsu states that it is not possible to accord the tag crime to any act that is not prohibited, it is equally inequitable to accord an organised crime tag to any act that is not defined as such.⁴² This argument supports the view expressed by Lord Edmund Davies in *R v Caldwell*.⁴³ In this case, an angry defendant got drunk and set the hotel on fire. He was indicted on two counts of arson and Lord Edmund Davies stated: “the law in action compiles its own dictionary. In time, what was originally the common coinage of speech acquires a different value in the pocket of the lawyer than when in the layman’s purse”.⁴⁴ This judgement refers to deliberate self-intoxication, which cannot be a defence to the commission of a crime.

In terms of the SAPS crime statistics for 2006/2007 as well as 2007/2008, which included statistics about organised crime, De Kock stated that the Minister of Safety and Security and Members of the Executive Committee (MECs) in the provinces had since July 2006 repeatedly referred to violent organised crime. However, these were references to cases registered under the sub-category of

⁴⁰See the report by Presidency relating to the meeting between the His Excellency, President Mbeki, Her Excellency, Deputy President Phumzile Mlambo-Ncquka and BBWG, which is accessible at <http://www.thepresidency.gov.za/main.asp/pr/2007/pr08231757.htm> last visited on 25 November 2007. The crimes are bank robberies, CIT and similar crimes.

⁴¹[Http://www.info.gov.za/aboutgov/poa/report2005jcps06.htm](http://www.info.gov.za/aboutgov/poa/report2005jcps06.htm), <http://www.info.gov.za/aboutgov/poa/report2004jcps.htm>, <http://www.info.gov.za/aboutgov/poa/report2006/feb2007jcps.htm> last visited on 25 November 2007.

⁴²Mensa-Bonsu *Criminal Law* 2.

⁴³[1982] AC 341.

⁴⁴*Id* n 43 *supra* at 357. See also Allen *Criminal Law* 52.

robberies labelled as car-jacking, truck-jacking, house robbery, robbery at business premises, cash-in-transit and bank robbery. De Kock accepts that some aggravated robberies are highly organised in nature. He further concedes that some of these crimes are committed by groups, which may not be organised criminal syndicates in the strict sense of the word. His view is that, one to three or four loosely associated or opportunistic individuals (street robbers) commit some of these crimes.⁴⁵ Accordingly, much of the picture of organised crime in South Africa is based on perceptions, feelings and baseless statements being repeated.⁴⁶

Surprisingly, until 2010, lucidity had not prevailed. In a clear demonstration of the state of uncertainty, De Kock went further to elaborate that house robbery is only organised crime if the robbers strike with a specific target in mind and in response to prior intelligence, that is, when they are sent by somebody at a higher level to a specific address in order to rob some specific item. He indicates that to achieve the cloning and exportation of vehicles to other countries requires that the hijackers should involve organised crime. The concept has been used interchangeably to refer to crime (activities) and criminal group.⁴⁷

The lack of a clear understanding as stipulated above, makes the measuring of organised crime a nearly impossible task. In an attempt to measure the size or impact of organised crime, Vander Beken and Defruytier agree with Beare and Naylor who conclude that crime statistics have mostly little meaning as far as organised crime is concerned, simply because actual numbers of organised crime are not available.⁴⁸ If crime statistics on organised crime are available, it will assist in understanding the extent of the problem. As no one ever reports a crime of

⁴⁵Crime in South Africa during 2006/2007 and 2007/2008: Trends, Spatial Distribution and Interpretation 5.

⁴⁶See <http://iafrica.com/news/sa/392912.htm> last visited on 19 January 2008.

⁴⁷SAPS 2009/2010 Annual Report 19.

⁴⁸Vander Beken and Defruytier *Assessing Organised Crime* 57.

“organised crime” to the police, this view is convincingly persuasive. Palpably, it is a crime which becomes evident when the police start investigating the facts. It is clear that statistics about organised crime is unreliable, as the compilers have no clear concept of the types of conduct which constitutes organised crime.

The Justice Crime Prevention and Security (JCPS) cluster of the South African Government stated that they were strengthening the partnership between organised crime investigators and the National Prosecuting Authority (NPA) to ensure appropriate guidance for investigators and to improve conviction rates in this category during the 2006/2007 financial year.⁴⁹ The co-ordination between these two organizations contributed to the arrest of four organised crime syndicates leaders and 61 runners. Furthermore, co-ordinated raids across the country netted 217 criminals who dealt in precious metals, 101 were arrested for drugs and 36 for vehicle theft. They indicated further that during the joint cross border operations in the Southern African Development Community (SADC) region, 850 vehicles that were recovered had been stolen from South Africa. The Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO) has redoubled its efforts in dealing with cross border crime.⁵⁰ This is in line with the African Regional Minister’s Declaration, which acknowledges that organised crime and corruption cannot be prevented or controlled through national measures only. International co-operation is crucial and had to be immediately and vigorously promoted at all levels.⁵¹ Co-operation can only be successful if all parties concerned have the same understanding of what constitutes organised crime.

⁴⁹The financial year of South Africa is calculated from first day of April to the last day of March of the following year.

⁵⁰See <http://www.info.gov.za/speeches/2007/07083013451001.htm> last visited on 25 November 2007. All police chiefs in the fifteen countries within the SADC are members of SARPCCO.

⁵¹Dakar Declaration 4 paragraph 6.

The imprecision of the concept organised crime and the contrasting meaning from one legal system to another is explained by Levi who states that its attraction and weakness is that one can read almost anything into it.⁵² According to him, the definitions of organised crime shift between discourses about activities as in common usage of the term “crime” - and discourses about evil associations, as in common usage of the term “Mafia”.⁵³ As pointed out by Obokata, this confusion has resulted in divergent views that organised crime refers to a set of activities whereas the other refers to a set of actors.⁵⁴

1.2 DEFINING ORGANISED CRIME

Definitions of organised crime can be divided into two main groups, namely those that focus on the criminal activities and those that focus on the criminal group aspect.

1.2.1 Definitions focussing on criminal activities

According to Obokata, organised crime as a set of activities refers to the structure of a chain of events and interaction process in which different individuals and groups participate in different ways at different stages.⁵⁵ According to Coertse, international organised crime is not a modern day phenomenon. The biggest threat to society today is the ability of people in organised crime to commit any type of crime, and money laundering is part and parcel of this threat.⁵⁶ In the same vein, Jojarth submits that money laundering is the child of crime’s tremendous financial

⁵²Fijnaut and Paoli *Organised Crime Concepts* 7.

⁵³Levi *Financial Crime* 53 and Gottschalk *Organised Crime* 4.

⁵⁴Obokata *Transnational Organised Crime* 14.

⁵⁵*Id* n 54 *supra* at 19.

⁵⁶Coertse *De Rebus* October 2001 at 32. The information is also accessible at <http://www.lawsoc.co.za/lawlibrary/notice/updates/2001/issue39.htm> last visited on 02

success.⁵⁷

Conklin states that organised crime is syndicated crime and is the violation of the laws on a large scale basis by ongoing, tightly structured groups devoted to the pursuit of profit through criminal means.⁵⁸ Adding to this view, Beirne and Messerschmidt state that the core syndicated crime is commonly known as organised crime.⁵⁹ Similarly, Kelly concludes that organised crime and syndicated crime are used interchangeably.⁶⁰ A critical analysis of the views by Conklin, Beirne and Messerschmidt suggests that syndicated crime and organised crime are synonymous.⁶¹ Their view supports the understanding that organised crime refers to the crime and not the perpetrators. Obokata states that organised crime must be understood as a serious crime committed by an organised criminal group.⁶²

Annually, the South African Police Service (SAPS) puts organised crime as its priority.⁶³ It has been using the concept of organised crime since 1995.⁶⁴ As organised crime is not defined in the South African Police Service Act of 1995,⁶⁵ it makes sense that there will be some degree of confusion. Before the 20-02-2009 the analysis of Sections 16(1) and 16(2)(a) of the SAPS Act of 1995, it suggested that the

December 2007.

⁵⁷Jojarth *Global Trafficking* 140.

⁵⁸Conklin *Criminology* 315. Syndicated crime does not differ from organised crime but it is only a matter of choice of terminology. Cressey states that the term organised crime has become synonymous with syndicated crime-the Mafia and La Cosa Nostra-traditional Italian American organizations that were characterized by a well-defined hierarchy of roles for members and leaders, with specific goals and unwritten laws that determined one's behaviour, see Roth *Organized Crime* 4.

⁵⁹Beirne and Messerschmidt *Criminology* 160.

⁶⁰Kelly *Organized Crime* 199.

⁶¹Syndicated crime is a term used by other experts to refer to organised crime or crime committed by organised criminal groups.

⁶²*Id* n 54 *supra* at 26.

⁶³SAPS Strategic Plan 2005-2010.

⁶⁴Organised crime is dealt with in section 16 of the South African Police Service Act 68 of 1995.

⁶⁵68 of 1995.

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. The position has since changed with the coming into operation of the South African Police Service Amendment Act of 2008.⁶⁶

Instead of clarifying the ambiguities, Section 16(2)(a) of the SAPS Act of 1995 as amended, has unfortunately further complicated the matter in that the definition of circumstances include: by a person, group of persons or syndicate acting in (1) an organised fashion, or (2) a manner which could result in substantial financial gain for the person, group of persons or syndicate involved. All that has been done by the amendment was the replacement of the word “enterprise” with “a person” and “organised manner” with “organised fashion” as well as the addition of the word syndicate. The confusion has already visited the SAPS where it states, in its 2009/2010 Annual Report, as follows:

Section 2 of the South African Police Service Amendment Act 57 of 2008 defines organised crime as a person, group of persons or syndicate acting in an organised fashion or in a manner which could result in substantial financial gain for the person, group or persons or syndicate involved.⁶⁷

However, the Prevention of Organised Crime Act of 1998,⁶⁸ hereafter referred to as the POCA, was enacted in 1998, which would have meant that the definition of organised crime (if the definition of organised crime that was to be found in this Act) would have rendered the definition in the South African Police Service Act to be no longer authoritative. The view of this author is that this amendment brought about by the South African Police Service Amendment Act 57 of 2008 has complicated the

⁶⁶57 of 2008.

⁶⁷SAPS 2009/2010 Annual Report 102. The fact that organised crime cannot be committed by one person was decided in the case of *Seevnarayan n 75 infra*. The footnote reflecting the definition was withdrawn although this was done after the publication.

⁶⁸121 of 1998.

matter even further as it can no longer be said that section 16(1)(a) deals with organised crime, precisely because an individual who cannot commit organised crime as the required element of an organised fashion, has now been included. Furthermore, the legislature did not define syndicate.

According to Gupta, the enactment of the POCA, embodies an aggressive Parliamentary stance against a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally. His view is that the POCA and the two amendment Acts passed in 1999 represent a major effort on the part of the South African authorities to combat the rapid growth in organised crime, money laundering and criminal gang activities both nationally and internationally. He states further that the Preamble to the Act provides a useful background on the fight against organised crime as it recognises the difficulty of proving the direct involvement of organised crime leaders in particular cases as they do not perform the actual criminal activities themselves, hence the criminalisation of the management of, and related conduct.⁶⁹

1.2.2 Definitions focussing on organised criminal group aspect

According to Levi, the term organised crime generally describes a group of people who act together on a long-term basis to commit crimes for gain. However, he argues that the term can also be applied to professional transnational financial criminals who are not part of some generalised, tightly knit grouping.⁷⁰ According to Obokata, the understanding of organised crime as a large criminal organisation such as Italian Mafia and the Japanese Yakuza is the most popular among the

⁶⁹*Journal of African Law (JAL)* at <http://www.law.harvard.edu/students/orgs/crlc/vol37-1/gupta.pdf> last visited on 25 November 2007.

⁷⁰Levi *Financial Crime* 55. This simply means that groupings of professionals who are engaged in financial criminal transactions are organised, although not in the general understanding of

general public.⁷¹

Unlike Levi who observes the importance of differentiating between organised crime and an organised criminal group,⁷² Hofmeyr states that over 85% of cases related to organised crime resulted in successful prosecutions.⁷³ It is clear that the statement of Hofmeyr confuses organised crime with organised criminal group. In fact, this statement relates to civil cases of assets derived from crime and not necessarily organised crime. His distinction of organised crime and an organised criminal group seems to be blurred. This is demonstrated in the foreword statement where he states as follows:

Organised crime often has a wealth of resources at its disposal and in a number of state, has managed to corrupt much of society, law enforcement and the state; organised crime and individual criminals operates like good business people; the reasons was that most vulnerable part of organised crime is the huge amount of cash generated by its operations; and that there has been rapid move of organised criminals into new investment opportunities such as economic crime or abalone smuggling where they perceive the returns to be high and risks to be low.⁷⁴

1.2.3 Discussion of the South African Police Service Act 68 of 1995

The legislature has unwittingly sown some seeds of confusion in section 16(3) of the SAPS Act of 1995 by inserting a provision, which states that in the event of a dispute as to whether the criminal conduct or endeavour thereto is organised crime, the determination by the National Commissioner shall prevail.⁷⁵ This does not really

the word.

⁷¹*Ibid* n 54 *supra*.

⁷²Lahneman and Lewis *Organized Crime* 14.

⁷³See <http://www.sagoodnews.co.za/crime/organised-crime-prosecutions-top-85-htm> last visited on 25 November 2007.

⁷⁴See Kruger *Organised Crime* iv-vi.

⁷⁵The Act suggest that the decision of the National Commissioner is final which applies within the Police; however a decision to prosecute on racketeering rest with the National

have any legal standing as the National Prosecuting Authority (NPA) will decide which crime to prosecute. It will fail Van Duyne's test who correctly argues that a decision rule should be non-personal in its application in the sense that the outcome is independent of the person who applies such a rule.⁷⁶ The path that is dependent on the discretionary determination by the National Commissioner can never be said to be precise. On this point, the law is by no means clear, or certainly not as clear as it should be, because his/her instruction will only be relevant for police officers, making such description an operational description for the police as the final decision for prosecution lies with the NPA.

1.2.4 Discussion of the Prevention of Organised Crime Act 121 of 1998

It is not clear from the case law whether the POCA is interpreted as focussing on criminal activities or group aspect. In *National Director of Public Prosecutions (NDPP) v R O Cook Properties (Pty) Ltd*; *NDPP v 37 Gillespie street Durban (Pty) Ltd*; *NDPP v Seevnarayan*,⁷⁷ the question in each case was whether certain property, houses in the first two cases and cash in the last case, should be forfeited to the State under Chapter 6 of the POCA. The issue that had to be decided was whether the properties in question were the instrumentality of an offence scheduled in the Act or whether they were the proceeds of unlawful activities. These issues are not relevant for this research; however, the emphasis statement, made *inter alia*, that the Act is designed to reach far beyond 'organised crime, money laundering and criminal gang activities' and the Act clearly applies to cases of individual wrongdoing, is relevant as it contributes to the confusion. In terms of this statement, any of the offences, such as giving false evidence in contravention of Section 54(9)(a)(ii) of the POCA, for example, will constitute organised crime.

Director of Public Prosecutions.

⁷⁶Van Duyne *Medieval Thinking* 28.

In *Mohunram v NDPP*,⁷⁸ the court gave a forfeiture order based on gambling in contravention of the law in the KwaZulu-Natal Gambling Act⁷⁹ by Kumarnath Mohunram. The question raised was whether the offences for which forfeiture is potentially competent in terms of Chapter 6 of the POCA that are limited to those created by the POCA. Similar to the argument pointed in *NDPP v R O Cook Properties (Pty) Ltd; NDPP v 37 Gillespie street Durban (Pty) Ltd; NDPP v Seevnarayan*,⁸⁰ *supra*, it was held as per Van Heerden AJ that the POCA does not only apply to discrete areas of organised crime, but can encompass illegal acts outside of money laundering, racketeering and criminal gang activities.⁸¹ In the same matter, Moseneke DCJ noted with approval, the argument submitted by the Law Review Project (LRP) as *Amicus Curiae*, that the areas of application of forfeiture are limited to those offences created by POCA. These are racketeering under Chapter 2, money laundering under Chapter 3 and criminal gang activities under Chapter 4. They may, he quoted the LRP, collectively be termed 'organised crime offences' and the rest may conveniently be called 'ordinary crimes.'⁸² This interpretation applies to all crimes.

In analysing the *Mohunram*⁸³ case above, the view construed by the LRP is that organised crime refers to money laundering, racketeering and criminal gang activities. It is the view of this author that, if there is anything to be called organised crime offence, all twenty eight (28) offences as created by the POCA, shall equally qualify to be called as such. The deficiency of the argument of the LRP is

⁷⁷2004 (2) SACR 208 (SCA).

⁷⁸2007 (2) SACR 145 (CC).

⁷⁹10 of 1996.

⁸⁰2004 (2) SACR 208 (SCA).

⁸¹2007 (2) SACR 145 (CC) at 158.

⁸²[Http://www.concourt.gov.za/site/mohunram.htm](http://www.concourt.gov.za/site/mohunram.htm) last visited on 25 November 2007. This argument refers to criminal cases and not civil process.

⁸³2007 (2) SACR 145 (CC).

that it excludes offences created in Chapters 6 and 8 of the POCA.

The POCA is the primary statute that deals with organised crime. In *NDPP v Van Staden*,⁸⁴ the question was whether a motor vehicle is an instrumentality of the offences of driving under the influence of intoxicating liquor and driving with the excess of alcohol in the blood. The area of interest is the question as to whether the POCA is only applicable to organised crime, money laundering and criminal gang activities. Nugent J stated that:

It has been said, at times, that the purpose of the POCA of 1998 is to combat the special evils that are associated with organised crime, but that is not entirely correct. That is certainly one of its purposes, and perhaps even its principal purpose, but as pointed out by this court in *NDPP v R O Cook Properties (Pty) Ltd et al.*,⁸⁵ its provisions are designed to reach far beyond organised crime and apply also to cases of individual wrongdoing.

He stated further that he has already observed that organised crime is but one of the targets of the Act.⁸⁶ The court held that, although the POCA was aimed at organised crime, it also applied to cases of individual wrongdoing.⁸⁷ In other words, this is broadening the definition to include activity of an individual.

Van Heerden AJ confirmed in *Mohunram*⁸⁸ that it is certainly true that POCA, even as amended, is not a model of legislative clarity and coherence. The short title refers only to the prevention of organised crime, while the first two phrases of the long title state that the Act is to introduce measures to combat organised crime, money laundering and criminal gang activities and to prohibit certain activities relating to racketeering activities. She referred with approval to the statement of Griesel J in

⁸⁴2007 (1) SACR 338 (SCA). This case is also accessible under reference 2006 SCA 135 RSA at <http://www.supremecourtofappeal.gov.za/judgments/sca-2006/2005-531.pdf> last visited on 11 October 2008.

⁸⁵2004 (2) SACR 208 (SCA).

⁸⁶See 2006 SCA 135 RSA at 142 as referred to under n 82 *supra*.

⁸⁷*Id* n 84 *supra* at 340-341.

⁸⁸2007 (2) SACR 145 (CC) at 158.

NDPP v R O Cook Properties (Pty) Ltd; NDPP v 37 Gillespie Street Durban (Pty) Ltd; NDPP v Seevnarayan,⁸⁹ where it was stated that the organised crime leitmotif forms a recurrent theme throughout the Act. She states further that, notwithstanding this recurrent theme, the wording of POCA as a whole makes it clear that its ambit is not in fact limited to so-called organised crime offences, so that the initial impression created by the short and long titles, as well as by most of the paragraphs of the preamble, is incorrect. This, she concludes, is misleading and more than a little unfortunate.⁹⁰

However, as pointed out by the NDPP, arguments along the lines advanced by the LRP in this regard have been considered and rejected by the Supreme Court of Appeal on two prior occasions. In *Cook Properties (supra)*, the court held that such an interpretation of POCA: “. . . radically truncates the scope of the Act. It leaves out portions of the long title, as well as the ninth paragraph of the preamble. These, show that the statute is designed to reach far beyond organised crime, money laundering and criminal gang activities. The Act clearly applies to cases of individual wrong-doing.”⁹¹ This writer is in agreement with this position. Moseneke DCJ declined to make a decision on the point as to whether the scope of the Act is designed to reach beyond racketeering, money laundering and criminal gang activities and apply to cases of individual wrongdoing, as it was not a question raised for consideration.⁹²

⁸⁹2004 (2) SACR 208 (SCA).

⁹⁰The long title is set at the head of the statute and gives a fairly full description of the general purpose of the Act, and the short title is simply the name of the statute for the purposes of ordinary reference and is usually found at the end of the statute, while the preamble sets out the main object of the Act; see Cockram *Interpretation of Statutes* 59 and 60. Van Heerden AJ, has not expressed her view on the question of whether organised crime includes individual activity or not.

⁹¹2007 (4) SA 222 (CC) at 235-236.

⁹²2007 (4) SA 222 (CC) at 264.

Legally speaking, there seems to be a relevant deficiency in the definition of organised crime and the application thereof. In the absence of a clear and unambiguous definition, the law could not be said to have paved a precise path to be followed. Blair states that the first step in tackling organised crime is to understand it.⁹³ Smith states that before an event can be labelled organised crime, the following questions must first be satisfied: is the activity unlawful?; is the unlawful activity organised?; is the organisation ethnically linked?; how can ethnic ties be charted as the basis of a putative conspiracy?; and what is known about the activity that would suggest how it might be interdicted or suppressed?⁹⁴ Until a legal position is unequivocally ascertained and understood in South Africa, many will continue to inculcate themselves by shouting organised crime where it does not dwell. It is expected that this research will close the gaps created by the lack of clarity.

1.3 CONCLUSION

The confusion pertaining to the existing descriptions and definitions and the indiscriminate use of the term “organised crime” clearly indicate that clarification regarding the exact meaning of this concept is needed. The understanding of this concept can only be achieved by analysing the theoretical foundation of the concept, ambit of the crime, international experience and the determination of the elements of the crime.

⁹³Organised Crime in Ontario 3 accessible at <http://www.torontopolice.on.ca/media/text/20070705-oacp-outoftheshadows.pdf> visited on 30 December 2007.

⁹⁴Smith *Mafia Mystique* 16-20.

CHAPTER TWO

THE THEORETICAL FOUNDATION OF ORGANISED CRIME AND THE HISTORICAL DEVELOPMENT OF THE CONCEPT

2.1 INTRODUCTION

The history of the concept of organised crime is unclear and the theories regarding the phenomenon tend to provide very limited solution to its understanding.⁹⁵ Organised crime is, as observed by Van Duyne, in many ways a strange concept. It is found in widely diverse contexts, being used as if it denotes a clear and well-defined phenomenon. It has constantly been redefined and contains all other kinds of implicit ideologies and myths. A review of the literature on organised crime creates doubt about the scientific usefulness of the concept.⁹⁶ Van Duyne concedes that it is difficult to relate the popular concepts and theories of organised crime to existing empirical evidence.⁹⁷ Some views suggest that the economic activities of these organising criminals can better be described from the point of view of crime-enterprises than from a conceptually unclear framework such as organised crime. The various views expressed point to the prevailing confusion of the phenomenon. Ultimately, his contention is that, instead of believing that mafia is a phenomenon typical of Sicily, which should be used only in reference to the Sicilian Cosa Nostra, it is a species of a broader *genus*, organised crime, and various criminal organisations - including the American Cosa Nostra, the Japanese Yakuza, and the Hong Kong Triads - belong to it.⁹⁸

⁹⁵Kelly *Organized Crime* 105.

⁹⁶Van Duyne *Crime-Enterprises* 55.

⁹⁷Existing empirical evidence refers to the reality of the existence of organised crime.

⁹⁸Van Duyne *Crime-Enterprises* 63. Fukumi states that the official name of Yakuza is Boryoku-dan meaning violence group; see Fukumi *The Yakuza* 99.

In order to have a better understanding of organised crime, it is imperative to first understand its origin and second, to understand the concept itself. Over the years, researchers and academics have embarked on discourses to establish the origin of organised crime as well as the concept itself. Unless one understands how these terms were created, one would not be able to understand the inconsistencies and contradictions of the meanings attached to the term organised crime. In this chapter, the origins of organised crime and the different models used in distinguishing organised crime from other criminal activities will be investigated.

2.2 THE ORIGIN OF THE CONCEPT OF ORGANISED CRIME

According to Fijnaut and Paoli, the term ‘organised crime’ originated in the United States (US) where it was used for the first time in 1896 in an annual report of the New York Society for Prevention of Crime. It was used to refer to gambling and prostitution operations that were protected by public officials.⁹⁹ Until the late 1980s, it was often stated that organised crime was considered a problem that concerned only a limited number of countries, primarily, the United States of America (USA) and Italy. Japan, China and Colombia were added later to the list.¹⁰⁰

⁹⁹Fijnaut and Paoli *Organised Crime Concepts* 22. Von Lampe agrees that this concept is an American invention, Von Lampe *Organized Crime in Europe* 403. The United Nations suggests that the term organised crime emerged in Chicago in 1919, see UNODC: *TOCTA* 25. The report can also be assessed <http://www.unodc.org/documents/data-and-analysis/TOCTA.Report-2010-low-res.pdf> last visited on 19 June 2011 and <http://www.unodc.org/documents/data-and-analysis/TOCTA1.The-Threat-Transnational-organized-crime.pdf> last visited on 19 June 2011. However, Tanfa’s submission that the concept of organised crime emerged first in the USA in the 1920s is not correct (Tanfa *Advance Fee* 13). This thesis is also accessible at <http://etd.unisa.ac.za/ETD-db/theses/available/etd-09272006-115222/unrestricted/thesis.pdf> last visited on 19 April 2009. Von Lampe and Woodiwiss argue that this is the period when there was more effort in finding a definition of the concept.

¹⁰⁰Fijnaut and Paoli *Organised Crime Concepts* 2.

Von Lampe states that the interest in the concept of organised crime and its historical development derives from the notion that, when we concern ourselves with organised crime we have to discuss two distinct properties, the reality of organised crime on the one hand and its conceptualisation on the other. According to him, the reality of organised crime consists of a myriad of mostly clandestine, diverse and complex aspects of society, which do not readily fall into place to form an easily identifiable entity. Furthermore, exploring the concept of organised crime, especially in its historical dimension, provides insight into the breadth and the depth as well as the inconsistencies and contradictions of the meanings attached to this term. It alerts us to some of the social and political factors that may play a role in shaping the perceptions of organised crime.¹⁰¹

According to Karatsou, the term 'organised crime' first came into regular use among the members of the Chicago Crime Commission in 1919.¹⁰² In the announcements of the Chicago Crime Commission, organised crime referred not to criminal organisations but in a much broader sense to the orderly fashion in which the so-called "criminal class" of an estimated 10 000 professional criminals in Chicago allegedly could pursue crime as a business. The discussion centered on the conditions, that seemingly allowed criminals to gain a steady income from crime, particularly property crimes, under virtual immunity from the law. In the eyes of the Crime Commission, the city government had to be blamed for incompetency, inefficiency and corruptness, while the public was criticised for indifference and even open sympathy towards criminals.¹⁰³ Others argue that the concept of

¹⁰¹Von Lampe *Concept of Organized Crime* paragraph 1 at <http://www.organized-crime.de/organizedcrimetheory.htm> last visited on 22 December 2007.

¹⁰²Katsarou *Organized Crime* 1. Chicago Crime Commission is a civic organisation created in 1919 by businessmen, bankers and lawyers to promote changes in the criminal justice system in order to better cope with the crime problem.

¹⁰³Von Lampe *Concept of Organized Crime* paragraph 3.1 at <http://www.organized-crime.de/organizedcrimetheory.htm> last visited on 22 December 2007, Von Lampe *Not Enlightenment* 103 and Katsarou *Organized Crime* 2.

organised crime was born in the USA in the 19th century.¹⁰⁴

The original understanding of organised crime did not prevail for long, but it changed significantly in the 1920s.¹⁰⁵ When the term 'organised crime' began to be used outside of Chicago, it functioned as a generic term in the criminal-policy debates that included both crime and criminal groups. By the mid 1930s, it was almost completely replaced by the somewhat narrower concept of racketeering.¹⁰⁶ Von Lampe contends that the term 'organised crime', which was referred to in the late 1920s and early 1930s, no longer referred to an amorphous criminal class but to gangsters and racketeers who were organised in gangs, syndicates and criminal organisations and followed big master criminals who functioned as powerful leaders of organised crime. Some of these leaders moved into the limelight and gained celebrity status as Public Enemies, most notably Al Capone.¹⁰⁷ Woodiwiss argues that, although the organised crime concept had been used since the late nineteenth century, serious efforts to define and discuss it as a distinct problem only began in the 1920s and 1930s.¹⁰⁸

The concept of organised crime faded from public debate from late 1930 to the end of the 1940s. Ryan contends that before World War II, criminal groups were not referred to as organised crime and indeed, no kind of crime was called organised crime. According to him, criminal organizations became to be known as the Mafia only after Tennessee Senator, Estes Kefauver, held congressional hearings in the

¹⁰⁴Madsen *Organised Crime* 13 and Fijnaut and Paoli *Organised Crime Concepts* 2.

¹⁰⁵The original understanding is the position where the concept meant a criminal group such as Mafia.

¹⁰⁶Organised crime is synonymous with a pattern of racketeering activity. See Smith *Mafia Mystique* 67 and Allsop *The Bootleggers* 24.

¹⁰⁷Von Lampe *Concept of Organized Crime* paragraph 3.2 at <http://www.organized-crime.de/organizedcrimetheory.htm> last visited on 22 December 2007. Joe Bonanno states that Capone means "a castrated male chicken". See also Fox *Blood and Power* 45.

¹⁰⁸Woodiwiss *Organized Crime* 227 and Woodiwiss *Dumbing Discourse* 2.

1950s.¹⁰⁹

In 1950, the Kefauver Committee¹¹⁰ was appointed to investigate organised crime in interstate commerce. The Committee concluded that numerous criminal groups throughout the country were tied together by a sinister criminal organisation known as the Mafia, which marked a significant change in the perception of organised crime in two respects. On the one hand, organised crime no longer appeared to be primarily a product of local conditions, but a problem that existed on a national scale that threatened municipalities from the outside. On the other hand, the notion of the Mafia as an organisation of Italian-Americans added an ethnic component to the concept, which sparked reactions to those who believe that ethnicity is not a defining aspect of organised crime.¹¹¹ Von Lampe argued that organised crime had become synonymous with a single ethnically homogeneous organisational entity. In his view, the concept of organised crime gained momentum in the 1960s in the USA and spread to Germany.¹¹²

The interest in organised crime and Mafia created by the Kefauver Committee, faded during the following years. Ryan's view is that, in 1957, a series of events, including criminal activities such as drug trafficking, brought organised crime back to center stage and eventually led to the merging of the two concepts of organised crime and

¹⁰⁹Ryan *Organized Crime Handbook* 42.

¹¹⁰The Chairman of the Committee was Senator Estes Kefauver of Tennessee. See also Lyman and Potter *Organized Crime* 24 and 24, Albanese *Organized Crime* 136-138, Roth *Organized Crime* 29, Fox *Blood and Power* 292 and Abadinsky *Organized Crime* 62-63.

¹¹¹See also Scherrer *Transnational Organized Crime* 25, Nelli *Business of Crime* 261 and Peterson *The Mob* 275.

¹¹²Von Lampe *Concept of Organized Crime* paragraphs 1 and 3.4 at <http://www.organized-crime.de/organizedcrimetheory.htm> last visited on 22 December 2007. The image of the Mafia as an Italian-American organisation was not quite as new as it had first appeared in 1890 when the chief of police of New Orleans was murdered by alleged Mafiosi, see Nelli *Business of Crime* 31 and 47.

Mafia in 1960.¹¹³ Correspondingly, O’Kane states that the Italians in the USA increasingly took over all the major rackets by the late 1950s. He concluded that the public viewed organised crime and Italian Mafiosi as identical entities and that congressional committees, law enforcement agencies and the mass media did everything to reinforce this stereotype during the 1960s and 1970s.¹¹⁴

The Federal Bureau of Investigations (FBI) completely resented (disliked) the concept of organised crime before 1963. Its head, Hoover, had not only refused the notion of an Italian-American Mafia, but also criticised concepts of syndicates and criminal organisations as a dominant factor in crime.¹¹⁵ In the first 38 years of tenure of Hoover in office, he not only publicly denied the existence of the Mafia or other nationwide crime syndicates in the USA, but bitterly opposed investigation of organised crime by Senator Estes Kefauver and Anslinger.¹¹⁶ According to Poveda, Hoover was especially embarrassed by the national publicity surrounding the discovery of the Apalachin meeting since he repeatedly denied the existence of the Mafia or a national organised crime syndicate.¹¹⁷ Hoover chose to launch a dramatic, publicity-laden campaign against isolated Midwestern bank robbers and kidnappers while leaving federal officials to themselves to contend with the more perplexing fight against organised crime and racketeering to state and local

¹¹³Ryan *Organized Crime Handbook* 42. See also Robinson *The Merger* 33.

¹¹⁴O’Kane *Crooked Ladder* 76.

¹¹⁵Von Lampe *Concept of Organized Crime* paragraph 3.2 at <http://www.organized-crime.de/organizedcrimetheory.htm> last visited on 22 December 2007. Compatibly, Southwell states that in 1957, Hoover did not believe in the existence of Mafia (Southwell *History of Organized Crime* 38). Carl Sifakis agrees that Hoover denied the existence of Mafia (Sifakis *Mafia Encyclopedia* ix). Equally, Robinson states that Hoover maintained his long-standing position that there is no persuasive evidence that a national crime syndicate exists (Robinson *The Merger* 34).

¹¹⁶Newton *The FBI* 256 and Newton *Chronology of Organized Crime* 138. Aslinger was the Director of the Bureau of Narcotics. Newton states that in 1955, Hoover assigned a team of FBI agents to determine and document the nonexistence of organised crime.

¹¹⁷Poveda *Controversies and Issues* 120. Apalachin meeting is refers to a meeting of the members of organised criminal group who met at a place called Apalachin.

authorities.¹¹⁸

History is not very helpful in understanding organised crime. The weakness of the use of the historical concept of organised crime lies in the fact that it leads to a very broad definition, one that could even be applied to an individual criminal, as long as someone else knowingly contributes to his criminal conduct.¹¹⁹ The Mafia concept of organised crime that had evolved during the 1950s and 1960s, and had largely been the result of a focus on New York City, proves this point.¹²⁰ Despite the tremendous impact of the Mafia concept on public perception, the concept soon proved unsuitable for devising valid law-enforcement strategies for the entire US. After rejecting a proposal to outlaw membership in the Cosa Nostra, the Congress passed the Racketeering Influenced and Corrupt Organisations Statute (RICO),¹²¹ hereafter referred to as the RICO, with an extremely broad underlying concept of organised crime.

While some members of the Federal Organised Crime Strike Forces¹²² defined organised crime as including only Cosa Nostra members, others had correctly included any group of two or more persons formed to commit a criminal act.¹²³ This resulted in the emergence of the concept of non-traditional organised crime, which transferred the Mafia model to other ethnically defined criminal organizations similar to the Cosa Nostra, such as East-Asian, Latin-American and Russian groups, outlaw-motorcycle gangs and the so-called prison gangs now referred to as

¹¹⁸Moore *The Kefauver Committee* 16.

¹¹⁹Von Lampe *Concept of Organized Crime* paragraph 2.4 at <http://www.organized-crime.de/organizedcrimetheory.htm> last visited on 22 December 2007.

¹²⁰This means that the concept of organised crime meant the Mafia.

¹²¹Title 18 of the United States Code, Section 1961 of 1970.

¹²²The Units were established in different cities since 1967.

¹²³Von Lampe *Concept of Organized Crime* paragraph 3.5 at <http://www.organized-crime.de/organizedcrimetheory.htm> last visited on 22 December 2007.

international organised crime.¹²⁴ According to Adamoli, the passing of RICO was largely triggered by the looming threat represented by Italian-American organised crime.¹²⁵

In order to clear the ambiguity surrounding organised crime, the USA President's Commission on Organised Crime concluded that drug trafficking was the single most serious organised crime problem in the USA and the largest source of income for organised crime thereby describing organised crime as drug trafficking.¹²⁶ This view follows the submission by Chambliss that crime is a political phenomenon based on the research on state-organised crime where state engage in crime, such as the involvement of the USA support of cocaine trafficking in Vietnam, Laos, Cambodia and Thailand.¹²⁷

2.3 THEORETICAL FOUNDATION OF ORGANISED CRIME

2.3.1 Introduction

Cockayne concedes that there is neither a unified nor a definition with which everyone agrees as either organised crime or transnational organised crime.¹²⁸ He argues that, it is possible to delineate three broad, overlapping conceptions. These conceptions are described as follows:

¹²⁴Von Lampe *Concept of Organized Crime* paragraph 3.6 at <http://www.organized-crime.de/organizedcrimetheory.htm> last visited on 22 December 2007.

¹²⁵Fijnaut and Paoli *Organised Crime Concepts* 6.

¹²⁶*Id* n 125 *supra* at 29.

¹²⁷This is based on the supposition that the soldiers who were based in Vietnam were involved in drug trafficking. Chambliss defines state-organised crime as acts committed by state or government officials in the pursuit of their job as representatives of the government (Chambliss *State-Organized Crime* 204). See also Lyman and Potter *Organized Crime* 321.

¹²⁸See <http://www.ipacademy.org/publications/policy-papers> last visited on 21 January 2008.

1. Organised crime is a set of activities, which may be undertaken by any actor or entity, whether economic or political, private or public.
2. Organised crime is a set of hierarchically-organised entities, conducting diverse commercial activities unified by their underlying business model, which is the protection racket. This description is often based on an analysis of the USA and Italian experiences with the Mafia.
3. Transnational organised crime is agnostic as to whether organised crime is properly understood as an activity or entity, instead suggesting that international concern with organised crime should be triggered whenever it has transnational effects.¹²⁹

Cesoni observed that there is a tendency to offer an all-embracing definition of organised crime, making it into a somewhat vague concept which can be used to cover a multitude of sins.¹³⁰ After analysing the definition of organised crime by the European Union, Bay concludes that the emphasis placed on organizational relationships and the seriousness of the crime, result in definitions or categorisations that are unable to distinguish between organised crime and other forms of collective criminality that are organised, such as gang crime, white collar crime and organisational crime.¹³¹ His view is that, instead of defining organised crime as an independent and distinctive form of crime, organised crime has become a catch-all term for a number of serious crimes that already have other designations. He finally concludes that the term 'organised crime' as a concept is inappropriate and should actually be avoided.¹³²

¹²⁹Cockayne *Response to a Rising Threat* 2. See <http://www.ipacademy.org/asset/file/159/CWC-working-paper-organized-crime-JC.pdf> last visited on 22 January 2008.

¹³⁰Cesoni *Mafia-Type Organizations* 157.

¹³¹Bay *Definitions of Organized Crime* 20-34.

¹³²*Id* n 131 *supra* at 31.

Regrettably, avoidance offers no solution. Similar sentiments were raised by Levi who states that it has become commonplace to observe that the term organised crime is frequently used but difficult to define, shifting as it does between discourse about activities- as in the term crime- and discourse about evil associations, as refracted through the common usage of the term Mafia. Accordingly, organised crime is generally applied to describe a group of people who act together on a long-term basis to commit crimes for gain. His emphasis is on the importance to separate the distinction between structures of association and structures of activity.¹³³

Attempts to understand organised crime has brought about various approaches to the subject. The network approach, as viewed by Von Lampe, proved unattractive to the media, as it did not gain widespread popularity before 1980 when the image of foreign crime syndicates such as the American Cosa Nostra and the Sicilian Mafia resurfaced as the center of attention. Paradoxically, the original perception in the 1960s was abandoned in favour of a belief that Mafias exist in Germany. Regardless of the image of imminent threat by foreign Mafias to German society as perceived by the media, politicians and police officials, the day-to-day police work continued to be based on a very broad and vague concept. The current official definition of organised crime in Germany, which dates back to 1990, requires not much more than the continuous co-operation of three persons. He concludes that the German debate on organised crime appears to have come full circle in the 1990s by going back to the Mafia oriented conception of the 1960s, without completely abolishing the broad concept of organised crime that had been tailored to suit domestic crime networks during the 1980s.¹³⁴ It is therefore important to analyse the approaches followed by various experts in this attempt to understand the subject.

¹³³Levi *Reflections on Murky Waters* 5.

¹³⁴Von Lampe *Concept of Organized Crime* paragraphs 4.3 and 4.4 at <http://www.organized->

2.3.2 Selected theories of defining and researching organised crime

The concept of organised crime may be better understood by using models or theories. Theory acts as an educational device that creates insights into criminal phenomenon.¹³⁵ According to Lyman and Potter, various organised crime theories have been presented over years in order to help social scientists better understand the phenomenon.¹³⁶ They have identified eight theories, namely, the Organised Crime's Contingency Model, Ianni's Kinship Model, Haller's Partnership Model, Cressey's Cosa Nostra Theory, Albin's Patron-Client Theory, Smith's Enterprise Theory, Chambliss's Crime Network Theory and Block's Description of Enterprise and Power Syndicates.¹³⁷ However, it should be noted that there are just as many models as writers on the subject of organised crime.¹³⁸

crime.de/organizedcrimetheory.htm last visited on 22 December 2007.

¹³⁵Gottschalk *Policing Organized Crime* 1.

¹³⁶Lyman and Potter *Organized Crime* 42.

¹³⁷*Id* n 136 *supra* at 44-45.

¹³⁸The other theories that are not discussed here include Von Lampe's Criminally Exploitable Ties, see Von Lampe *Criminally Exploitable Ties* 10-11; Van Dijck's lexical approach, essential approach and formalist approach, see Van Dijck *Definitions of Organised Crime* 72, Schelling *Organized Crime* 71 and Van Dijck *Definitions of Organised Crime* 72, 73 and 75-76; Albanese's 10-factor model, see Mackenzie *Criminal and Criminal Market* 75-76; Van Duyne's Theory, see Van Duyne *Organized Crime* 7; Shelling's Model, Firestone's Corporate Model ("Godfather model"), Feudal Model, Lombroso's Atavism Theory, Durkheim's Anomie Theory, Cloward and Ohlin's Differential Opportunity Theory, Merton's Strain Theory, Sellin's Culture Conflict Theory, Sutherland's Differential Association Theory and Rationale Choice Theory, see Marion *Organized Crime* 21-23, Beare *Criminal Conspiracies* 53-54, Wright *Organised Crime* 2, Liddick *Overview of Organized Crime* 49 and 193, Firestone *Mafia Memoirs* 76, Naylor *Crime War* 51, Mallory *Organized Crime* 35-39, Lyman and Potter *Organized Crime* 42 and Abadinsky *Organized Crime* 19. See also <http://www.megaessays.com/essay-search/anomie-theory.html> last visited on 22 November 2008, <http://en.wikipedia.org/wiki/Differential-association>, see also <http://en.wikipedia.org/wiki/Rational-choice-theory> last visited on 22 November 2008, <http://www.exampleessays.com/essay-search-association-theory.html> last visited on 22 November 2008, <http://www.hewett.norfolk.sch.uk/curric/soc/crime/diff-opp-htm> last visited on 22 November 2008, <http://www.hewett.norfolk.sch.uk/CURRIC/soc/crime/mert-str.htm> last visited on 22 November 2008, <http://www.umsl.edu/~keelr/200/culflic.html>, and <http://stmarys.ca/~evanderveem/wvd/classical-crm-theory/sellin.htm>, and <http://teffendi-kriminologi.blogspot.com/2006/11/kriminologi-kritis-marx-ist-criminology.html> last

The theories provided by Potter and Lyman are briefly described as follows:

1. Organised Crime's Contingency Model

This model emanates from the President's Commission on Organized Crime (PCOC) of 1986. It provides a clear delineation of levels of involvement of members and non-members of organised crime that includes criminal groups, the protectors, specialised support, user support and social support.¹³⁹

2. Cressey's Cosa Nostra Theory

This theory, which is in recognition of the work done by Cressey, adopts a "bureaucratic" structure as a point of departure. The theory developed when Cressey stated that criminals have managed to put together an organisation, which is at once a nationwide confederation in the USA.¹⁴⁰ He stated further that a pervasive organisation of criminals called the Mafia has dominated almost all aspects of life in the western part of the Island of Sicily. According to him, in the beginning of the twentieth century, thousands of Sicilians immigrated to America, bringing with them the customs of their own homeland that included psychological attitudes toward a wide variety of social relationships.¹⁴¹ He further submits that La Cosa Nostra is the hierarchical family which embodies male members of Italian

visited on 22 November 2008.

¹³⁹Lyman and Potter *Organized Crime* 42. This Commission was established under President Reagan's administration.

¹⁴⁰*Id n 1 supra* at 1.

ancestry that represent the boss, the *consigliere* (close associate) or counselor, the underboss, the *caporegime* and the soldiers.¹⁴²

According to Albin, two models seek to describe and explain the structure and function of organised crime in the USA, the traditional model and the governmental conceptualization that has come to be known as the Cressey Model.¹⁴³ Rogovin and Martens defend Cressey's model as visionary, not all-inclusive but as having stood the test of time.¹⁴⁴ This view is based on the fact that the model was designed many years before various models were identified, hence the comparison with a foresight or vision. Lupsha concludes that Cressey is a proponent of organization, hierarchy and structures as a perspective to approach organised crime.¹⁴⁵

Standing describes hierarchy as a model developed by Cressey, which is based on a formal, bureaucratic and rational entity based on the division of specific roles. He states that Cressey offered several typologies of crime organizations based on the existence of specific positions or jobs.¹⁴⁶ Various authors call this model "bureaucratic", "national conspiracy" or "corporate".¹⁴⁷

In my view, the assertions by Standing are not geared to distinguish between criminal organisation and organised crime. This argument is premised on the incorrect ideology that an organised criminal group constitutes organised crime. The erroneous quotation of the definition of an 'organised criminal group' as that of

¹⁴¹*Id* n 1 *supra* at 8.

¹⁴²Lyman and Potter *Organized Crime* 45. Van Duyne *Organized Crime* 6 criticizes this model on the basis that it was founded on the scanty evidence of an unreliable witness.

¹⁴³Albin *Cressey's Contributions* 16.

¹⁴⁴Rogovin and Martens *The Evil* 36. Kelly considers this theory a powerful descriptive device, *Kelly Folds of Discourse* 46.

¹⁴⁵Lupsha *Individual Choice* 105.

¹⁴⁶Standing *Rival Views* 3.

¹⁴⁷Albanese *Models of Organized Crime* 78-79.

‘organised crime’ supports this view.¹⁴⁸ This confusion reigned before, during and after the United Nations Convention Against Transnational Organised Crime (2000), hereafter referred to as the Palermo Convention.¹⁴⁹ Finckenauer and Waring point out correctly that, one of the assumptions followed in assessing organised crime is that a criminal organisation is not synonymous with organised crime.¹⁵⁰

3. Albini’s Patron-Client Theory

This theory explains organised crime as criminal patrons who exchange information, have connections with government officials and access to a network of operatives for the client’s economic and political support. This reflects a simple social organisation or social-exchange network in the community that can be formed, dissolved and re-formed with new actors. This crime organization is actually syndicated in a loose system of a power relationship.¹⁵¹ The patron is the individual who has achieved a power position where he can grant favours to those beneath him in the underworld. He also serves as a client to those legal power sources who can offer him protection in return for his pay-off or services.¹⁵²

Kelly interprets Albini’s models as an evolutionary-centralisation model and developmental-associational model. An evolutionary-centralisation model assumes

¹⁴⁸*Id* n 146 *supra* at 66 and Standing *Organised Crime* 180.

¹⁴⁹Palermo Convention refers to the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (United Nations New York 2002) (UNODCP *Protocols*). This Convention was signed and ratified/accepted/approved/accented by Italy, South Africa, Tanzania and the USA on 12-12-2000: 02-08-2006, 14-12-200: 20-02-2004, 13-12-2000: 24-05-2006 and 13-12-2000: 03-11-2005 respectively.

¹⁵⁰Finckenauer and Waring *Crime that is Organized?* 139-140. This statement demonstrates subscription to the notion that organised crime refers to a group as opposed to crimes committed by such a group. However, their argument results in a more distinctional confusion when they state that there can be organised crimes without there being an organised crime.

¹⁵¹Lyman and Potter *Organized Crime* 47-48, Smith *Illicit Enterprise* 127 and Hagan *Criminology* 493.

that organised crime in the USA derives from the Mafia which is an alien conspiracy of Sicilian origin, while a developmental-associational model sees organised criminality as emerging out of social and economic conditions prevailing within American society at specific periods in history.¹⁵³ The essence of Kelly's explanation is that events may have transformed its character, but the organizational core remains intact. While this does not deny the existence of Mafia or Cosa Nostra, it asserts them as one of the types of criminal organization among numerous others. Roth points out that the key ingredient of this model is the word "organized" which distinguishes organised crime from other types of crime.¹⁵⁴

4. Smith's Enterprise Theory

This theory describes organised crime as an enterprise or a business.¹⁵⁵ This entrepreneurial conception entails that organised crime is nothing more than an extension of normal business operations into the illegal market. This theory conceives organised crime simply as entrepreneurial activity that happens to be illegal.¹⁵⁶ It needs to be noted that Smith has indicated that there is a shift from organised crime to an illicit enterprise, which is a business that conducts illegal activities.¹⁵⁷ He is supported by Mahan who argues that the concept of organised crime may have been overused, hence the choice of the term illicit enterprise.¹⁵⁸

According to Carter, the movement toward viewing organised crime as enterprise crime came about because of its market-driven nature, which suggests that any

¹⁵²Albini *The American Mafia* 258.

¹⁵³Kelly *Folds of Discourse* 50.

¹⁵⁴Roth *Organized Crime* 5.

¹⁵⁵Abadinsky *Organized Crime* 3, Smith *Illicit Enterprise* 130 and Mallory *Organized Crime* 40-42.

¹⁵⁶Lyman and Potter *Organized Crime* 49.

¹⁵⁷Smith *Mafia Mystique* 335 and Smith *Organized Crime* 64.

¹⁵⁸Mahan *Beyond the Mafia* 1. Illicit enterprise refers to illegal business.

commodity for which a profit can be earned is open to organised crime.¹⁵⁹ Marion argues that this theory is a system where the legitimate marketplace leaves potential customers for goods and services unserved or unsatisfied. Such a high level of demand for goods or services, combined with a relatively low risk of arrest and with high profits, provides the ideal condition for crime.¹⁶⁰ The implication of Smith's theory is that the proper point of intervention for controlling organised crime is not to pursue organizational leaders and notorious individuals but to attempt to understand organizational behaviour in the illegal market.¹⁶¹

5. Ianni's Kinship Group Model

Ianni argues that organised crime is nothing more than a traditional social system, organised by action and by cultural values that have nothing to do with modern bureaucratic virtues. His assertion is that there is no formal organization or confederation of Italo-American in organised crime called Mafia, Cosa Nostra or anything else.¹⁶² He maintains that organised crime can best be explained by examining local kinship or ethnic social networks and not a structure apart from their functioning, nor a structure independent of their current personnel.

Ianni adds three conditions to his theory, namely: (1) that organised crime is not limited to Italian-American crime syndicates; (2) that prison friendships, gang associations and community socialisation process are as important as ethnicity to organised crime's recruiting; and (3) ethnic succession which entails that every new immigrant group faces discrimination, lack of economic opportunity and blocked pathways to power. In order to overcome these blocked opportunities, these

¹⁵⁹Carter *Organized Crime* 137. See also Liddick *Overview of Organized Crime* 208.

¹⁶⁰Marion *Organized Crime* 23.

¹⁶¹Lyman and Potter *Organized Crime* 49.

¹⁶²Ianni *The Web of Kinship* 55.

immigrants become part of organised crime because of its profitability and its close relationship with political power.¹⁶³ Liddick rejects the perception that ethnicity is the key element in understanding the structure, functioning and membership guidelines of criminal organizations.¹⁶⁴ According to him, it is a myth.

6. Chambliss's Crime Network Theory

This theory depicts organised crime as an overlapping series of crime networks with shifting memberships highly adaptive to the economic, political and social exigencies of the community, without a centralised system of control. Chambliss views organised crime as a network of individuals, the most powerful of whom are business-people, law enforcement officials and political officeholders who direct the activities of criminal actors involved in prostitution, gambling, pornography¹⁶⁵ and drugs. He finds organised criminals to be more appropriately the employees of the crime network participants.¹⁶⁶

7. Haller's Partnership Model

Haller sees organised crime as a series of small-scale business partnerships, usually involving several senior partners and many junior partners who sometimes conduct business in concert with one another and often separately.¹⁶⁷ In explaining this model, Haller states that if we do not look at the structure and functions of the

¹⁶³Lyman and Potter *Organized Crime* 49 and Ianni *Family Business* 108.

¹⁶⁴Liddick *Overview of Organized Crime* 20.

¹⁶⁵Longino *Pornography* 85 defines pornography as verbal or pictorial explicit representations of sexual behaviour that have as a distinguishing characteristic "the degrading and demeaning portrayal of the role and status of the human female...as a mere sexual object to be exploited and manipulated sexually". Russel defines pornography as material that combines sex and/or the exposure of genitals with abuse or degradation in a manner that appears to endorse, condone or encourage such behaviour, see Russell *Introduction* 2-3.

¹⁶⁶Lyman and Potter *Organized Crime* 49-50. See also Chambliss *On the Take* 61 and 74.

¹⁶⁷Lyman and Potter *Organized Crime* 50 and Haller *Illegal Enterprise* 209.

families, but instead at the money-making activities of the members, we find a markedly nonbureaucratic world compared with the legitimate economy. Members own and operate their businesses independent of the family as independent entrepreneurs.¹⁶⁸

8. Block's description of Enterprise and Power Syndicates

Block describes organised crime as more centralised and exhibiting a greater degree of hierarchical structure. He found that organised crime was dominated by two types of criminal syndicates in the form of enterprise and power syndicates. The characteristics of enterprise syndicates being large in number, hierarchy command, centralised authority and well defined division of labour. Concerning the power syndicates, they are loosely structured, extraordinarily flexible associations centred on violence and deeply involved in the production and distribution of informal power.¹⁶⁹

Reflecting on theory, Albanese has closely linked the notion of models of organised crime to a threefold classification, which are a "hierarchical model", a "local, ethnic" or "patron-client model" and an "enterprise model" of organised crime. Respectively, these models center on the view of the American Cosa Nostra as a nationwide bureaucratic organizational entity, conceptualisation of the Cosa Nostra as a web of asymmetric ties embedded in local or ethnic networks, economic activities and the primacy of market forces over group structures.¹⁷⁰

Standing states that those interested in the subject of organised crime have been somewhat obsessed with a definitional debate. In order to understand the concept

¹⁶⁸Haller *Bureaucracy* 55.

¹⁶⁹Lyman and Potter *Organized Crime* 50.

of ‘organised crime’, he asks a critical question as to how can crime be organised. He bases his approach on four models which were developed by scholars concerned with analysing the co-ordination of social life in general. These models are: hierarchy (bureaucratic), networks, markets and clans.¹⁷¹

When analysing the four models of Standing, it is clear that they are actually focussed on a structure. He states that hierarchy is defined by vertical division of roles, authority by rules, specialisation, departmentalisation and impartiality, whereas a network is rather considered as a flat, flexible and informal approach to co-ordinating social (or specifically criminal) life. He argues that networks denote interconnectedness between essentially independent entities.¹⁷² Regarding market models, he states that a market operates on the basis of competition by independent units (firms or people) that strive for survival and profit and in doing so naturally compete with each other.¹⁷³ By clans, he refers to criminal gangs and membership based on clans like Mafia-type associations where brotherhood is adhered to.¹⁷⁴ It is the view of this author that Standing is advocating structuralism that makes him a follower of those who subscribe to the notion of an organised criminal group as organised crime.

The South African situation appears to be correctly mirrored by Von Lampe who argues that the first step in the construction of an analytical model of organised crime is to determine what aspects of the social universe to include. This is not so much a definitional question than a matter of tentatively marking out a field of study. In the absence of a generally accepted, authoritative definition of the term “organised crime”, the only inclusive approach seems to be one which outlines the

¹⁷⁰Albanese *Organized Crime* 104-119.

¹⁷¹*Id* n 146 *supra* at 1 and 3.

¹⁷²*Id* n 146 *supra* at 7.

¹⁷³*Id* n 146 *supra* at 9.

field of study by the scope of the public and scientific debate. His conclusion is that, organised crime is what people so label. This includes just about any kind of co-operation for the rational, that is non-impulsive, commission of illegal acts, regardless of the social status or the motives of the perpetrators. Accordingly, the elements of the model should be selected with a view to those factors that either represent or significantly influence the emergence and continued existence of patterns of criminal co-operation for the rational commission of criminal acts.¹⁷⁵

Von Lampe believes that analytical modelling schemes have two advantages for the study of organised crime. Firstly, they correspond much more to the complexity and multi-dimensionality of the structures, events and processes that are lumped together under the term “organised crime”. Secondly, they better fulfil the present needs of organised crime research.¹⁷⁶ He argues that any meaningful model of organised crime has to include six basic elements - three representing what has variously been labelled organised crime and three elements representing environmental factors. The three core elements representing what has been labelled organised crime are the following: the actors who co-operate in rational, non-impulsive criminal activities; the structures that connect these actors; and the criminal activities in which these actors are involved. The three elements representing environmental factors are: society, government, and the realm of public discourse, that is the media. He refers with approval to John Landesco’s view that there is no organised crime without organised criminals, and these organised criminals are, at least in part, a product of their social environment.¹⁷⁷ This writer cannot agree more with this argument.

¹⁷⁴*Id* n 146 *supra* at 12.

¹⁷⁵Von Lampe *Models of Organized Crime* 195.

¹⁷⁶*Ibid* n 175 *supra*.

¹⁷⁷Landesco *Chicago* xi.

2.4 CONCLUSION

The analysis of the different models leaves one with the two mainstream categorisations, namely organised criminal group and organised crime. On the one hand, organised crime seems to refer to an act that is a specific set of crimes such as gambling, prostitution, drug trafficking, extortion and counterfeiting; while on the other hand, it can also be used to refer to a group or organization such as Mafia, Triads, Cosa Nostra, Yakuza, Organizatsiya or other secret societies.¹⁷⁸ Adamoli contends that the essential characteristics of the term organised crime is that it denotes a process or method of committing crimes, not a distinctive type of crime itself, nor even a distinct type of criminal.¹⁷⁹

There are as many models and theories of organised crime as there are authors. There is neither a flawlessly correct model nor an utterly wrong model. Almost all these models fail on the requirement of pattern, which is needed in South Africa. This writer does not subscribe to any of these models because his view is that organised crime is an activity based on structure and crime. The arguments by Boronia, Standing, Von Lampe and Van Dijck above are persuasive and can be modified to suit the South African situation.

Having observed the different approaches to organised crime and the fact that South Africa has not yet settled on any of the said approaches, this writer approaches it as a “criminal contract”. It is a contract in terms of which criminals agree to generate profit by repeatedly committing certain types of crimes. Strangers are not welcome and the terms are self-enforceable. With this in mind, to penetrate organised criminal groups, one has to, with an extra advantage of added secrecy

¹⁷⁸Leong *International Organised Crime* 8.

¹⁷⁹Adamoli *et al Around the World* 4.

and knowledge, think, act and operate likewise. Only when one has insight of the inside, will one then be able to cause the dismantlement. The writer therefore concludes that a composite model consisting of enterprise, activity and commodity can better suit the South African situation.

CHAPTER THREE

DEFINITION OF ORGANISED CRIME

3.1 INTRODUCTION

Organised crime is a most elusive and perplexing concept to define.¹⁸⁰ The inherent aim of a definition is to provide greater clarity in our understanding but the precise nature and practice of definitions themselves elude clear understanding.¹⁸¹ In any discussion about organised crime, the first question that always arises is what constitutes organised crime. Fijnaut and Paoli asked two pertinent questions, which are still relevant today, that is, where does organised crime begins and what are the specifics¹⁸² *vis-a-vis* other forms of serious crime,¹⁸³ a view which is shared by Redpath.¹⁸⁴ Gastrow points out that it is very difficult to distinguish white-collar crime and commercial crime in which a number of people participate, from organised crime.¹⁸⁵

Bassiouni and Vetere describe organised crime as the label given to a criminal phenomenon represented by certain groups engaging essentially in violent and profit-motivated criminal activity.¹⁸⁶ According to Cowling, the fact that organised

¹⁸⁰Ianni and Reuss-Ianni *The Crime Society* 1.

¹⁸¹Halpin *Definition in Law* 187.

¹⁸²Specifics refer to special characteristics that distinguish this crime from other forms of serious crimes.

¹⁸³Fijnaut and Paoli *Organised Crime Concepts* 7. They argue that, if organised crime is understood as a set of criminalised profit making activities, how does it then differs from enterprise crime. If instead it involves groups of criminals, what is the minimum number of individuals necessary in a group or network to apply the label of organised crime?

¹⁸⁴Redpath *The Scorpions* 18.

¹⁸⁵Gastrow *Penetrating* I ix.

¹⁸⁶Bassiouni and Vetere *Organized Crime* xxvi. Andre Standing and Liddick differ with the suggestion that the fight against organised crime was started in 1975, because according to

crime and criminal gangs by their nature are difficult to define, contributes to the absence of a universally acceptable definition.¹⁸⁷

Van Duyne describes organised crime as a way of doing business by systematically using criminal methods, which imply a fundamental disrespect for the rules, which govern the economic and social fabric of society. He further explains that it is not restricted to class or certain criminal or social areas. It concerns trade in goods and services for which there is a demand, albeit these goods and services are forbidden and/or are offered cheaply because the costs of doing business are reduced by criminal fraudulent methods.¹⁸⁸

Marion prefers the term crime venture and defines it as a criminal activity carried out by a particular group of criminals on a regular basis. She cites examples of truck hijackings where members who have ties to syndicates, access skilled labour to carry out the job called outlets where they can get rid of stolen property.¹⁸⁹ Crime venture, which is a criminal undertaking, appears to be close to what would be called organised crime in South Africa. Opolot points out that anyone who attempts to define the elusive concept of organised crime will be faced with a host of conceptual traps and obstacles. His conclusion is that many people, including researchers, police and the average person do not have an understanding of the

them, President Herbert Hoover of the 31st USA (1929-1933) was already involved in the fight against organised crime in 1929 and observation in 1920 respectively; see Standing *Rival Views* 25 and Liddick *Overview of Organized Crime* 36 as well as <http://www.whitehouse.gov/history/presidents/hh31.html> last visited on 29 September 2007.

¹⁸⁷Cowling *Organised Crime* 350. See also Tanfa *Advance Fee* 13, who quotes Reid by stating that organised crime has been considered a problem throughout the century, and no universally accepted definition of the term has been established.

¹⁸⁸Van Duyne *Organised Crime* 1-2.

¹⁸⁹Marion *Organized Crime* 5. Rhodes, *Organized Crime* 25, define venture as a one-time criminal episode like robbing a bank, burglarising a series of homes or hijacking of trucks.

nature, concept and the definition of organised crime.¹⁹⁰

Williams and Savona, whose views are supported by Goredema, Adamoli and Ruggiero, state that the term organised crime has long been a source of controversy and contention, probably because of the different ways in which various features of the problem are approached.¹⁹¹ They submit that experts are also concerned, however, with more controversial issues such as the size, structure and cohesion of criminal organisations. They conclude by saying that, on one end of the spectrum are those who see organised crime in terms of large hierarchical organizations 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, the real power and effectiveness of organised crime are 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.¹⁹²

It is clear that it is difficult to agree on and define the essence of organised crime. Various definitions, which are neither predominantly correct nor totally erroneous as measured in terms of the jurisdictions they represent, will be analysed and discussed in this chapter.

¹⁹⁰Opolot *Organized Crime* 18. Lee concurs that organised crime is an elusive phenomenon, Lee III *Organized Crime* 1. This is in compatible with the view of Rhodes who points that organised crime is a slippery concept, a view that is further shared by Tambulasi and Treverton, see Rhodes *Organized Crime* 4, Tambulasi *Corruption and Organised Crime* 20 and Treverton *Market State* 50. In enjoining this view, Kelly states that organised crime is essentially protean in character, see Kelly *Organized Crime* 383.

¹⁹¹Williams and Savona *Transnational Organized Crime* 3. See also Goredema *Organised Crime* 6, Adamoli *et al Around the World* 4 and Ruggiero *Organised Crime* 141.

¹⁹²Williams and Savona *Transnational Organized Crime* 3 and 4.

3.2 A DEFINITION OF ORGANISED CRIME

It is suggested that the definitions of 'organised crime' can be divided into two mainstream models, namely:

- A structural model that is based on the view that an organised criminal group is the definitive element of organised crime.
- A crime model, which is based on the view that organised crime refers to an act or acts committed by either an individual or group.

Obokata simply states that there are two main ways to understand organised crime which is either, a set of actors, or a set of activities.¹⁹³ Standing subscribes to the notion that the definition of an organised criminal group is basically the same as that of organised crime. His contention implies that the definition of an organised criminal group by the Palermo Convention of 2000 *supra*, is also the definition of organised crime. He further argues in support of Smith that the term illicit enterprise seems far more attractive than the muddled concept of organised crime.¹⁹⁴ The basis of this argument is that a perspective that focuses on criminal activities rather than on the nature of offenders will highlight a continuum in business.

The question that Standing has not addressed is how an organised criminal group can be a crime. This is important as it distinguishes an organised criminal group, which is a perpetrator of an act and an activity, which is a crime and in this regard organised crime. This writer is unable to agree with the notion of labelling an organised criminal group as organised crime.

Given the intrinsically political nature and function of the concept organised crime,

¹⁹³Obokata *Transnational Organised Crime* 14.

there is very little chance that there will ever be a commonly or broadly accepted definition of organised crime.¹⁹⁵ Goredema supports this view.¹⁹⁶ Southwell states that it is surprising to find that authorities experience difficulties in tackling transnational criminal organizations (TCO). Law enforcement and other agencies are even in the 21st century not able to agree on a single definition of what organised crime is.¹⁹⁷ In the same vein, Wright, Madsen and Hobbs all agree that organised crime has proved difficult to define in terms that satisfy all parties.¹⁹⁸ Wright concludes that there are as many definitions of organised crime as there are people with interest in the subject.¹⁹⁹ Van Duyne argues that the core task of a definition is to determine the boundaries of something. It must therefore determine the beginning and the end of a phenomenon including a description.²⁰⁰

Rhodes, Maltz, Vermeulen, Van Damme and De Bondt admit that there is a lack of common understanding of organised crime in the dozens of definitions.²⁰¹ However, researchers of this subject must keep the observation of Aromaa in mind, when he states that definitions and measurements are of course not irrelevant, but that to require perfection from them may be counter-productive.²⁰² In this chapter, consideration shall be given to the United Nations, African Union, Southern African Development Community and conclude with the position on the definition of organised crime in South Africa.

¹⁹⁴Standing *Rival Views* 66. See also Liddick *Overview of Organized Crime* 33.

¹⁹⁵Van Dijck *Definitions of Organised Crime* 88. See also <http://www.humsec.eu/cms/fileadmin/user-upload/humsec/Journal/Van-Dijck-OC-Definitions.pdf> last visited on 30 August 2010.

¹⁹⁶Goredema *Organised Crime* 6.

¹⁹⁷Southwell *History of Organized Crime* 6.

¹⁹⁸Wright *Organised Crime* 2, Madsen *Organized Crime* 14 and Hobbs *The Firm* 230.

¹⁹⁹Wright *Organised Crime* 2.

²⁰⁰Van Duyne *Medieval Thinking* 24.

²⁰¹Rhodes *Organized Crime* 31, Maltz *Development of Definition* 68 and Vermeulen, Van Damme and De Bondt *Organised Crime* 36.

²⁰²Aromaa *Trafficking in Human Beings* 15. This view suggests that, one can still fight the scourge without a perfect definition.

3.2.1 Position of the United Nations (UN) on the definition of organised crime

There exists a strong perception that the UN has defined organised crime.²⁰³ However, this is completely erroneous. Although the UN began to address issues of organised crime in September 1975 during the Fifth UN Congress on the Prevention of Crime and Treatment of Offenders meeting in Geneva, the phenomenon was never defined.²⁰⁴ The definition of organised crime that is normally confused as that of the UN is a definition inserted by the secretary in the discussion document.²⁰⁵ Obokata and Jacobs state correctly that even the Palermo Convention does not contain a definition of organised crime.²⁰⁶ This writer is unable to agree with the views expressed by Von Lampe and Madsen who suggest the existence of a definition of organised crime by the UN or Interpol.²⁰⁷

Vlassis, a Secretary of the Ad Hoc Committee for the Elaboration of the United

²⁰³According to Calderoni, the Palermo Convention defines organised crime as an organised criminal group; see Calderoni *Organized Crime Legislation* 32.

²⁰⁴Jamieson *The Antimafia* 164.

²⁰⁵See paragraph 17 of A/AFCON.56/3 which is the UN: Changes in Forms and Dimensions of Criminality-Transnational and National Working paper prepared by the secretariat for the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders, 1-12 September 1975. The report is also accessible under UN documents with reference A/CONF.56/10 at <http://www.asc41.com/UN-Congress/5thCongressofthePreventionofCrime/5th-Congress.htm> last visited on 30 July 2011. See also page 5 point 12 of the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. These reports have not defined organised crime but have included the description by the Secretariat which as an example, states that “organized crime is understood to be the large-scale and criminal activity carried by groups of persons, however loosely or tightly organized for 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”.

²⁰⁶Obokata *Transnational Organised Crime* 26 and Jacobs *Intelligence* 35 and 36. Jacobs argues that, within the context of the UN Convention Against Transnational Organized Crime, organised crime boils down to the commission of a serious offence involving an organised criminal group.

²⁰⁷Von Lampe <http://www.organised-crime.de/OCDEF1.htm> last visited on 29 September

Nations Convention Against Transnational Organized Crime, confesses that the fundamental difficulty of the Working Group lay with the definition of organised crime.²⁰⁸ The Working Group was divided in its approach. One half of the group believed that a definition was not necessarily the most crucial element of a Convention on organised crime, but that the instrument could come without a definition, while the other half contended that the absence of a definition would send a wrong signal regarding the political will and commitment of the international community.²⁰⁹

The Intergovernmental Experts²¹⁰ accepted that organised crime continues to evolve and manifest itself in different ways. Appreciating that there was a general understanding of criminal organizations, the group believed that efforts to determine the scope of the Convention on organised crime should build on that understanding, focusing action under the new convention against those groups.²¹¹ They conceded that arriving at a comprehensive definition of organised transnational crime, which could be acceptable universally, would be extremely difficult. Three principal views were expressed:

- A definition of of organised transnational crime was necessary and could be achieved.
- Organised transnational crime should be left undefined, following the example of other international instruments such as those against terrorist acts, and that the scope of the new convention should be as broad as possible. The issue could be approached in a descriptive fashion, by delineating constituent elements of organised crime.

2007 and Madsen *Organized Crime* 16.

²⁰⁸The Working Group towards the UN Convention was established in Vienna in 1997.

²⁰⁹Vlassis *The UN Convention* 87.

²¹⁰This is a group of experts who assembled to look at the Convention on organised crime.

²¹¹Intergovernmental Experts 5 paragraph 10(a).

- The legal basis of the convention would be the seriousness of the offence, to be determined in accordance with the penalty, combined with the involvement of criminal organizations in its commission and its transnational effects.²¹²

Vlassis has firsthand observation of the developments in the processes leading to the adoption the Palermo Convention.²¹³ One of the challenges that he identified was finding a definition that is acceptable to the States. He states that the Naples Political Declaration and Global Action Plan stressed the need for international community to arrive at a generally agreed concept of organised crime as a basis for more compatible national responses and more effective international co-operation. He observed further that some countries were sceptical about the initiatives especially with the definitions figuring prominently amongst these difficulties.²¹⁴ He indicates that the issue that appeared to be the most difficult in numerous discussions was how the international community would define organised crime in a way that would be acceptable to everyone, despite differences in concepts, perceptions and legal systems.²¹⁵

The Palermo Convention was adopted in 2000 to deal with organised crime, human trafficking and trafficking in firearms. It is important to analyse the developments that led to this Convention. This approach will assist in clarifying the perception that the UN has defined organised crime. The General Assembly (GA) of UN approved Resolution 49/159 of 23 December 1994, which is the Naples Political Declaration and Global Action Plan Against Organised Transnational Crime. In terms of this Convention, States were urged to implement them as a matter of urgency. It is in the Naples Political Declaration and Global Action Plan Against

²¹²*Id* n 211 *supra* at 7 para 12.

²¹³Vlassis *Global Situation* 475-494. This happened during the period before the adoption of the Protocol in 2000.

²¹⁴*Id* n 213 *supra* at 481 and McClean *Transnational Organized Crime*.

Organised Transnational Crime, which is the World Ministerial Conference on Organised Transnational Crime where the Commission on Crime Prevention and Criminal Justice was directed to initiate the process of requesting the views of Governments on the impact of a Convention or Convention against Organised Transnational Crime and on the issues that could be covered therein.²¹⁶

According to Nair, the conference provided a working definition of organised crime. It states that organised crime is a group activity of three or more persons, with hierarchical links or personal relationships, which permit their leaders to earn profits or control territories or markets, internal or foreign, by means of criminal activity and to infiltrate the legitimate economy.²¹⁷

Vlassis concludes by indicating that the Experts Group as created in terms of Resolution 52/85 of 12 December 1997, developed guiding principles, which acknowledged that the contours of organised crime were generally understood but that it continued to be difficult to reach a comprehensive definition. They indicated that, as there was an understanding of criminal organizations, efforts to determine the scope of the Convention should be build on that understanding, which will be focussing action under the new Convention against those groups as well as the seriousness of crime and punishment.²¹⁸ Vlassis has consistently used the concept of organised criminal group and organised crime, which shows his appreciation for their difference.

On 28 July 1998, the Commission on Crime Prevention and Criminal Justice and

²¹⁵*Id* n 213 *supra* at 485.

²¹⁶See Report of the Adhoc Committee as per agenda item 105 of the 55th session of the GA at 2-3 and Vlassis *Global Situation* 485 and 493.

²¹⁷Nair *Organised Crime* 9-10. Abadinsky points out that this definition was offered by the host country at the 1998 conference, which was held at Warsaw. However, the conference did not adopt it; see Abadinsky *Organized Crime* 2.

the Economic and Social Council adopted Resolution 1998/14. This resolution was then submitted to the GA of the UN as a recommendation for adoption. The GA adopted Resolution 53/111 of 09 December 1998 in which it decided to establish an open-ended Intergovernmental Ad Hoc Committee. The purpose of this Committee was to elaborate a comprehensive international Palermo Convention and to discuss the elaboration, as appropriate, of international instruments addressing trafficking in women and children; combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition; and illegal trafficking in and transporting of migrants, including by the sea.²¹⁹

The Ad Hoc Committee, which was chaired by Ambassador Luigi Lauriola of Italy, held 11 concerted sessions in which no less than 222 meetings were held between 12 January 1999 and 28 October 2000 in the execution of its assignment.²²⁰ From the numerous meetings held in the search of a solution for the global challenge of transnational organised crime, three Declarations were adopted. These are the Buenos Aires Declaration on Prevention and Control of Organised Transnational Crime, the Dakar Declaration on the Prevention and Control of Organised Transnational Crime and Corruption, and Manila Declaration on the Prevention and Control of Transnational Crime.²²¹

²¹⁸*Id* n 213 *supra* at 489-490.

²¹⁹See Report of the Adhoc Committee as per agenda item 105 of the 55th session of the General Assembly. The report is also accessible at <http://www.uncjn.org/Documents/Conventions/dcatoc/final-documents383.pdf> last visited on 26 December 2007. Further resolutions were adopted as per 53/114 of 09 December 1998, 54/126 of 17 December 1999, 54/127 of 17 December 1999, 54/128 of 17 December 1999 and 54/129 of 17 December 1999. These resolutions dealt with drafting of the main text of the Convention and the related instruments, the holding of further meetings, the establishment of an experts group, the inclusion of corruption and the acceptance of the offer by the Government of Italy to host the 2000 meeting respectively. See point 6 on the Report of the Adhoc Committee as per agenda item 105 of the 55th session of the General Assembly at 1.

²²⁰*Id* n 219 *supra* at 21.

While it was clear that arriving at an acceptable definition of organised crime was notoriously difficult, several States were of the view that a definition was not necessarily the most crucial element of a convention, and that the instrument could come into being without such a definition. The reason advanced was that the participants could not agree on a precise definition. In moving towards a common solution, it was agreed that each element of organised crime that include a form of organization, continuity, the use of intimidation and violence, a hierarchical structure of groups with division of labour, the pursuit for profit and the purpose of exercising influence on the public, the media and political structures should be looked at.²²²

It is important to note that in its attempts to find a common definition of organised crime, the Intergovernmental Experts group tabled various options sponsored by and supported by countries that participated in the discussion. These options include those sponsored and/or supported by Russia, Germany, France, Argentina, Mexico, Democratic Republic of Congo and Ecuador.²²³ The Mexican option is couched in the same way as Article 2 of the Federal Organized Crime Law, which was passed in November 1996 providing that “when three or more individuals agree to organize to carry out, in a permanent or ongoing form, activities that by themselves or combined with others result in committing... crimes, they will be sanctioned for the sole fact, as members of organized crime”.²²⁴

Poland sponsored option 6, which defined organised crime as follows:

“Organized crime” means group activities of three or more persons, with hierarchical links or personal relationships, which permit their leaders to earn profits or control territories or markets,

²²¹*Id* n 219 *supra* at 3. See also Vlassis *Global Situation* at 483, 489 and 493.

²²²*Id* n 213 *supra* at 487 and 488.

²²³Intergovernmental Experts 17-19.

²²⁴*Arzt Mission [Im]possible* 142.

internal or foreign, by means of violence, intimidation or corruption, both in furtherance of criminal activity and to infiltrate the legitimate economy, in particular by:

- (a) Illicit traffic in narcotic drugs or psychotropic substances, and money-laundering, as defined in the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.
- (b) Traffic in persons, as defined in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 2 December 1949.
- (c) Counterfeiting currency, as defined in the International Convention for the Suppression of Counterfeiting Currency of 20 April 1929.
- (d) Illicit traffic in or stealing of cultural objects, as defined by the UN Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970 and the International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995.
- (e) Stealing of nuclear material, its misuse or threats to misuse to harm the public, as defined by the Convention on the Physical Protection of Nuclear Material of 3 March 1980.
- (f) Terrorist acts.
- (g) Illicit traffic in or stealing of arms and explosive materials or devices.
- (h) Illicit traffic in or stealing of motor vehicles.
- (i) Corruption of public officials.

For the purpose of the present Convention, “organised crime” includes commission of an act by a member of a group as part of the criminal activity of such group.²²⁵

The Poland option was used as the basis for the discussion during the 51st session of the Experts Meetings together with proposals and contributions submitted by Governments.²²⁶ By listing the activities, the scope of the crime is limited, which will limit the all-encompassing interpretation of organised crime.

On completion of its assignment, the Ad Hoc Committee made a recommendation in

²²⁵Intergovernmental Experts 17-18; Gastrow *Organised Crime* 6-7; United Nations, General Assembly, 1 October 1996, A/C.3/51/7, p. 3 and Adamoli *et al Around the World* 7.

its report under Part IV, which deals with matters calling for action by the General Assembly at its 55th session. It recommended the General Assembly to adopt the UN Convention Against Transnational Organised Crime and Protocols to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime annexed to the resolution. It further recommended that the Assembly open them for signature at the high-level political signing conference, which was to be held in Palermo, Italy from 12th to 15th of December 2000 in accordance with Resolution 54/129.²²⁷

The meeting in Palermo was held between the 12th to 15th of December 2000 where the UN Convention Against Transnational Organised Crime was adopted by the General Assembly in Resolution 55/25 of 15 November 2000.²²⁸ The General Assembly adopted a Protocol Against the Illicit manufacturing and Trafficking in firearms, their parts and components and ammunition supplementing the Convention Against Transnational Organised Crime as per Resolution 55/255 of 31 May 2001. What could be observed is that the UN has managed to provide a definition of an organised criminal group under Article 2(a) of this Convention, which is commonly known as the Palermo Convention. This Article states that an organised criminal group is a structured group²²⁹ of three or more persons, existing

²²⁶*Id* n 219 *supra* at 6 and 23. See also McClean *Transnational Organized Crime* 6.

²²⁷*Id* n 219 *supra* at 23.

²²⁸United Nations Convention Against Transnational Organised Crime as adopted by the General Assembly in its resolution 55/25 of 15 November 2000. Betti *European Union* 3. European Parliament working paper, describes 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. Accessible at <http://www.uncjn.org/Documents/Conventions/dcatoc/final-documents-2/convention-eng.pdf> last visited on 26 December 2007.

²²⁹A 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.

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,²³⁰ in order to obtain, directly or indirectly, a financial or other material benefit.

According to Cockayne, the Palermo Convention defines transnational organised crime as those offences which, to paraphrase, involve a structured group of three or more people with the shared aim to commit either a Transnational Organised Convention crime (including money-laundering, corruption and obstruction of justice), or any other crime punishable by four year's deprivation of liberty or more; where those crimes are committed with a view to material gain; and where those crimes have transnational effects, are committed transnationally, or are committed by a transnational group.²³¹ This view is misplaced because the Convention did not define the term 'organised crime', but rather a 'criminal group.

Abadinsky states that attempts by various entities to define organised crime have produced limited success without providing a generally accepted definition. However, he went astray when he concludes that the Palermo Convention established an international definition of organised crime. In pointing out such definition, he quotes the definition of an organised criminal group. However, he concludes that there is no generally accepted definition of organised crime.²³² Levi, Redpath, Roth, Madsen and Lunde also point out that the UN defined "organised crime" broadly as a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses in accordance with this Convention in order to obtain, directly or

²³⁰The 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.

²³¹Cockayne *Response to a Rising Threat* 2.

²³²Abadinsky *Organized Crime* 2 and 3.

indirectly, a financial or material benefit.²³³ Abadinsky concludes that international representatives did not arrive at a consensus on a definition or a list of criminal acts, but decided to adopt a broad definition of organised criminal group.²³⁴

Having noted the arguments of Abadinsky and those who support his view, this writer agrees with Finckenauer. He correctly states that the Palermo Convention, struggled mightily with the definition problem but did ultimately reach agreement on what an organised criminal group is.²³⁵ In acknowledging the lack of an international definition of organised crime, the Secretary General of the UN, Dr Ban Ki-moon states that there are two competing definitions of organised crime. One that focuses on particular groups of people and one that focuses on particular types of crimes, both of which have some validity. He points out that when most people say ‘organised crime’, it is often a shorthand way of referring to groups of people, usually “the mafia” and similar groups. He moves further and submit his definition pointing that, essentially, organised crime is any serious offence committed by a group of three or more people with the aim of making money.²³⁶

The UN has in 2010 stated that under the Organised Crime Convention, transnational organised crime is any national offence undertaken by three or more people with the aim of material gain.²³⁷ Unfortunately the UN erred and misrepresented itself in suggesting that an Organised Crime Convention exists. The only instrument on organised crime is the UN Convention Against Transnational Organized Crime. This writer’s analysis is that, the coining of the definition of the

²³³Levi *Organized Crime* 780, Roth *Organized Crime* 7, Roth *Global Organized Crime* 11, Madsen *Organized Crime* 15, Redpath *The Scorpions* 18 and Lunde *Organized Crime* 8.

²³⁴Roth *Organized Crime* 7.

²³⁵Finckenauer *Mafia* 28 and Finckenauer *Problems of Definition* 80. Krause, Hübschle and Simon support this view, see Krause *Crime Threat Analysis* 73-74, Hübschle *Organised Crime* 8 and Simon *Advance-Fee Fraud* 14.

²³⁶UNODC: *TOCTA* 19.

²³⁷*Id* n 236 *supra* at 1. However, there is no Organized Crime Convention nor such definition.

term 'organised criminal group' in the Convention came at the time when the UN was desperately searching for a suitable definition of organised crime. The UN acknowledged that it is unable to define the term 'organised crime' and decided that it will be better to define the term 'organised criminal group'. As a result, many countries, academics, criminologists, jurists and researchers have incorrectly assumed that the definition as adopted refers to organised crime. This writer is therefore of the opinion that the UN did not define organised crime as such, but as an organised criminal group.

Based on the heading of the Palermo Convention, the UN is not supposed to find a definition of organised crime that will suit all the countries. As the purpose of the Palermo Convention is to promote co-operation to prevent and combat transnational organised crime more effectively, this writer's view is that the Convention should have defined transnational organised crime, leaving the definition of organised crime to the countries in their municipal laws. Such definition of transnational organised crime will be considered a universal definition required. Unfortunately, the UN did not literally conclude this as such.

3.2.2 Position of the African Union (AU) on the definition of organised crime

Goredema has already pointed out that, no definition of organised crime has been adopted at regional level in Africa. He has defined organised crime as 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.²³⁸ In proving the lack of a generally accepted definition, or reluctant to be pinned down to a specific definition, he later defined

²³⁸Goredema *Legislation* 25. This definition was coined in 2001. See also Burchell *Principles* 974, Milton *Criminal Law* B4-1 and Krause *Crime Threat Analysis* 75.

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.²³⁹ While agreeing with the position that there is no definition of organised crime in the region, this writer is of the view that his definitions have been influenced by the definition of an 'organised criminal group' of the UN. It appears as if the purpose of the second definition was to improve on the first one, which did not have the element of time of existence of a criminal group. Therefore, this writer is unable to agree with these definitions because of the lack of time frames in the first and repetitive activities in the second.

Shaw and Wannenburg argue that the term organised crime needs to be used with great care in the African context. Their view is based on the assumption that this crime is likely to resemble the Hollywood-style Mafia Don and his cohorts than the complex network of individuals.²⁴⁰ This means that organised crime differs with the famous hierarchy associated with Mafia and other traditional criminal organisations. The African Regional Ministers have concluded that, the emphasis on the issue of the definition of organised transnational crime should be placed on the transnational nature of the criminal activity to be covered by an international Convention. They acknowledged that the issue of definition was complex and agreed that the regional group of experts could contribute in that direction. They further recommended that the indicative list of criminal activities contained in Article 1 of the draft framework Convention should be supplemented with the following crimes: trafficking in illegal migrants; extortion; kidnapping; cattle-rustling; export of toxic wastes; illicit export of precious raw materials; trafficking in protected species; international fraud; sexual exploitation of children; trafficking in human organs;

²³⁹Goredema *Organised Crime* 6. This definition was coined in 2004.

²⁴⁰Shaw and Wannenburg *Organized Crime* 367.

and violation of intellectual property rights.²⁴¹ This writer concludes that the African Union has not defined organised crime.

3.2.3 Position of the Southern African Development Community (SADC) on the definition of organised crime

Gastrow points out that there is a lack of a uniform definition of organised crime in the SADC. He cautions 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.²⁴² Roth supports this view by stating that to create laws that will effectively combat organised crime on national and international levels, it is necessary to have a mutually accepted definition that distinguishes organised crime from other forms of criminality.²⁴³ According to Gastrow's research, the only countries, which submitted definitions of organised crime to him, are Tanzania, South Africa, Swaziland and Zambia.²⁴⁴ Although these definitions were submitted, the information supplied, which insinuated that the phenomenon has been defined, is inaccurate as the definitions were supplied by individuals and are not formally acknowledged. Tanzania is the only country that has defined the concept.²⁴⁵ Standing followed this

²⁴¹Dakar Declaration 18 paragraph 5. This declaration is also accessible UNBISNET site at <http://daccessdds.un.org/doc/UNDOC/GEN/V97/261/09/PDF/V9726109.pdf> last visited on 12 April 2009.

²⁴²Gastrow *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.

²⁴³Roth *Global Organized Crime* 10-11.

²⁴⁴*Id* n 242 *supra* at 31.

²⁴⁵Gastrow 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 CIAC, SAPS (now ex-member), Snr Supt. Dlodlu of Royal Swazi Police (RSP) (Complaints and Inspections section) and Senior Assistant Commissioner F A Nguluvu (retired Director of CID)

report.²⁴⁶

Gastrow indicates correctly that the SADC region still has to develop a common understanding of what organised crime actually is. He argues 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 concludes, correctly in this writer’s opinion, that the reality is that we do not know what the various spokespersons and law enforcement agencies in Southern Africa precisely mean when they refer to organised crime.²⁴⁷

Gastrow also points out that the importance of determining a universal definition of the term ‘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.²⁴⁸ SARPCCO defines organised crime as follows:

Organised crime means the illegal activities carried out by an organised criminal group or

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 Assistant Commissioner (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. See Van Wyk *Crime Threat Analysis 2*.

²⁴⁶*Id* n 146 *supra* at 41-43. Standing based his research on the mistaken findings of Gastrow.

²⁴⁷Gastrow *Penetrating I* at 1-2.

²⁴⁸*Ibid* n 242 *supra*.

groups of persons, however loosely or tightly organised, operating over a period of time and having the aim of committing serious crimes through concerted action by using intimidation, violence, corruption or other means in order to obtain, directly or indirectly, a financial or other material benefit.²⁴⁹

With reference to SADC region, Hübschle maintains that there exists no regional definition of organised crime.²⁵⁰ While the SARPCCO has defined organised crime, this term is currently applicable only in police circles. Although SARPCCO and all its machinery has been incorporated into SADC structures, the definition, which was an operational tool, may need to be expressly adopted in order to gain legal status and apply in the region. This writer concludes that the SADC has not defined organised crime.

In order to comprehend the degree to which the predicament of a definition has affected the globe, the definitions of some countries and other experts that are not forming part of this research are included in this section.²⁵¹ As pointed out by Passas, despite a plethora of studies on organised crime, controversies regarding its definition, structure, functions, and how best to control it, continue to this day. He states further that sensationalism, myths and misinformation have made it 'a topic much abused in the literature, both popular and academic.'²⁵² Van Duyne and Van Dijck state that for roughly two decades the issue of organised crime succeeded in

²⁴⁹The Council of Police Chiefs, now Committee of Police Chiefs, adopted the definition of organised crime as submitted by the Legal Sub Committee. This definition is reflected in paragraph 5.3 in page 10 of the report of the Legal Sub-Committee (LSC) of SARPCCO to the 14th SARPCCO Annual General Meeting as presented by the Chairperson, Deputy Commissioner Ephraim Angombe Shikongo of the Namibian Police Force in 2009. See also Lebeya *Understanding Organised Crime* 14.

²⁵⁰Hübschle *Organised Crime* 8. The ISS was tasked by the SARPCCO through the Enhancing Regional Responses Against Organised Crime (EROCC) project to conduct research within SARPCCO. See <http://www.iss.co.za/uploads/OrgCrimeReviewDec2010.pdf> and <http://www.organized-crime.de/OCDEF1.htm#sarpcco> last visited on 27 August 2011.

²⁵¹It is important to indicate the extent of the challenge of understanding organised crime by looking at countries that do not form part of this research.

²⁵²Passas *Organized Crime* xiii.

remaining high on the political law enforcement agenda across the world.²⁵³

Dobovšek indicates that organised crime is a major problem in most European countries.²⁵⁴ In spite of the fact that there is no generally accepted definition of the term '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.²⁵⁵ This definition is a handy tool for the European Police (EUROPOL) organisation, which can now measure what it calls 'organised crime'.²⁵⁶

The definition of the term 'organised crime' has to be viewed with the understanding, as pointed out by Van Duyne, who argues that all definitions that have been suggested thus far fail on one important point in that they cannot be operationalised²⁵⁷ or used as an exclusive yardstick to determine organised crime. He argues 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 concludes that there is some irony in the fact that those who think they can define organised crime have never bothered to define licit organised

²⁵³Van Duyne and van Dijck *Assessing Organised Crime* 101. See also <http://www.etc-graz.at/cms/fileadmin/user-upload/humsec/Journal/HUMSEC-Journal-Issue-1.pdf> last visited on 19 January 2008.

²⁵⁴Dobovšek *Unify the Definition in Pagon Policing* <http://www.ncjrs.gov/policing/org323.htm>. last visited on 16 September 2007 and Van Dijck *Definitions of Organised Crime* 68. The reason for the lack of the definition is cited as the quick development and changing of the forms in which organised crime appears. See also Krause *Crime Threat Analysis* 74.

²⁵⁵Many authors repeat the word power. Maltz *Defining Organized Crime* 19, believes that it is either political or economic power, which is the objective of organised crime.

²⁵⁶Mallory *Organized Crime* 9. According to Mallory, Dobovšek concluded that a definition of organised crime was impossible, but that characteristics that describe organised crime activity were useful.

²⁵⁷Operationalised is described by Van Duyne as the making of a definition phrase-by-phrase concrete, which means that one must be able to determine unambiguously whether some occurrence X can be included in the concept-category or set X. See Van Duyne *Medieval Thinking* 28.

industry or organised trade.²⁵⁸ Hagan adds that the analysis of the contents of many definitions provided by various writers and government reports fails to provide any definition.²⁵⁹ Vander Beken and Defruytier concluded that there is no agreement on the concept and definition of organised crime itself and that existing definitions remain vague and virtually useless for empirical application. They compare the measuring of organised crime with ghost hunting.²⁶⁰

It is clear from the various definitions applied by different countries and experts that no universal definition can suit the requirements of all municipal laws. Finding such a universal definition has reached a deadlock situation.²⁶¹ Each country formulates the definition that suits its situation. The critical element that makes South Africa's position on definition different from many other jurisdictions is a pattern of racketeering activity.

3.2.4 Position of South Africa on the definition of organised crime

Entering the definitional debate today is not exploring uncharted waters. The world is already rich in literature on the definition of an organised crime concept. South Africa is in a better position to begin to ask herself what is meant by organised crime. She shall enter the definitional arena prepared to harvest and modify any of the hundreds definitions which have been developed and tested by other jurisdictions. The general public, researchers and law enforcers need clarity in this regard to prevent confusion and misunderstanding between researchers, public prosecutors and the SAPS.²⁶²

²⁵⁸Van Duyne *et al Changing Europe* 2.

²⁵⁹Hagan *Criminology* 470. See also Albanese *North American Organised Crime* 9.

²⁶⁰Vander Beken and Defruytier *Assessing Organised Crime* 51-52.

²⁶¹Van Dijck *Definitions of Organised Crime* 72.

Some authors use the term ‘organised crime’ to define a set of relations among illegal organisations, while others use it to indicate a group of illegal activities performed by a given set of agents.²⁶³ Skaperdas and Syropoulos state that the term ‘organised crime’ consists of two words that tends to contradict each other. They point out that while a crime is by definition an illegal act, the adjective organised means having a formal organization to co-ordinate and carrying out activities.²⁶⁴ The weakness of considering organization as crime forms the arguments of Cressey who states that organised crime is not against the law. What is against the law is smuggling, selling narcotics, selling untaxed liquor, gambling, prostitution, usury, murder, conspiracy and so forth.²⁶⁵ Sachs J observed in *Mohunram v NDPP*²⁶⁶ that no “bright lines” could be drawn between organised crime and private criminal activities.

It cannot be accepted that a group of persons, *per se*, constitute a crime, but rather that crime will be constituted by what the group commits. Not even the courts will interpret “an organised criminal group” as organised crime, as the two are not synonymous. Crime should not be confused with its perpetrators. Unlike Ryan who submits that organised crime is being defined as what organised crime does rather than who does it,²⁶⁷ This writer would ardently argue in contrast that organised crime must be defined as to what an organised criminal group do rather than how the group is constituted. This writer holds the view that we need to resist the temptation of deceiving our understanding of organised crime. Organised crime should therefore be understood to mean a conglomeration of serious crimes

²⁶²O’Connor and Rausch *Model Codes* 294.

²⁶³Fiorentini and Peltzman *Economics of Organised Crime* 3.

²⁶⁴Skaperdas and Syropoulos *Gangs as Primitive States* 61. This is also accessible at <http://www.socsci.uci.edu/~sskaperd/sgangasprimitivestates1995.pdf> last visited on 23 July 2011.

²⁶⁵Cressey *Criminal Syndicates* 14.

²⁶⁶2007(6) BCLR 575 (CC) at 576.

²⁶⁷Ryan *Organized Crime Handbook* 3.

perpetrated by an organised criminal group over time with the intention of generating some income. This view is supported by Finckenauer and Chin who state that organised crime is not a crime but a collection of crimes, carried out by some number of individuals who have a modicum of organisation.²⁶⁸

It is important that organised crime should be a statutory offence that must derive its definition from a statute. The importance of a definition is pointed out by Markina, who passionately argues that, although starting every paper with a definition of organised crime seems to be boring, the definition of the phenomenon could not be omitted since it varies from country to country even from expert to expert.²⁶⁹ In the same light, Reuter states that while definitional discussions are inevitably tedious, it is useful to give some bounds to our review by distinguishing those kinds of criminal organizations with which we are concerned from those many others with which we are not.²⁷⁰ In line with this view, Varese states that the organised crime concept has over the past hundred years been used to refer to diverse phenomena often with overtly political and partisan intentions, leaving readers unsure as to what it means.²⁷¹

South Africa has not defined organised crime in any of its laws. Organised crime is thus not as clearly understood as some may want to believe. In *NDPP v Vermaak*²⁷², the accused was convicted for driving a vehicle whilst under the influence of intoxicating liquor. The question of law was whether the POCA applies to crimes which cannot be categorised as organised crime. Nugent JA, contended that “there has for some time been a controversy, engendered largely by the short title of the Act, as to whether it is confined to cases of organised crime. Precisely what that

²⁶⁸Finckenauer and Chin *Sex Trafficking* 59.

²⁶⁹Markina *Organised Crime in Estonia* 46.

²⁷⁰Reuter *American Organized Crime* 93.

²⁷¹Varese *Organized Crime* 1.

term is said to mean is not altogether clear, as the term is not defined in the Act. For present purposes I use the term to describe offences that have organizational features of some kind that distinguish them from individual criminal wrongdoing”.²⁷³

Von Lampe who states that in the absence of a generally accepted definition, there remains a great deal of uncertainty about what organised crime really is.²⁷⁴ United States RICO of 1970, which deliberately avoids the definition of the term ‘organised crime’, influenced South African law and left her without a definition of her own.²⁷⁵ In the absence of an official definition, the ISS defined organised crime as significant and planned criminal activity which involves several persons acting jointly, or at least with a common purpose to commit a crime or a series of crimes motivated by the prospect of direct or indirect material benefit. The persons involved may be human beings or corporate bodies.²⁷⁶

The first definition of organised crime that came to the attention of the police authorities in South Africa was that of Hagan which states that ... “organised crime includes any group of individuals whose primary activity involves violating criminal laws to seek illegal profits and power by engaging in racketeering activities, and

²⁷²2008 (1) SACR 157 (SCA).

²⁷³2008 (1) SACR 157 (SCA) at 161. In *NDPP v Geyser* case no (160/07) [2008] ZASCA 15 (25 March 2008) (reportable) at paragraph 17, Howie JP stated that the POCA does not define organised crime, but that the species of what inevitably are organised crimes are described and provided for in the text under sections 2, 4, 6 and 9.

²⁷⁴Von Lampe *Criminally Exploitable Ties* 9.

²⁷⁵Ryan *Organized Crime Handbook* 5, Abadinsky *Organised Crime* 3 and Hagan *Organized Crime Continuum* 77. Gastrow acknowledges once more, in *Gastrow Organised Crime* 5, that a generally accepted comprehensive definition of organised crime has yet to emerge in South Africa and internationally. Report is also accessible at <http://www.issafrica.org./Pubs/monographs/No28/Definitions.html> last visited on 24 September 2007. The report further points out the confusion which the question of definition has caused to detectives that are tasked with the investigation of organised crime.

²⁷⁶Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 01 June 2008. Marion comprehensibly states that the term does not have a fixed definition and therefore means

when appropriate, engaging in intricate financial manipulations”.²⁷⁷ The definitions used by the police are mentioned to illustrate the reason for investigators to know what they have to find out and further that they have to prepare the relevant case for the NPA.

The SAPS submitted through Van Wyk the following as the definition of South Africa:

Organised crime is the systematic commissioning of crimes motivated by a craving for profit and/or power.²⁷⁸

Gastrow states that 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

many things to different people, see Marion *Organized Crime* 5.

²⁷⁷Truter *Organised Crime Intelligence Unit* 12. This definition was signed into a memorandum GM 28/2/4 dated 10-03-1992 by Minister H J Kriel which is unfortunately classified, not accessible to the public and therefore not part of any law. Hagan submits that this definition is that of the FBI; see Hagan *Organized Crime Continuum* 83 and Hagan *Criminology* 466-467.

²⁷⁸*Id* n 242 *supra* at 32-33.

(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.).²⁷⁹

According to Bay, the K4 Committee of the European Union, which was an Ad hoc Committee established in 1994, drafted the characteristics depicted by Van Wyk above. The characteristic of time frame, which is prolonged or indefinite, was not one of the compulsory characteristic as the EU had only three compulsory characteristic.²⁸⁰ This definition fails in a number of fronts, amongst others, the lack of discrimination of perpetrator, nature of crime and time factor. While the definition of Gastrow defines organised crime, Van Wyk defines an organised criminal group.²⁸¹

De Kock states that organised crime refers to:

- Crime repeatedly committed over an extensive period by more than one individual- each with their own functional specialisation/division of labour, which is organised in a classic business like organization with a hierarchical structure and with a profit motive.
- Crimes where either intimidation, violence, coercion, blackmail, bribery²⁸² and corruption or a combination of these will usually be used.

²⁷⁹These criteria have been taken from the European Union as indicated in Van Wyk *Crime Threat Analysis 2*, Gottschalk *Organised Crime* 5-6, Gottschalk *Policing Organized Crime* 22-23, Krause and Van Wyk *Crime Threat Analysis*, Buys *Hijacking of Trucks* 12-14, Adamoli *et al Around the World* 9, Wright *Organised Crime* 8-9, Bullock, Clarke and Tilley *Organised Crimes* 5-6 and Van Duyne *Medieval Thinking* 25-26. In South Africa, what is required for people to be considered a criminal group is association in fact. Van Dijck calls this criterion 4+7 criterion; see Van Dijck *Definitions of Organised Crime* 68.

²⁸⁰Bay *Definitions of Organized Crime* 23. See also Van der Heijden *Measuring Organized Crime*, which is also accessible at <http://www.ncjrs.gov/policing/mea313.htm> last visited on 01 March 2008.

²⁸¹Amir states that the Israel police differentiate between organised criminality and organised crime. Although this writer is not agreeing with the view that organised crime has both the aims of economic and political view, it points out that there is a need to distinguish perpetrators from crime, see Amir *Organized Crime in Israel* 313.

²⁸²It was erroneous to refer to bribery as the crime was already repealed in favour of corruption in 1992.

- Crimes which usually involve more than one criminal dimension, which extend over different police jurisdictions (precinct, police area, provincial and even international boundaries) and are in many cases based on the trade of contraband.²⁸³

Later, De Kock rephrased his statement and submitted that highly organised crime will *inter alia* subscribe to the following important criteria:

1. It involves several people linked together through a business-like structure and with a clear profit motive.
2. Each of the above members will fulfil specialised functions (a high degree of division of labour).
3. Corruption/blackmail is used to procure the cooperation of people in positions of authority or able to facilitate matters for criminals involved.
4. Money laundering (usually through the acquisition of expensive vehicles fixed property and jewellery) is involved.²⁸⁴

In terms of the Policy Document of the Detective Service, which was approved by the then Divisional Commissioner MJ Schoeman of the SAPS on 08-02-2000, organised crime was defined as systematic commissioning of crimes motivated by a craving for profit or power.²⁸⁵ Dambazau argues that any discourse on crime prevention and control must necessarily be preceded by a definition of the phenomenon called crime. This writer's submission is that the same argument applies to organised crime.²⁸⁶

In fact, South Africa has only a description of what comprises organised crime and not a definition.²⁸⁷ The definition submitted by Van Wyk above has no authority and

²⁸³De Kock *Generators of Crime* 10. This is a report dated 10 August 1999.

²⁸⁴Crime in South Africa during 2006/2007: Trends, Spatial Distribution and Interpretation 6 as released in June 2007.

²⁸⁵Policy Document of Organised Crime dated 08-02-2000 page 2. See also Krause *Crime Threat Analysis* 72.

²⁸⁶Dambazau *Criminality in Nigeria* 23.

²⁸⁷Collins *Dictionary* 427, defines description as to give an account of representation in words.

does not reflect the correct position of South Africa. The description, which has been given in terms of Section 16(1) of the South African Police Service Act of 1995²⁸⁸ 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 subsection 1 are explained further in subsection 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 organised fashion.²⁸⁹ This writer's analysis of Sections 16(1) and 16(2) of the SAPS Act of 1995, suggests that the legislature intended to define the term '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

The act, process, or technique of describing. The definitions in the SAPS Act of 1995 appear only in Section 1. Section 16(2)(a) is the only portion dealing with organised crime. The rest of the Sections (i.e., 16(2)(b) to 16(2)(j)) deal 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 South Africa, the Detective Service operated on two spheres, namely, a national sphere and a provincial sphere. The national sphere was called the National Crime Investigation Service. These specialised units are reflected under paragraph 9.4.2 *infra*. The Western Cape had also a Marine Investigation Unit, see Gastrow *Chinese Organised Crime* 3. The Act is also accessible at <http://www.info.gov.za/gazette/acts/1995/a68-95.htm> last visited on 17 November 2007. The amendment of this section changed the view in that it inserted a new section "(k) in respect of the commission of any alleged offence referred to in the definition of 'serious offence' in the Regulation of Interception of Communications and Provision of Communications-Related Information Act, 2002 (Act No. 70 of 2002)." Serious offence is defined as under paragraph 5.5.2 *infra*.

²⁸⁸68 of 1995.

²⁸⁹This Act has further defined organised fashion in a similar way as the one in the National Prosecuting Authority Act of 1998. Organised fashion is defined in section 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 a pattern of racketeering activity in terms of section 1(1) of POCA of 1998 as reflected in n 325 *infra* is synonymous with the definition of organised fashion except that it has an element of pattern.

an organised fashion.²⁹⁰

In terms of section 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. As the law follows a precise path, a description, which is dependent on the determination by the National Commissioner, will therefore not assist the situation. It can be concluded 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.

In terms of the Policy of the Organised Crime Component²⁹¹ 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.²⁹²

In the introductory note of the Guidelines to the investigation of Organised Crime Projects Investigations (OCPI), this writer submitted that, 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.²⁹³

²⁹⁰See section 16(2A) of the SAPS Act of 1995. The South African Police Service Amendment Act of 2008 has replaced the word organised manner, which appeared before amendment with organised fashion, which are synonymous.

²⁹¹Section 3(18) of a Policy document of the Organised Crime Component as approved by the Divisional Commissioner of the Detective Service, SAPS (2004).

²⁹²This is actually a description that emanates from Section 16 of the SAPS Act 68 of 1995.

²⁹³Guidelines 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

Gastrow points out that the SAPS has tended to rely on the definition presently in use at Interpol's Organised Crime Unit, namely as: ... "Organised crime is 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".²⁹⁴ In this definition, the Unit subscribed to a structural approach in defining organised crime.

In yet another demonstration of a need for defining organised crime, the SAPS has in its Annual Report 2007/2008, defined 'organised crime' as 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.²⁹⁵ As if this is not enough, it further reflected the definition of organised crime in its 2009/2010 report.²⁹⁶ Dambazau is correct in pointing out that it is not because writers are intellectually incapable of producing an answer to what the definition of crime is or ought to be, it is because the word is the most elusive of all definitions in the lexicon of legal and criminological terms.²⁹⁷

While it is agreeable that terminologies need not distract operators from the real objective of crushing the backbones of criminals operating in groups, a definition in the context of public policy is also important because it affects the allocation of

crime appears, for operational purposes, to have been committed or not. I drafted this document.

²⁹⁴Gastrow *Organised Crime* 5. See also *Standing Rival Views* 43 and www.alternatives.com/Crime/define.html last visited on 20 May 2008.

²⁹⁵SAPS Annual Reports 2007/2008 page 119 and 2008/2009 page 111. This is the same definition as reflected in Lebeya *Organised Crime* 20 and 149, see n 308 *infra*.

²⁹⁶*Ibid* n 67 *supra*.

²⁹⁷Dambazau *Criminality in Nigeria* 23.

financial and personnel resources for combating organised crime.²⁹⁸ Nagle supports this view and states that a clear conceptualisation of this phenomenon is crucial to the enactment of proper legislation, appropriate allotment of resources, building strategies, designing law enforcement training and searching relevant international co-operation. Ultimately, the lack thereof creates obstacles to the fight against organised criminal groups because of a lack of distinction between common criminals and crime syndicates.²⁹⁹

3.3 CONCLUSION

Definitional discussions on organised crime are tedious but remain essential because countries are increasingly being brought into line in an apparent desire for uniformity across nations in terms of legislation, policies, sanctions and strategies for control. While definitions may be boring, they remain an issue as distorted understanding of the phenomenon renders the almost insurmountable task of policing it, hopeless.³⁰⁰ As Leong puts it, we need to know what it is that we are fighting against before any useful discussion or appropriate instruments can be derived.³⁰¹ The UN, AU and SADC have not yet defined organised crime. The existence of various definitions illustrate the different views on what is understood by the term 'organised crime'.

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 labelled as

²⁹⁸Finckenauer *Mafia* 12.

²⁹⁹Nagle *Global Organized Crime* 1655. This is also accessible at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?Article1905&context=ilj&sei-redir=1> last visited on 30 July 2011.

³⁰⁰Beare *Purposeful Misconceptions* 157-159.

³⁰¹Leong *International Organised Crime* 7.

deviant behaviour.³⁰² Finckenauer argues that, since law defines crime, the legal definitions of the term 'organised crime' may be the most important issue.³⁰³

Organised crime has not been defined in the South African laws. The country cannot afford to continue to operate in an undefined territory regarding this phenomenon. The many different definitions by South Africans confirm the confusion experienced in the country. Advances made by the Portfolio Committee on Safety and Security on the South African Police Service Amendment Bill were unfortunately diverted from organised crime focus to national priority offence focus.³⁰⁴ Because of diversion, where the focus shifted from organised crime to national priority offence, the move was aborted and the Legislature ended up with the establishment of the Directorate for Priority Crime Investigation (DPCI) and the definition of national priority offence leaving the long waiting organised crime phenomena undefined.³⁰⁵ The search for a definition of the term 'organised crime' is an abandoned mission in South Africa.

The challenge of designing a suitable definition is, as pointed out by Hagan, compounded by the fact that organised crime already has a popular public definition, which may interfere with its being precisely defined as a legal or sociological category of criminal activity.³⁰⁶ If a group of ten armed robbers robs a vehicle transporting cash, the majority of people will maintain that it is organised

³⁰²Laisseri *SARPCCO and EAPCCO* 10.

³⁰³Finckenauer *Mafia* 10 and Van Dijck *Definitions of Organised Crime* 65.

³⁰⁴See point 5.5 page 1928 of the Announcements, Tablings and Committee Reports no 135-2008 dated 20-10-2008 for the Parliament of the Republic of South Africa. The report is also accessible at <http://www.pmg.org.za/docs/2008/comreports/081020pcsafetyreport.htm> last visited on 14 April 2009. It was promising to note that the Committee agreed that there is a need to define organised crime more specifically and provide a measure of flexibility for the Head of Organised Crime-Fighting Unit (OCU) and the Minister to add to the mandate through regulations/policy frameworks to be approved by parliament.

³⁰⁵The definition of national priority offence is reflected under Section 1 of the South African Police Service Act 68 of 1995 as brought about in terms of Section 17 D(1)(b) of the South African Police Service Amendment Act of 2008.

³⁰⁶Hagan *Criminology* 467.

crime, whereas a prosecutor will be unable to draft a charge sheet in terms of the POCA. It is understood that, if one is unable to draft a charge sheet on POCA, then the crime committed cannot be called contravention of POCA or simply organised crime. The situation in the SAPS is that, it is guided by the crimes created by the POCA to conclude that the crime committed constitutes organised crime.³⁰⁷ In other words, if the charge sheet does not reflect the contravention of any section of the POCA, which comprises of various sections, such a crime cannot be said to be organised crime. It is therefore important to establish a definition of the term 'organised crime'.³⁰⁸

³⁰⁷The crimes created by the POCA are in Sections 2, 4, 5, 6, 9, 54, 71, 74 and 75. My conclusion is that organised crime proper is the contravention of Section 2 of the POCA of 1998. Although there are various cases decided in terms of POCA, very few dealt with Chapter 2, which do not take the matter any further.

³⁰⁸A definition offered at n 295 *supra*, may trigger the search for a suitable definition.

CHAPTER FOUR

OFFENCES CREATED BY THE PREVENTION OF ORGANISED CRIME ACT 121 OF 1998

4.1 INTRODUCTION

The legislature has recognised certain crucial prevailing issues that necessitated the promulgation of the Prevention of Organised Crime Act (POCA) 121 of 1998. These issues include an acknowledgement of the rapid growth of organised crime, money laundering and criminal gang activities in the national and international arena where they present a danger to public order, economic stability and social security.³⁰⁹ It is further acknowledged that common law and statutory law fail to keep pace with international measures aimed at dealing effectively with the phenomena in South Africa. While appreciating the difficulties of proving the direct involvement of organised criminal leaders in particular cases, it was found necessary to criminalise the management and related conduct in connection with enterprises, which are involved in a pattern of racketeering activity. It intended to ensure that no person should either benefit from the fruits of any offence or be entitled to use property for the commission of an offence. It finally tendered a promise to protect the communities from fear, intimidation and physical harm caused by the pervasive presence of criminal gangs.³¹⁰

³⁰⁹Hofmeyr has quoted a decision, which erroneously interprets the Act by suggesting that the long title to the Act states that the rapid growth of organised crime, money laundering and racketeering threatens the rights of all in the Republic. Kruger holds the same view; see *Kruger Organised Crime v* and 5. This position is in this writer's view, misleading because the Legislature has never referred to organised crime and racketeering in the same sentence of this Act.

³¹⁰See the Preamble to the POCA of 1998.

The purpose of POCA, which is set out in the long title to the Act, includes the introduction of measures to combat organised crime, money laundering and criminal gang activities; the prohibition of certain activities relating to racketeering activities; the provision for the prohibition of money laundering and for an obligation to report certain information; the criminalisation of certain activities associated with gangs; the provision for the recovery of the proceeds of unlawful activity; and for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and related activities.³¹¹ An analysis of the Preamble and the long title of the POCA, suggest that the Act is focussed and intended to mainly deal with three types of offences, to wit, organised crime, money laundering and criminal gang activities. Burchell argues that the POCA, by its very title, deals with organised crime. This suggests that there must be some element of organised crime before a prosecution for racketeering, money laundering and gang related activity could be instituted.³¹²

The POCA creates a number of offences.³¹³ From the outset, it is imperative to take note of the twenty eight (28) offences that have been created by the POCA before embarking on the discussion. These offences may be grouped into four categories, to wit, patterns of racketeering activities, proceeds of unlawful activities, criminal gang activities and administrative activities.

³¹¹See the purpose above the Preamble to the POCA of 1998.

³¹²*Id* n 33 *supra* at 976.

³¹³Dendy: *De Rebus* March 2006, accessible at <http://www.derebus.org.za> last visited on 02 July 2011.

Table 4.1: Categories and the Sections of the POCA of 1998 (**Source:** POCA 1998)

Category of crime	Sections in the POCA of 1998 that constitute an offence
Pattern of racketeering	2(1)(a), 2(1)(b), 2(1)(c), 2(1)(d), 2(1)(e), 2(1)(f) and 2(1)(g).
Proceeds of crime	4(a), 4(b), 5(a), 5(b), 6(a), 6(b) and 6(c).
Criminal gangs activities	9(1)(a), 9(1)(b), 9(1)(c), 9(2)(a), 9(2)(b) and 9(2)(c).
Administrative activities	54(9)(a)(i), 54(9)(a)(ii), 54(9)(b), 71(3)(b), 74(3), 75(1), 75(2) and 75(3).

Due to the fact that aggravating circumstances usually attract a heavy sanction, it is worth noting that in terms of Section 9(3) of POCA, if a court, after having convicted an accused of any offence, other than an offence contemplated in Chapter 4 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 sentencing purposes. The importance of establishing that a person is a member of any criminal gang is therefore paramount as it determines the aggravating circumstances for meting a proportional sentence.

4.2 OFFENCES RELATING TO RACKETEERING ACTIVITIES (CHAPTER 2)

The term 'racketeering offence' creates confusion as racketeering as such is not criminalised in the Act. Regrettably, the legislature has failed to define racketeering.³¹⁴ Accurately so, De Koker argues that racketeering is originally an American term for the organised blackmailing of businesses by intimidation and violence. He concludes that, globally, the term has since been employed more widely to refer to organised crime in general.³¹⁵ The view expressed by Kruger that racketeering is an offence contributes to the confusion.³¹⁶ The Act criminalises a

³¹⁴Goredema *Money Laundering* 86.

³¹⁵De Koker *Money Laundering* com 3-13.

³¹⁶Kruger *Organised Crime* 20-22. Arguments in this regard appears under element of pattern of racketeering activities in chapter six *infra*.

pattern of racketeering activities and not racketeering. Burchell uses the term “racketeering-based offences.”³¹⁷

A pattern of racketeering activity is defined 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 within ten years (excluding the period of imprisonment) after the commission of such prior offence referred to in Schedule 1.³¹⁸

4.2.1 Receive, use, invest or retain the proceeds of racketeering activity

Section 2(1)(a) of the POCA provides that any person who receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and knows or ought reasonably to have known³¹⁹ that such property is so derived; and uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of any enterprise within the Republic or elsewhere, shall be guilty of an offence and be liable on conviction to a fine not exceeding R1 000 million, or imprisonment for a period up to imprisonment for life.³²⁰

Kruger identifies the elements of contraventions of Section 2(1)(a) of the POCA as the existence of an enterprise; a pattern of racketeering activity; the accused directly or indirectly, received or retained property, derived from a pattern of racketeering activity; the accused knew or ought reasonably to have known that the property was derived from a pattern of racketeering activity; the accused directly or indirectly used

³¹⁷*Id* n 33 *supra* at 977.

³¹⁸Section 1(1) of the POCA of 1998.

³¹⁹Knowledge has been defined in Sections 1(2) and 1(3) of the POCA of 1998.

³²⁰The nature of the penalty is provided for in Section 3(1) of the POCA of 1998.

or invested any part of such property, to acquire any interest in any enterprise, or to establish any enterprise, or to operate any enterprise, or in the activities of any enterprise.³²¹ In terms of the specimen charge sheet that depicts the elements of an offence, he advances the accused; received or retained property; the property; derived from; a pattern of racketeering activity; *mens rea*; used or invested property; in the operation of the enterprise; and enterprise.³²²

An analysis of this subsection indicates that the elements of contraventions of this subsection include the following:

1. The accused must have received or retained property.
2. There must be a pattern of racketeering activity.
3. There must be an enterprise within the Republic or elsewhere.
4. The property must have been derived directly or indirectly from a pattern of racketeering activity.
5. The accused must have known or ought to have reasonably known that such property is derived directly or indirectly from a pattern of racketeering activity.
6. Participation or involvement must be in a Schedule 1 offence.
7. The accused must have used or invested, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise; within the Republic or elsewhere.

4.2.2 Receive or retain the proceeds of racketeering activity

Section 2(1)(b) of the POCA stipulates that any person who receives or retains any property, directly or indirectly, on behalf of any enterprise; and knows or ought reasonably to have known that such property is derived from or through a pattern of

³²¹*Id* n 316 *supra* at 17.

³²²*Id* n 316 *supra* at 176. An accused refers to one person, who in an organised crime shall operates with others.

racketeering activity; within the Republic or elsewhere, shall be guilty of an offence and be liable on conviction to a fine not exceeding R1 000 million, or to imprisonment for a period up to imprisonment for life.³²³

An analysis of this subsection indicates that the first six elements of contraventions of Section 2(1)(a) *supra*, are applicable in this subsection. The distinctive elements applicable in this section are the following:

1. The accused must have received or retained the property on behalf of any enterprise.
2. The property must have been received or retained within the Republic or elsewhere.

4.2.3 Knowingly use or invest the proceeds of pattern of racketeering activity

Section 2(1)(c) of the POCA provides that any person who uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise; and knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity; within the Republic or elsewhere, shall be guilty of an offence and be liable on conviction to a fine not exceeding R1 000 million, or to imprisonment for a period up to imprisonment for life.³²⁴

An analysis of this subsection indicates that elements 3-5 of the elements under 4.2.1 *supra* are applicable and that the distinctive elements of contravening this section are the following:

1. The accused must have used or invested property.
2. Such usage or investment of property must be on behalf of an enterprise.

³²³*Ibid* n 320 *supra*.

4.2.4 Acquisition, maintenance or control of any interest through racketeering activity

Section 2(1)(d) of the POCA provides that any person who acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity; within the Republic or elsewhere, shall be guilty of an offence and be liable on conviction to a fine not exceeding R1 000 million, or to imprisonment for a period up to imprisonment for life.³²⁵

In terms of the specimen charge sheet that reflects the elements of an offence, Kruger submits the accused; maintained an interest in or control of enterprise; the enterprise; and pattern of racketeering activity.³²⁶ An analysis of this subsection indicates that elements 2, 3 and 6 under 4.2.1 *supra*, are applicable and a distinctive element of contravention of this subsection is that the accused must have directly or indirectly acquired, maintained interest or controlled any enterprise through a pattern of racketeering activity.³²⁷

4.2.5 Conduct racketeering as a manager, employee or an associate

Section 2(1)(e) of the POCA states 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; within the Republic or elsewhere, shall be guilty of an offence and be liable on conviction to a fine not exceeding R1 000 million, or to imprisonment for a period up to imprisonment for life.³²⁸

³²⁴*Ibid* n 320 *supra*.

³²⁵*Ibid* n 320 *supra*.

³²⁶*Id* n 316 *supra* at 179.

³²⁷*Id* n 316 *supra* at 16.

³²⁸*Ibid* n 320 *supra*.

In terms of the specimen charge sheet that reflects the elements of contravention of this subsection, Kruger tables the accused; the enterprise; the accused managed the enterprise; *mens rea*; and pattern of racketeering activity.³²⁹ In *S v De Vries*,³³⁰ the court dealt with the elements of this section. The facts of the case were that eleven accused faced a variety of common-law charges - including theft, robbery with aggravating circumstances, kidnapping and attempted murder - in connection with three separate incidents in which commercial vehicles carrying cigarettes were stolen. In addition, they faced statutory charges of unlawful possession of firearms and ammunition, and four counts under Section 2 and 4 of the POCA. The question to be answered was whether any of the accused committed an offence in terms of POCA. The court held that it was clear that accused 1, Selwyn Winston De Vries, had managed the enterprise in that he had issued instructions to the others concerning the first robbery, and had maintained a dominant role throughout the second robbery. As to accused 2, the fact that he had been second in charge and had conveyed accused 1's instructions did not make him a manager. He had, similarly to the other members of the enterprise, generally taken instructions from accused 1. He was not, therefore, a manager of the enterprise, and was entitled to be acquitted on count 1.³³¹ However, the court found that the accused had committed a pattern of racketeering activity based on the robberies.

Except elements 2 and 6 under 4.2.1 *supra*, the elements required to prove that the offence under this subsection had been committed and are the following:

1. There must be an enterprise.³³²
2. The accused must directly or indirectly conduct or participate in the conduct

³²⁹*Id* n 316 *supra* at 180.

³³⁰2009 (1) SACR 613 (C).

³³¹2009 (1) SACR 613 (C) at 165.

³³²See also Kruger *Organised Crime* 14 and *Dos Santos* at 20.

of an enterprise.³³³

3. The accused must be a manager or an employee or associated with the enterprise.³³⁴
4. The enterprise's affairs must be identifiable.
5. Participation must be ongoing, continuous or repeated participation or involvement.³³⁵

4.2.6 Management of the operations of an enterprise

Section 2(1)(f) of the POCA states that, any person who manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity; within the Republic or elsewhere, shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 million, or to imprisonment for a period up to imprisonment for life.³³⁶

In *De Vries*³³⁷ *supra*, the court held that, in order to secure a conviction under Section 2(1)(f) of POCA, the State had to prove four elements: that an enterprise existed; that the accused had managed the operations or activities of the enterprise; that a pattern of racketeering activity had taken place; and that the accused knew, or should reasonably have known, that a pattern of racketeering activity was taking place.³³⁸ Except the second element under 4.2.1 *supra*, all these elements are applicable to this section.

³³³*Ibid* n 332 *supra*.

³³⁴*Id* n 316 *supra* at 14.

³³⁵See *Dos Santos* case under n 417 *infra* at 21.

³³⁶*Ibid* n 320 *supra*.

³³⁷*Ibid* n 330 *supra*.

³³⁸*Id* n 330 *supra* at 614-615.

An analysis of this subsection indicates that the elements 1, 3 and 4 under 4.2.4 are applicable. Furthermore, the elements 1, 3, 4, 5, and 7 under 4.2.1 *supra*, are also applicable here. The distinguishing elements of contraventions of Section 2(1)(f) of POCA are as follows:

1. The accused must manage the operation or activities of an enterprise directly or indirectly.
2. The accused must know or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity.³³⁹

4.2.7 Conspiracy or attempts to violate the provisions of section 2(1)(a-e) of POCA of 1998

Section 2(1)(g) of the POCA states that, any person who conspires or attempts to violate any of the provisions of paras (a), (b), (c), (d), (e) or (f), within the Republic or elsewhere, shall be guilty of an offence and be liable on conviction to a fine not exceeding R1 000 million, or to imprisonment for a period up to imprisonment for life.³⁴⁰ Conspiracy, attempt and incitement are inchoate crimes. Inchoate crimes can be defined as acts which are committed in anticipation of the commission of a principal crime.³⁴¹ The inchoate crime that is not covered in this subsection is incitement.

Singer and La Fond state that at common law, which was applicable in South Africa

³³⁹These elements were highlighted by Cloete JA in *Eyssen v S* (764/2007) [2008] ZASCA 97 which is also accessible at <http://www.ufs.ac.za/apps/law/appeal/files/2008/3/2007-746.pdf> last visited on 23 November 2008.

³⁴⁰*Ibid* n 320 *supra*.

³⁴¹Visser and Vorster *Criminal Law Cases* 395 and Milton *Criminal Law* 2 [41-43].

before the promulgation of the Riotous Assemblies Act of 1956,³⁴² conspiracy was defined as an agreement of two or more individuals to commit a criminal or unlawful act or a lawful act by unlawful means.³⁴³ Section 18(2)(a) of the Riotous Assemblies Act of 1956 provides that any person who conspires with any other person to aid or procure the commission of or to commit any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person of actually committing that offence would be liable. As explained by Snyman, the definition of conspiracy is not confined to acts relating to riotous assemblies but covers any crime.³⁴⁴

In *S v Alexander (2)*,³⁴⁵ the accused were charged on the main count with a contravention of section 21 (1) of the General Law Amendment Act 76 of 1962, namely a conspiracy to commit certain wrongful and wilful acts and three alternative charges. The court held as per Van Heerden J as follows:

Where two or more persons have associated themselves in an organisation with the agreed purpose or object of committing an offence, they have in law formed a conspiracy to commit the contemplated offence. It follows that any person who joins such an organisation as a member, well knowing the object or purpose thereof, or who remains a member after becoming aware of the purpose thereof, has signified by his conduct his agreement with the aims of the said organisation and has made himself guilty of a conspiracy to commit such offence.³⁴⁶

In *Libazi v The State*,³⁴⁷ the facts of the case were briefly that five accused were arraigned in Sterkspruit Circuit Court of Mthatha High Court for murder, conspiracy

³⁴²17 of 1956.

³⁴³Singer and La Fond *Criminal Law* 282.

³⁴⁴*Id* n 14 *supra* at 294. According to Weaver, Abramson, Burkoff and Hancock put it differently that at common law, a conspiracy consisted of an agreement between two or more persons to commit, by concerted action, an unlawful act or a lawful act by unlawful means, see Weaver *et al Criminal Law* 256.

³⁴⁵1965 (2) SA 818 (C).

³⁴⁶1965 (2) SA 818 (C) at 822. See also Visser and Vorster *Criminal Law Cases* 435.

to murder, five counts of attempted murder, illegal possession of firearms and ammunition. The appellants were convicted of murder and conspiracy on which they lodged the appeal. The court confirmed that, although conspiracy is punishable in terms of an old statute dealing with riotous assemblies, the crime of conspiracy as defined in the Act is not limited to acts relating to riotous assemblies. The definition is wide enough to cover conspiracy to commit any crime.³⁴⁸

Attempt in the POCA is restricted to the crimes mentioned in section 2 only. The elements of criminal attempt are wrongful intent to commit an offence and unlawfulness.³⁴⁹ The legislature has incorporated the offences of attempt and conspiracy in the POCA to attract heavier punishment for those acts that are related to organised crime as opposed to those crimes related to other crimes. While the element of jurisdiction is the same as element 4 under paragraph 4.2.1 *supra*, the analysis of this subsection indicates that the unique elements of this offence include the following:

1. The agreement to commit an offence must be at least between two persons.³⁵⁰
2. The accused must conspire or attempt to violate any of the provisions of paragraphs (a)-(f) of Section 2(1) of the POCA of 1998.³⁵¹

In terms of Section 2(4) of POCA, prosecution for the contravention of the provisions of Section 2 of POCA shall only be undertaken if so authorised in writing by the NDPP. One of the distinguishing characteristics of prosecution in terms of Section 2 of the POCA is the unconventional court process where evidence of hearsay, similar facts or previous convictions are admissible as provided in Section 2(2) of this Act.

³⁴⁷[424/2009 [2010] ZASCA 91 (1 June 2010)].

³⁴⁸This case is accessible at <http://www.justice.gov.za/sca-2010/sca10-091.pdf> last visited on 04 November 2011.

³⁴⁹Visser and Vorster *Criminal Law Cases* 395.

³⁵⁰*Id* n 14 *supra* at 295.

³⁵¹This section limits the crimes to those in section 2 of the POCA of 1998 and therefore differs

This section states that the court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair. An example of a case where hearsay evidence was admissible is *De Vries v The State*³⁵² *supra* where the aerial photographs in question were processed from negatives of a film bearing the number V13928 which had been written into the logbook by the technician and not by Thatane, the witness. As the technician was not called, the appellant argued that the entry was hearsay and that the state had therefore not established that the photographs had indeed been taken when Thatane said they were.³⁵³

4.3 OFFENCES RELATING TO THE PROCEEDS OF UNLAWFUL ACTIVITIES (CHAPTER 3)

Offences under this chapter are divided into three subcategories. These subcategories are under Sections 4, 5 and 6 and they are generally referred to as the proceeds of unlawful activities.

4.3.1 Money laundering

Money laundering is not a common law crime.³⁵⁴ It is a phenomenon highly intertwined with organised crime.³⁵⁵ According to Van der Schoot, the concept of money laundering originated in the USA.³⁵⁶ The outlawing of money laundering is a

with the Riotous Assemblies Act of 1956, which covers all types of crimes.

³⁵²(130/11) [2011] ZASCA 162 paragraph 21. The case is also accessible at <http://www.justice.gov.za/sca/judgements/sca-2011/sca2011-162.pdf> last visited on 01 October 2011.

³⁵³*Ibid* n 352 *supra* at 21.

³⁵⁴*Id* n 316 *supra* at 44.

³⁵⁵Besozzi *Illegal Markets* 501.

³⁵⁶Van der Schoot *Organised Crime* 33.

core element in the fight against organised crime.³⁵⁷ According to the UNODC Annual Report of 2009, money laundering is defined as the method by which criminals disguise the illegal origins of their wealth and protect their asset bases in order to avoid suspicion of law enforcement and to prevent leaving a trail of incriminating evidence. It concludes that money laundering empowers corruption and organised crime.³⁵⁸

The African Regional Ministers³⁵⁹ have recognised that money laundering is a vital component of all forms of organised crime. They raised extreme concerns about the ability of organised crime to infiltrate legal financial markets and its attempts to control sectors of national economies through the laundering of illicit proceeds, which continue to represent grave threats for their countries and their national economies.³⁶⁰ In terms of the SADC Protocol on Combating Illicit Drugs, money laundering is defined as engaging directly or indirectly in a transaction that involves money or property which is proceeds of crime or receiving, processing, conceiving, disguising, transforming, converting, disposing of, removing from, bringing into any territory, money or property which is proceeds of crime.³⁶¹

Richards observes that money laundering has been described or defined in different ways. In support of his arguments, he points out the following:

- Money laundering is the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate.
- Money laundering is the process of taking the proceeds of criminal activity and making these proceeds appear legal.

³⁵⁷Milton *Criminal Law* B4-3.

³⁵⁸UNODC Annual Report 2009 at 25.

³⁵⁹These are the Ministers from Africa who sat to look at ways of contributing to the development of the Palermo Convention.

³⁶⁰Dakar Declaration 6 paragraph 16.

³⁶¹Article 1 of SADC Protocol on Combating Illicit Drugs. This Protocol can also be accessed at <http://www.sadc.int/#article1> last visited on 5 September 2009.

- Money laundering is the act of converting funds derived from illegal activities into a spendable or consumable form.³⁶²

Nair defines money laundering as the conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing the illicit nature and origin of the property from government authorities.³⁶³ He has also quoted the definition of money laundering as adopted by Interpol's General Assembly in 1995 as any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources.³⁶⁴ In a dissenting voice that is blurred by close interpretation, Behan argues that the term dirty money is a misnomer, as the only major cases in which it is necessary to launder specific banknotes are kidnap ransoms and bank robberies, which are fairly rare activities for organised crime in general.³⁶⁵ Van Duyne dubs this dirty money, crime-money.³⁶⁶

According to the Financial Action Task Force's Report on Money Laundering, the value of the sales of cocaine, which is estimated at the value of \$122 billion yearly, is being laundered.³⁶⁷ In terms of the Financial Intelligence Centre Act (FICA) of 2001,³⁶⁸ money laundering is defined, as an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds of unlawful activities which constitutes an offence in terms of Section

³⁶²Richards *Criminal Organizations* 43-44.

³⁶³Nair *Organised Crime* 138.

³⁶⁴*Id* n 363 *supra* at 139.

³⁶⁵Behan *The Camorra* 125.

³⁶⁶Van Duyne *Money-Laundering* 363.

³⁶⁷Van Duyne *Organized Crime* 6. South Africa is a member of the Financial Action Task Force (FATF), which was founded in Paris in 1989 by the Group of seven (G7) which are Canada, France, Germany, Japan, the United Kingdom, the Commission of the European Communities and the United States.

³⁶⁸38 of 2001.

64 of this Act or Sections 4, 5 or 6 of the Prevention Act.³⁶⁹ The phrasing of this definition is underscored by the Proceeds of Crime Act 2002,³⁷⁰ which defines money laundering as an act which: constitutes an offence under Sections 327, 328 and 329; constitutes an attempt, conspiracy or incitement to commit one of those offences; constitutes aiding, abetting, counselling or procuring the commission of one of those offences; or would constitute any of the above offences if done in the United Kingdom.³⁷¹

Van Duyne defines money laundering as an act of accounting or fiscal act to bypass the law. He limits the concept to those acts, which are intended to hide the sources of assets by pretending to be originating from other legitimate sources. Any other money transactions which are not intended to result in such a legitimation, should therefore not be considered money laundering but money-channelling. He, however, concedes that money-channelling may be the first step in money laundering.³⁷² Lyman and Potter observe that organised criminal groups do not usually have a legal way to spend their illicit profits and therefore have to hide as much of their revenue as possible.³⁷³ Wright believes that organised crime groups generate large sums of money by activities such as drug trafficking, arms smuggling and financial crime.³⁷⁴

The process of changing the face of the dirty profit into “clean money” stream requires penetration of legitimate business by organised criminal groups and it is called money laundering. Graham, Bell and Elliott explains that the term laundering

³⁶⁹Section 1 of FICA of 2001. See also Burchell *Principles* 988 and Kruger *Organised Crime* 35. The Prevention Act is defined as the Prevention of Organised Crime Act 121 of 1998. This writer differs with Burchell who states that money laundering is also defined in Section 4 of POCA of 1998. The definitions in POCA are in Section 1 and have not been repeated in other sections. Sections 4, 5 and 6 of the POCA deals with the proceeds of crime as indicated in paragraph 4.1 *supra*.

³⁷⁰12 Statutes 2451 of the United Kingdom.

³⁷¹See section 340(11). See also Graham, Bell and Elliott *Money Laundering* 35.

³⁷²Van Duyne *Organized Crime* 115.

³⁷³Lyman and Potter *Organized Crime* 171.

is not confined to cash, but it is used because money laundering techniques are intended to turn 'dirty' money into 'clean' money.³⁷⁵ Block states that money laundering is a process of changing illicitly acquired wealth into what appears to be licit.³⁷⁶ There are as many definitions of money laundering as are authors.³⁷⁷

Nelen and Lankhorst argue that lawyers are involved in money laundering by giving advice on beneficial ways to transfer money, thinking up and passing money through their accounts.³⁷⁸ This view finds application in the unreported case of *S v Dustigar* (Case no CC6/2000, Durban and Coast Local Division) where 19 persons, mostly family members who allowed their bank accounts to be used, were convicted of money laundering in terms of the old law, Proceeds of Crime Act of 1996.³⁷⁹ In this case, Nugalen Gopal Pillay, a practicing attorney, who was involved in drafting two fictitious sales agreements in support of a confessed robber was convicted.³⁸⁰ In *De Vries*,³⁸¹ the appellant, Achmat Mather, was convicted on two counts of theft arising from the two robberies in the Western Cape. The court concluded that although he had not participated in the robberies himself, he had indeed purchased the stolen cigarettes when he must have been aware that they were stolen goods. It further concluded that the appellant's actions in doing so for the purpose of resale amounted to "money laundering" as envisaged in Section 4 of POCA, and convicted him on two charges under that section.

The POCA, which is a multi-pronged law, has not defined money laundering. The Act

³⁷⁴Wright *Organised Crime* 68.

³⁷⁵Graham, Bell and Elliott *Money Laundering* 3. Money is not restricted to cash but value of other assets.

³⁷⁶Block *Bad Business* 234.

³⁷⁷Gilmore *Dirty Money* 11 and 30, Shanty and Mishra *From Trafficking to Terrorism*, Karchmer *Money Laundering* 39, Albanese *Organized Crime* 296 and Klotter *Criminal Law* 312. See also 33 Am. Crim. L. Rev. 881 (1996) and 18 USC sections 1956-1957.

³⁷⁸Nelen and Lankhorst *Lawyers and Notaries* 135.

³⁷⁹76 of 1996.

³⁸⁰See Goredema *Money Laundering* 94.

has two sets of money laundering provisions which are: general money laundering offences involving proceeds of all forms of crime, and offences involving proceeds of a pattern of racketeering activities.³⁸² Section 4 of POCA is dedicated to money laundering.³⁸³

De Koker states that money laundering refers in general to any act that obscures the illicit nature or the existence, location or application of proceeds of crime.³⁸⁴ Botes argues that the overall objective of money laundering operation is the concealment of the illegal source of the proceeds of crime in order to convey the impression that the proceeds are derived from a legitimate source. He describes money laundering as the washing of dirty money through various channels until all traces of illegal activities have been removed.³⁸⁵ He continues and points out that money laundering can be regarded as a process during which three essentially complex concealment steps, which are placement, layering and integration might be taken.³⁸⁶ De Koker's

³⁸¹(130/11)[2011] ZASCA 162 at 166.

³⁸²See the main money laundering offences under POCA 4.1 *supra* at [http://library.saps.org.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://library.saps.org.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) last visited on 24 January 2009 and Goredema *Money Laundering* 84.

³⁸³It provides that any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and - (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect -(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere -(aa) to avoid prosecution; or (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence and liable in terms of Section 8 to a fine not exceeding R100 million, or to imprisonment for a period not exceeding 30 years.

³⁸⁴De Koker *Money Laundering* com 1-5.

³⁸⁵Botes *Money Laundering* 2.

³⁸⁶Botes *Money Laundering* 45, Richards *Criminal Organizations* 46, Lyman and Potter *Organized Crime* 172, Roth *Organized Crime* 267, Nair *Organised Crime* 140, Mallory *Organized Crime* 231 and Joyce *Money Laundering* 82. Lunde, Robinson, Wallace and Roberson, Graham, Bell and Elliott, Gilmore, Bjelopera and Finklea, Ntema, Nsundano as well as Bazley and Winch buttress these three steps and agree with this explanation; see Lunde *Organized Crime* 46, Robinson *The Laundrymen* 10-11; Wallace and Roberson *Criminal*

dissenting view is that not all money laundering schemes necessarily reflect these stages because a single act can constitute the offence of money laundering.³⁸⁷

According to Botes, organised crime syndicates infiltrated South Africa in the 1980s and set up companies in order to create a legitimate veil behind which dirty money could be safely laundered while the security forces were preoccupied with the liberation movements.³⁸⁸ Unfortunately, he has not mentioned any of the companies to support his view. He believes that the South African regime of the 1980s participated heavily in money laundering while assisting organisations such as *Uniao Nacional para a Independencia Total de Angola* (UNITA) that fought against governments and were seen as supporters of their enemies.³⁸⁹ He has not explained how this was done. He correctly observed that there are very few real successful prosecutions against money launderers in South Africa.³⁹⁰

The money that is being laundered is the proceeds of crime, which is in fact fundamental property. In terms of the POCA, property means money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof.³⁹¹ The proceeds must have been generated through an illegal activity. The Prevention of Organised Crime Second Amendment Act³⁹² inserted a definition for “unlawful

Law 236; Graham, Bell and Elliott *Money Laundering* 5; Bazley and Winch *Money Laundering* 1; Gilmore *Dirty Money* 32, Bjelopera and Finklea *Organized Crime* 16, Ntema *Money Laundering* 1, Nsundano *Money Laundering* 1.2.1-1.2.3 and Jojarth *Global Trafficking* 140.

³⁸⁷South African Money Laundering and Terror Financing Law 2007 and De Koker *Money Laundering* com 1-6. See also Kruger *Organised Crime* 36.

³⁸⁸Botes *Money Laundering* 8.

³⁸⁹*Ibid* n 388 *supra*. UNITA is literally translated as National Union for the Total Independence of Angola. It was established by Dr Jonas Macheiro Savimbi on the 10-03-1966. See also Siegel *Diamonds* 88.

³⁹⁰*Id* n 388 *supra* at 11.

³⁹¹Section 1(1) of the POCA of 1998. Property does not include property associated with terrorists or a related activity as this has been defined separately.

³⁹²38 of 1999.

activity” into POCA of 1998.³⁹³ In terms of this definition, “unlawful activity” is any conduct which constitutes a crime or which contravenes any law, whether such conduct occurred before or after the commencement of POCA and whether it occurred in South Africa or elsewhere.³⁹⁴

In essence, the definition of the proceeds of unlawful activities requires a very specific connection or link between the property, service, advantage, benefit or reward and the alleged unlawful activity. It must have been derived, received or retained in connection with or as a result of any unlawful activity. In *NDPP v Seevnarayan*,³⁹⁵ the court considered these phrases and held that the state’s arguments lost sight of the fact that the funds concerned were legitimately “derived (or) received” by the respondent. This case concerns the investment of R4 115 738-58 at Sanlam by the respondent in order to evade income tax which does not constitute organised crime. From a money laundering perspective, money or property can only constitute proceeds of crime if the crime that gives rise to the proceeds has been completed and the relevant proceeds were derived, received or retained in connection with or as a result of that offence. It is important to distinguish between the predicate offence such as theft or fraud and the laundering of the proceeds of the theft or fraud. The acts that a thief commits in respect of property that will be or is being stolen, cannot constitute a laundering offence until the theft has been completed and the property has been “derived, received or retained” as required.³⁹⁶

The word predicate offence came into the South African legal vocabulary through *De*

³⁹³See section 1 of the Prevention of Organised Crime Second Amendment Act of 1999.

³⁹⁴Section 1(1) of POCA of 1998.

³⁹⁵2004 (2) SACR 208 (SCA).

³⁹⁶See

[http://library.saps.org.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://library.saps.org.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) last visited on 24 January 2009.

*Vries*³⁹⁷ *supra*, where it was stated that the elements of offence of contravening Section 2(1)(c) of the POCA are quite different from those constituting underlying or predicate offences.³⁹⁸ The relevancy of this case in this section is to demonstrate the entry point of the terminology in our laws.

From an elementary point of view, the analysis of this section and the case of *De Vries*³⁹⁹ *supra*, suggests that the elements of contraventions of Section 4 of POCA would include the following:

1. An act from which the proceeds are derived or received must be unlawful.
2. Such unlawful act must constitute a predicate offence that gave rise to the proceeds derived, received or retained in connection therewith.
3. Such activity must have happened in the Republic or elsewhere.
4. Receipt or retention of property must take place.
5. Property must have been derived directly or indirectly from a pattern of racketeering activity.
6. The accused must know or should reasonably have known that the property is derived from crime.
7. The accused must use or invest such property.

4.3.2 Assisting another to benefit from proceeds of unlawful activities

Section 5 of the POCA provides that any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or

³⁹⁷*Ibid* n 330 *supra*.

³⁹⁸2009 (1) SACR 613 (C) at 613-614. The term was further repeated in *S v Dos Santos* 2010 (2) SACR 382 (SCA) albeit without defining it. In this case, Tony Dos Santos was convicted of the contravention of Section 20 of the Diamonds Act 56 of 1986 while Derrick Mbatha was convicted of Section 19 of the Act.

³⁹⁹2009 (1) SACR 613 (C) at 613-615.

transaction whereby - (a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or (b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way, shall be guilty of an offence and liable in terms of Section 8 to a fine not exceeding R100 million, or to imprisonment for a period not exceeding 30 years.

The analysis of this section indicates that the unique elements of contravention of Section 4 under paragraph 4.3.1 *supra*, are applicable except element 7. This element is replaced in Section 5 of the POCA with the following:

Such proceeds must be used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way.

4.3.3 Acquisition, possession or use of proceeds of unlawful activities

Section 6 of the POCA provides that any person who (a) acquires; (b) uses; or (c) has possession of property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence and liable in terms of section 8 to a fine not exceeding R100 million, or to imprisonment for a period not exceeding 30 years.

The analysis of this section indicates that the elements of contravention of Section 5 of the POCA are applicable except that the element indicated under paragraph 4.3.2 *supra*, is replaced by the following in Section 6 of POCA:

The accused must acquire, use or has possession of the proceeds of criminal activities of another person.

4.4 OFFENCES RELATING TO CRIMINAL GANG ACTIVITIES (CHAPTER 4)

Offences under this chapter are called gang related offences. These offences includes both membership of a criminal gang and criminal activities of a criminal gang. Criminal gang is defined 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.⁴⁰⁰ According to Snyman, the words included at the beginning of the definition mean that the court can also find that a group of persons with which the accused associated with was a criminal gang in spite of the fact that the group has no identifiable name or identifying sign or symbol.⁴⁰¹ Gastrow defines 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 a gang-focused criminal activity either individually or collectively.⁴⁰²

A pattern of criminal gang activity is defined as including the commission of two or more criminal offences referred to in Schedule 1: provided that at least one of those offences occurred after the date of commencement of Chapter 4, and the last of

⁴⁰⁰Section 1(1)(iv) of the POCA of 1998. See Standing *Organised Crime* 251, who argues that South Africa copied the American official definition without serious explanations of what it means by 'criminal gang'. See also Kruger *Organised Crime* 55 and Obokata *Tansnational Organised Crime* 34. In terms of the United States Code Title 18, Part I of Chapter 26, Section 521(a), criminal street gang means an ongoing group, club, organization, or association of 5 or more persons - (A) that has as one of its primary purposes the commission of one or more of the criminal offenses described in subsection (c); (B) the members of who engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and (C) the activities which affect interstate or foreign commerce.

⁴⁰¹Snyman *Die Nuwe* 215. See also Kruger *Organised Crime* 56.

⁴⁰²Gastrow *Organised Crime* 10. Kinnes and Steinberg *Criminal Empires* 4. Krause *Crime Threat Analysis* 119.

those offences occurred within three years after a prior offence and the offences were committed- (a) on separate occasions; or (b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang.⁴⁰³ Logically, it does not make sense as to why the legislature define a criminal gang as consisting of three or more persons, but requires that a pattern of criminal gang activities is committed by two or more persons.⁴⁰⁴

The organised criminal groups, who are in the South African context called the criminal gangs, operate mostly in the Western Cape Province. As Kinnes and Steinberg puts it, street gangs are no longer characterised by youngsters who hang around the streets of local communities to 'defend' the community from rival gangsters, but that they have developed into organised criminal empires.⁴⁰⁵

Kinnes and Steinberg who agree with this view, argue that one of the important factors that contributed to the organisational sophistication of local gangs is their need to keep foreign syndicates out of their markets.⁴⁰⁶ Kemp concludes that the Americans and the Firm are the biggest and best organised drug gangs in the Cape Flats.⁴⁰⁷ He convincingly questions the distinctions between a criminal gang and organised criminal groups by arguing that, if the gangs want to monopolise the illegal markets for sex industry, arms trade, fishing, loan schemes, diamond and property industries, then how do they differ from other criminal organisations.⁴⁰⁸ In essence, this argument concludes that the term 'criminal gang' and 'organised criminal group' do not differ. The view of these authors are supported by the UN which has included the 28s Prison Gang amongst the 40 selected organised criminal

⁴⁰³Section 1(1)(xi) of the POCA of 1998. See also Kruger *Organised Crime* 57.

⁴⁰⁴See section 1(1)(iv) and section 1(1)(xi) of POCA of 1998.

⁴⁰⁵Kinnes and Steinberg *Criminal Empires* 2 and 4 and *Standing Anti-gangs Policy* 2. Ironically, Fox who states that the Al Capone, who is an individual, is a gang blurs this self-created distinction, see Fox *Blood and Power* 176.

⁴⁰⁶Kinnes and Steinberg *Criminal Empires* 8.

⁴⁰⁷Kemp *Gangs* 207.

groups in sixteen countries.⁴⁰⁹

Jensen believes that young men join gangs because of the infinite riches that could be acquired in the gang including fast cars, money and drugs.⁴¹⁰ In supporting the view that criminal gang and organised criminal group are the same, Kinnes simply ask a question as to the point at which a street gang stops being a street gang and moves into more organised criminal formations.⁴¹¹ Similar in temperament, Burchell states that Pinnock highlighted this dilemma by asking a question, 'at what point do we make a distinction between the activities of a gang and the survival strategies of the poor'.⁴¹²

In unpacking the origin of this confusion, Standing states that, Chapter 4 of the POCA, which relates to criminal gangs was originally planned to be a piece of legislation called the Gangsterism Prevention Act. According to him, this chapter is a carbon copy of the California law called The Street, Terrorism Enforcement, and Prevention (STEP) Act of 1988. He concludes that in merging the RICO and the California STEP Act to produce the POCA, the drafters did not distinguish criminal gang and organised criminal group.⁴¹³ His view is that gangs and criminal organisations appear to be seen as one. This is evidenced by his submission that the POCA permitted the courts to administer extremely harsh penalties for those found to be members of organised crime groups or criminal gangs.⁴¹⁴ He also refers to the Hard Livings, the Americans, the Firm, the Corner Boys, the Sexy Boys, the Junky Funkey Kids and the Mongrels as criminal organizations, whereas they are also

⁴⁰⁸*Id* n 407 *supra* at 9 and 14.

⁴⁰⁹UNODC *Forty Selected Organised Criminal Groups* 21. This is also accessible at <http://www.unodc.org/pdf/crime/publications/Pilot-survey.pdf> last visited on 07 May 2011.

⁴¹⁰Jensen *Gangs* 87.

⁴¹¹*Id* n 407 *supra* at 12.

⁴¹²*Id* n 33 *supra* at 984.

⁴¹³Standing *Organised Crime* 51, 245 and 267 as well as Standing *Anti-gangs Policy* 5.

⁴¹⁴Standing *Organised Crime* x.

known as criminal gangs who are aggressive and recruiting new members and creating more cells in the Cape Flats.⁴¹⁵ This writer's view is that it is unnecessary to distinguish between a 'criminal gang' and an 'organised criminal group'.

Snyman argues that the crimes created in Section 9 of the POCA overlap with those covered in the rules of criminal law governing participation in crime (as co-perpetrators or accomplices) and the anticipatory crimes, that is, attempt, conspiracy and incitement.⁴¹⁶ His view is that these crimes are unnecessary in the POCA. However, the Legislature has alluded the fact that the other laws, including the common laws and statutory laws, were insufficient to deal with the scourge of organised crime.

Gastrow who argues that gangs differ from criminal groups because of the level of organization, conceded that under certain circumstances, the criminal activities of gangs do amount to organised crime.⁴¹⁷ His distinction blurs when he states that one of the more notorious of these organised criminal groups was the Msomi gang who operated from Alexandra.⁴¹⁸ This confusion has also visited Ince who points out that two of the most notoriously violent criminal gangs in the world are Sicilian Mafia and the Chinese Triads.⁴¹⁹ These are well known "traditional" organised criminal groups that have been referred to by various organised crime researchers.⁴²⁰

⁴¹⁵*Id* n 414 *supra* at 38 and Standing *Anti-gangs Policy* 2 and 17. The definitions of consortium, cartel, syndicate, organization and gang as pointed out by Mallory, support the view that these are the same; see Mallory *Organized Crime* 4-5.

⁴¹⁶*Id* n 14 *supra* at 442.

⁴¹⁷Gastrow *Organised Crime* 10.

⁴¹⁸*Id* n 417 *supra* at 12.

⁴¹⁹Ince *Organised Crime in China and Italy* 2. This article is accessible at www.internetjournalofcriminology.com/InceorganisedcrimeinChinaandItaly.pdf last visited on 16 May 2011. See also *Journal of Modern Italian Studies* Vol 1 Issue 2 2003: pages 273 – 291.

⁴²⁰Some of these researchers include Cressey and Abadinsky.

The exhibition of uncertainties by the influential researchers on the distinction between criminal gang and organised criminal group, such as Gastrow and Robinson tends to support, their view is that this distinction is a cosmetic fallacy. Criminal gang and organised criminal group' are one and the same. This writer concludes that criminal gang should not be categorised as distinct from organised criminal group. This view is in line with Standing's argument that there is no need to have a separate section within POCA for criminal gangs. The crimes created by the chapter on criminal gang (Chapter 9) can be accommodated in the chapter on racketeering activity (Chapter 2). Consequently, he suggests that the authorities should consider scrapping Section 4 of the POCA.⁴²¹ This writer supports a call to review the POCA of 1998.

4.4.1 Aids and abets criminal gang activity

Section 9(1)(a) of the POCA provides that, any person who actively participates in or is a member of a criminal gang, 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, shall be guilty of an offence and be liable in terms of Section 10(1)(a) to a fine, or to imprisonment for a period not exceeding six years and if the offence was committed under aggravating circumstances⁴²² be liable to a fine, or to imprisonment for a period not exceeding eight years. Snyman submits that this offence overlap with the crime of conspiracy. His argument is based on the understanding that, when a person joins an organization whose aims are to commit a crime or crimes whilst being aware of its unlawful aim or aims, or remains a

⁴²¹Standing *Anti-gangs Policy* 20.

⁴²²Section 10(2) states that if the offence contemplated in Section 9 is committed on the premises or grounds of, or within 500 metres of a public or private 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.

member after becoming aware of them, this signifies that person's agreement with the organization's aims and thereby commits conspiracy.⁴²³ He concedes that the offences in this subsection may amount to attempt, conspiracy or incitement but will not invariably do so. His conclusion is that Section 9(2)(a) creates a crime which goes beyond already existing crimes or provisions of criminal law.⁴²⁴ This means that this offence is a duplication of an existing one. This writer agrees on the ground that the other laws did not cover the pattern of criminal gang activity covered by this Act.

The analysis of this subsection indicates that the elements of contravention of Section 9(1)(a) of the POCA include the following:

1. The existence of a criminal gang.
2. The accused must actively participate or be a member of a criminal gang.
3. The accused must wilfully aid and abet any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang.

4.4.2 Violence or threats for violence by a criminal gang

Section 9(1)(b) of the POCA states that 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 liable in terms of section 10(1)(a) to a fine, or to imprisonment for a period not exceeding six years and if the offence was committed under aggravating circumstances, be liable to a fine, or to imprisonment for a period not exceeding eight years. Snyman submits that this offence overlaps with the crime of conspiracy as well as intimidation in terms of Section 1 of the Intimidation Act of 1982.⁴²⁵ This writer agrees with his argument,

⁴²³*Id* n 14 *supra* at 442.

⁴²⁴*Id* n 14 *supra* at 443.

⁴²⁵72 of 1982. See Snyman *Criminal Law* 442. Section 1(1) of the Intimidation Act of 1982

safe that the pattern of racketeering activity was not covered in other laws.

The analysis of this subsection indicates that the elements of contravention of Section 9(1)(b) of the POCA are the same as the first two elements of contravention of Section 9(1)(a) of POCA as referred to under paragraph 4.4.1 *supra*. The third element is replaced by the following:

The accused must threaten 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.

4.4.3 Threats of retaliation in response to violence

Section 9(1)(c) of the POCA 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 liable in terms of Section 10(1)(a) to a fine, or to imprisonment for a period not exceeding six years and if the offence was committed under aggravating circumstance shall be liable to a fine, or to imprisonment for a period not exceeding eight years. Snyman submits that this offence overlaps with the crime of incitement.⁴²⁶

states as follows: any person who (a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint (i) assaults, injures or causes damage to any person; or (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or (b) act or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication (i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of property of any other person or the security of the livelihood of any other person shall be guilty of an offence and liable on conviction to a fine not exceeding R2 000 000 or imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.

⁴²⁶*Id* n 14 *supra* at 443.

The analysis of this subsection indicates that the elements of contraventions of Section 9(1)(c) are the same as the first two elements of contravention of Section 9(1)(a) of POCA as referred to under paragraph 4.4.1 *supra*. The third element is replaced by the following:

1. The accused must threaten a specific person or persons in general.
2. The threat must be with retaliation in any manner or by means whatsoever, in response to any act or alleged act of violence.

In considering whether a person is a member of a criminal gang for purposes of this, Chapter 4, the court may in terms of Section 11 of the POCA, 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; and is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.⁴²⁷

4.4.4 Cause, contribute or promote a pattern of criminal gang activities

Section 9(2)(a) of the POCA states 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 liable in terms of Section 10(1)(a) to a fine, or to imprisonment for a period not exceeding six years and if the offence was committed under aggravating circumstances, shall in terms of Section 10(1)(c) be liable to a fine, or to imprisonment for a period not exceeding eight years.

⁴²⁷See section 11 of the POCA of 1998.

The analysis of this subsection indicates that the elements of contravention of Section 9(2)(a) of the POCA are the same as the first element of contravention of Section 9(1)(a) of POCA as referred to under paragraph 4.4.1 *supra*. The second and third elements are replaced by the following:

1. The accused must perform any act.
2. The act must be aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity.

4.4.5 Incites, instigates, commands, aids and encourages gang activity

Section 9(2)(b) of the POCA states 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 shall be guilty of an offence and be liable in terms of Section 10(1)(b) to a fine, or to imprisonment for a period not exceeding three years and if the offence was committed under aggravating circumstance, shall in terms of Section 10(1)(d) be liable to a fine or to imprisonment for a period not exceeding five years.

Before the passing of the POCA, incitement was already prohibited in terms of Section 18(2) of the Riotous Assemblies Act of 1956.⁴²⁸ In *R v Nlhovo*,⁴²⁹ the Appellate Division ruled that it is a crime at common law to incite another to commit a crime even though nothing further is done towards its commission.⁴³⁰ The difference is that the POCA selects only those crimes in Section 9 while the Riotous Assemblies Act of 1956 encompasses all crimes. This writer is of the view that this section is unnecessary and should be repealed in its entirety.

⁴²⁸See also Snyman *Criminal Law* 298 and Burchell *Principles* 642 and paragraph 4.2.7 *supra*.

⁴²⁹1921 AD 485.

⁴³⁰*Id* n 33 *supra* at 642.

4.4.6 Causes, recruits or instigates the joining of a criminal gang

Section 9(2)(c) of the POCA states 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 in terms of Section 10(1)(b) to a fine, or to imprisonment for a period not exceeding three years and if the offence was committed under aggravating circumstances, shall in terms of Section 10(1)(d) be liable to a fine or to imprisonment for a period not exceeding five years.

The analysis of this subsection indicates that the elements of contraventions of this subsection are the same as the first element of contravention of Section 9(1)(a) of POCA as referred to under paragraph 4.4.1 *supra*. The second and third elements are replaced by the following:

1. The act must be to cause, encourage, recruits, incites, instigates, commands, aids or advises another person.
2. The purpose must be to join a criminal gang.

Amongst the known criminal gangs that came to the attention of the SAPS are the Americans, the Hard Livings, the Sexy Boys, the School Boys, the Junky Funky Kids, the Skollies,⁴³¹ the Majimbos and the Varados. These groups operate in areas such as Mitchell's Plain, Bishop Lavis, Elsie's River, Phillipi, Ravensmead, Manenburg, Bellevue South, Athlone, Kensington, Paarl East, Westbury, Eersterus and Gelvandale.⁴³²

⁴³¹According to Jensen, skollie (scavenger) is someone who refuses to work for a living; violent hooligan or thug; lurking around urban spaces, seizing the moment and terrorizing hardworking people; see Jensen *Gangs* 2.

⁴³²Kinnes and Steinberg *Criminal Empires* 1, 2, 4, 7 and 11.

4.5 APPLICATION OF THE POCA IN CASE LAW

As indicated in *Mohunram*⁴³³ above, Van Heerden J, submitted that, it is certainly true that POCA, even as amended, is not a model of legislative coherence.⁴³⁴ Like-mindedly, Mujuzi states that the POCA is a complex piece of legislation enacted to deal with complex criminal activities.⁴³⁵

In *Vermaak*,⁴³⁶ the court held, amongst others, as follows:

There had for some time been a controversy as to whether or not the POCA was confined to cases of organised crime, that is, offences that had organizational features of some kind that distinguished them from individual criminal wrongdoing.⁴³⁷ The Supreme Court of Appeal had held that the POCA was designed to go beyond organised crime, and that it clearly applied to cases of individual wrongdoing. That decision had subsequently been upheld by the Constitutional Court in a judgment from which it flowed irresistibly that the court, like the Supreme Court of Appeal before it, took the view that the POCA was not confined to organised crime; otherwise, the Constitutional Court could not have made the order that it had made. Accordingly, the court was bound to follow the legal principle that the POCA was not confined to organised crime, but extended to individual wrongdoing. The offence in issue was one which fell squarely within the terms of item 33 of Schedule 1 to the POCA, and nothing that had subsequently been said warranted a reconsideration of the finding that a motor vehicle was an instrumentality of the offence of driving while under the influence of alcohol. Accordingly, the contrary findings of the court below could not stand.⁴³⁸

Van der Merwe and Du Plessis are, in this writer's view, contributing to the confusion by stating that organised crime may be committed by an individual or by a

⁴³³2007 (4) SA 222.

⁴³⁴*Id* n 433 *supra* at 235.

⁴³⁵Mujuzi *The POCA* 2. This is accessible at www.osf.org.za/file-uploads/docs-download.asp? last visited on 06 September 2010.

⁴³⁶2008 (1) SACR 157 (SCA).

⁴³⁷*Id* n 316 *supra* at 7.

⁴³⁸*Id* n 436 *supra* at 158.

group of persons, but are frequently perpetrated by groups over a substantial period.⁴³⁹ In *Prophet v NDPP*,⁴⁴⁰ the accused was charged with drug-manufacturing. Mpati DP, expressly acknowledged that the crime committed by an individual does not constitute racketeering. She stated as follows:

Whether the appellant was manufacturing drugs for sale or personal use was unknown. But drug trafficking and drug abuse are a scourge in any society and are viewed in a very serious light. The penalties provided for drug offences in the Drugs Act are testimony to this.

This is an indication that the court appreciated that the offence of drug-manufacturing conducted by Mr Prophet could not be classified as racketeering, money laundering or criminal gang activities.

The POCA also creates crimes that cannot be categorised as organised crime.⁴⁴¹ An example of what cannot be considered as organised crime is contraventions of Section 75(2) of POCA, which is contempt of court. In order to eradicate the confusion regarding what organised crime is, it is vital to distill the POCA offences and swiftly sift that which is organised crime from the rest of the offences. The exercise of identifying organised crime from the Act falls within the ambit of Interpretation of Statutes. As Botha explains, interpretation of statutes is the juridical understanding of legal texts that deals with the body of rules and principles, which are used to construct the correct meaning of legislative provisions to be applied in practical situations.⁴⁴²

Organised crime must be understood from the interpretation of the POCA. The purpose and the Preamble to the Act repeatedly refer to three types of offences, to wit, organised crime, money laundering and criminal gang activities. When the index to the sections and chapters are analysed, the types of offences are grouped into

⁴³⁹Van der Merwe and Du Plessis *Law of South Africa* 490.

⁴⁴⁰2006 (1) SA 38 (SCA).

⁴⁴¹*Id* n 316 *supra* at 7.

⁴⁴²Botha *Interpretation of Statutes* 2.

three major groups which are offences relating to racketeering activities (Chapter 2), offences relating to the proceeds of unlawful activities (Chapter 3), and offences relating to criminal gang activities (Chapter 4). There are other offences, which deals with perjury (Chapter 6) and misuse of information and interference with officials (Chapter 8) which may be grouped as offences relating to administrative activities, which do not form part of this discussion.

If organised crime is defined as an offence that had organizational features of some kind that distinguishes it from individual criminal wrongdoing, as the decision of the court in *Vermaak*⁴⁴³ *supra* suggests, this would leave a number of questions unanswered as some elements are missing. First, it does not reflect the crucial element of organised fashion, which is required in any definition of the phenomenon. According to Kruger, De Koker concludes that the lack of particular organisational features as in *Mohunram*⁴⁴⁴ *supra*, makes it very difficult in many cases to draw clear distinctions between organised crimes and ordinary crimes. De Koker argues that, although the constitutional court referred to the concept of organised crime in this case, the judges did not clarify what they meant by organised crime.⁴⁴⁵ This writer's view is that, until the Legislature defines the phenomenon, the term will continuously be used in an indiscriminate fashion that will confuse those trying to understand its meaning.

If the Act is not intended to bring about measures to address organised crime alone, but also other criminal activities such as money laundering and criminal gang activities. The question that needs to be answered is, where is organised crime dealt with in the Act? The answer lies in the comparison of the three offences referred to

⁴⁴³*Ibid* n 272 *supra*.

⁴⁴⁴2007 (6) BCLR 575 (CC) paragraphs 74 and 140. Kruger *Organised Crime* 7. The facts of the case are discussed under n 72 *supra*.

⁴⁴⁵De Koker *Money Laundering* com 3-15. See the details of the case under n 72 *supra*.

in the purpose and Preamble as well as the other types of offences referred to as racketeering, money laundering and criminal gang activities, perjury, unlawful disclosure and interference with officials in the execution of their duties. The definitions of criminal gang, a pattern of criminal gang activity and a pattern of racketeering activity as provided above are applicable and should be taken into consideration.⁴⁴⁶ In terms of the argument advanced in the *Seevnarayan*⁴⁴⁷ case, if in any charge, an individual can be prosecuted without establishing the link with any other person, such offence cannot be considered to be organised crime. Hendley ardently supports the view that distinguishes organised crime from ordinary crime as offences committed by individuals as opposed to crime of a collective effort. As an example, he argues that a burglar operating alone cannot be engaged in organised crime.⁴⁴⁸ De Koker states that, in this case, it was pointed out that the Act is intended to combat organised crime, money laundering and criminal gang activities. He concludes that this triad of social evils forms a recurrent theme throughout the Act.⁴⁴⁹

Table 4.2: A schematic analysis of the Preamble and offences in the POCA (**Source:** POCA 1998)

Offences referred to in the purpose and Preamble of the POCA of 1998	Offences referred to in the chapters and sections of the POCA of 1998
Introduce measures to combat organised crime	Racketeering activities (Chapter 2).
Provide for the prohibition of money laundering	Offences relating to proceeds of unlawful activities (Chapter 3).
Criminalise certain activities associated with gangs	Gang related activities (Chapter 4).
Provide for matters connected therewith	Perjury (Chapter 6).
Provide for matters connected therewith	Misuse of information and interference with officials (Chapter 8).

⁴⁴⁶See paragraphs 4.2 and 4.4 *supra*.
⁴⁴⁷2004 (2) SACR 208 (SCA).
⁴⁴⁸Hendley *American Gangsters* 3.
⁴⁴⁹De Koker *Money Laundering* com 3-15.

In *NDPP v Mohamed*⁴⁵⁰ an application was brought before court requesting the court to declare Chapter 6 of the POCA to be unconstitutional and accordingly invalid. The relevant aspect of this case is reference regarding the purpose of the POCA as stated by Ackermann J, and referred to with approval by Moseneke DCJ and Sachs J in *Mohunran* case as follows:

The Act's overall purpose and operation has been dealt with in *Mohamed* and need not be repeated here. The briefest of summaries suffices. The rapid growth of organised crime, money laundering, criminal gang activities and racketeering has become a serious international problem and security threat, from which South Africa has not been immune. It is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. Prior to the Act, South Africa's common and statute law failed to keep pace with international measures aimed at dealing effectively with these problems. Hence the need for the measures embodied in the Act.⁴⁵¹

This statement incorrectly construes that organised crime and a pattern of racketeering activity are distinctive offences. This writer is unable to agree with this view because, as indicated in paragraph 4.1 above, the legislature has never used the word organised crime and racketeering in the same sentence, but has, on the contrary, consistently used the triad, organised crime, money laundering and gang activities.

Following the order in which the legislature has repeatedly cited the offences, that is, organised crime, money laundering and gang activities, and that the second group of offences fits money laundering while the third group fits criminal gang activities, it stands to reason that the legislature intended a pattern of racketeering activity to be organised crime. The argument advanced by De Koker is that, as the term pattern of racketeering activity appears to be so closely related to racketeering and to organised crime, one would expect that racketeering refers to the activities of organised

⁴⁵⁰2002 (4) SA 843 (CC).

⁴⁵¹2002 (4) SA 843 (CC) at 850. See *Mohunram* 2007 (4) SA 222 (CC) at 266 and 271.

crime.⁴⁵² The statement by Woodiwiss, which states that most academics and professionals concerned with the subject, organised crime usually referred to a certain type of criminal activity that is virtually synonymous with racketeering finds application here.⁴⁵³ This is similar to the position in the USA where the term racketeer was always synonymous with members of organised crime operations.⁴⁵⁴ This writer's view is that the legislature used the term racketeering as similar to the term 'organised crime' and this is supposed to be indicated in clear terms.

The court has repeatedly pronounced itself that the POCA is not solely designed to deal with organised crime but other crimes too. The inference to be drawn is that, not all offences in the POCA could be called organised crime. To cite but one example is money laundering which an individual can perpetrate. As indicated in *Seevnarayan*⁴⁵⁵ *supra*, an individual cannot commit organised crime alone. Burchell states that the difficulty of identifying the material qualities of crime has prompted some scholars to contend that the only satisfactory and reliable means of identifying crimes is by the formal legal procedural consequences of the conduct in question. Consequently, if the consequence of a particular act is prosecution in a criminal court followed by the infliction of punishment, then the conduct can be said to be a crime.⁴⁵⁶ The law should be as simple as practicably possible. It cannot be expected that it should take only jurists to unearth and understand what the legislature intended to proscribe. Legislation must be drafted in such a way that the readers know what the law expects of them.⁴⁵⁷

⁴⁵²De Koker *Money Laundering* com 3-13.

⁴⁵³Woodiwiss *The Strange Career* 3 and 7 and Woodiwiss *Organized Crime* 10.

⁴⁵⁴See <http://law.jrank.org/pages/9631/Racketeering.htm> last visited on 26 October 2008.

⁴⁵⁵*Ibid* n 447 *supra*.

⁴⁵⁶*Id* n 33 *supra* at 57.

⁴⁵⁷Botha *Interpretation of Statutes* 5.

The POCA is the primary legislation on organised crime. The understanding of organised crime should originate from this law. As the power to prosecute for contravention of Section 2 rests with the NDPP, an alternative mode of determining whether the crime is organised crime or not is to ask a question as to whether the NDPP has pronounced on the willingness to prosecute in terms of Section 2(4) of the POCA. If the answer is in the affirmative, then that is organised crime. Unfortunately, this would leave the definition in the NDPP's hands, which would definitely not guarantee consistency.

In *Moodley v NDPP*,⁴⁵⁸ authority to prosecute in terms of Section 2(4) of POCA was set aside by the court because the NDPP was found to have not applied his mind. The facts of the case were briefly that five accused were charged with dealing in and possession of mandrax (methaqualone) tablets as well as three counts of a pattern of racketeering activity. The authorisation to prosecute in terms of Section 2(4) of the POCA was granted by the NDPP, Ngcuka on 24 March 2004. The applicant's contention was based on the grounds that the prosecution was instituted on 10 December 2003, prior to authorization. The racketeering charges were set aside not on the grounds of prosecution before authority but on the grounds of the lack of specificity required. However, the Supreme Court of Appeal held in *NDPP v Moodley*,⁴⁵⁹ as per Scott JA, stated that once the prosecution was authorized in writing by the National Director, there could be no reason, provided the accused had not pleaded why the further prosecution of the accused on racketeering charges would not be lawful, even if the earlier proceedings would not be lawful, or were to be regarded as invalid for want of written authorization.⁴⁶⁰ In conclusion, the court stated that, whatever the position may have been, prior to 24 March 2004, and it is

⁴⁵⁸2008 (1) SACR 560 (N).

⁴⁵⁹2009 (2) SA 588 (SCA).

⁴⁶⁰*Id* n 459 *supra* at 594.

unnecessary to express a view in this regard – once the written authorization to prosecute was granted, the prosecution was lawful in terms of Section 2(4) of POCA.

4.6 CONCLUSION

The POCA is said to be the primary statute on organised crime.⁴⁶¹ The offences indicated above substantiate the submission that there are twenty eight offences created by the POCA. The stubborn perception that the POCA has created three offences is tenuous and must therefore be discarded to help in the minimisation of misinterpretation. It is also clear from the analysis of the POCA that the Act was not only designed to deal with organised crime but other crimes too. The need to determine with certainty as to what is considered as organised crime in terms of the South African laws is not only paramount but also significantly pressing. The determination of a definition is to set the parameters of the context in which a particular word should be understood. Having said this, this writer is convinced that organised crime should be defined in no uncertain terms in the POCA.

The POCA is not a model of legislative coherence; it is a legislation that may be described as half-baked, which requires immediate return to the legislative oven. Having analysed all the offences created in terms of the POCA, this writer has come to the conclusion that the legislature intended to refer to the offences which are generally known as pattern of racketeering activities as reflected in Section 2 (Chapter 2) of this Act to be organised crime. When reference is being made to organised crime, it has to be understood to refer to the contravention of any provisions of Section 2 of the POCA.

⁴⁶¹The other statutes such as the South African Police Service Act of 1995, the
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CHAPTER FIVE

THE ELEMENTS OF ORGANISED CRIME

5.1 INTRODUCTION

A definition of a crime is always broken down into elements. These elements have to be proved to secure a conviction. An element is one of the fundamental or irreducible components making up a whole. Elements of an offence are defined as those physical acts, attendant criminal circumstances, results and states of mind which are specifically included within the definition of the offence.⁴⁶² In order to understand a whole, one must first understand the elements and be able to unpack them. Applied to criminal law, this translates into an act, unlawfulness, criminal capacity and culpability.

The International Association of Chiefs of Police (IACP)⁴⁶³ designed a tool to serve as an indicator for recognising organised crime. The IACP needed to determine whether traditional organised criminal activities were occurring. They viewed gambling, prostitution and narcotics addiction as being among the most popular manifestations of organised crime. They then had to determine if the occurrence of organised crime, that is, intimidation and corruption are being used to promote and strengthen the basic ingredients of organised crime, to wit, organization, profit, continuity, monopoly and immunity. Based on this tool, affirmative answers to the following questions are good indicators of the existence of a structured organised

Financial Intelligence Act of 2001 are supporting legislation.

⁴⁶²Chapter 2 of Title 11 of the Delaware Criminal Code of 1953. The purpose of referring to this Code is to clarify the meaning of an element of a crime.

⁴⁶³This is a voluntary organization where the Police Chiefs from any country may join. They designed the tool to assist in ensuring that when they speak of organised crime, they have the

criminal activity:

Are unreported assaults occurring; are there a series of unexplained arsons involving marginal businesses; is there reluctance by witnesses or victims to testify; does the criminal activity continue after the arrest of persons who appear to hold key positions; do patterns emerge in the setting or posting of bail; are high priced attorneys defending persons whose level of operation would apparently preclude their ability to pay for such a service; is testimony by police and witnesses vague or uncertain; do patterns of light sentences or lack of vigorous prosecutions emerge in the prosecution of certain persons; does the income of the families of incarcerated persons appear to continue; and is there a structured group using force, fear or corruption in your community to obtain or maintain monopoly and immunity for a continuing criminal enterprise?"⁴⁶⁴

The tool is currently being used by members of the association, which helps in ensuring that there is uniformity in categorising activities that may constitute organised crime. However, it does not purport to provide the elements of organised crime.

According to Vlassis, the Working Group of 1997 that was assigned to deal with the implementation of the Naples Declaration identified the elements of organised crime as including organization, continuity, use of intimidation and violence, a hierarchical structure of groups with divisions of labour, the pursuit of profit and the exercising of influence on the public, the media and political structures.⁴⁶⁵ In fact, the 1994 Naples Political Declaration and Global Action against Organised Transnational Crime listed six characteristics of organised crime as follows:

(1) Group organization to commit crime; (2) hierarchical links or personal relatives, which enable leaders to control the group; (3) the use of violence, intimidation and corruption to earn profits or control territories or markets; (4) the laundering of illicit proceeds to further criminal

same meaning.

⁴⁶⁴*Id* n 242 *supra* at 18-19.

⁴⁶⁵Vlassis *The UN Convention* 87-88 and McClean *Transnational Organized Crime* 3-4. The last three offences enable organised crime to flourish which is supported by Peterson at Peterson *The Mob* 426.

activity and to infiltrate the legitimate economy; (5) a potential for expansion into any new activity beyond national borders; and (6) co-operation with other organized transnational criminal groups.⁴⁶⁶

Liddick, who uses the term attributes rather than elements, submits that the most frequently cited organised crime attributes are: hierarchy, rational profit through crime, use of force or threat, corruption of public officials, public demands for services, monopoly control of illegal markets, restricted membership, non-ideological, specialisation of work tasks, codes of secrecy and extensive planning.⁴⁶⁷ Singh calls them characteristics and lists organizational structure, durability over time and diversified interests.⁴⁶⁸

Albanese mentions the following characteristics: continuing organised hierarchy, rational profit through crime, use of force or threat, corruption to maintain immunity, public demands for services, monopoly over particular market, restricted membership, non-ideological, specialisation, code of secrecy and extensive planning.⁴⁶⁹ Roth lists corruption, violence, continuity, structure, discipline, lack of ideology, multiple enterprises, rules and regulations, codes of conduct and sophistication.⁴⁷⁰ Finckenauer and Finklea list ideology or lack thereof, structure/organized hierarchy, continuity, violence, restricted membership/bonding, illegal enterprises, penetration of legitimate businesses and corruption.⁴⁷¹

Some writers have at times used elements and characteristics interchangeably. After considering the views of various experts, Mallory compiled a list of eighteen

⁴⁶⁶Adamoli *et al* *Around the World* 7 and Obokata *Transnational Organised Crime* 25. The World Ministerial Conference on Organised Transnational Crime held in Naples, Italy on 21-23 November 1994 adopted the Declaration.

⁴⁶⁷Liddick *Overview of Organized Crime* 34.

⁴⁶⁸Singh *Organised Crime in Canada and India* 4.

⁴⁶⁹Albanese *Organized Crime* 4.

⁴⁷⁰Roth *Organized Crime* 20.

characteristics of “organised criminal group” as follows:

Has non-ideological in motives; exhibits continuity over long periods of time; perpetual in nature; uses tactical and strategic or long-term planning to reach the goals of organised crime; governed by rules and codes of secrecy; seeks to monopolise products and services; has an organised hierarchy; uses force and intimidation; restricts membership; provides illegal goods and services as demanded by the public; obtains enormous profits by criminal means; employs corruption for immunity and control; creates a division of labour with job specialisation; engages in money laundering; invests profits in legal enterprises and seeks to control these businesses; exhibits an ability to adapt to changes in supply and demand, law enforcement and competition; operates internationally; engages in more than one illicit activity and uses legal businesses as fronts for illegal activity.⁴⁷²

Richards lists fourteen characteristics of organised crime groups or criminal organisations as used by the Criminal Intelligence Directorate of the Royal Canadian Mounted Police (RCMP). While corruption, discipline, infiltration, monopoly, motivation, violence, continuity, mobility and diversity are similar to those of Mallory above, he includes some additional characteristics on the list. The additional characteristics are as follows:

- Protection of the organization’s leaders by separating them from the soldiers, cell from cell, and function from function.
- Subversion of society’s institutions and legal and moral value systems.
- Has allowed entrenchment and refinement of criminal activities and practices.
- Sophistication in the use of advanced communication systems, financial controls, and operations.
- Bonding of individual-to-individual, and individual-to-organization, for solidarity and protection, often through complex initiation rites⁴⁷³

Gottschalk lists ten characteristics of criminal organisations, namely - structure,

⁴⁷¹Finckenauer *Problems of Definition* 65 and Finklea *Organized Crime* 60.

⁴⁷²Mallory *Organized Crime* 9-10.

⁴⁷³Richards *Criminal Organizations* 4.

activities, international, violence, corruption and infiltration – which are the same as those of Mallory. The additional 4 characteristics are the following:

- The average size of criminal organizations was 50-100.
- Half of the criminal organizations had members drawn from the same background or ethnic background, while the other half had no such identity.
- Some criminal organizations had political influence at the local and regional level, while a few had influence at the national level in the country of intervention.
- Most criminal organizations had some kind of co-operation with other criminal organisations.⁴⁷⁴

Caiden and Alexander point out that the 1976 Task Force on Organised Crime, United States approached the understanding of organised crime by attempting to eliminate what is not organised crime. It listed the following seven characteristics:

Organised crime is a conspiratorial crime; has profit as its primary goal; it is not limited to illegal enterprises or unlawful services but includes sophisticated activities as well; it is predatory, using intimidation, violence, corruption and appeals to greed; its conspiratorial groups are well disciplined and incorrigible; it is not synonymous with the Mafia but knows no ethnic bounds; and, it excludes political terrorists, being politically conservative, not radical.⁴⁷⁵

Maltz lists nine characteristics of organised crime, namely - corruption; violence; sophistication; continuity; structure; discipline; bonding ritual; multiple enterprises; and involvement in legitimate enterprises.⁴⁷⁶ Hagan concludes that organized hierarchy, rational profit through crime, use of force or threat of force and corruption to obtain immunity are the characteristics that have been identified with some consensus.⁴⁷⁷ Gambetta argues amongst the criminal groups themselves, violence is dramatically more common as compared to violence perpetrated among

⁴⁷⁴Gottschalk *Organised Crime* 92-93.

⁴⁷⁵Caiden and Alexander *Perspectives* 9.

⁴⁷⁶Maltz *Organized Crime* 24, Beare *Criminal Conspiracies* 14-15 and Kruger *Organised Crime* 4.

⁴⁷⁷Hagan *Criminology* 470.

ordinary citizens.⁴⁷⁸

Carter's characteristics include - an accumulation of profits; longevity; a structure to further the group's crime; use of violence to help in attaining goals; and ability to corrupt government officials, police officials and/or corporate officials. He however, went further to quote the elements of organised crime as viewed by the "Dutch's Centrale Recherche Informatiedienst (CRI)" - as any hierarchical structure; internal support and sanctions; money laundering; corruption and bribery of legal system officials; involvement in more than one illegal activity; organizations that hide behind front companies; criminal activities that cover a long period of time; and members who act violently against competitors.⁴⁷⁹

Nair puts forward the characteristics of organised crime which he calls "essential elements of organised crime" as - connectivity; communality; continuity; hierarchy of command; hierarchy of control; leadership; insulation of the leadership; motive; monopoly; predatory; specialized support; division of labour; public protection; ruthless enforcement; protective measures; laundering; age factor; political links; conspiracy; merchants of death; and destruction.⁴⁸⁰ Marion is of the view that, the best way to define organised crime is through a description of its characteristics. She submits the characteristics as - goal for profit; longevity; secrecy; violence; opportunistic behaviours; corruption; restricted membership; conspiracy; hierarchy; non-ideological goals; loyalty; monopolistic practices; and rules to be followed.⁴⁸¹

After having analysed various definitions of organised crime, Hagan came to a conclusion that the following, in order of preference, are indicative of organised

⁴⁷⁸Gambetta *The Underworld* 78.

⁴⁷⁹Carter *Organized Crime* 137.

⁴⁸⁰Nair *Organised Crime* 14-17.

⁴⁸¹Marion *Organized Crime* 7.

crime:⁴⁸²

Hierarchy	Profits	Violence	Corruption	Public demand	Membership	Specialisation	Secrecy	Planning	Non-ideological
13	11	10	10	6	3	2	2	2	2

Figure 5.1: Determination of preferred requirements in the definition of organised crime

(Source: Own Source)

If “organised crime” is to be defined as a crime, the crime should contain the basic elements of a crime. Maré defines crime as an unlawful human act, which is accompanied by a blameworthy state of mind and which is punishable by the state.⁴⁸³ She submits the elements of crime as the act, culpability, unlawfulness and consequences.⁴⁸⁴ Snyman classifies the elements of crime into two categories, namely, definitional and general elements. Definitional elements means the concise description of the requirements set by the law for liability for specific type of crime with which an accused is charged, as opposed to other crimes. He provides the examples of general elements of crime as voluntary conduct, unlawfulness and culpability.⁴⁸⁵

Faced with the difficulty of defining organised crime, various law enforcement organizations and authors attempted to identify characteristics of organised crime. These characteristics provided guidelines to identify conduct which could constitute organised crime, but were not the elements of the crime as the term is understood in criminal law. As it can be seen from the characteristics of organised crime as mentioned above, there are just as many types of characteristics as authors. In

⁴⁸²Hagan *Organized Crime Continuum* 78.

⁴⁸³Maré *Criminal Law* 1083.

⁴⁸⁴*Id* n 483 *supra* at 1089-1098.

order to be considered as the elements of 'organised crime', the characteristics as pointed out above, may be modified in line with the basic elements of crime and align them with the prescripts of the POCA. The significance of the elements of a crime is that, if the prosecutor fails to prove any element of the crime charged beyond a reasonable doubt, the accused must be acquitted of the offence charged.⁴⁸⁶ In this chapter, the elements of organised crime are therefore analysed in line with the definition of organised crime as provided and a pattern of racketeering activity in the POCA. As indicated in chapter four *supra*, organised crime is, according to the definition, synonymous with racketeering, which is referred to in Chapter 2 or section 2 of the POCA.

Comparatively, the discussion in this chapter shall also include the laws of five states in the USA, namely, Arizona, California, Colorado, Connecticut and Delaware. These states were chosen as they have statutory definitions of the various elements of organised crime.

5.2 THE ELEMENTS OF ORGANISED CRIME

The elements of a statutory offence are found within the creating provision. It is essential that the elements be embodied in an indictment as failure to do so will render the indictment defective for want of averment.⁴⁸⁷ The elements of organised crime are found in its definition. Consequently, if the definitions differ, the elements are bound to differ. The problem at present is that criminologists who do not have to adhere to legal principles are defining the term 'organised crime'. Furthermore, the existing definition in the South African law does not refer to organised crime as such but to a pattern of racketeering activity. The layman or inexperienced police official

⁴⁸⁵*Id* n 14 *supra* at 71.

⁴⁸⁶Dressler *Criminal Law* 73.

⁴⁸⁷Milton *Criminal Law* 20.

will therefore be seduced by popular definitions and not be able to investigate these crimes as the lines between populist definitions and the definition in law becomes more blurred. In order to achieve uniformity and certainty, definition in law, other than that found in POCA, should be found.

Organised crime is a chameleonic kind of crime that epitomizes and adapt to the legislatively designed criminal environment of each country. Supportingly, Schulte-Bockholt states that organised crime is an ideological chameleon that changes its colours in accordance with the environment in which it is generated.⁴⁸⁸ Lunde submits that attempts by law enforcement and other agencies to provide a single definition of organised crime have been confounded by the fact that the activities underworld are, by their nature, kaleidoscopic, constantly responding to shifts in market conditions and exploiting the myriad money-making opportunities provided by the legitimate overworld.⁴⁸⁹ Obokata states that there is no single way to describe 'organised crime' as it takes a variety of forms in practice.⁴⁹⁰ Buscaglia, Gonzalez-Reiz and Ratcliff state that one of the ways of constructing a law or definition is to import it from outside but adapt it to work effectively in the cultural context of one's own country.⁴⁹¹

Having concluded that the crimes defined in Chapter 2 of the POCA actually refer to organised crime, the discussion that follows will refer to the terminology and crimes set out in this chapter. These offences are stipulated in Sections 2(1)(a), 2(1)(b), 2(1)(c), 2(1)(d), 2(1)(e), 2(1)(f) and 2(1)(g) of the POCA as discussed in chapter four above.

⁴⁸⁸Schulte-Bocholt *Organized Crime* 22.

⁴⁸⁹Lunde *Organized Crime* 8.

⁴⁹⁰Obokata *Transnational Organised Crime* 13.

⁴⁹¹Buscaglia, Gonzalez-Ruitz and Ratcliff *Organized Crime* 12. In essence, they mean that you may import a definition from another country but you may need to adapt it to suit your own environment.

5.2.1 An organised criminal group

The concept ‘organised criminal group’ may be understood by first observing the definition as provided by the Palermo Convention. As pointed out above, an organised criminal group is a structured group (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) of three or more persons, existing over a period of time 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.⁴⁹²

As observed by Gilmore and Williams, organised criminal groups vary in shape, size, skills and specializations. Transnational criminal organisations range from highly structured organisations to more fluid and dynamic networks.⁴⁹³ Balsimo and Carpozi state that organised criminal groups comprise people of varying talents, qualities and responsibilities banded together in a surreptitious conspiracy, which for the most part of it, is run like many large, diversified industries or businesses.⁴⁹⁴ The POCA is silent about an organised criminal group or syndicate; in fact, it does not use these terms at all. The term syndicate has been brought into the South African law in terms of the Protection of the Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004. It has further been used in the South African Police Service Act of 1995 as amended in 2008.

The terms ‘organised criminal group’, ‘criminal gang’, ‘syndicate’, ‘racket’ and

⁴⁹²Article 2(a) and 2(c) of Palermo Convention.

⁴⁹³Gilmore *Dirty Money* 17 and Williams *Transnational Criminal Organisations* 36.

⁴⁹⁴Balsimo and Carpozi *Under the Clock* xiii.

‘enterprise’ are, at times, used interchangeably across the world. It is therefore important to look at the interpretation of these terminologies as they play a crucial role in the current understanding of the phenomenon. While Arizona defines ‘criminal syndicate’ as any combination of persons or enterprises engaging, or having the purpose of engaging on a continuing basis in conduct that violates any one or more provisions of any felony statute of this state, South Africa failed to define this term.⁴⁹⁵ It has only defined ‘criminal gang’.⁴⁹⁶ As some of these terms are not defined in the POCA, reference is made to how they are described in other jurisdictions, specifically the USA.

In Arizona, criminal groups are known as a combination, criminal syndicate and criminal street gang. ‘Combination’ means persons who collaborate in carrying on or furthering the activities or purposes of criminal syndicate even though such persons may not know each other’s identity. Membership in the 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 activities or dealings between or among themselves in an illicit operation.⁴⁹⁷

A criminal syndicate means any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuing basis in conduct that violates any one or more provisions of any felony statute of this State.⁴⁹⁸

‘Criminal street gang’ means an ongoing formal or informal association of persons in

⁴⁹⁵Section 13-2301 (C) (7). This statute is accessible at <http://www.michie.com/arizona> last visited on 29 August 2009.

⁴⁹⁶See the definition in terms of section 1(1)(iv) as referred to in paragraph 4.4 *supra*.

⁴⁹⁷See 13-2201 C 5 of Arizona Organized Crime Fraud and Terrorism, which is also accessible at <http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=13> last visited on 01 August 2009.

⁴⁹⁸See 13-2201 C 7 of Arizona Organized Crime Fraud and Terrorism, which is also accessible at <http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=13> last visited on 01

which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member.⁴⁹⁹

The definition of 'criminal street gang' in Arizona, differs slightly from that of Colorado where it is defined, in the latter, as any ongoing organization, association or group of three or more persons, whether formal or informal (a) which has as one of its primary objectives or activities the commission of one or more predicate criminal acts, and (b) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.⁵⁰⁰

Davis states that 'syndicate' means a large criminal organisation and the word syndicate is frequently used for organised crime.⁵⁰¹ Reuter argues that racketeers, which is how organised criminal groups are at times known, are persons who are members of a large group with continuing identity, specified roles for individuals and a range of criminal interests. This group, he adds, include Mafia and motor cycle gangs. His choice of the term 'racketeers' instead of 'organised crime', in reference to organised criminal group, is based on the premise that the former has acquired fewer complicating secondary meanings as compared to the latter.⁵⁰²

In South Africa, there is some confusion on the issue of whether street gangs should be classified as a form of organised crime or not. In terms of the POCA, a gang is seen as separate as it is dealt with in its own section. The question is, if the definition of the term 'organised crime' is any group of three or more people engaged

August 2009.

⁴⁹⁹See 13-105-8 of Arizona Organized Crime Fraud and Terrorism, which is also accessible at <http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=13> last visited on 13 January 2012.

⁵⁰⁰Title 18 Article 23 section 101 of the Colorado Gang Recruitment Act.

⁵⁰¹Davis *Dictionary of Crime* 256.

in ongoing and serious offences, how is it possible not to see street gangs as a form of organised crime.⁵⁰³ Barker states that in the late 1980s, the academic community began to view organised motorcycle gangs as organised crime groups.⁵⁰⁴ However, organised crime is not intended to deal with individual criminals but organised criminal groups, criminal syndicates, enterprise or co-perpetrators or whatever title of criminal grouping. The Italian law explicitly provides that anyone meeting the conditions of being found to be habitual offender, to be a professional delinquent or misdemeanant whenever, having regard to the nature of the offences, the behaviour and manner of life of the offender and other circumstances specified in Article 133, is a habitual criminal, if it is determined that he is habitually living, even though only in part, on the proceeds of offences.⁵⁰⁵ However, in the South African context, a single repeat offender can be a habitual criminal or serial offender but cannot be a group; hence, he cannot be an organised criminal group. This is the position taken in *Seevnarayan*⁵⁰⁶ *supra* where it is stated as follows:

“The evasion of personal income tax by a single individual could not be categorized as ‘organised crime’, even where it might have been perpetrated over a few successive tax years.”

For any person to be prosecuted for organised crime there must be a co-perpetrator in the offences committed. It is not necessary for the co-perpetrator to be charged with the accused, what is required is that there must be evidence of the involvement of the second person. The Tanzanian law is a good example of how this can be implemented.⁵⁰⁷

⁵⁰²Reuter *Racketeers* 50-51.

⁵⁰³Standing *Organised Crime* 68.

⁵⁰⁴Barker *Biker Gangs* 115.

⁵⁰⁵Article 105 of the Italian Penal Code.

⁵⁰⁶*Id* n 447 *supra* at 180.

⁵⁰⁷See section 2(3) of the EOCCA of 1984 (Act 13 of 1984). This law is also accessible at <http://www.parliament.go.tz/Polis/PAMS/Docs/13-1984.pdf> last visited on 21 February 2009. 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

Abadinsky is of the view that organised crime is a crime in which there is more than one offender, and the offenders are intended to remain associated with one another for the purpose of committing crimes.⁵⁰⁸ The RCMP argues that the various components that comprise the legal definition of the term 'organised crime' are based on the exclusion of a group of three or more persons that has formed randomly for the immediate commission of a single offence.⁵⁰⁹ Whilst agreeing with the view of Homer and Cupito of setting a minimum number of participants in organised crime, their suggestion that the alternative to counting the number of participants in organised crime is to call crime organised if gross or net profits surpass a given amount, is bound to create further confusion and cannot be supported.⁵¹⁰

In what could be seen as a rejection of the high flyers approach,⁵¹¹ Ryan states that before 1970, a common complaint about organised crime interdiction was that imprisoning the gang leader merely removed the head of the serpent, leaving the body to continue unaffected.⁵¹² According to Kemp, 'high-flyer' is a term that refers to gang bosses in the Cape. He submits that some of these high-flyers became members of the Numbers gang, and upon release, they were named generals.⁵¹³ Although Standing admits that little has been written on whom high flyers are or

offence without the connivance or collaboration of a person or persons not known to the court, the commission of the offence shall be deemed to have been organized, and the offence to be organised crime for the purpose of sentence.

⁵⁰⁸*Ibid* n 232 *supra*.

⁵⁰⁹See <http://www.rcmp-grc.gc.ca/organizedcrime/what-e.htm> last visited on 25 February 2008.

⁵¹⁰Homer and Caputo *Guns and Garlic* 16.

⁵¹¹This is an approach, which was adopted by the SAPS Western Cape Province in dealing with organised crime. It entails the identification of a prominent criminal in a syndicate and targets that individual for investigation and prosecution.

⁵¹²Ryan *Organized Crime Handbook* 25.

⁵¹³Kemp *Gangs* 180, 181 and 208. The Numbers is composed of three segments, which are the 26s, the 27s and the 28s, which are characterised by assassinations, money, and confidence tricksters respectively.

how they have been identified, he similarly submits that high flyers are gang bosses or leaders of gangs.⁵¹⁴ He further argues that a recurring theme in the international literature on both gangs and organised crime has been the exact opposite-head hunting which is not an effective way of combating organised crime or illegal markets. He substantiate his view by advancing an argument that arresting prominent figures in organised crime merely opens up a new opportunity for other operators. He concludes that there are thousands of people who will take the position of a high flyer should he be arrested or killed.⁵¹⁵

Highflyers are people who use others to do their dirty work so as to keep their own hands clean.⁵¹⁶ Sibidla states that 'high flyers' are usually affiliated with gangs- often with the Numbers 26, 27 or 28 prison gangs.⁵¹⁷ As it could be seen from the list of high flyers, Shamiel Eyssen is amongst them. What can be seen as a concession that no high flyer operates outside an organised criminal group, Shamiel Eyssen and eight others were convicted with various crimes in terms of POCA including pattern of racketeering activity. The name of this organised criminal group is called the Fancy Boys and high flyer approach is an initiative that deviated from the organised crime process without any added value.⁵¹⁸ Lewis states that there are other gangs who claim Number 29 and others 25. Her list of gangsters includes the Air Force Gang and Nongoloza.⁵¹⁹

In comparing with Arkansas, there is no distinction amongst criminal gang, criminal organisation and criminal enterprise. A joint definition of criminal gang, organization

⁵¹⁴Standing *Organised Crime* 48, 52 and 237. Those fitting the example of high-flyer are Quinton "Mr Big" Marinus and Ernie "Lastig" Solomons.

⁵¹⁵Standing *Anti-gangs Policy* 24.

⁵¹⁶Sipho *Organised Crime* 158.

⁵¹⁷*Ibid* n 516 *supra*. Lewis submits that the 28 Gang is the oldest of the Numbers and that both the 27 and 28 were developed outside the prison; see Lewis *Gangsters* 22.

⁵¹⁸*Id* n 516 *supra* at 164.

⁵¹⁹Lewis *Gangsters* 22 and 25. The prison gang is the brainchild of Mzozephi Mathebula @ Jan

or enterprise is any group of three or more individuals who commit a continuing series of two or more predicate criminal offences that are undertaken in concert with each other.⁵²⁰ In South Africa, an organised criminal group is distinguished from a criminal gang in that the former is dealt with in Section 2 while the latter is dealt with under Section 9 of the POCA. Krause supports this distinction when he states that gangs differ from syndicates.⁵²¹ In contrast, Kruger quotes the decision in the *Eyssen*⁵²² case where the court held that to fulfil their purpose, the members of the Fancy Boys gang were a group of individuals associated in fact within the meaning of enterprise as defined in Section 1 of the POCA.⁵²³ Kruger's position becomes clear when he submits that gangs are usually less formally structured than syndicates.⁵²⁴ He further supports Gastrow's view that gangs provides a natural first step in the career of many who move on to organised crime.⁵²⁵ While a survey of state gang statutes by Harries will support the distinction between gangs and organised criminal groups, this writer is of the view that this approach is off-course and the POCA needs to be cautiously revisited because 'criminal gang' and 'organised criminal group' are the same.⁵²⁶

In Canadian law, a criminal gang is not distinguished from organised criminal group.⁵²⁷ In determining whether an accused participates in or contributes to any

Note or Nongoloza, see Lewis *Gangsters* 27, 33 and 38.

⁵²⁰See Gang Related Legislation Arkansas 5-74-202(a) and 5-74-203(3). See also <http://www.iir.com/nygc/gang-legis/arkansas.htm> last visited on 16 March 2009.

⁵²¹Krause *Crime Threat Analysis* 119.

⁵²²*Ibid* n 516 *supra*.

⁵²³*Id* n 316 *supra* at 27.

⁵²⁴This view is carbon copy of Gastrow's, as per Gastrow *Organised Crime* 9.

⁵²⁵*Id* n 316 *supra* at 54.

⁵²⁶See <http://www.regent.edu/acad/schlaw/blogs/docs/streetgang.pdf> last visited on 25 June 2011 for a report on Street Gang Safe Houses: A Survey of State Gang Statutes and the Absence Thereof in America by Sean E. Harris, 2009.

⁵²⁷Section 467.1(1) of the Criminal Code of Canada, which is also accessible at <http://laws.justice.gc.ca/en/showdoc/cs/c-46///en> last visited on 25 February 2009, states that every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly,

activity of a criminal organization, the Canadian position is that, the court may consider, among other factors, whether the accused: uses a name, word, symbol or other representation that identifies, or is associated with the criminal organization; frequently associates with any of the persons who constitute the criminal organization; receives any benefit from the criminal organization; or repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization.⁵²⁸ Vander Beken and Defruyter argue that irrespective of legal or criminological definitions, the most important element to retain, which is common to all definitions, is the group that commits a crime. They state that aspects, such as structure, durability and insulation, are the key elements to understanding organised crime.⁵²⁹ It is clear that Canada does not distinguish between the term 'criminal gang' and 'organised criminal group'. This writer agrees with this view.

Cressey states that there are those who view criminality as an individual matter rather than as an organisational matter and the law enforcement process has been, by and large, designed for the control of individuals, not for the control of organisations.⁵³⁰ According to him, there are formal and informal organizations among criminals. On one hand, informal organizations are simply a stabilised

by act or omission, participates in or contributes to any activity of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. Criminal organisation means a group, however organised, that: (a) is composed of three or more persons in or outside Canada; and (b) has as one of its main purposes or main activities the facilitation of commission of one or more serious offences that, if committed, would likely result in the direct benefit, including a financial benefit by the group or by any of the persons who constitute the group. It does not include a group of persons that forms randomly for the immediate commission of a single offence. See also <http://www.rcmp-grc.gc.ca/organizedcrime/what-e.htm> last visited on 25 February 2008. Although the RCMP states that consensus on a definition for organised crime was globally reached in 2002, it provides the definition of organised criminal group, which demonstrates its misguided belief. See also Abadinsky *Organized Crime* 3.

⁵²⁸See section 467.1(3) of the Criminal Code of Canada.

⁵²⁹Vander Beken and Defruyter *Assessing Organised Crime* 64.

⁵³⁰*Id* n 1 *supra* at 67.

pattern of interaction based on similarities of interests and attitudes, and on mutual aid while on the other hand are formal organizations, which have three characteristics, to wit, division of labour, existence of rules and agreements and announced objective. For him a formal organization is the end of the continuum.⁵³¹ Beare disagrees with this approach. She points out that some writers have attempted to draw a continuum based on the notion that “Mafia” organised crime activity is somehow closest to an “ideal type” organised crime group, with other groups perceived to be “looser” and therefore further removed from this pure form. She concludes that while it is valid to acknowledge the durability, hierarchy and multiplicity of the traditional Mafia, to use this form or organised crime as the polar end of continuum is to distort the picture presented of other organised crime groups.⁵³²

The requirement of the element of an organised criminal group was a deciding factor in *NDPP v Seevnarayan*,⁵³³ where the court held, inter alia:

The only means of avoiding the potentially disproportionate results of a forfeiture order in the present instance would be to apply a restrictive interpretation to the statutory provisions in question. The key to such restrictive approach was found in the provisions of the short title, the long title as well as the preamble to the Act. The short title of the Act already held a clue as to the mischief aimed at: prevention of ‘organized’ crime. The evasion of personal income tax by a single individual could not be categorised as ‘organised crime’, even where it might have been perpetrated over a few successive tax years. Regard should be had to the long title of the Act: the Act was intended to combat ‘organised crime, money laundering and criminal gang activities.’⁵³⁴

Clearly, the three-phase process of interpretation as explained by Botha, namely, initial phase, research phase and concretisation phase was applied. This process includes finding the initial meaning and balance between text and context of the

⁵³¹*Id* n 1 *supra* at 29.

⁵³²Beare *Criminal Conspiracies* 15-16.

⁵³³2003 (2) SA 178 (C).

⁵³⁴2003 (2) SA 178 (C) at 180.

particular legislation, the intra- and extra-textual aids, and the harmonisation with the purpose of the legislation.⁵³⁵

Finckenauer states that criminal organizations are criminal networks that have the characteristics of hierarchy of authority, division of labour and continuity. He argues that unless the network lasts beyond a single or limited criminal opportunity or views themselves as a criminal organization or develops durability, reputation, and continuity, it is not a true criminal organization. He contends that criminal organizations have, to a greater or lesser degree, sophistication, structure, stability, self-identification and authority of reputation as its characteristics.⁵³⁶ Abadinsky aligns himself with Finckenauer and believes that an organised crime group must perpetuate itself which is an element of continuity. He argues that an organised crime group constitutes an organised criminal conspiracy designed to persist through time, that is, beyond the life of the current membership. His conclusion is that hierarchy of at least three permanent levels is one of the requirements and that a group with just a leader and followers is not sufficient.⁵³⁷ Regrettably, this writer is unable to reconcile with this view because some criminal groups do not built these hierarchical layers before they engage in organised crime.

While Marshall professes that organised crime groups are not hierarchical in Africa, Ebbe takes it further and argues the importance of defining the meaning of the term 'organised crime' in Africa, since it is not the traditional "Italian type".⁵³⁸ Indeed, the Mafia leader or the Godfather ideology does not work in the South African situation. If a group of people rob a bank, it has never been heard of where they will go and deliver the loot to the boss who will in turn reward them. From experience, the

⁵³⁵Botha *Interpretation of Statutes* 18.

⁵³⁶Finckenauer *Mafia* 20-21.

⁵³⁷*Id* n 241 *supra* at 3-4.

⁵³⁸Lahneman and Lewis *Organized Crime* 10 and 11.

robbers share their loot equally.

Kleemans argues correctly that, instead of looking at criminal groups as pyramidal structures, they should be viewed as criminal networks.⁵³⁹ Traditional images of organised crime are outdated and do not reflect the amount and type of organised criminal activity occurring around the world today.⁵⁴⁰ According to Standing, the clan model is egalitarian and segmentary in that there is a lack of differentiation between members. Furthermore, no hierarchy governs the group. The spoils of the group's activities are shared equally among the members.⁵⁴¹

Liddick's view is that it is a myth that criminal organizations are structurally very similar to legal corporations, and operate like a bureaucracy. It is a myth that like any formal legal organization, organised criminal groups are characterised by a hierarchical authority structure, a rational division of labour, formal rules and procedures that govern employee behaviour, and rigid organizational boundaries.⁵⁴² This writer concurs with this argument.

In dealing with the criteria for the allocation of points that determines the prioritisation of organised crime threats, Van Wyk came up with a list of five entities which are individuals, group of loosely-knit individuals, gang, organised group and syndicate, to which she allocates 1, 2, 3, 4 and 5 points respectively.⁵⁴³ Regrettably, she has not defined, described or explained these classifications and the difference thereof. Standing argues that the decision to distinguish between the term 'criminal

⁵³⁹Kleemans *Racketeering* 163 and 170-171.

⁵⁴⁰Marion *Organized Crime* 380.

⁵⁴¹Standing *Organised Crime* 75.

⁵⁴²Liddick *Overview of Organized Crime* 12.

⁵⁴³Van Wyk *Crime Threat Analysis* 22. This is a tool that the police designed to assist them in prioritising as to which organised criminal group deserves more priority above others. An organized criminal group with the highest points is supposed to be the one that enjoys priority.

gangs' and 'organised criminal groups' in the POCA seems unwarranted, as their definitions are remarkably similar and further that these difference seems to be a degree of organization rather than anything else that suggest the former as less organised than the latter. He believes that this was a political decision to show that something is being done to tackle those people (gangs) and the culture in those areas.⁵⁴⁴ In subscribing to this view, Lambrechts argues that gangs can be transformed into a more sophisticated organised criminal group.⁵⁴⁵

Shaw argues that according to the SAPS, syndicates are seen as more sophisticated organizations operating on a wider level than gangs and that gangs may be employed by syndicates to do dirty work at street level.⁵⁴⁶ Gastrow, who is supported by Krause, submits that gangs are generally less structured than syndicates.⁵⁴⁷ Nair argues that organised crime is understood to be the extended and ferocious form of gangsterism. His view is that, it is a manifestation of criminals consolidated to commit several crimes in pursuance of conspiratorial deliberations.⁵⁴⁸ He concludes that gangsters, racketeers and syndicates are but categories of organised criminals.⁵⁴⁹ According to Abadinsky, a criminal gang differs from a criminal organization mainly because the latter survive even if the head dies while the former cannot as the former is less organised than the latter.⁵⁵⁰

As indicated above, Gastrow defines a crime syndicate as a criminal organization, engaged in the commission of serious criminal offences, which is based on a

⁵⁴⁴Standing *Anti-gangs Policy* 19 and Standing *Organised Crime* 67-71.

⁵⁴⁵Lambrechts *Filling the Void* 1 and 4, which is accessible at <http://www.interdisciplinary.net/wp-content/uploads/2010/04/lambrechtspaper.pdf> last visited on 03 July 2010.

⁵⁴⁶Standing *Organised Crime* 251.

⁵⁴⁷Standing *Organised Crime* 252, Krause *Crime Threat Analysis* 119 and Gastrow *Organised Crime* 9.

⁵⁴⁸Nair *Organised Crime* 2.

⁵⁴⁹*Id* n 548 *supra* at 21. Vertinsky submits that criminal gangs are forming a new and increasingly powerful level of organised crime in America; see Vertinsky *Criminal Gangs* 1.

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.⁵⁵¹ This definition is influenced by the definition of ‘criminal gang’ in terms of Section 1(1)(iv) of the POCA.⁵⁵² He views ‘organised criminal group’ and ‘syndicate’ as synonymous. The predicament of Gastrow’s submission is that it excludes a group of two persons.

An organised criminal group and a terrorist organization are not synonymous. The formation of the groups may structurally look alike but the purpose of such establishments distinguishes the two. In terms of the Protection of the Constitutional Democracy Against Terrorist and Related Activities Act of 2004,⁵⁵³ the group is called an ‘entity’. An ‘entity’ is defined as a natural person, or a group of two or more natural persons (whether acting in the furtherance of a common purpose or conspiracy or not), or a syndicate, gang, agency, trust, partnership, fund or other unincorporated association or organization, or any incorporated association or organization or other legal person, and includes, where appropriate, a cell, unit, section, subgroup or branch thereof or any combination thereof.⁵⁵⁴ It should be further noted that an act, which corresponds to a pattern of racketeering activity in the POCA, is terrorist activity in terms of the Protection of the Constitutional Democracy Against Terrorist and Related Activities Act of 2004.⁵⁵⁵ This writer agrees with the view by Standing that the distinction between the terms ‘organised criminal group’ and ‘criminal gang’ are superfluous.⁵⁵⁶

⁵⁵⁰*Id* n 242 *supra* at 1.

⁵⁵¹Gastrow *Organised Crime* 9. See also Krause *Crime Threat Analysis* 75-76.

⁵⁵²See paragraph 4.4 *supra*.

⁵⁵³33 of 2004.

⁵⁵⁴Section 1(1) of the Protection of the Constitutional Democracy Against Terrorist and Related Activities Act of 2004.

⁵⁵⁵*Ibid* n 554 *supra*. The definition of terrorist activity include activity committed, directly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking. This law is also designed to prevent situations such as the involvement of Executives Outcomes private company in Angola and Sierra Leone; see Gerry Cleaver *Privatisation of Security* 139.

⁵⁵⁶Standing *Anti-gangs Policy* 19.

The concept of an enterprise is an absolute alien in the vocabulary of the Palermo Convention. It was created by the Congress in the USA to prevent the money and power of organised crime from being used to infiltrate and corrupt legitimate business and labour unions from subverting and corrupting democratic processes.⁵⁵⁷ In terms of the POCA, the term 'enterprise' includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity.⁵⁵⁸ This element is required in respect of all offences referred to in Chapter 2 of the POCA. Kruger follows the arguments of Johnson who states that the enterprise is an organizing principle behind the racketeering events. This view presupposes that an enterprise plays a role in all the offences in Sections 2(1)(a) to 2(1)(c) of the POCA.⁵⁵⁹ The necessity of this element is questionable on two fronts. First, an enterprise does not have to be illegitimate; and second, an individual is included in its definition.⁵⁶⁰ This writer's view is that an enterprise is supposed to be a criminal enterprise and should better be called an 'organised criminal group'.

According to the Collins English Dictionary, the general meaning of 'enterprise' is a project or undertaking especially that warrants boldness or effort; participation in such projects; readiness to embark on new ventures; boldness and energy; initiative in business; business unit; a company or firm. In a somehow confused criminalistics language, this term has assumed two meanings - legitimate and illegitimate ventures.⁵⁶¹ It can be argued that an enterprise as intended in the criminal world is an illegitimate venture and nothing farther.

⁵⁵⁷Low *Criminal Law* 586.

⁵⁵⁸Section 1(1) of the POCA of 1998.

⁵⁵⁹*Id* n 316 *supra* at 25.

⁵⁶⁰*Id* n 33 *supra* at 977.

⁵⁶¹Collins English Dictionary 518.

According to Van Duyne, the term ‘business crime enterprise’ refers to the planned criminal abuse of a seemingly legitimate business front.⁵⁶² Marion defines an ‘organised crime enterprise’ as a criminal group that provides illegal goods or services such as narcotics to people on a regular basis.⁵⁶³ The FBI defines an ‘organised crime group/enterprise’ as a continuing criminal conspiracy, having an organised structure, fed by fear and corruption, and motivated by greed.⁵⁶⁴ Furthermore, the FBI defines a ‘criminal enterprise’ as a group of individuals with an identified hierarchy, or comparable structure, engaged in significant criminal activity.⁵⁶⁵ From the definition, as pointed by West, a ‘criminal enterprise’ is synonymous with an ‘organised criminal group’. This is the view held by the FBI, which concludes that the term ‘organised crime’ and ‘criminal enterprise’ are similar and often used synonymously.

South Africa has already faced a challenge by the inclusion of an individual in its definition of enterprise. In *S v Eyssen*,⁵⁶⁶ Eyssen was convicted in the High Court on two counts relating to racketeering activities, namely contraventions of Sections 2(1) (e) and (f) of the POCA, a count of contravening Section 9 of the same Act, two counts of housebreaking with intent to rob and robbery, and one count of robbery with aggravating circumstances. The Court held, amongst others, that there was no requirement that the enterprise be legal or illegal. It was the pattern of racketeering activity that brought in the illegal element. The concepts of ‘enterprise’ and ‘pattern of racketeering activity’ were discrete (distinct), and while proof of the pattern might establish proof of the enterprise, this would not inevitably be the case. Since it was a requirement that the accused [in subsections (e) or another person (in subsection (f))

⁵⁶²Van Duyne *Organized Crime* 9.

⁵⁶³Marion *Organized Crime* 5.

⁵⁶⁴*Id* n 563 *supra* at 6.

⁵⁶⁵See West *Criminal Enterprise in America* at <http://news.goldseek.com/Goldseek/1229324820.php> last visited on 20 February 2009 and <http://www.fbi.gov/hq/cid/orgcrime/glossary.htm> last visited on 18 July 2009.

must participate in the affairs of the enterprise, it would be important to identify what those affairs were, and for the State to establish that any criminal act relied upon constituted participation in such affairs.

Furthermore, the court indicated that a pattern of racketeering activity is defined as ‘the planned, ongoing, continuous or repeated participation or involvement in’ a Schedule 1 offence. The word ‘planned’ qualified the three words, which followed it; unrelated or coincidental instances of proscribed behaviour would not constitute a pattern.⁵⁶⁷

It is difficult to envisage a wider definition. A single person is covered. So it seems is every other type of connection between persons known to the law or existing in fact; those, which the Legislature has not included specifically, would be incorporated by the introductory word “includes”. Taking a group of individuals associated in fact, which is the relevant part of the definition for the purpose of appeal, it seems to me that the association would at least have to be conscious; that there would have to be a common factor or purpose identifiable in the association; that the association would at least have to be conscious; that there would have to be ongoing; and that the members would have to function as a continuing unit.⁵⁶⁸

Comparatively, in terms of Title 18 section 1961(4) of the RICO of 1970, enterprise includes any individual, partnership, corporation, association, or other legal entity, and union or group of individuals associated in fact although not a legal entity.⁵⁶⁹ Kruger agrees that the enterprise need not be a legal entity, but need only exist in fact. He lists the characteristics of an enterprise as differentiation of roles and of tasks, a system of command, a common or shared goal or purpose, the intention to make profit, continuity, that it is separate and apart from the pattern of activity in which it engages, and the enterprise as the organizing principle behind the events

⁵⁶⁶2009 (1) SACR 406 (SCA).

⁵⁶⁷2009 (1) SACR 406 (SCA) at 408-409.

⁵⁶⁸*Id* n 567 *supra* at 409.

⁵⁶⁹This US statute is also accessible at <http://www4.law.cornell.edu/uscode/18/1961.html> last visited on 20 February 2009.

that constitute the racketeering activity.⁵⁷⁰ Many experts, academics, writers and researchers in the field of organised crime have listed these characteristics as the characteristics of either 'organised crime' or 'organised criminal group', which suggest that they view an organised criminal group and a criminal enterprise as synonymous.⁵⁷¹ This writer is in agreement with the view that an organised criminal group and a criminal enterprise are synonymous.

In contrast to the above view, South Africa has adopted an approach that enterprise includes innocent entities. While South Africa includes departments of state as enterprise, the question that West poses is as follows:

If a government body knowingly enacts or influence the enactments of certain legislative items that will be known to facilitate acts that cause financial harm to a citizen or citizens of the United States for no other reason than the enrichment of the enterprise acting thusly, would that not constitute a corrupt and immoral act, and should that government body and its membership be indicted and tried for such crimes under the above mentioned statutes?⁵⁷²

Rhodes states that the federal courts have supported the liberality holding that the concept of 'enterprise' is not unconstitutionally vague; governments, even police departments, may be considered 'enterprise'; illegal as well as legal enterprises may be prosecuted; and foreign enterprises are subject to RICO.⁵⁷³

In *Eyssen*,⁵⁷⁴ Cloete JA stated that the essence of the offence in subsection 2(e) of POCA is that the accused must actually conduct an enterprise's affairs. It covers a person who was managing, or employed by, or associated with the enterprise. As manage is not defined, it therefore bears its ordinary meaning, which in this context is: "(1) Be in charge of, run; (2) Supervise (staff); (3) Be the manager of". For a

⁵⁷⁰*Id* n 316 *supra* at 26.

⁵⁷¹These include Abadinsky, Adamoli, Beare, Finckenauer, Hagan, Lyman, Mallory, Maltz, Potter, Vlassis and Voronin as referred to in this research.

⁵⁷²See Criminal Enterprise in America by James West at <http://news.goldseek.com/Goldseek/1229324820.php> last visited on 20 February 2009.

⁵⁷³Rhodes *Organized Crime* 217. See *US v Turkette* at footnote n 1134 *infra*.

conviction, the State had to establish the existence of an enterprise, a pattern of racketeering activity and a link between all the accused persons.

In *S v Naidoo*,⁵⁷⁵ the accused was charged with various co-accused on charges of fraud, theft and contravention of the POCA. The appellant, who was the second accused, raised an objection of misjoinder because he has not been charged with all the counts that had been brought against the first accused. The court held as follows:

There was authority for the proposition that where there was no connection in time, space or fact between the charges facing two accused, it was not permissible for them to be tried together in respect of offences in which each and every one of them was not implicated. If this were not so, an accused could spend weeks in court while evidence affecting another accused was dealt with, merely because on other counts he was charged with an offence in which the co-accused was connected. The situation *in casu* was different, however, since the State's case was that the various accused were all in different capacities involved in an illegal enterprise in contravention of Section 2(1) of POCA. Various criminal activities had been undertaken, all having as their ultimate purpose the facilitation of various crimes for the benefit of the **criminal enterprise formed by all the accused** (this writer's emphasis). Ultimately, the charge against each of the accused was one of racketeering and being part of a conspiracy to achieve a criminal result. There was accordingly no possibility that any of the accused ran the risk of being in a situation where any evidence led would not be relevant to the case he had to meet. It was necessary for the State to prove all the elements in the common-law offences, which contributed to the **illegal enterprise** (this writer's emphasis), which enterprise in turn constituted the main POCA count against them. In the circumstances there could be no question of the appellant claiming that, he was not being charged with the 'same offence'.⁵⁷⁶

This writer is of the view that the enterprise, which is the organizing principle, is intended to mean a criminal enterprise and not an innocent business.

⁵⁷⁴2009 (1) SACR 406 (SCA) paragraph 5 *supra*.

⁵⁷⁵2009 (2) SACR 674 (GSJ). The case can also be accessed at <http://www.saflii.org/za/cases/ZAGPJHC/2009/2.pdf> last visited on 09 November 2011.

⁵⁷⁶2009 (2) SACR 674 (GSJ) at 674-675.

Unfortunately, authors have used the term ‘enterprise’ and ‘criminal enterprise’ to denote the illegal venture.

In *De Vries*⁵⁷⁷ the court held that in order to secure a conviction under Section 2(1)(f) of POCA, the State had to prove four elements: that an enterprise existed; that the accused had managed the operations or activities of the enterprise; that a pattern of racketeering activity had taken place; and that the accused knew, or should reasonably have known, that a pattern of racketeering activity was taking place.⁵⁷⁸ Kruger does not distinguish between a criminal group and an enterprise. He points out that whenever two individuals jointly perpetrate a crime, there is some degree of association apart from the commission of the crime itself. This structure, he concludes, is the enterprise.⁵⁷⁹ In *Turkette*⁵⁸⁰ *infra*, the court stated that an enterprise is an entity – a group of persons associated together for a common purpose of engaging in a course of conduct.⁵⁸¹ The enterprise required is not supposed to be an ordinary business one; it is supposed to be a criminal enterprise. This writer cannot agree more that a criminal enterprise is an organised criminal group.

In South Africa, the element of an organised criminal group is satisfied if it can be proved that two persons collaborated with each other. According to Harding, the threshold will be lowered by requiring two people instead of three. To the contrary, this should not happen just because the POCA net is tightly woven to trap even a two-man organisation.⁵⁸² An organised criminal group is an underpinning element of organised crime without which, no organised crime could be committed. The South

⁵⁷⁷2009 (1) SACR 613 (C).

⁵⁷⁸*Id* n 577 *supra* at 614-615.

⁵⁷⁹*Id* n 316 *supra* at 27.

⁵⁸⁰*Ibid* n 1103 *infra*.

⁵⁸¹*Id* n 1103 *infra* at 583. See also Gurulé *Criminal Litigation* 68.

⁵⁸²Harding *Criminal Enterprise* 201. By lowering a threshold, he refers to a situation where the

African legislature should rather follow the Palermo Convention and use the term 'organised criminal group' instead of an 'enterprise'. To avoid incomprehension that may be contributed by the definition in the Palermo Convention, the legislature should define an organised criminal group even if it means adopting the UN definition as pointed out. In conclusion, the legislature needs to reconsider the wobbly cosmetic distinction made by Sections 2 and 9 of the POCA and aptly amend it to reflect the reality.

5.2.2 Serious crime

To understand the element of serious crime, crime which is an unlawful blameworthy conduct punishable by the state, must be taken into consideration, as that would be a point of departure.⁵⁸³ Serious crime as defined in terms of the Palermo Convention means conduct constituting an offence punishable by a maximum, deprivation of liberty of at least four years or a more serious penalty.⁵⁸⁴ This is not applicable in South Africa. Before 1992, serious crime has always been considered as those crimes referred to in Schedule 1 of the Criminal Procedure Act of 1977.⁵⁸⁵ From 1992 until 2002, serious crime was defined in terms of Section 1 of the Interception and Monitoring of Prohibition Act (IMPA) of 1992.⁵⁸⁶ The Regulations of Interception of Communications and Provision of Communication-Related Information Act (RICCA) of 2002 repealed the IMPA.⁵⁸⁷

number of people required to form a criminal group is reduced from three to two.

⁵⁸³*Id* n 14 *supra* at 4.

⁵⁸⁴Article 2(b) of the United Nations Convention Against Transnational Organized Crime of 2000 (Palermo Convention).

⁵⁸⁵Schedule 1 of the Procedure Act 51 of 1977 include offences in Chapter 2 of the Prevention and Combating of Corrupt Activities Act 12 of 2004; extortion; Drugs and Drug Trafficking Act 140 of 1992; illicit dealing in or possession of precious metals or precious stones; Intimidation Act 72 of 1982; and Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004.

⁵⁸⁶127 of 1992. The list of the offences is not repeated here as it has been repealed and did not apply to POCA.

⁵⁸⁷70 of 2002.

The RICCA of 2002 defines ‘serious offence’ as follows:

Serious offence means any- (a) offence mentioned in the Schedule,⁵⁸⁸ or (b) offence that is allegedly being or has allegedly been or will probably be committed by a person, group of persons or syndicate (i) acting in an organised fashion which includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics; (ii) acting in the execution or furtherance of a common purpose or conspiracy; or (iii) which could result in substantial financial gain for the person, group of persons or syndicate committing the offence, including any conspiracy, incitement or attempt to commit any of the above-mentioned offences.⁵⁸⁹

Although section 16 of the SAPS Act of 1995, as amended by the South African Police Service Amendment Act of 2008,⁵⁹⁰ considers serious crime as defined in the RICCA of 2002.⁵⁹¹ This list is not designed for POCA of 1998 but it is designed for the RICCA of 2002 and the SAPS Act of 1995. Unfortunately, these various lists for different purposes exacerbate the confusion in the law enforcement agencies that have to execute their duties by prioritising serious crime.

‘Predicate offence’ is defined in the Palermo Convention as any offence as a result of which proceeds have been generated that may become the subject of an offence as defined.⁵⁹² All serious crimes or offences are included in the definition of predicate offences. Because predicate offences are intended for money laundering activities in terms of Article 6, they are called “laundry list”. In *S v Boekhoud*,⁵⁹³ the facts were

⁵⁸⁸The offences are reflected in the Schedule 1 to the RICCA of 2002.

⁵⁸⁹Section 1 of the Regulations of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002.

⁵⁹⁰58 of 2008.

⁵⁹¹70 of 2002.

⁵⁹²Article 2(h) of the United Nations Convention on Transnational Organized Crime of 2000.

⁵⁹³(522/10) [2011] ZASCA 48 (30 March 2011). The case is also accessible at <http://www.saflii.org/za/cases/ZASCA/2011/48.html> last visited on 09 November 2011.

summarily that Boekhoud, along with four co-accused, was indicted in the High Court on a main charge of contravening Section 2(1)(e) of the POCA, 54 other counts, which include a number of counts of theft, fraud, money laundering in contravention of Section 4 of POCA, and also contraventions of the provisions of the Mining Rights Act 20 of 1967 as well as contraventions of Exchange Control Regulations of 1961 in the alternative. While the rest of the case is irrelevant to this research, the court pointed out that racketeering acts are commonly referred to as predicate offences.⁵⁹⁴ Unsurprisingly, Hall interpolates that predicate acts are in essence racketeering activities.⁵⁹⁵ The list of predicate offences emanating from the Palermo Convention has various identities including laundry list, racketeering activity, criminal activity, listed offences and Scheduled offences. The offences reflected in Schedule 1 of the POCA, are for organised crime, money laundering and criminal gang offences. As the list serves as a predicate, laundry and gang offence list, it may be called a POCA list.

⁵⁹⁴(522/10) [2011] ZASCA 48 (30 March2011) at 13.

The POCA list is as follows:⁵⁹⁶

Murder; rape; kidnapping; arson; public violence; robbery; assault with intent to do grievous bodily harm; indecent assault; the statutory offence of— (a) unlawful carnal intercourse with a girl under a specified age; (b) committing an immoral or indecent act with a girl or a boy under a specified age; (c) soliciting or enticing such girl or boy to the commission of an immoral or indecent act; any offence under any legislation dealing with gambling, gaming or lotteries; contravention of Section 20 (1) of the Sexual Offences Act 23 of 1957; 12. any offence contemplated in Section 1 (1) of the Corruption Act 12 of 2004; extortion; childstealing; breaking or entering any premises whether under the common law or a statutory provision, with intent to commit an offence; malicious injury to property; theft, whether under the common law or a statutory provision; any offence under Section 36 or 37 of the General Law Amendment Act 62 of 1955; fraud; forgery or uttering a forged document knowing it to have been forged; offences relating to the coinage; any offence referred to in Section 13 of the Drugs and Drug Trafficking Act 140 of 1992; any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament; any offence in contravention of Section 36 of the Arms and Ammunition Act 75 of 1969; dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of a statute or provincial ordinance; any offence relating to exchange control; any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones; any offence contemplated in Sections 1 (1) and 1A (1) of the Intimidation Act 72 of 1982; defeating or obstructing the course of justice; perjury; subornation of perjury; any offence referred to in Chapter 3 or 4 of this Act; any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine; and any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

The crime that forms an element of organised crime must be considered serious and the seriousness is determined by listing in the POCA list. As it could be observed, the offences of money laundering and gang related activities (Chapters 3 and 4) are included in the POCA list.

⁵⁹⁵Hall *Criminal Law* 167.

⁵⁹⁶Schedule 1 of POCA of 1998. This list consist of 34 types of offences.

McCormack points out that no crime can be part of RICO pattern of racketeering activity unless it is expressly included in the predicate offences list because they provide the underlying basis of a RICO violation.⁵⁹⁷ Burchell states that, in South Africa, these predicate offences are listed in Schedule 1.⁵⁹⁸ Kruger is of the opinion that Schedule 1 of POCA lists those offences that can qualify as racketeering acts.⁵⁹⁹ Scheb and Scheb II state that the courts frequently refer to these acts of racketeering as predicate acts.⁶⁰⁰ This writer is of the view that the legislature should define and relists serious crime for the purpose of the POCA. The current Schedule 1 list of crimes is too broad and hampers the focus of enforcement. Some of these serious crimes, such as rape, have never been prevalent in any organised crime project. In fact, rape will not qualify as a predicate offence because the Palermo Convention's definition of 'predicate offence' includes the element of generation of benefit, which is lacking in rape. South Africa is a signatory to the Convention which was signed on 15 December 2000.

One of the limitations of the POCA is that, while defining a pattern of racketeering activity, it fails to define racketeering activity. Various countries have defined racketeering activity. To follow the Task Force on Organized Crime's position that organised criminal groups participate in any illegal activity that offers maximum profit at minimum risk of law enforcement interference, one will end up with a very long list of serious crimes.⁶⁰¹ The current Schedule 1 of the POCA, which is the POCA list, is too long. This writer reiterates that the legislature should define 'serious crime' for the purpose of the POCA because serious crime forms the basis of a pattern of racketeering activity. Such serious crime may also be referred to as

⁵⁹⁷McCormack *RICO* 5-2.

⁵⁹⁸*Id* n 33 *supra* at 982.

⁵⁹⁹*Id* n 316 *supra* at 22.

⁶⁰⁰Scheb and Scheb II *Criminal Law* 258.

⁶⁰¹Task Force Report on Organized Crime 2.

racketeering activity and racketeering activity should be defined as serious crime. The POCA list should be trimmed to focus on those crimes that serve as financial generators for organised criminal groups.

5.2.3 A pattern of racketeering activity

The Palermo Convention does not use the concepts ‘racketeering’ or ‘pattern’ thereof. The POCA defines a ‘pattern of racketeering’ activity 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 within ten years (excluding the period of imprisonment) after the commission of such prior offence referred to in Schedule 1.⁶⁰² This definition is encumbered with six terminologies. These terms are: pattern; racketeering activity; planned, ongoing, continuous or repeated participation or involvement; Schedule 1 offence; at least two Schedule 1 offences and ten years period. These terms need to be unpacked for a better understanding of this requirement.

First, a pattern of racketeering activity is supposed to follow racketeering activity. The word ‘pattern’ is not defined in the POCA. The ordinary meaning of ‘pattern’ as described by the Collins dictionary is an arrangement of repeated or corresponding parts.⁶⁰³ Second, a pattern is formed by at least two similar activities. The Pennsylvania Corrupt Organizations Act⁶⁰⁴ states clearly that pattern of racketeering activity refers to a course of conduct requiring two or more acts of racketeering activity, one of which occurred after the effective date of this section. While

⁶⁰²Section 1(1) of the POCA of 1998. See also Kruger *Organized Crime* 20 and *S v Eyssen* 2009 (1) SACR at 407.

⁶⁰³Collins *Dictionary* 1144.

⁶⁰⁴18 Pa cons. Stat. subsection 911(h) (8).

acknowledging that racketeering activity is not defined in South Africa, Kruger states that racketeering activity is an event. The relationship of the events to one another, or of an event to the enterprise, or to a common objective of the enterprise establishes a pattern. He concludes that the POCA has a definition in the same sense as RICO. In this regard, he points out Schedule 1 of POCA.⁶⁰⁵

Kruger has further submitted that racketeering is a crime which is usually committed by organised criminal groups. He qualifies the word “usual” by stating that the POCA does not limit the crime of racketeering to organised criminal groups. In view of the fact that the High Courts and the Supreme Court of Appeal have found that the POCA applies to cases of individual wrongdoing, he concludes that racketeering is a complex crime, which bears some resemblance to the common-law crime of conspiracy.⁶⁰⁶ In this writer’s view, racketeering cannot be called a crime when it is not punishable as such. He should have stood by his statement that racketeering is an event or racketeering activity.

In *Naidoo*,⁶⁰⁷ Blieden J cited with approval, the *Eyssen* case⁶⁰⁸ *supra*, where it was stated that the relevant meaning of ‘pattern’ is given in the Oxford English Dictionary as an order or form discernible in things, actions, ideas, situations, et cetera.⁶⁰⁹ Kruger uses the definition of Brown’s dictionary which means an arrangement or order discernible in objects, actions, ideas, situations, et cetera.⁶¹⁰ A ‘pattern of racketeering’ activity is the element that has to be interpreted and such

⁶⁰⁵*Ibid* n 316 *supra*. Nkosi supports the view that racketeering has not been defined in South Africa; see Nkosi *Combat Organised Crime* 28, which is also accessible at <http://www.nmmu.ac.za/documents/theses/ZABA%20%20PHILIP%20%20NKOSI.pdf> last visited on 11 January 2012.

⁶⁰⁶*Id* n 316 *supra* at 11.

⁶⁰⁷*Id* n 575 *supra* at 675. The case is also accessible under *Naidoo v The State* 2009 SGHC Case number 06/134 (reportable) at <http://www.saflii.org/za/cases/ZAGPJHC/2009/2.html> last visited on 03 April 2009.

⁶⁰⁸2009 (1) SACR 406 (SCA).

⁶⁰⁹*Ibid* n 607 *supra*.

interpretation follows hereunder.

Firstly, the crime must be considered serious and the seriousness is determined by being listed in Schedule 1 of the POCA. A racketeering activity is punishable as the original Schedule 1 offence committed. As alluded to above, this is also termed a predicate offence in terms of the Palermo Convention.⁶¹¹ As this writer has already pointed out that some crimes such as rape, which are on Schedule 1 of the POCA, should not be classified as predicate offences, simply because they generate no financial or other material benefit. This writer therefore concludes that the offences listed in the POCA Schedule 1, the POCA list, are in essence racketeering activities.

In examining the laws of the states of Arizona, California, Colorado, Connecticut and Delaware, it is found that with the exception of Arizona, which has not defined a pattern of racketeering activity, all these states have defined both racketeering and a pattern of racketeering activity. All the definitions of Delaware,⁶¹² Colorado,⁶¹³ Connecticut,⁶¹⁴ and California,⁶¹⁵ require at least two incidents of racketeering activities. The fact that international practices shows a better understanding of the law by defining both racketeering and a pattern of racketeering activities, persuasively postulates that the POCA should be amended to define racketeering activity to be in line with other jurisdictions.

⁶¹⁰*Id* n 316 *supra* at 23.

⁶¹¹*Ibid* n 592 *supra*.

⁶¹²See Section 1502(5) of the Delaware Criminal Code. The Code can also be accessed at <http://delcode.delaware.gov/title11/c015/index.shtml> last visited on 16 March 2009. See 7.2.2.2 *infra*.

⁶¹³Section 18-17-103(3) of the Colorado Organized Crime Control Act. [Title 18 of Colorado Criminal Code, Article 17 of Colorado Organized Crime Control Act, Section 103]. See also <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp> last visited on 18 July 2009.

⁶¹⁴Title 53 Crimes Chapter 949c section 394 (e) Volume 13. See also <http://www.cga.ct.gov/2001/pub/chap949c.htm> last visited on 18 July 2009.

⁶¹⁵Section 186.2(b) (1). See also <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=186-186.8> last visited on 18 July 2009.

Secondly, the crime must be planned. This means that it need not be a spontaneously committed crime. The explanation of planning is also understood by the use of the word systematically, which means done or acting according to a fixed plan or system or can also be explained by the word methodical, which means characterised by method or order. In *Eyssen*,⁶¹⁶ the court held that the word ‘planned’ cannot be read *eiusdem generis* with ongoing, continuous or repeated and therefore qualifies all three. Accordingly, unrelated instances of proscribed behaviour and an accidental coincidence between them, does not constitute a pattern. It concludes that the word ‘planned’ makes this clear.⁶¹⁷ Kruger concludes that in *Eyssen*,⁶¹⁸ Veldhuizen J held that the words “ongoing, continuous or repeated involvement in” imply that the conduct must have been planned.⁶¹⁹

Thirdly, the planned crime must be something which is ongoing, continuous, or repeated by those who participate or are involved. The element of repetition is important. According to Burchell, continuity can be either open-ended or close-ended. Close-ended continuity is defined as a series of related predicate offences extending over a substantial period. Open-ended continuity is defined as conduct that poses a threat of extending into the future.⁶²⁰ If a group of twelve robbers robs a cash-in-transit vehicle, an ordinary man will say that is organised crime. On the other hand, a jurist will ask a question as to whether this is the first offence by the suspects or not. If it is their first offence of that nature, that would mean a racketeering activity of which the element of repetition is lacking and such crime is not organised crime regardless of the feeling and attention that the public may view

⁶¹⁶2009 (1) SACR 406 (SCA) at 407.

⁶¹⁷2009 (1) SACR 406 (SCA) at 407 paragraph 8. The term *eiusdem generis* means “of the same kind/type/sort”. See Botha *Interpretation of Statutes* 124 and Hallevy *The Principle of Legality* 156.

⁶¹⁸Unreported case of CPD no CC 31/06 of 22 March 2007.

⁶¹⁹*Id* n 316 *supra* at 22.

that type of crime.

Repetition creates a pattern. Kruger states that in order to prove the pattern of racketeering activity, the state must prove that:

- At least two offences contemplated in Schedule 1 of POCA were committed.
- At least one of those offences occurred after 21 January 1999.
- The last offence occurred within 10 years of the first offence.
- *Mens rea* was present in the manner set out in Section 1(2) and (3).⁶²¹

In *Eyssen*⁶²² case, Cloete JA, stated in the judgement that, it is a further requirement for conviction that the participation by the accused must be through a pattern of racketeering activity.⁶²³ Although Burchell states that the definition of racketeering activity in the POCA is based on the USA's RICO, he could not offer such definition but has instead advanced the definition of a 'pattern of racketeering' activity as defined in the POCA.⁶²⁴

There is a view that prosecuting criminals on a pattern of racketeering activity and a predicate offence is exposing such criminals to double jeopardy because a pattern is constituted by the same predicate offences. To prosecute a criminal group for one act of racketeering activity as a pattern of racketeering activity would tantamount to the principle of double jeopardy, which is unfortunately not limited by the law of general application. Reid explains the principle of double jeopardy as meaning that once a defendant has been tried and acquitted of a crime, he or she may not be tried

⁶²⁰*Id* n 33 *supra* at 979.

⁶²¹*Id* n 316 *supra* at 23.

⁶²²(746/2007) [2008] ZASCA 97 (17 September 2008). This case is also accessible <http://www.saflii.org/za/cases/ZASCA/2008/97.pdf> last visited on 03 April 2009. Eyssen was the leader of Fancy Boys gang.

⁶²³2009 (1) SACR 406 (SCA) at 407.

⁶²⁴*Id* n 33 *supra* at 976.

again for the same crime.⁶²⁵ According to Skelton, “mistrials” caused by events beyond the control of the government or by the defendant’s request do not count as jeopardy.⁶²⁶ Unambiguously, there is nothing in Chapters 2, 3 and 4 of the POCA that shall be construed to limit prosecution under any other provision of the law.⁶²⁷ Although the prohibition of exposure to double jeopardy related to a fair trial that might be viewed as part of the principle of legality, it is specifically allowed with regard to the crime requiring pattern, which pattern is formed by crimes that an individual may have likely faced some jeopardy. It is for this reason that one looks further abroad, in *People v McGlotten*,⁶²⁸ where the court ruled that separate convictions for a violation of the Colorado Organized Crime Control Act (COCCA) and underlying predicate offenses, which convictions were based upon the same activity, do not constitute double jeopardy.⁶²⁹

According to Currie and De Waal, Section 35(3)(m) of the Constitution of the Republic of South Africa Act of 1996⁶³⁰ affords constitutional protection against double jeopardy or repeated prosecution for the same offence.⁶³¹ If prosecuted, the accused may plea *autrefois* convict or *autrefois* acquit.⁶³² This means that the accused may plea that he/she has already been convicted or acquitted of the same crime that he/she is being charged with. Wallace and Roberson state that the constitutional guarantee against double jeopardy involves three separate restrictions on government conduct. First, the accused is protected from prosecution for the

⁶²⁵Reid *Criminal Law* 16.

⁶²⁶Skelton *Criminal Law* 302.

⁶²⁷Section 1(4) of the POCA of 1998.

⁶²⁸166 P. 3d 182 (colo. App. 2007).

⁶²⁹Title 18 Article 17 Section 101. See <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp> last visited on 18 July 2009.

⁶³⁰108 of 1996.

⁶³¹Currie and de Waal *The New Constitution* 416-417 and Currie and de Waal *The Bill of Rights* 788.

⁶³²See section 106(1)(c) and section 106(1)(d) of the Criminal Procedure Act of 1977 as well as Currie and De Waal *The Bill of Rights* 788.

same offence after an acquittal. Second, the accused is protected from prosecution for the same offence after a conviction. Third, the accused is protected from multiple punishments for the same criminal conduct. They conclude that the purpose of this doctrine is to protect a person from the harassment of multiple trials.⁶³³

If a crime is ongoing or continuing, it does not make it a pattern. The ongoing and continuous aspects cannot stand without the component of repetition. The perpetrator must not be a beginner but a repeat or serial offender in respect of the same type of such serious offence. Based on the Continuing Criminal Enterprise (CCE) statute, Horowitz calls organised crime a “three strike” crime.⁶³⁴ His view differs with that of Scheb and Scheb II who argue that to establish a pattern of racketeering activity requires proof of at least two of the acts of racketeering having occurred within a period of ten years, excluding any period of imprisonment.⁶³⁵

Fourthly, one of the crucial components of a pattern of racketeering activity is the period in which such incident took place. The period in which such serious crimes are committed must be in the sequence that one of the offences occurred within ten years (excluding the period of imprisonment) after the commission of such prior offence as referred to in Schedule 1 of the POCA. It is important to note the time at which the incident has occurred. The Act requires the following in respect of time:

1. One of the crimes must have been committed after the 21 January 1999, which is the date on which the POCA came into operation. This can better be referred to as a “central crime”. The crime is not committed if all the incidents took place before the Act came into operation. This is an application of the rule

⁶³³Wallace and Roberson *Criminal Law* 36.

⁶³⁴See <http://www.continuingcriminalenterprise.html> last visited on 25 February 2008. In South Africa, this could be called a double strike offence.

⁶³⁵Scheb and Scheb II *Criminal Law* 258. The difference of the understanding of this element by Horowitz and Scheb and Scheb II is enlightened by the use of two different laws using the terms continuing series and pattern of racketeering activity. Whereas a pattern of racketeering

against promulgating of laws with retrospective effect as expressed in Section 35(3)(l) of the Constitution of the Republic of South Africa Act of 1996.⁶³⁶

2. The other crime must be committed within ten years of the “central crime” as referred to above. As long as the gap in between is not longer than ten years, the consideration of new and old crimes is unlimited.⁶³⁷

This is in essence, the limitation against the *ex post facto* application as the crime committed in 1990 can be taken into operation if the central crime is committed in 1999. Once the central point leaves no gap of ten years period, the extent to which the calculation is done is unlimited. Any disruption of the prescribed ten years period to either direction (before or after) ends the counting of acts.

5.2.4 An act

For every crime, be it common law or statutory law crime, be it a result or conduct crime, human conduct is always required. It is a fundamental element of every crime.⁶³⁸ An act refers to a voluntary human act.⁶³⁹ A voluntary act is a movement of the human body that is willed or directed by the actor. It is also referred to as *actus reus*.⁶⁴⁰ Smartt states that an act does not make a man guilty of a crime unless his mind is also guilty. She explains that *actus reus* is the actual criminal act that describes the conduct element of a criminal offence.⁶⁴¹ According to Visser and Vorster, the requirement that a conduct must be voluntary does not mean that it must necessarily be desired, but merely that it is an activity or inactivity over which the human will is able to exercise control.⁶⁴² Snyman simply states that by conduct

activity is defined, the word continuing series has not been defined.

⁶³⁶200 of 1996. See also Snyman *Criminal Law* 39 and 42 as well as Burchell *Principles* 105.

⁶³⁷See also Goredema *Money Laundering* 86.

⁶³⁸Visser and Vorster *Criminal Law Cases* 35-36.

⁶³⁹*Id* n 638 *supra* at 35.

⁶⁴⁰Singer and La Fond *Criminal Law* 35.

⁶⁴¹Smartt *Law for Criminologists* 72.

⁶⁴²*Id* n 638 *supra* at 35.

is meant an act or omission. He explains that an act must comply with definitional elements of crime. He describes an act as referring only to the type of act mentioned in the definition of the crime with which an accused is charged, and more specifically, the type of act set out in the definitional elements of the relevant crime.⁶⁴³

With regard to organised crime, a human act must be related to an organised criminal group. The conduct can be committed in various ways by the perpetrator. The perpetrator must have done the following:

1. Received or retained property derived from a pattern of racketeering activity.⁶⁴⁴
2. Used or invested any part of such property in acquisition of any interest.⁶⁴⁵
3. Received or retained such property on behalf of an enterprise.⁶⁴⁶
4. Used or invested such property on behalf of the enterprise or acquisition of interest in the establishment or operation of the enterprise.⁶⁴⁷
5. Acquired or maintained any interest in and control of any enterprise through a pattern of racketeering activity.⁶⁴⁸
6. While being a manager or employee of an enterprise, have conducted or participated in the conduct of such an enterprise's affairs through a pattern of racketeering activity.⁶⁴⁹ It is important to identify those affairs.⁶⁵⁰
7. Manage the operations or activities of an enterprise.⁶⁵¹ As 'manage' is not defined, it therefore bears its ordinary meaning, which is "be in charge of;

⁶⁴³*Id* n 14 *supra* at 30, 51 and 52.

⁶⁴⁴See section 2(1)(a)(i) of the POCA of 1998.

⁶⁴⁵See section 2(1)(a)(iii) of the POCA of 1998.

⁶⁴⁶See section 2(1)(b)(i) of the POCA of 1998.

⁶⁴⁷See section 2(1)(c)(i) of the POCA of 1998.

⁶⁴⁸See section 2(1)(d) of the POCA of 1998.

⁶⁴⁹See section 2(1)(e) of the POCA of 1998.

⁶⁵⁰See also *Eyssen supra* paragraph 5.

⁶⁵¹See section 2(1)(f) of the POCA of 1998.

run; supervise, be the manager of".⁶⁵²

8. Conspire or attempts to violate the provisions of Section 2 of the POCA.⁶⁵³

5.2.5 Culpability

A person is criminally accountable if he possesses the necessary mental ability to distinguish between right and wrong and, is further capable of acting in accordance with such insight. Snyman states that by culpability is meant that there must, in the eyes of the law, be grounds for blaming the perpetrator personally for his unlawful conduct.⁶⁵⁴ Culpability or fault takes either the form of intention or negligence, which are also known as *dolus* and *culpa* respectively.⁶⁵⁵ McCormack submits that the RICO statute does not contain any separate *mens rea* or scienter elements beyond those encompassed in the predicate acts. No specific intent to engage in an unlawful pattern of racketeering prohibited by RICO is required.⁶⁵⁶

In organised crime, both intention and negligence are applicable.⁶⁵⁷ The element of negligence appears from the text of section 2(1)(a)(ii), 2(1)(b)(ii), 2(1)(c)(ii) and 2(1)(f) of

⁶⁵²See *Eyssen supra* paragraph 5.

⁶⁵³See section 2(1)(g) of the POCA of 1998.

⁶⁵⁴*Id* n 14 *supra* at 149. Burchell describe *culpa* as conduct falling short of a standard of a reasonable man. While Padfield states that negligence is merely a failure to comply with the standards of the reasonable man, Heaton states that negligence is a failure by the accused to act in conformity with an objective standard decided on by the court looking back on what actually happened in the situation. Herring states that a negligent act is one which falls below the standards expected of a reasonable ordinary prudent person (hypothetical reasonable person). Alexander, Ferzan and Morse submits that negligence requires that one is unreasonably unaware of a substantial and unjustifiable risk that the forbidden result may occur or that the relevant circumstances exist; see Burchell *Principles* 526, Padfield *Criminal Law* 51 and Heaton *Criminal Law* 72, Herring *Criminal Law* 71 and Alexander, Ferzan and Morse *Crime and Culpability* 24.

⁶⁵⁵Snyman *Criminal Law* 152 and Burchell *Principles* 455.

⁶⁵⁶McCormack *RICO* 5-63. In *US v Pepe*, 747 F.2d 632 (11th Cir 1984), the appellant was charged and convicted under 18 USC 1961-1968 for conducting loan sharking activities in Southern Florida. The question to be addressed by the court included sufficiency of evidence to prove the intention to commit a crime in terms of the RICO. The court concluded that there is no need to have separate elements of crime other than the predicate offence.

POCA, which states that any person who: knows or ought reasonably to have known....⁶⁵⁸ Intention is the reproach of a criminally accountable person because he has committed an unlawful act or caused an unlawful result with the knowledge of the unlawfulness of such act. Snyman describes intention as meaning that a person commits an act while his will is directed towards the commission of the act or the causing of the result; in the knowledge of the existence of the circumstances mentioned in the definitional elements of the relevant crime; and in the knowledge of the unlawfulness of the act.⁶⁵⁹ Visser and Vorster translated the definition of intention by Van der Merwe and Olivier as the blame that the law attaches to a criminally accountable actor, because he willed the result which he has caused or because he willed the act which he has committed, while being aware of the unlawfulness of his conduct.⁶⁶⁰

According to Burchell, except culpable homicide, contempt of court or certain statutory prohibitions, all common law crimes require 'intention'.⁶⁶¹ His explanation of the term is that intention involves a purposefully chosen course of action, knowing that it was unlawful. In his view, the test for intention is simply what the accused knew or foresaw.⁶⁶² Dressler asserts that at common law, a person intentionally causes the social harm of an offence if it is his desire to cause the social harm or he acts with the knowledge that the social harm is virtually certain to occur as a result of his conduct.⁶⁶³ In Italy, a crime is considered intentional when the harmful or dangerous event which is the result of the act or omission, and on which the law makes existence of the crime depend, is foreseen and desired by the

⁶⁵⁷*Id* n 33 *supra* at 977 and 990.

⁶⁵⁸See section 2 of the POCA of 1998.

⁶⁵⁹*Id* n 14 *supra* at 181.

⁶⁶⁰Visser and Vorster *Criminal Law Cases* 288. The original source is written in Afrikaans by Van der Merwe and Olivier *Die Onregmatige Daad* 119.

⁶⁶¹*Id* n 33 *supra* at 455 and 522.

⁶⁶²*Id* n 33 *supra* at 523.

⁶⁶³Dressler *Criminal Law* 119.

actor as a consequence of his own act or omission.⁶⁶⁴ Intention takes various forms, which are *dolus directus*, *dolus indirectus*, *dolus eventualis* and *dolus indeterminatus*.⁶⁶⁵

Dolus directus is applicable where the accused meant to do the prohibited act or to bring about the criminal consequences.⁶⁶⁶ In *R v Kewelram*,⁶⁶⁷ the appellant who was the occupant of a store, set fire to the stock in the store in order to obtain insurance money. The store was also destroyed by fire. The appellant was convicted of arson in respect of the burning of the store. This is indirect intention because he did not directly mean to burn the store but wanted to burn the stock with the understanding that the shop shall also burn down. The intention to defraud the insurance company is direct and that is *dolus directus*.⁶⁶⁸

Dolus indirectus is where, although not the accused's aim and object, he or she foresaw the unlawful act or consequence as certain, or as substantially certain or virtually certain.⁶⁶⁹ In *Kewelram*⁶⁷⁰ *supra*, the appellant was convicted of arson in respect of the burning of the store. This is indirect intention (*dolus indirectus*) because he did not directly mean to burn the store but wanted to burn the stock with the consciousness that the shop shall also burn down.⁶⁷¹

Dolus eventualis exists when the accused does not mean to bring about the unlawful circumstance or to cause the unlawful consequence, which follows from his or her conduct, but foresees the possibility of the circumstance existing or the consequence

⁶⁶⁴Article 43 of the Italian Penal Code.

⁶⁶⁵*Id* n 33 *supra* at 152 and 461-463.

⁶⁶⁶*Ibid* n 665 *supra*.

⁶⁶⁷1922 AD 213. See also Visser and Vorster *Criminal Law Cases* 288.

⁶⁶⁸Visser and Vorster *Criminal Law Cases* 288-289

⁶⁶⁹*Ibid* n 665 *supra*.

⁶⁷⁰1922 AD 213. See also Visser and Vorster *Criminal Law Cases* 288.

⁶⁷¹Visser and Vorster *Criminal Law Cases* 288-289.

ensuing and proceed with his or her conduct.⁶⁷² According to Kruger, *dolus eventualis* requires that the perpetrator reconciles himself or herself to the consequences foreseen as a possibility: it is the particular, subjective, volitional mental state with regard to the foreseen possibility, which characterises *dolus eventualis*.⁶⁷³

An example of *dolus eventualis* is in *R v Jolly*.⁶⁷⁴ In this case, the appellants unlawfully and deliberately derailed a train. Except the engine driver, none of the passengers were hurt. The appellants were convicted of assault with intention to murder. After the conviction, the question of whether the facts alleged in the indictment constitute the crime of assault with intent to commit murder and whether there is sufficient evidence on the record of an intention to murder were reserved for decision by the Appellate Division. In its decision, the court, as per Innes CJ, observed the doctrine by the English law, which stated that it was a universal principle that when a man is charged with doing an act of which the probable consequences may be highly injurious, the intention is an inference of law resulting from doing the act. The court ruled in the affirmative on both questions.⁶⁷⁵

Dolus indeterminatus is applicable where the accused does not have a particular object or person in mind, for instance, if he throws a bomb into a crowd of people or derails a train. Although he has no particular intention to kill a particular individual in the crowd or upon a train, it does not mean that he lacks the intention. His knowledge and foresight that someone will die, has 'general intention' or *dolus indeterminatus*.⁶⁷⁶ This element is similar to what the Italian Penal Code termed preterintentional, which is present when the act or omission is followed by a harmful

⁶⁷²*Ibid* n 665 *supra*.

⁶⁷³*Id* n 316 *supra* at 148.

⁶⁷⁴1923 AD 176. See also Visser and Vorster *Criminal Law Cases* 290.

⁶⁷⁵1923 AD 176 at 185 and 188.

⁶⁷⁶*Ibid* n 665 *supra*.

or dangerous event more serious than that desired by the actor.⁶⁷⁷

5.2.6 Unlawfulness

An act is unlawful if it violates the provisions of common law, statutory law or unwritten customary law. In organised crime, an element of unlawfulness is applicable when the commission of a crime, which is in the POCA list takes place. According to Snyman, 'unlawful' means contrary to law.⁶⁷⁸ He suggests that to avoid confusion, it may be better to replace the word unlawfulness with unjustified or lack of justification.⁶⁷⁹

The only grounds of justification specifically highlighted are the defence which are available to the accused charged with committing an offence under Section 2(1)(a) or (b), which he or she may in terms of Section 7A(1) of POCA raise. The facts to be raised are that the accused had reported a knowledge or suspicion in terms of Section 29 of the Financial Intelligence Centre Act (FICA) of 2001.⁶⁸⁰ In the case of a person who is an employee of an accountable institution as defined in the FICA, and he or she is charged with committing an offence under Section 2(1)(a), Section 7A(2) of the POCA applies.

The defence which the accused may raise in terms of Section 7A(2) of the POCA may be the following:

That he or she had-

- (a) Complied with the applicable obligations in terms of the internal rules relating to the reporting of information of the accountable institution.

⁶⁷⁷Article 43 of the Italian Penal Code.

⁶⁷⁸*Id* n 14 *supra* at 31.

⁶⁷⁹*Id* n 14 *supra* at 96.

⁶⁸⁰38 of 2001.

- (b) Reported the matter to the person charged with the responsibility of ensuring compliance by the accountable institution with its duties under that Act.
- (c) Reported a suspicion to his or her superior, if any, if-
 - (i) The accountable institution had not appointed such a person or established such rules.
 - (ii) The accountable institution had not complied with its obligations in terms of section 42(3) of that Act in respect of that person.
 - (iii) Those rules were not applicable to that person.⁶⁸¹

5.2.7 Financial or other material benefit

The element of financial or other material benefit in the definition of organised crime under paragraph 5.2 *supra*, is represented as property in most provisions of the POCA. Peter states that the main aim of the organised criminal group is acquiring financial or other form of material benefit.⁶⁸² Abadinsky argues that the goals of organised crime groups are money and power and is not motivated by social doctrine, political beliefs or ideological concerns.⁶⁸³ Finckenauer supports this view and states that research in the USA concluded that organised crime groups were non-ideological and terrorist organizations would not be classified as a form of organised crime. He submits that organised crime exists for the purposes of economic gain and making profit through whatever means, is its primary goal.⁶⁸⁴ Similarly, Finklea argues that organised crime is motivated by the desire to make money and tends to regard any activity beyond that required to effect profit as bad for business while terrorists are concerned that non-ideological partners will increase the chance of successful police penetration or that profits will seduce the faithful.⁶⁸⁵

⁶⁸¹Section 7A(1) of the POCA of 1998.

⁶⁸²Peter *Organised Crime* 74.

⁶⁸³*Id* n 242 *supra* at 3.

⁶⁸⁴Finckenauer *Problems of Definition* 65 and 66.

⁶⁸⁵Finklea *Trends and Issues of Congress* 24.

Although Paoli is of the view that the true goal of criminal organizations is power, this is power to position the group in an advantageous situation for financial benefit.⁶⁸⁶ The same can be said of the Task Force's report stating that what organised crime wants is money and power.⁶⁸⁷ Additionally, Viano states correctly that the primary motivation of those engaged in international organised crime is financial gain.⁶⁸⁸ In the same vein, Potter submits that organised crime groups, whether engaged in gambling, loansharking, drug trafficking or prostitution exist for the explicit purpose of making money.⁶⁸⁹ Similarly, Vander Beken states that organised crime is perceived as a profit and opportunity driven phenomenon.⁶⁹⁰

Internationally, property is defined as assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible, and legal documents or instruments evidencing title to, or interest in such assets.⁶⁹¹ Property is defined as money or any other movable, immovable, corporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof.⁶⁹² Proceeds means any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3 paragraph 1.⁶⁹³ Liddick argues that organised criminals are motivated by profit and their methods of

⁶⁸⁶Paoli *Mafia Phenomenon* 280.

⁶⁸⁷Task Force Report on Organized Crime 1.

⁶⁸⁸Viano *Global Organized Crime* 189.

⁶⁸⁹Potter *Criminal Organizations* 125.

⁶⁹⁰Vander Beken *European Organised Crime* 11.

⁶⁹¹See Article 2(d) of the United Nations Convention against Transnational Organized Crime 2000, Article 1(q) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which are accessible in Shanty and Mishra *From Trafficking to Terrorism* 631 and 683.

⁶⁹²Section 1 of POCA of 1998. See also Kruger *Organised Crime* 16.

⁶⁹³See Article 2(e) of the United Nations Convention against Transnational Organized Crime 2000, Article 1(p) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which are accessible in Shanty and Mishra *From Trafficking to Terrorism* 631 and 683.

acquisition of wealth and power is self-evidently criminal.⁶⁹⁴ This view finds support in the argument of Singh who states that the element of financial or material benefit should be the ultimate objective behind undertaking the commission or facilitation of offences.⁶⁹⁵

Naylor is of the view that, instead of just closing rackets that generate illegal income, the objective has become to attack criminal profits after they have been earned, on the theory that taking away wealth accumulated by criminals removes both the motive (profit) and the means (operating capital) to commit further crimes.⁶⁹⁶ He argues that the theory behind the proceeds of crime control is premised on four pillars, which are: since profit is the motive, eliminating criminal gains acts as a powerful deterrent; taking away ill-gotten income prevents criminals from being able to infiltrate and corrupt the legitimate economy; removing the money also takes away the capital essential to commit future crimes; and the moral principle that no one should be permitted to profit from commission of a crime.⁶⁹⁷ The purpose of deploying the proceeds of crime processes is to detach the criminal from her dishonest gains and confiscate same. Costa supports this view and states that since criminals are motivated by profit, the key is to go after their money.⁶⁹⁸

Kruger argues that racketeering is usually embarked upon for the purpose of making money but there may be organizations that use racketeering activities to advance their ideological goals. His reasons are based on the incorporation of the Protection of the Constitutional Democracy Against Terrorist and Related Activities Act of 2004 into the POCA.⁶⁹⁹ This writer differs with this view because the fact that

⁶⁹⁴Liddick *Overview of Organized Crime* 35.

⁶⁹⁵Singh *Organised Crime in Canada and India* 48.

⁶⁹⁶Naylor *Follow-the-Money* 256.

⁶⁹⁷*Id* n 696 *supra* at 257.

⁶⁹⁸UNODC: *TOCTA* iii.

⁶⁹⁹*Id* n 316 *supra* at 28-29.

this crime has been included in the POCA list does not mean that terrorist activities or organizations should be considered as organised crime. The inclusion of terrorist activities is aimed at civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and related activities.⁷⁰⁰ It can also be clearly observed from the separate use of organised crime and terrorist activities in the wording of the preamble that reads, “and whereas there is a need to devote such forfeited assets and proceeds to the combating of organised crime, money laundering and the financing of terrorist and related activities”.⁷⁰¹ Similar to the view held by Hagan, this writer is persuaded to agree with Richards, who submits that the motivation for power and influence resulting from the accumulation of wealth distinguishes organised criminal groups from terrorists who are motivated by political or social gains.⁷⁰²

The element of financial benefit is emphasised by Bovenkerk who distinguishes organised crime as pertaining to groups that work together to systematically engage in serious economic offences for the pursuit of monetary gain, specifically extortion and the trade in illegal goods and services.⁷⁰³ It is difficult to detect financial benefits of organised criminal groups. This writer is of the view that the challenge of detecting these benefits is not limited to South Africa. Williams emphasised that the legislative vacuum in Russia was compounded by weaknesses in law enforcement. He correctly observed that law enforcement agencies have little experience in dealing with financial crimes, whether fraud or money laundering, yet, this is one of the areas of criminal activity where sophistication and specialised expertise are most

⁷⁰⁰See Schedule in terms of section 27 of Protection of the Constitutional Democracy Against Terrorist and Related Activities Act of 2004.

⁷⁰¹*Ibid* n 700 *supra*.

⁷⁰²Richards *Criminal Organizations* 4 and Hagan *Organized Crime Continuum* 79.

⁷⁰³Bovenkerk *Criminal Organizations* 276.

needed.⁷⁰⁴

Profit is the proceeds of crime and not an instrumentality to the commission thereof. In *NDPP v Gerber*,⁷⁰⁵ Andre Grobler who is the first respondent, cultivated 295 dagga plants at the house of his partner Leigh Whyte at Bramley North. He pleaded guilty, was convicted and sentenced to 18 months or R6 000-00 fine, which was wholly suspended for five years. The Asset Forfeiture Unit (AFU) applied for the forfeiture of the property as an instrumentality to the commission of the crime. The court held that, having regard to all of the facts of the present case, it would not be appropriate to make a forfeiture order that would leave the second respondent and her foster child together with her elderly mother homeless.⁷⁰⁶ In reaching this decision, Schwartzman J, considered the argument of the Council for the applicant, Pillay, which he found to be helpful, where he raised a question as to whether forfeiture is permissible when the owner has committed no wrong of any sort, whether intentional or negligent, active or acquiescent.⁷⁰⁷

Property, which is derived from a pattern of racketeering activity, surfaces in Chapter 2 providing that a person must have knowingly: received or retained property;⁷⁰⁸ used or invested any part of property;⁷⁰⁹ received or retained property on behalf of an enterprise;⁷¹⁰ used or invested any property on behalf of an enterprise or in acquisition of any interest in, or the establishment or operation of activities of any enterprise;⁷¹¹ and acquired or maintained any interest in or control of any

⁷⁰⁴Williams *Russian Organized Crime* 9.

⁷⁰⁵2007 (1) SACR 384 (W).

⁷⁰⁶2007 (1) SACR 384 (W) at 385

⁷⁰⁷2007 (1) SACR 384 (W) at 394.

⁷⁰⁸Section 2(1)(a)(i) and (ii) of the POCA of 1998.

⁷⁰⁹Section 2(1)(a)(iii) of the POCA of 1998.

⁷¹⁰Section 2(1)(b) of the POCA of 1998.

⁷¹¹Section 2(1)(c) of the POCA of 1998.

enterprise.⁷¹² The rest of Chapter 2 does not refer to benefit, but such benefits cannot be separated from the activities of the enterprise in which the accused is involved.

5.2.8 Penal provision

According to Rabie and Maré, a conduct constitutes a crime if the legislature stipulates a criminal norm and a criminal sanction for its commission. A criminal norm is defined as a provision in an Act stating clearly that certain conduct constitutes a crime and that a criminal sanction is a provision prescribing what punishment a court must mete out once a person has been found guilty of the particular crime.⁷¹³ If a statutory provision creates a criminal norm only, but remains silent on the criminal sanction, the punishment is at the court's discretion. In contrast, Burchell who bases his view on the decision in *R v Carto*,⁷¹⁴ argues that punishment is an integral part of the concept of crime without which there would be no distinction between penal and non-penal laws. He concludes that to render any act criminal, there must be some punishment affixed to the commission of the act and where no law affixing such punishment exists, there is no crime in law.

In *S v Theledi*,⁷¹⁵ the appellant was convicted for contravention of Section 53(10) read with Section 41(1) of the Attorneys Act 53 of 1979 in that he has practised without being in possession of a fidelity fund certificate. As the Act prohibited practising without being admitted, the court held as follows:

Applying the maxim *nullum crimen sine lege*, that Section 53(10), read with Section 41(1) did not create an offence in respect of an admitted attorney who practised without a fidelity fund certificate and that the appellant had accordingly been incorrectly convicted.

⁷¹²Section 2(1)(d) of the POCA of 1998.

⁷¹³Rabie and Maré *Punishment* 6 and Snyman *Criminal Law* 48.

⁷¹⁴1917 EDL 87 at 95.

⁷¹⁵1993 (2) SA 402 (T).

Further, that the provisions of Section 83(10) were not relevant to the appellant as he was an admitted attorney entitled to appear in the magistrate's court.⁷¹⁶

All the offences in the POCA have specific penal provisions. With regard to the contravention of Section 2 of the POCA of 1998, penalties are provided for in Section 3 of this Act.⁷¹⁷

5.3 CONCLUSION

The elements of organised crime can only be determined if there is a clear legislated definition. By creating a definition, law enforcement will also be able to draw an organised crime threat assessment. This shall not only assist in identifying the elements with certainty but it will also assist the investigators who are assigned to combat organised crime. The absence of a definition of the term 'organised crime' can create gaps and ambiguities.⁷¹⁸

While Foglesong and Solomon argue that it is unclear how the definitional void hampers the fight against organised crime, they appreciate that most legal scholars and legal officials lament this legal lacuna.⁷¹⁹ The absence of a definition affects the conclusive determination of the elements of organised crime. By using the definition offered in paragraph 5.2 *supra*, and Chapter 2 of the POCA as the basis, the elements of organised crime are as stipulated above. Should an official definition be crafted and inserted in the legislation by the legislature, some of the elements as

⁷¹⁶*Id* n 33 *supra* at 98.

⁷¹⁷*Id* n 316 *supra* at 34.

⁷¹⁸See paragraph 3.2.3 *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.

⁷¹⁹Foglesong and Solomon *Ukraine* at <http://www.ncjrs.gov/textfiles1/nij/186166.txt> last visited on 03 May 2009. Bjelopera and Finklea support the view that the lack of centralization of organised crime-related statutes may not affect law enforcement's abilities, see Bjelopera and Finklea *Organized Crime* 37.

stated above may have to be adjusted accordingly.

This writer therefore concludes that the definitional elements of organised crime are the following:

1. An organised criminal group.
2. Serious crime.
3. A pattern of racketeering activity.
4. An act.
5. Culpability
6. Unlawfulness.
7. Financial or other material benefit.
8. A penal provision.

CHAPTER SIX

ORGANISED CRIME IN ITALY

6.1 INTRODUCTION

Italy is a country renowned for its unprecedented number of criminal organizations, which resulted in appellation of “traditional organised crime”.⁷²⁰ It gained the reputation of being the birthplace of organised crime but this does not in any way postulates that organised crime is limited to Italy.⁷²¹ The Mexican Cartels, for instance, were involved in cocaine, marijuana and heroin trafficking in the USA. These cartels also formed alliances with La Nuestra Familia and La Eme in California, Juirez Cartel, Tijuana Cartel, Gulf Cartel and even the Yardies gangs in New York.⁷²² There is hardly any country, which can claim to have not experienced the operation of Nigerian organised criminal groups.

The Triads and Vietnamese organised criminal groups that include BTK, 5T and Black Dragons expanded from Canada to Australia and operated in Sydney.⁷²³ Ryan noted that Chinese Triads, 'Ndrangheta, Lebanese, Vietnamese, Romanian,

⁷²⁰Wright *Organised Crime* 100. Traditional organised crime refers to Italian Mafia, Chinese Triads, Russian Organizatsiya, Japanese Yakuza and American Cosa Nostra. While Madsen states that this refers to Italian, Finklea submits that this includes Italian, Russian, Japanese and Chinese mafia; see Madsen *Organized Crime* 14 and Finklea *Organized Crime in the USA* 8.

⁷²¹Lozzi-Toscana *Organized Crime in Italy* 105. Van der Schoot is of the view that organised crime was formerly only a problem in Italy and the USA. Schloenhardt holds the view that although organised crime is ubiquitous, the USA and Italy are the two countries with notorious organised crime history; see Van der Schoot *Organised Crime* 9 and Schloenhardt *Serious and Organised Crime Groups* 6 as well as <http://www.aph.gov.au/Senate/Committee/acc-ctte/laoscg/submissions/sub01.pdf> last visited on 18 September 2011.

⁷²²Southwell *History of Organized Crime* 145-146.

⁷²³*Id* n 722 *supra* at 151.

Colombian and Japanese organised crime syndicates were listed as operating in Australia.⁷²⁴ Lyman and Potter argues persuasively that academics and scholars concluded that there is no single dominant crime organisation (Italian or otherwise), and further that organised crime is composed of numerous ethnic and transnational groups operating together or in part and in conjunction with legitimate business and political entities.⁷²⁵

Organised criminal groups have come to be known by different names from different countries or people. A semantic collage of attempting to sort these names out is an exercise of futility.⁷²⁶ This means that it will be difficult to try to group these many organised criminal groups, prioritising others as traditional organised criminal groups above others.

Organised crime is not limited to the countries forming the focus of this research, for instance, the Colombian Drug Cartels that include the Cali Cartel, the Medellin Cartel were formed in the 1970s and are indisputably controlling the world's supply of cocaine.⁷²⁷ Richards, whose view is supported by Thoumi, states that the Cali Cartel is responsible for 80% of the world's cocaine supply.⁷²⁸ The Jamaican Yardies,

⁷²⁴Ryan *Organized Crime Handbook* 10.

⁷²⁵Lyman and Potter *Organized Crime* 3.

⁷²⁶Liddick *Overview of Organized Crime* 49 and *International Herald Tribune*: 20 July 2011 page 2. These names include blackmailers, bootleggers, buttleppers, cartels, com-tsotsis, comrade criminals, conspirators, corporations, confederations, the family, crime-entrepreneurs, criminal gang, criminal holding, criminal practitioners, criminal enterprise, criminal entrepreneurs, criminal syndicates, criminal society, enterprise, extortionists, firms, gangs, group of people, the people, group, high-way men, hit-men, laundrymen, loan sharks, mafia, maguma-guma, makintsa, the combination, the fix, troupe, the mob, mobs, mobsters, networks, organizations, organised group, outfits, partnerships, pirates, professional criminals, racketeers, rackets, rings, secret society, skollies, smugglers, society international, street gangs, super gangs, syndicates, teamsters, terrorists, traffickers, tsotsis, the killers, the Impudent, the Crocodiles, malaitha, and uncivil society or warlords.

⁷²⁷Southwell *History of Organized Crime* 144, Ryan *Organized Crime Handbook* 53-54, Lyman and Potter *Organized Crime* 248-251, Abadinsky *Organized Crime* 167-172, Hagan *Criminology* 485 and Marion *Organized Crime* 361 and 364.

⁷²⁸Richards *Criminal Organizations* 17 and Thoumi *Illegal Drug Industry* 117.

as the police call them, or Posses as they call themselves, were involved in robberies and dagga distribution. They found their way into London, Manchester and New York where they were in the latter, called the Shower Posse, Dunkin Boys Posse and Spanger Posse respectively.⁷²⁹ According to Ryan, there were about 30 Posses with a membership of over 10 000 operating in more than 20 large cities in America and specialising in drug distribution and falsification of identity documents.⁷³⁰ Having observed that organised crime is not limited to the countries forming the focus of this research, this chapter shall look at the definition of organised crime, organised criminal groups in the country, crimes mostly committed and the responses by the authorities to such identified challenges.

Italian criminal groups have dominated much of the literature on organised crime for decades hence the public perception that organised crime is solely an Italian-American phenomenon.⁷³¹ Organised crime is often believed to have its origin in Sicily, Italy. It is certainly true that the most famous criminal organization is undoubtedly the Mafia.⁷³² It came into being in an area typical of the feudal estates in the centre of Sicily.⁷³³ According to Violante, people often use terms such as 'octopus' or 'cancer' in describing the Mafia, which has the effect of wrongly making the Mafia seem mysterious, omnipotent and uncatchable.⁷³⁴ Gambetta goes further and suggests the hypothesis that the Mafia is a specific economic enterprise, an industry that produces, promotes and sells private protection.⁷³⁵ In a similar way, Varese enlightens one that a Mafia group is a particular type of organised crime that specialises in one particular commodity, which is 'protection' that it produces,

⁷²⁹Southwell *History of Organized Crime* 146.

⁷³⁰Ryan *Organized Crime Handbook* 55-56. See also Marion *Organized Crime* 365.

⁷³¹Lyman and Potter *Organized Crime* 80.

⁷³²Skaperdas *Economy of Organized Crime* 175 and Obokata *Transnational Organised Crime* 1.

⁷³³Pantaleone *The Mafia* 23 and Obokata *Transnational Organised Crime* 1.

⁷³⁴Jamieson *The Antimafia* ix. Violante was the Speaker of the Chamber of Deputies and Chairman of Antimafia Commission 1992-1994.

⁷³⁵Gambetta *The Sicilian Mafia* 1. See also Obokata *Transnational Organised Crime* 3.

promotes and sells.⁷³⁶ In contrast, Oleinik is of the opinion that the Mafia expresses an idea, mental habit and a state of mind rather than a definitely organized institution.⁷³⁷

Ferraroti describes Mafia as a typical example of ... “informal power; characterised by the existence of an organisation; its extension to all spheres of public life; the capacity to interfere in the private lives of persons and by the acceptance of Mafia power within the average conscience of the social groups in which it operates, which (together) have determined its relative institutionalisation”.⁷³⁸ According to Van der Heijden, both hierarchical and flat structures are found among domestic groups in Italy.⁷³⁹

The Mafia was not the only criminal organisation in Italy.⁷⁴⁰ An organisation such as the Camorra, predates the Mafia by several decades, but its history has not been as famous as that of its Sicilian counterpart (Mafia).⁷⁴¹ In describing the Camorra, Saviano states that, it is made up of groups that suck like voracious lice, hindering all economic development, and others that operate as instant innovators, pushing their businesses to new heights of development and trade.⁷⁴²

6.2 DEFINITION OF ORGANISED CRIME IN ITALY

The official definition of organised crime in Italy is as follows:

⁷³⁶Varese *The Russian Mafia* 4.

⁷³⁷Oleinik *Organized Crime* 264.

⁷³⁸Jamieson *The Antimafia* 20.

⁷³⁹Van der Heijden *Measuring Organized Crime*, which is accessible at <http://www.ncjrs.gov/policing/mea313.htm> last visited on 01 March 2008.

⁷⁴⁰Schneider *Iced* 103.

⁷⁴¹Behan *The Camorra* 5.

⁷⁴²Saviano *Gomorra* 45-46.

The association is of Mafia type when those who form part thereof avail themselves of the force of intimidation of the bond of association and of the condition of subjection and “omertà” (silence of a culpable nature) deriving therefrom in order to commit crimes, to acquire directly or indirectly the management or in any case the control of economic activities, concessions, authorizations, public contracts and services or in order to obtain profits or unjust advantages for themselves or for others, or in order to prevent or hinder the free exercise of the vote or to procure votes for themselves or for others on the occasion of elections.⁷⁴³

It should be noted that a criminal association or association for committing crime that is criminalised in Article 416 has not been defined.⁷⁴⁴

In addition to this official definition, there are various definitions of experts defining the phenomena from an Italian perspective. Adamoli defines the term ‘organised crime’ as a method of conducting criminal operations, which is distinct from other forms of criminal behaviour. Its salient features are violence, corruption, ongoing criminal activity, and the precedence of the group over any single member. Organised criminal groups are characterised by their continuity over time regardless of the mortality of their members. They are not dependent on the continued participation of any single individual.⁷⁴⁵ Ruggiero describes organised crime as a vertical structure with a low degree of co-operation among its members.⁷⁴⁶

Varese describes organised crime as mafia and explains that, for some, the term ‘mafia’ is a phenomenon typical of Sicily and such a word should be used only in reference to the Sicilian Cosa Nostra. However, his view is that the mafia (with a lower case) is a species of a broader *genus*, organised crime, and various criminal organisations - including the American Cosa Nostra, the Japanese Yakuza, and the

⁷⁴³Article 416-bis of Italian Penal Code. This Antimafia law is also called Rognoni-Latorre law, which is named after Virgio Rognoni and Pio La Torre who supported this law.

⁷⁴⁴Article 416 of the Italian Criminal Code.

⁷⁴⁵*Ibid* n 179 *supra* at 4.

⁷⁴⁶Ruggiero *Organized Crime* 121.

Hong Kong Triads - belong to it.⁷⁴⁷ He agrees with Schelling that by the term 'organised crime' we do not mean simply crime that is organized.⁷⁴⁸ One of the characters of mafia is persistence.⁷⁴⁹

The explanation of Varese and Schelling's view is that, if three burglars get together and plan a robbery, they do not qualify to be an organised criminal group. To them, an organised criminal group seeks 'to govern' the underworld. Burglars may be in the underworld but do not seek to govern it. They conclude that an organised criminal group aspires to obtain a monopoly over the production and distribution of a certain commodity in the underworld. Some kinds of crimes are organised in monopolistic fashion, and characterised by occasional gang wars, truces and market sharing arrangements. Schelling cites examples of loan-sharking, gambling, and drug dealing as criminal businesses that lend themselves to monopolisation more than others.⁷⁵⁰

Turone states that organised crime is regarded as a particular kind of economic crime in Italy. He defines it as any group of people committing systematically serious crimes having an economic aspect with a kind of a business organization, where costs, profits, money launderings, investments and reinvestments are programmed with an entrepreneurial approach, so that the group may acquire favourable position within an illegal market, and through consequent reinvestments, within the legal economy itself.⁷⁵¹

⁷⁴⁷Varese *The Russian Mafia* 4.

⁷⁴⁸See also Hill *Yakuza* 7.

⁷⁴⁹Follain *The Last Godfathers* 75. The characteristics of mafia is that, they hate not knowing who is responsible for murdering any of their number. In one incident, they spent more than six years trying to establish that Michele 'the Cobra' Carataio is the one who has started the first mafia war and planted the car-bomb in a tangerine grove in Ciaculli that had caused a police crackdown.

⁷⁵⁰Rhodes *Organized Crime* 37 and Schelling *Organized Crime* 261.

⁷⁵¹Turone *Italian Experience* 48-49. This report can also be accessed at http://www.unafei.or.jp/english/pdf/RS_No73/No73_10VE_Turone.pdf last visited on 20

6.3 ORGANISED CRIMINAL GROUPS IN ITALY

In correcting the perception that Italian organised crime is commonly thought of as the Mafia, Richards states that Mafia is but one of the four distinct criminal groups operating from Italy. The names of the other three groups are the Camorra, the 'Ndrangheta and the Sacra Corona Unita or Sacred Crown.⁷⁵² Hess concludes that 'mafia' can be objectively defined as the mysterious sense of fear, which a man notorious for his crimes or brutal use of force arouses in the weak, the meek and the cowardly.⁷⁵³ This suggests that mafia is a belief that something sinister that can cause harm, exist.

Ryan admits that the historical origins of the Mafia are uncertain. One of the views is that its birth is the 9th century response to Arabic domination of Sicily. This view is based on the fact that the Arabic word Mafia means 'place of refuge' and it was used to describe Sicilian refugees who hid on the hillsides. He further states that a more popular etymology says that the Mafia arose in 1282 in Palermo, Italy as a political and patriotic organisation devoted to ridding Sicily of French domination. This assertion is supported by Nathanson Study on Organised Crime and Fulvetti, who are of the view that Mafia was born in 1282 and 1860 respectively.⁷⁵⁴

Varese's view is that the first sign of the Mafia's existence in Sicily is 1830.⁷⁵⁵ The group's members swore an oath to kill all persons of French descent with a rallying

August 2011.

⁷⁵²Richards *Criminal Organizations* 5. See also Abadinsky *Organized Crime* 156 and Ince *Organised Crime in China and Italy* 4-5. Shelly submits that the Mafia, the Camorra and other Italian groups coercively operated in Italy; see Shelly *Organized Crime* 33.

⁷⁵³Hess *Mafia and Mafiosi* 51-52.

⁷⁵⁴Ryan *Organized Crime Handbook* 43. See also Ianni *Family Business* 25 and Fulvetti *Organised Crime in Italy* 47. The years are not the same but it is in the same century.

⁷⁵⁵Varese *Mafias on the Move* 102. Lewis agrees with Ryan and submits that this concept

cry “*Morte alla Francia Italia anela*” acronym MAFIA meaning death to the French is Italy’s cry, or as Lyman, Potter and Allsop put it, “death to France, Italy groans”.⁷⁵⁶ Nicaso and Lamothe state that the words mean ‘Death to the French is Italy’s Cry’.⁷⁵⁷ To behave in a manner of a member of the Mafia was viewed as to make oneself respected by being capable of revenging by ones own force any sort of offence to an enemy.⁷⁵⁸ According to Fulvetti, the Mafia has been considered a simple criminal phenomenon, an expression of the Sicilian culture, a positive desire to make one’s own justice, the strong arm of Sicilian landowners, a criminal enterprise and much more.⁷⁵⁹

Ianni argues along the same lines as Allen that the origins of the word ‘mafia’ are lost in antiquity. He laments the arguments suggesting that Mafia is an acronym “*Morte alla Francia Italia anela*” as meaning “Italy desires death to France” as absurd.⁷⁶⁰ Southwell states that there are those who claim that this is roughly translated “Death to France Italy Cries”.⁷⁶¹ Roth submits that Mafia has been applied to groups and individuals so widely that its origins and historical roots have lost their importance.⁷⁶² Lyman and Potter concede that the true origins of the word are blurred by mixed usage and personal preferences. They observed that Albini has noted several common references such as Maffia- Tuscan word for misery; Mauvia- French word for bad; Ma-afir- Arabic tribe that settled in Sicily; MAFIA- Mazzini Autorizza Furti Incendi Auvelenamenti (translated Massini Authorises Thefts, Arson

probably derives from the identical word in Arabic, meaning ‘place of refuge’; see Lewis *Honoured Society* 23.

⁷⁵⁶Lyman and Potter *Organized Crime* 22, Allsop *The Bootleggers* 260 and Peterson *The Mob* 451.

⁷⁵⁷Nicaso and Lamothe *Criminal Empires* 33.

⁷⁵⁸Arlacchi *Mafia* 111. This means that an individual must not seek the assistance of the police if someone has wronged him; he must help himself by physically using force on his enemy, which is how he will be respected by others.

⁷⁵⁹Fulvetti *Organised Crime in Italy* 51.

⁷⁶⁰Ianni *Family Business* 25 and Allen *Merchants of Menace* 9.

⁷⁶¹Southwell *History of Organized Crime* 11.

⁷⁶²Roth *Organized Crime* 64.

and Poisons); Mu'afy- Arabic word meaning protects from death in the night; and Mafia- the name of a stone quarry in Sicily.⁷⁶³

With regards to Cosa Nostra, Southwell states that it means “Our thing” which originates from “amico nostra” meaning “a friend of ours”.⁷⁶⁴ Richards differs with Southwell and states that Cosa Nostra is literally translated “our affairs”.⁷⁶⁵ Santino describes Cosa Nostra as a type of elite of the Mafia organisations.⁷⁶⁶ On the other hand, Albini states that Cosa Nostra is a structure of authority and membership that has been revealed by Joseph M Valachi.⁷⁶⁷

According to Southwell, Italian Mafia does not in any concrete way exist, but that it is a shorthand phrase to describe the wide range of very real Italian organised crime groups, ranging from the actual Sicilian Mafia to 'Ndrangheta, from Calabria to Mala del Brenta of Venice.⁷⁶⁸ Similar sentiments have been raised by De Vito who states that the Mafia is synonymous with organised crime and that it has been frequently glorified, lionized and mythologized through legions of books, movies, documentaries and televisions.⁷⁶⁹ Southwell concludes that the term Mafia has become a brand name associated with everything of the underworld and that it has become so synonymous with organised crime in Italy that other major organised crime groups have to suffer the indignity of constant referrals to them as the “something Mafia”.⁷⁷⁰ This is a view that Finckenauer vehemently disputes and passionately argues that

⁷⁶³Ryan *Organized Crime Handbook* 33-34. See also Jamieson *The Antimafia* 10-11 and Hagan *Criminology* 489.

⁷⁶⁴Southwell *History of Organized Crime* 11. Ryan calls it La Cosa Nostra abbreviated LCN; see Ryan *Organized Crime Handbook* 43.

⁷⁶⁵Richards *Criminal Organizations* 5.

⁷⁶⁶See www.centroimpastato.it/publ/online/mafia-in-Italy.htm last visited 28 August 2011.

⁷⁶⁷Kelly *Folds of Discourse* 39.

⁷⁶⁸Southwell *History of Organized Crime* 9.

⁷⁶⁹De Vito *International Organized Crime* xi.

⁷⁷⁰*Id* n 768 *supra* at 13.

the stereotyped view that the concepts ‘organised crime’ and ‘mafia’ are synonymous is incorrect.⁷⁷¹

Dunn believes that there are at least six Russian mafia gangs operating in Italy.⁷⁷² In describing the different organisations that have suffered the indignity of constant referrals as “something Mafia”, Southwell lists and explicates the following organisations as part of that Mafia:

1. The Sicilian Mafia is an organised criminal group, which emerged around 1877 in the Island of Sicily. This formation came as a result of the continual incursion and occupation by the Greeks, Vandals, Byzantines, Arabs, Normans and Bourbons.⁷⁷³
2. The Neapolitan Mafia is a term that refers to the Camorra, meaning quarrel, which is Italy’s oldest organised criminal group that operated in Naples since 1810.
3. The Calabrian Mafia is a term that refers to ‘Ndrangheta organised criminal group that operated from Calabria. ‘Ndrangheta is a Greek word meaning “heroism” and “virtue”. According to Southwell, the *Direzione Investigativa Antimafia* (DIA), stated that ‘Ndrangheta is one of the most powerful criminal organisations in the world with more than 200 ndrea (head of family) and 6 000 members.
4. The Venetian Mafia is a term that refers to the Mala del Brenta criminal organisation, which was formed in Venice by Felice “Angel Face” Maniero in the early 1980s.
5. The Puglia Mafia is a term that refers to the Sacra Corona Unita meaning “United Sacred Crown” organised criminal group that operated from Pulgia

⁷⁷¹Finckenauer *Problems of Definition* 63, 73 and 75.

⁷⁷²Dunn *Major Mafia Gangs* 84.

⁷⁷³Behan *The Camorra* 26, states that the word Mafia was first recorded in 1862 while that of Camorra was recorded 100 years earlier.

under the leadership of Raffaele Cutolo's lieutenant called Giuseppe Rogoli.⁷⁷⁴

It appears as if Mafia has become an umbrella label for a whole world panoply of gangs.⁷⁷⁵ Dean, Fahsing and Gottschalk as well as Jamieson point out that the Sicilian Mafia, Calabrian ('Ndrangheta) Mafia, Camorra Mafia and Sacra Corona Unita (SCU/ United Holy Crown) Mafia are the four mafias that coexisted in a set of uneasy relationship within the domain of the Italian underworld of organised crime.⁷⁷⁶ Cesoni simply submits that the words 'mafia', 'organised crime' or 'criminal organization' have become particularly fashionable in the 1990s.⁷⁷⁷

Nicaso and Lamothe identified 'Ndrangheta, Sicilian Mafia, Camorra and Sacra Corona Unita as the main criminal organisations operating in Italy.⁷⁷⁸ They contend that the term Mafia describes five distinct groups in Italy, namely, the Sicilian Mafia, the Camorra of Naples and Campania, the 'Ndrangheta in Calabria, the Sacra Corona Unitá and La Rosa in Apulia.⁷⁷⁹ In fact, the Camorra is not the Mafia. The labelling of this group as Mafia is the indignation that all the criminal organizations had to suffer. Steinberg compares this abuse with the term Triads in which every Chinese organised criminal group is so labelled.⁷⁸⁰

According to Behan, the Anti-Mafia Commission described Carmine Alfieri's gang as a "phenomenon that has taken on a stronger form of oppression and corruption" than the Mafia and that, when Alfieri was arrested in 1992, assets worth \$1 200

⁷⁷⁴Southwell *History of Organized Crime* 11 and 14-17.

⁷⁷⁵Dickie *Cosa Nostra* 21.

⁷⁷⁶Dean, Fahsing and Gottschalk *Organized Crime* 21 and Jamieson *The Antimafia* 11.

⁷⁷⁷Cesoni *Mafia-Type Organizations* 157.

⁷⁷⁸Nicaso and Lamothe *Criminal Empires* 7-70.

⁷⁷⁹See Crime in Italy at <http://www.justlanded.com/english/Italy/Articles/Culture/Crime-in-Italy> last visited on 08 February 2009.

⁷⁸⁰Steinberg *Illicit Abalone* 3.

million were seized making him the richest criminal in Italy.⁷⁸¹ It is also worth mentioning that although Mafia and Cosa Nostra were used interchangeably as a generic term for organised crime after the testimony of Valachi, they are not the same.⁷⁸² Behan's view is that, the difference between the Camorra and the Mafia lies in their origin. While the Camorra, an open criminal organization, originates from the urban poor of Naples, the Mafia, an organization, generally based on a family structure, originates in the rural areas. He further states that the early use of the word Mafia normally described an attitude, while the word Camorra related to an activity and organisation.⁷⁸³ His view is that the common denominator in Yakuza, Cosa Nostra, Sicilian Mafia and Triads is that they have services of enforcement of contracts and protection that define the core operation of mafia.⁷⁸⁴

Balloni, Bisi, Forlevesi, Mazzucato and Sette believe that organised criminal groups of foreign extraction such as those from Russia, China, Yugoslavia and Morocco infiltrated Emilia-Romagna region in Italy.⁷⁸⁵ Overtime, the Sicilian Mafia and the Camorra of Naples that consisted of 12 families co-operated.⁷⁸⁶ Behan argues that the origin of Camorra, which is a Neapolitan criminal organization, is far from clear. He states that some writers believe that the organization was established in 1417 as a result of the direct descendant of the Gardina, which is a Spanish secret society. However, he concedes that criminal gangs were operating in Naples amongst the poor and illiterate community that did not keep the records.⁷⁸⁷ It is likely, he concedes, that the Camorra emerged during the period 1799 and 1815 when there

⁷⁸¹Behan *The Camorra* 6.

⁷⁸²Ianni *Family Business* 4. Valachi was born in New York on 22 September 1903; see Peterson *The Mob* 359.

⁷⁸³Behan *The Camorra* 25-26 and 29.

⁷⁸⁴*Id* n 783 *supra* at 6.

⁷⁸⁵Balloni *Infiltration of Organized Crime* 34.

⁷⁸⁶Lyman and Potter *Organized Crime* 27.

⁷⁸⁷*Id* n 783 *supra* at 8.

was a power vacuum in Neapolitan Republic.⁷⁸⁸ This argument finds support from Skaperdas who further argues that organised crime emerges where there is a power vacuum.⁷⁸⁹ Van Duyne argues that a State which fails to safeguard life and property of its subjects, even if only partly, mislays credibility and legitimation. In support of his argument, he cites (South) Italy, the Russian Federation and Colombia as telling examples of partially 'failed states'.⁷⁹⁰ He points out that Colombia is torn apart because of guerrillas and paramilitary death squads, while its rule of law has disintegrated.⁷⁹¹

As indicated above, various organised criminal groups operated in Italy. However, the Italian laws provides that, if five or more persons participated in the offence, they are punished as having committed such offence under aggravating circumstance and not organised crime.⁷⁹²

6.4 CRIMES MOSTLY COMMITTED BY ORGANISED CRIMINAL GROUPS

Some of the crimes committed by criminal organizations are narcotics cultivation, refining and trafficking.⁷⁹³ Skaperdas straightforwardly argues that all Italian organised criminal groups have been involved in drug trafficking since the early 1980s.⁷⁹⁴ Behan candidly lists intimidation, extortion, illegal gambling, usury, irregular allocation of public sector contracts, illegal trade in cigarettes, illegal trade in drugs, money laundering, kidnappings and bank robberies as some of the crimes,

⁷⁸⁸*Id* n 783 *supra* at 12.

⁷⁸⁹Skaperdas *Economy of Organized Crime* 173. This is also accessible at <http://www.sosci.uci.edu/-sskaperd/skaperdasEoG01.pdf> last visited on 23 July 2011. This report has been reproduced in Varese Federico (ed) *Organized Crime: Critical Concepts in Criminology* Vol I (Routledge London 2010) 244-260.

⁷⁹⁰Van Duyne *Fears* 1.

⁷⁹¹*Id* n 790 *supra* at 2.

⁷⁹²Article 112(1) of the Italian Penal Code.

⁷⁹³Jamieson *The Antimafia* 23.

⁷⁹⁴Skaperdas *Economy of Organized Crime* 175.

which were committed by the Camorra.⁷⁹⁵ Lozzi-Toscana identifies them as drug trafficking, trafficking in goods and human trafficking.⁷⁹⁶

Robbery is statutorily defined as follows:

Whoever, in order to procure a wrongful benefit for himself or others, takes possession of the movable property of another, by taking it away from the person who holds it, by means of violence against the person or threats, shall be punished by imprisonment for from three to ten years or by a fine of from 200 000 to 800 000 lire. Anyone who uses violence or threats immediately after the taking in order to assure himself or others of possession of the thing taken, or to ensure that he or others will not be caught, shall be subject to the same punishment. The punishment shall be imprisonment from four years and six months to twenty years, and a fine of from 300 000 to 1 500 000 lire - (1) if the violence or threats were committed with arms or by a disguised person, or by more persons than one acting together; or (2) if the violence consisted in putting someone in a state of incapacity to will or to act.⁷⁹⁷

Usury is legislatively defined as follows:

Whoever, apart from the cases designated in the preceding Article, by taking advantage of another person's state of need, causes that person to give or promise, in any form whatever, to himself or another, usurious interest or other benefits, as consideration for a loan of money or other movable property, shall be punished by imprisonment for up to two years and by a fine of from 40 000 to 800 000 lire. Anyone who, apart from cases of complicity in the crime designated in the preceding provision, obtains from a person in a state of need a sum of money or other movable property, causing a usurious compensation to be given to himself or another, as his commission, shall be subject to the same punishment.⁷⁹⁸

According to Behan, the Camorristi who were members of Camorra had also a stronghold in prisons where an inmate was not allowed to eat, drink, smoke or gamble without a cammorrista's permission. He points out that an inmate had to

⁷⁹⁵Behan *The Camorra* 116-119, 121 and 125.

⁷⁹⁶Lozzi-Toscana *Organized Crime in Italy* 116.

⁷⁹⁷Article 628 of the Italian Penal Code.

⁷⁹⁸Article 644 of the Italian Penal Code.

give a cammorrista a tenth of all the money he was sent, and had to pay for the right to buy and sell, as well as paying for both essential and superfluous things. If he had a legal advice, it was as if he was granted a privilege and those who refused to accept such impositions ran the risk of being clubbed to death.⁷⁹⁹

Other crimes include highway robbery, kidnapping, muggings, burglary, car theft and bag snatching.⁸⁰⁰ Kara suggests that Italy is a hub of the female sex trade for numerous international mafia groups. He points out that criminal organisations such as Albanians, Romanians, Russians, Nigerians and Chinese are involved in this trade. He concludes that 5% of all women murders in Italy are those of foreign origin.⁸⁰¹ This is an indication that they may have been trafficked into the country for the purpose of prostitution. According to the UN Interregional Crime and Justice Research Institute (UNICRI), the trafficking in Nigerian minors and women into Italy for prostitution started around the second half of 1980s, following the economic difficulties.⁸⁰² In support of this view, Massari lists the crimes of illegal immigrants, prostitution and theft.⁸⁰³ Theft is statutorily defined as follows:

Whoever takes possession of the movable property of another, by taking it away from the person who holds it, for the purpose of deriving benefit from it for himself or for others, shall be punished by imprisonment for up to three years and by a fine of from 12 000 to 200 000 lire.⁸⁰⁴

Liddick submits that nowhere is organised crime's involvement in the disposal of hazardous waste more evident than in Italy, where the Cosa Nostra, the Camorra and the 'Ndrangheta exercise significant control over the trade. It is daunting to note

⁷⁹⁹Behan *The Camorra* 13.

⁸⁰⁰See <http://www.justlanded.com/english/Italy/Articles/Culture/Crime-in-Italy> last visited on 08 February 2009.

⁸⁰¹Kara *Sex Trafficking* 92.

⁸⁰²UNICRI *Trafficking of Nigerian Girls* 25.

⁸⁰³Massari *Transnational Organized Crime* 62.

⁸⁰⁴Article 624 of the Italian Penal Code.

that an estimated 80 million metric tons of waste produced annually in Italy disappears.⁸⁰⁵

6.5 RESPONSES TO THE CHALLENGE POSED BY ORGANISED CRIMINAL GROUPS

6.5.1 Legislative response

The Italian laws are codified. Articles 416-418 of the Italian Penal Code of 19 October 1930 are dedicated to organised crime. In the following years, these sections were amended to deal with the Mafia.

Article 416 deals with criminal associations or associations to commit crime. The Article provides as follows:

When three or more persons associate together for the purpose of committing a number of crimes, those who promote or establish or organize the association shall be punished, for that offence alone, with three to seven years' imprisonment. For the sole fact of participating in the association, the penalty is imprisonment for one to five years. The leaders shall be given the same penalty as that established for the promoters. If the members circulate armed in country areas or along public ways, imprisonment for five to fifteen years shall be applied. The penalty is increased if the number of associates is ten or more. If the association is aimed at committing any of the crimes as per Articles 600, 601 and 602, imprisonment shall be of five to fifteen years in the cases foreseen by the first paragraph and of four to nine years in the cases foreseen by the second paragraph.⁸⁰⁶

As it possibly will be observed from the wording of the Article, the elements of this crime are an association of three or more persons; organized for the purpose of committing crimes; more than one crime; and organizers, promoters and members. This crime may be termed 'general organised crime', which is not focussing on a

⁸⁰⁵Liddick *Harzadous Wastes* 139.

particular group.

The law further provides as follows:

Whoever, apart from cases of complicity in an offence or of aiding the offender, gives refuge or supplies food to any of the persons participating in the association shall be punished by imprisonment for up to two years. The punishment shall be increased if the refuge or food is furnished on a continuing basis. Anyone who commits the act for the benefit of a close relative shall not be punishable.⁸⁰⁷

The prohibition is extended to cover complicitators and aiders.

Article 416-bis deals with associations of a mafia type. The Article provides that any person who forms part of an association of a mafia type, formed by three or more persons, shall be punished with imprisonment for seven to twelve years. Those who promote, direct or organize the association shall be punished, for that alone, with imprisonment for nine to fourteen years. The Article provides further that, if the association is an armed one, the penalty of imprisonment from nine to fifteen years shall be applied in the cases foreseen in the first paragraph, and from twelve to twenty-four years in the cases foreseen in the second paragraph. The association shall be considered to be an armed one when its participants have arms or explosive materials available to them in order to achieve the aims of the association, even if such arms or explosives should be concealed or kept in a deposit. If the economic activities of which the associates intend to assume or maintain control are wholly or partly financed with the price, the product or the profit of crimes, the penalties established in the preceding paragraphs shall be increased by one-third to one-half.⁸⁰⁸

⁸⁰⁶Article 416 of the Italian Penal Code.

⁸⁰⁷See also *Wise Italian Penal Code* 145-146.

⁸⁰⁸Article 416-bis of the Italian Criminal Code as amended by Decree Law no. 92 of 23 May 2008.

One of the characteristics of this Article is that it is always obligatory to seize from the person convicted, the things that served or were intended for committing the crime, and of the things which are the price, the product or the profit thereof or which constitute the use thereof. The Article stipulates further that its provisions shall also apply to the “Camorra” to “Ndrangheta” and other associations. However, they may be called locally, even foreign ones, which by availing themselves of the force of intimidation of the bond of association, pursue aims corresponding to those of associations of mafia type.⁸⁰⁹

Article 418 that deals with assistance to associates provides that any person, except for the cases of complicity in the crime or aiding and abetting, gives shelter or provides food, lodging, means of transport or instruments of communication to any of the persons who participate in the association shall be punished with imprisonment from two to four years. The punishment shall be increased if the assistance is provided continuously. A person who commits the act in favour of a near relation is not punishable.⁸¹⁰

While Article 73 of the Italian Criminal Code criminalises the illegal production of, trafficking in and possession of narcotic or psychotropic drugs, Article 74 deals with criminal association in illegal trafficking in these substances. The latter stipulates that, when three or more persons conspire to commit more than one of the offences mentioned in Article 73, those who promote, constitute, manage, organize or finance the association shall, for this alone, be punished by a term of imprisonment of not less than twenty years.⁸¹¹ The Article further criminalises those who take part in the association. In a case where the number of associates is ten or more or if the

⁸⁰⁹Article 416-bis of the Italian Criminal Code.

⁸¹⁰Article 418 of the Italian Criminal Code. The law is not intended to punish the relation between members of close family, hence the exclusion of near (close) relative.

⁸¹¹Article 74(1) of the Italian Criminal Code.

association has narcotic or psychotropic addicts, the penalty is increased.⁸¹² Of paramount importance is the provision of Article 74(6) which provides that if the association has been formed in order to commit the offences mentioned in Article 73, paragraph 5, the first and second paragraphs of Article 416 of the Penal Code shall apply.⁸¹³ It is therefore clear that Article 74 takes cognisance of the fact that it is dealing with criminal association albeit focussing on a particular commodity, to wit, narcotics and psychotropic drugs, whereas Article 416 deals with criminal associations in general.⁸¹⁴

According to Mitsilegas, the development of measures against organised crime in Italy is inextricably linked with the proliferation of Mafia and Mafia-type fighting structures in various parts of the country. Amongst the aspects, he refers to are the following:

1. The establishment of Anti-Mafia Commission in February 1963 that operated until 1976 in response to the escalation of 'Mafia wars' in Sicily with the designated task to examine the origins and characteristics of the Mafia phenomenon in Sicily, to propose measures to repress it and to eliminate the causes.⁸¹⁵
2. The enactment of Law 575 of 31 May 1965 entitled "Dispositions against the Mafia" that empowered the police to have special surveillance powers, judicial or police identification, freezing of assets belonging to a person suspected to be involved in the structures as well as powers to suspend

⁸¹²Article 74(3) of the Italian Criminal Code.

⁸¹³Article 74(6) of the Italian Criminal Code.

⁸¹⁴These laws came under Law no 162 of 26 June 1990. See <http://www.pfizer.it/cont/pfizer-italia-decreto-contenuti/0806/1704/pfizer-italias-model-english-vers-5578all1.pdf> last visited on 13 January 2012.

⁸¹⁵See also Jamieson *The Antimafia* 16, Behan *The Camorra* 188, Anti-Mafia Commission at <http://reference.findtarget.com/search/AntimafiaCommission> last visited on 20 February 2011 as well as Violante at <http://www.absoluteastronomy.com/topics/Luciano-Violante> last visited on 05 March 2011.

licences, grants and authorisations issued publicly. This is the first time that the name Mafia appeared in legislation.⁸¹⁶

3. The enactment of Law 646 known as the Rognoni-La Torre law which introduced Article 416bis entitled “*Associazione di tipo mafioso*” or Mafia-type association.⁸¹⁷ In a further move, Parliament created the office of the High Commissioner for the Mafia Fight, which was later absorbed into the *Direzione Investigativa Antimafia* (DIA).⁸¹⁸

A Law Decree 306/8 June was promulgated to permit for the extended period of investigation of specific serious crimes, to wit, aggravated robbery or extortion, terrorism, detention of arms and large quantities of drugs by the DIA. The number of prison warders was also increased by 2000.⁸¹⁹

The Antimafia Commission was re-established in 1982, 1986, 1988, 1992, 1994 and 1996. These Commissions were dissolved and re-established to address issues that were not addressed in the previous sittings. As an example, the first Commission which was established in 1963 focussed on surveillance, identification and tracing of assets involved in mafia-type association; the second Commission of 1982 had no investigative powers but analysed the Anti-mafia legislation and drug trafficking by Cosa Nostra; and the third Commission focussed on proposals at the legislative and administrative level where the seizure of assets and the prohibition to stand for elections by persons who had been committed for trial, a fugitive from law and those serving criminal sentences were included.⁸²⁰

⁸¹⁶See also Jamieson *The Antimafia* 17.

⁸¹⁷Mitsilegas *The Ambivalent Concept* 56-57. Jamieson indicates that such organisation must consist of three or more members; see Jamieson *The Antimafia* 28.

⁸¹⁸Jamieson *The Antimafia* 26 and 47 as well as Behan *The Camorra* 189.

⁸¹⁹Jamieson *The Antimafia* 42 and 47.

⁸²⁰See <http://reference.findtarget.com/search/AntimafiaCommission> last visited on 20

As pointed out by Violante, the Chairperson of the Commission, in the ten years from 1982, 113 laws were passed on public order of which 40 were specifically dealing with the Mafia.⁸²¹ Even with these laws, Maran still rates the Americans well ahead of the Italians in bringing the RICO laws, which made association with organised crime punishable by huge jail terms while easing the burden of proof.⁸²² His view is that the RICO is more effective. Behan submits unconfirmed information from Agostino Cordova, a Naples' Federal Prosecutor that Parliament passed thirty five (35) laws relating to organised crime since 1975.⁸²³

Since 1992, fifteen laws were passed on Antimafia. The contents and the crimes created are summarily as follows:

- Law 119 of 29 March 1993 that allows the change of identity for collaborators and their families.
- Law 256 of 24 July 1993 that modifies the prohibition of those convicted or suspected of belonging to a Mafia association to ride only in their place of abode.
- Law 328 of 9 August 1993 that permits the ratification of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime.
- Law 310 of 12 August 1993 that deals with notification on transfers of shares in companies.
- Law 382 of 27 September 1993 that focuses on the creation of a support fund for the victims of extortion.

February 2011.

⁸²¹Jamieson *The Antimafia* 53. According to Umberto Santino in Law Enforcement in Italy and Europe against mafia and organised crime, the number of laws enacted was 114; see also <http://www.centroimpastato.it/otherlang/mcdonald.php3#anchor808025> last visited on 11 December 2011.

⁸²²Maran *Mafia* 19.

⁸²³Behan *The Camorra* 191.

- Law 109 of 19 February 1994 that regulates the procedures of public works contracts.
- Law 501 of 8 August 1994 that concerns assets confiscation.
- Law 36 of 15 February 1995 that extends the duration of Article 41*bis* of Law 354 1975 until 31 December 1999.
- Law 216 of 2 June 1995 that concerns public works contracts.
- Law 332 of 8 August 1995 that reduces the maximum length of pre-trial detention from 20 years to 9 years.
- Law 107 of March 1996 that sets up a fund of solidarity for victims of usury.
- Law 97 of 10 April 1997 that constitutes Parliamentary Commission of Enquiry into waste disposal industry and the extent of its infiltration by criminal and organised crime.
- Law 267 of 7 August 1997 that prevents the admission and utilisation of statements made during preliminary hearings as evidence during hearings in an open court.
- Law 282 of 28 August 1997 that permits the temporary use of the armed forces in support of civil police in the Naples area.
- Law 11 of 7 January 1998 that permits the use of video testimony in court trials in the case of extremely complex proceedings or when there are particular concerns for public safety.⁸²⁴
- Law 228 of 11 August 2003 that combats slavery and trafficking in human beings.⁸²⁵

Behan states that a further spate of laws established included the anti-extortion law.⁸²⁶ Money laundering is criminalized pursuant to Article 648 bis of the Italian

⁸²⁴Jamieson *The Antimafia* 72-74.

⁸²⁵See also Huber *Trafficking in Human Beings* 178.

⁸²⁶Behan *The Camorra* 190.

Penal Code and is punishable by four to twelve years of imprisonment, and by fines of a maximum of EUR 15,240.⁸²⁷

Although the laws were effective, criminal organisations kept on designing new methods of perpetration. As a result, new laws had to be promulgated to counter this development. These developments enhanced the effectiveness of the criminal justice system.

6.5.2 Institutional response

Concerning the law enforcement response, the “Antimafia Police Force” called DIA was established under Law 410 of 30 December 1991.⁸²⁸ The DIA is responsible for mafia-related offences only, making it possible to develop an extensive knowledge of the mafia-phenomenon and acquire a pivotal role among those agencies in Italy and abroad that are responsible for the fight against organised crime.⁸²⁹ It needs to be noted that, prior to the creation of the DIA, all three police forces already had specialised units to deal with typical Mafia-type crimes. These were the *Servizio Centrale Operativo* (SCO), which is the Central Operational Service of the State Police; the *Raggruppamento Operativo Speciale* (ROS), which is the Special Operational Group of the Carabinieri; and the *Gruppi di Investigazione sulla Criminalità Organizzata* (GICO) which is the Organised Crime Investigation Group of the Finance Police.⁸³⁰

Experience suggests that where there is more than one law enforcement agency that share the same mandate, there is always competition which creates problems in

⁸²⁷See also <http://www.estandardsforum.org/italy/standards/anti-money-laundering-combating-terrorist-financing-standard> last visited on 07 May 2011.

⁸²⁸Jamieson *The Antimafia* 75 and Behan *The Camorra* 190.

⁸²⁹See <http://www.interno.it/dip-ps/dia/eng/coop.htm> last visited on 08 February 2009.

⁸³⁰Jamieson *The Antimafia* 79.

respect of cooperation. The challenge of the lack of co-operation and componental jealousy is not a new phenomenon. The DIA was created on the assumption that it would centralise all police work on organised crime, yet the law did not require the specialised organised crime units of the individual forces to be dismantled. As a result, the commanders of the existing units were reluctant to give up their best officers to the law interagency force and fearing for their autonomy, reinforced their own capabilities. The army was also sent to Sicily in support of civil authorities. The DIA received specialised training in dealing with financial crime from the *Lebera Università Internazionale degli Studi Sociali* (LUISS) business school in Rome.⁸³¹

Year	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
C	573	1421	724	290	305	455	537	501	818	1306	1786	1645	1347	1145	1189
A						821	788	585	874	1 217	1990	2136	1412	1777	1324

Figure 6.1: Figures for the persons reported for the crime (C) as well as the number arrested (A) for the crime of Mafia association in Sicily (**Source:** Jamieson).⁸³²

The number of operations in the form of surveillance and telephone interception increased from 15 360 in 1992 to 44 176 in 1996.⁸³³

Paoli argues that extortion represent the primary and most stable source of revenue for most Cosa Nostra families.⁸³⁴ According to him, the arrested fugitives belonging to Calabrian or Sicilian mafia groups are as follows:

⁸³¹*Id n 830 supra* at 78 and 79.
⁸³²*Id n 830 supra* at 81 and 82.
⁸³³*Id n 830 supra* at 83.
⁸³⁴Paoli *The Italian Mafia* 26.

Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Calabrian	12	47	34	59	66	34	86	53	43	44	38	22	30
Sicilian	29	69	41	90	56	39	80	50	38	25	25	26	18

Figure 6.2: The number of Calabrians and Sicilians arrested in Italy (**Source:** Source: Jamieson).⁸³⁵

Paoli further presents the DIA reports of the murders committed in Calabria and Sicily by organised criminals and ordinary murders to be as follows:

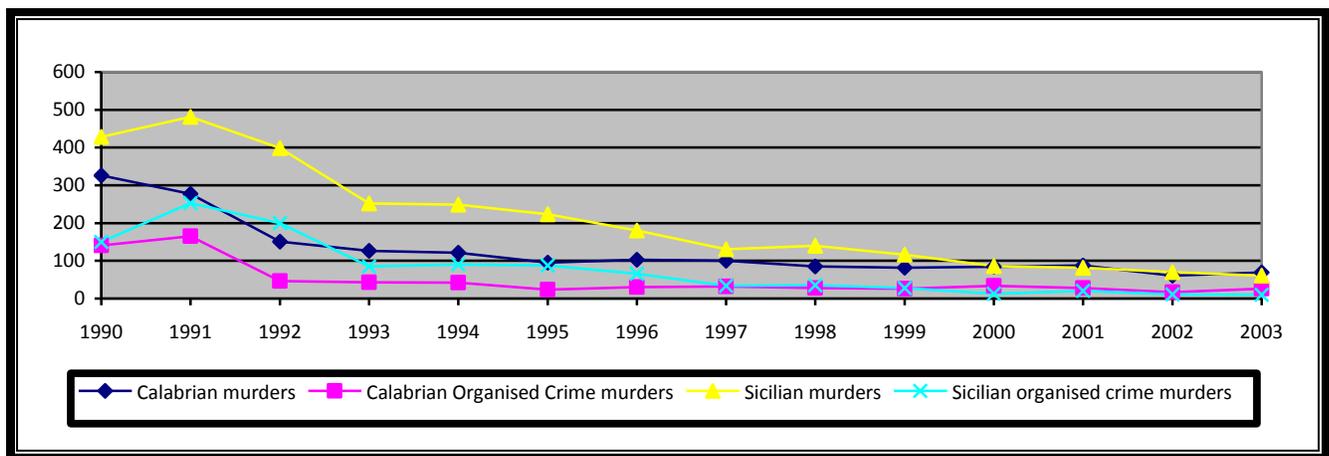


Figure 6.3: Graph showing murders committed by Calabrians and Sicillians (**Source:** Jamieson)⁸³⁶

In 1991, the Service for Intelligence and Democratic Security (SIDSE) and the Service for Military Intelligence and Security (SISMI), which are coordinated by the Executive Committee for the Intelligence and Security Services (CESIS) were designated responsibility in the area of organised crime by carrying out intelligence and security activities regarding any danger or form of subversion of organised crime groups which threaten the institutions and the development of civil coexistence.⁸³⁷

⁸³⁵*Id* n 834 *supra* at 22.

⁸³⁶*Id* n 834 *supra* at 25. It is worth noting that the Italian Law Enforcement agency was only able to arrest Bernardo Provezano after 40 years; see the Times of 11 April 2006 accessible at <http://www.timesonline.co.uk/tol/news/world/europe/article704267.ece> last visited on 12 September 2009.

The National Antimafia Directorate called the *Direzione Nazionale Antimafia* (DNA) was established under Law Decree 367 of 20 November 1991, which was converted into Law 8 of 20 January 1992 for the purpose of prosecuting Mafia related matters.⁸³⁸ Contemporary to DIA was the *Consiglio Generale per la Lotta alla Criminalità Organizzata*, which is the General Council for the Fight against Organized Crime. The Head of DIA was also a participant.⁸³⁹ One of the concerns observed by Jamieson is the low conviction rate. Of the 113 Mafiosi who were on trial at Catanzaro, only 10 were convicted which resulted in the decrease in public faith in the police and judicial organs in the years 1969-1970.⁸⁴⁰ Italy entered into bilateral agreements with Australia, Germany, Belgium, France, Spain, Austria and other countries in North and South America that is also designed to co-operate in fighting transnational organised crime.⁸⁴¹

The Parliamentary Commission of Inquiry into the phenomenon of organised crime, mafia or the like was established on 27 October 2006.⁸⁴² Its mandate includes, the monitoring of the implementation of the Anti-mafia legislations, verifying the effectiveness of the units established to implement them and reporting to Parliament at the end of its work.⁸⁴³

6.6 CONCLUSION

Organised crime has indisputably originated in Italy, a view agreed by most academics, authors and scholars alike. This argument is supported by the fact that

⁸³⁷Jamieson *The Antimafia* 86.

⁸³⁸*Id* n 837 *supra* at 77 and 94.

⁸³⁹*Id* n 837 *supra* at 78.

⁸⁴⁰*Id* n 837 *supra* at 18-19.

⁸⁴¹*Id* n 837 *supra* at 176-185.

⁸⁴²Act Oct. 27, 2006, No 277.

⁸⁴³See Article 1 of the Act Oct. 27, 2006, No 277.

the well-known organised criminal group, Mafia, has its origin in Italy.⁸⁴⁴ Today, it is perceived as synonymous with organised crime, hence the insubordination of other organised criminal groups as “something Mafia”.

Although the legal definition of organised crime exist, it is not phrased in the same format as most definitions. It explicitly points out the activities and consequences. Even though the elements of the crime cannot help the South African situation, they are helpful for Italian authorities.

No less than 114 laws were dedicated to fighting organised crime.⁸⁴⁵ While the Legislature has defined what the term ‘organised crime’ is, researchers and academics have also defined the phenomena. Various specialised investigating, prosecuting units and commissions were created and set up to deal with the phenomena.

⁸⁴⁴The authors include Skaperdas in Skaperdas *Economy of Organized Crime* 372, Dash referred to in Dash *The First Family* 31 and Maran in Maran *Mafia* 15.

⁸⁴⁵See www.centroimpastato.it/publ/online/mafia-in-Italy.htm last visited 28 August 2011.

CHAPTER SEVEN

ORGANISED CRIME IN THE UNITED STATES OF AMERICA (USA)

7.1 INTRODUCTION

Organised crime is no better understood in the United States (US) than other places. It is, indeed, a topic of immense interest in American society.⁸⁴⁶ The term was coined in the USA in the nineteenth century as referring to gambling and prostitution.⁸⁴⁷ Roth states that academics, public officials, government officials and journalists have been among those attempting to define organised crime and its various manifestations for more than a century.⁸⁴⁸ Horowitz argues that the core infirmity of the Continuing Criminal Enterprise (CCE) statute (21 U.S.C. s 848), is that it redefines ordinary criminal activity in essentially political terms to satisfy the public's thirst for politically created solutions to politically created problems. The resulting redefinition of two or three ordinary crimes as a "Continuing Criminal Enterprise" is often indistinguishable from a modification of the rules on grouping and criminal history calculation. Rather than change the rules of sentencing, which shall have meant the passing of heavier sentences, Congress chose to invent a super statute and define a super crime. In doing so, it attempted to imbue the crime of a Continuing Criminal Enterprise, which will be discussed later, with characteristics, which Congress thought made it seem to be a distinct crime. He calls this crime a "three strike" statute.⁸⁴⁹

⁸⁴⁶Potter *Criminal Organizations* 1.

⁸⁴⁷Obokata *Transnational Organised Crime* 14.

⁸⁴⁸Roth *Organized Crime* 1.

⁸⁴⁹See <http://www.continuingcriminalenterprise.html> last visited on 22 December 2011.

Organised crime is multifaceted and can manifest itself in different ways.⁸⁵⁰ Southwell points out that anyone who claims to give a definitive and totally accurate history of the origins of Mafia or the word Mafia is mistaken.⁸⁵¹ He states further that organised crime is a trillion dollar business that operates in every country in the planet. His explanation is that the keyword of the 21st century is globalisation and no other human activity better illustrates international inter connectedness than modern structural criminality.⁸⁵² According to him, Chicago gang boss Alphonse “Scarface” Capone who is said to have murdered Tony Lombardo,⁸⁵³ often claimed that he was like any other businessman, saying, “All I do is supply a demand”.⁸⁵⁴ Obokata concludes that organised crime does not flourish if there is no demand for illicit goods and services.⁸⁵⁵ This view is complemented by Bjelopera and Finklea who state that organised crime fills needs not met by licit market structures.⁸⁵⁶

Salerno and Tompkins describe organised crime as “a crime which is organized, businesslike, professional”- crime which is so well integrated into our lives that we often do not notice it moving in or recognize its face when it arrives.⁸⁵⁷ These views are compatible with that of Bersten who states that organised crime is the field of transactions materially connected with markets in illegal goods and services.⁸⁵⁸

⁸⁵⁰Recommendations 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.

⁸⁵¹Southwell *History of Organized Crime* 10.

⁸⁵²*Id* n 893 *supra* at 6.

⁸⁵³Allsop *The Bootleggers* 268-269.

⁸⁵⁴Southwell *History of Organized Crime* 7 and Balsimo and Carpozi *Under the Clock* 220.

⁸⁵⁵Obokata *Transnational Organised Crime* 21.

⁸⁵⁶Bjelopera and Finklea *Organized Crime* 3.

⁸⁵⁷Salerno and Tompkins *Crime Confederation* vii. They write about the USA position.

⁸⁵⁸Bersten *Defining Organised Crime* 39. See also <http://anj.sagepub.com/content/23/1/1.full.pdf> last visited on 15 May 2011.

Marion admits that, while appreciating that a clear understandable definition of organised crime can determine where legal resources should be applied or allocated, what the criminal penalties should be, and what the most appropriate prosecuting body should be, there are many obstacles to providing a concise and applicable definition of exactly what is meant by the term 'organised crime'.⁸⁵⁹ Caiden and Alexander believe that no other social phenomenon in the USA is as steeped in myths and misconceptions as is the subject of organised crime.⁸⁶⁰

Cressey states that criminals have managed to put together an organization, which is at once a nationwide confederation in the USA.⁸⁶¹ He states further that the pervasive organisation of criminals called Mafia has dominated almost all aspects of life in the western part of the Island of Sicily. At the beginning of the twentieth century, thousands of Sicilians immigrated to America, bringing with them the customs of their own homeland that included psychological attitudes toward a wide variety of social relationships.⁸⁶² He concludes that this move was instigated by Fascist Premier Benito Mussolini of Italy in the late 1920 and early 1930's when he had the Mafia of Southern Italy hounded to the point where some of the members found it necessary to migrate, either to avoid official prosecution or to avoid "unofficial" liquidations and executions by the police.⁸⁶³ According to Ryan, the authorities in Sicily started a crack down on the Mafia in 1878 and that this move forced many convicted mafiosi to flee prosecution by immigrating to the USA where a great number settled in Chicago, New Orleans and New York.⁸⁶⁴

⁸⁵⁹Marion *Organized Crime* 3.

⁸⁶⁰Caiden and Alexander *Perspectives* 1.

⁸⁶¹*Id* n 1 *supra* at 1.

⁸⁶²*Id* n 1 *supra* at 8.

⁸⁶³*Id* n 1 *supra* at 13.

⁸⁶⁴Ryan *Organized Crime Handbook* 37 and Cressey *Structure of Syndicates* 27.

7.2 DEFINITIONS OF ORGANISED CRIME IN THE UNITED STATES OF AMERICA

The American academics, politicians, researchers, scholars and authors have worked tirelessly in trying to define organised crime. Viano states that the USA made concerted efforts and aggressive approaches to combating organised crime.⁸⁶⁵ As it can be seen in the final report of the Oyster Bay Conference, it was stressed that there is a need for development of a systematic and accurate definition of the term 'organised crime'.⁸⁶⁶ Bequai points that numerous attempts have been made over more than a century to define organised crime.⁸⁶⁷ In the same vein, Liddick has correctly observed that a single precise definition of 'organised crime' does not exist. His view is that a survey of the literature reveals that the plethora of definitions are often ambiguous and sometimes diametrically oppose while many official accounts of organised crime are merely descriptions of criminal activities, lacking the level of generalisation necessary to constitute a definition.⁸⁶⁸

The definition of organised crime varies from agency to agency, from federal to state and from state to state. Definitions of organised crime vary even within a state.⁸⁶⁹ According to Mallory, the investigator must not only have an understanding of an academic definition but also the legal definition.⁸⁷⁰ Gottschalk argues that Organised Crime must be used to refer to crime organizations whilst organised crime should refer to activities- crimes that often require a degree of organization on the part of

⁸⁶⁵Viano *Global Organized Crime* 185.

⁸⁶⁶Marion *Organized Crime* 216.

⁸⁶⁷Bequai *Organized Crime* 1.

⁸⁶⁸Liddick *Overview of Organized Crime* 31. Gottschalk agrees and states that many definitions are confusing, puzzling or simply contradictory; see Gottschalk *Policing Organized Crime* 21.

⁸⁶⁹Nagle *Global Organized Crime* 1654.

⁸⁷⁰*Id* n 471 *supra* at 3.

those involved.⁸⁷¹ This writer is unable to agree with this view. Hagan simply states that organised crime refers more broadly to group crime, that is, crime committed by two or more people.⁸⁷²

The USA comprises fifty states with individual codified laws. In the discussion that follows, the definitions of organised crime in the laws, will be analysed. While some definitions view the group as organised crime, others view the activity as organised crime. As an emphasis, Reuter states that, for some, organised crime is a set of relationships, while it is a set of particular activities for others.⁸⁷³

Albanese states that President's Commission on Organised Crime described organised crime as 11 different groups that included La Cosa Nostra, Outlaw Motorcycle gangs, Prison gangs, Triads and Tongs, Vietnamese gangs, Yakuza, Marielitos, Colombian cocaine rings, Irish organised crime, Russian organised crime and Canadian organised crime.⁸⁷⁴ The division of the Organized Crime Section of the FBI into three units focussing on Italian-American Organised Crime, Eurasia/Middle Eastern Organised Crime and Asian and African Organised Crime, supports Reuter's view.⁸⁷⁵ Caiden and Alexander express the view that the subject of organised crime remains clouded by the Mafia mystique and that even those who are in a position to know better cannot seem to divest themselves of it.⁸⁷⁶

In passing the RICO of 1970, the USA failed to include the definition of the concept 'organised crime'.⁸⁷⁷ However, the concept was already defined in the Omnibus

⁸⁷¹Gottschalk *Organised Crime* 19. The difference is that one organised crime has first capital letters while the other has all small letters.

⁸⁷²Hagan *Organized Crime Continuum* 79.

⁸⁷³Reuter *Disorganized Crime* 175.

⁸⁷⁴Albanese *Organized Crime* 11.

⁸⁷⁵*Id* n 874 *supra* at 244.

⁸⁷⁶Caiden and Alexander *Perspectives* 2.

⁸⁷⁷The RICO was amended in 1978, 1984 and 1987 without inserting the definition of

Crime Control and Safe Streets Act (OCCSSA) of 1968. Unfortunately, the Justice System Improvement Act of 1979 repealed this definition, leaving the USA without a definition.⁸⁷⁸ The purpose of this legislation was to encourage states and units of general local government to prepare and adopt comprehensive plans based upon their evaluation of state and local problems of law enforcement. It defined the phenomenon as follows:

Organized crime means the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labour racketeering, and other unlawful activities of members of such organisations.⁸⁷⁹

In 1975, the New York Supreme Court declared section 70-a of the Executive Law, the law creating the New York State's Organized Crime Task Force unconstitutional because it did not define 'organised crime'.⁸⁸⁰ Bjelopera and Finklea conclude that there is no current statutory definition of 'organised crime'.⁸⁸¹

Various states in the USA developed and adopted their own definitions due to the lack of a uniform definition in the USA federal laws. In this regard, it is worth

organised crime.

⁸⁷⁸Public Law 96-157. Dec. 27, 1979 section 901. [93.STAT 1167] Justice System Improvement Act of 1979. The amended act incorporated the definition of white collar crime (section 901(18)) as an illegal act or series of illegal acts committed by nonphysical means and by concealment of guile, to obtain money or property, to obtain business or personal advantage. See also Finklea *Trends and Issues for Congress* 3 as well as Finklea *Organized Crime* 61.

⁸⁷⁹Public Law 90-351, Title I, Part F (b) - Omnibus Crime Control and Safe Streets Act 1968: 82 STAT. 197. See also <http://transition.fcc.gov/Bureaus/OSEC/library/legislative-histories/1615.pdf> last visited on 15 June 2011; Adamoli *Around the World* 4; Bjelopera and Finklea *Organized Crime* 8; Passas *Organized Crime* xv; Maltz *Defining Organized Crime* 17; Maltz *Organized Crime* 22; Maltz *Definition of Organized Crime* 23; Maltz *Development of Definition* 68; Finckenauer *Mafia* 11; Lyman and Potter *Organized Crime* 4; Mallory *Organized Crime* 5; Nair *Organised Crime* 9; Finklea *Organized Crime in the USA* 7 and Von Lampe *Definitions of Organized Crime* 14-15 at <http://www.organized-crime.de/OCDEF1.htm> last visited on 08 August 2009.

⁸⁸⁰Kelly, Chin and Schatzberg *Organized Crime* 23.

⁸⁸¹Bjelopera and Finklea *Organized Crime* 3, 8 and 36 and Finklea *Organized Crime* 61.

mentioning that 34 states have passed laws which are more or less similar to the RICO of 1970.⁸⁸² Those states with definitions shall be dealt with below.

In attacking the definition of 'organised crime' as defined in the Omnibus Crime Control Act of 1968, Passas argues that it is vague and illustrates the confusion of acts with actors.⁸⁸³ In the same vein, Maltz enjoins him and states that there is confusion between offender and offence in organised crime. On the question of whether organised crime refers to an act or to a group, he subscribes to the notion of a group, a view supported by Longo.⁸⁸⁴ Maltz argues that, although the Law Enforcement Assistance Administration uses this definition for developing action programmes to counter organised crime, it is too vague to use in a criminal code.⁸⁸⁵ He states that reference to organised crime in its generic sense, refers not to sets of behaviours but to an entity, a group of people, a disease or a bogeyman.⁸⁸⁶ Abadinsky views the arguments of Maltz as a semantic problem in calling a specific behaviour or act an organised crime on the one hand and an entity or a group of people on the other hand. His view is that organised crime is crime in which there is more than one offender, and the offenders are and intend to remain associated with one another for the purpose of committing crimes.⁸⁸⁷

⁸⁸²These 34 states, including the territories are Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, the Commonwealth of Puerto Rico, Rhode Island, Tennessee, Texas, Utah, Virgin Islands, Washington and Wisconsin. See 33 AM.CRIM.L.REV.930 (1996), McCormack *RICO* 9-i – 9.232 and Klotter *Criminal Law* 311. Except Texas and Iowa, all the other 32 states are also dealt with in Floyd *RICO State by State*.

⁸⁸³Passas *Organized Crime* xv.

⁸⁸⁴Longo *Discoursing Organized Crime* 23 and 25.

⁸⁸⁵Maltz *Development of Definition* 68.

⁸⁸⁶Maltz *Defining Organized Crime* 2. A bogeyman is an imaginary monster used to frighten children, in other words, he argues that organised crime was not real.

⁸⁸⁷*Ibid* n 232 *supra*.

In terms of the California Control of Profits of Organized Crime Act 1982,⁸⁸⁸

Organized crime means crime which is of a conspiratorial nature and that is either of an organised nature and which seeks to supply illegal goods and services such as narcotics, prostitution, loan sharking, gambling, and pornography, or that, through planning and coordination of individual efforts, seeks to conduct the illegal activities of arson for profit, hijacking, insurance fraud, smuggling, operating vehicle theft rings, or systematically encumbering the assets of a business for the purpose of defrauding creditors. Organised crime also means crime committed by a criminal street gang, as defined in subdivision (f) of Section 186.22. Organised crime also means false or fraudulent activities, schemes, or artifices, as described in Section 14107 of the Welfare and Institutions Code, and the theft of personal identifying information, as defined in Section 530.5.⁸⁸⁹

Although the state of California has defined the phenomenon, my view is that it should have settled for one definition instead of using three different definitions for one phenomenon in one state.

Tennessee defines the term 'organised crime' as the unlawful activities of the members of an organised, disciplined association engaged in supplying illegal goods and services, including, but not limited to, gambling, prostitution, loan sharking,

⁸⁸⁸In terms of section 186 of the California Penal Code, this section forms the California Control of Profits of Organized Crime Act. It is also accessible at <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=pen&codebody=&hits=20> last visited on 18 July 2009.

⁸⁸⁹Section 186.2(d) of the California Control of Profits of Organized Crime Act 1982. See Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 03 August 2009. See also California Penal Code at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=186-186.8> last visited on 18 July 2009. Loan sharking is defined by Pace and Styles as a financial transaction at usurious or exorbitant rates of interest, usually without collateral and with the fear of physical force to guarantee payment; see Pace and Styles *Organised Crime Concepts* 134. The definition of California as provided by Abadinsky is not traceable in legislation. Similarly, the definition by the Special Crime Study Commission on Organized Crime, Sacramento: California Board of Corrections stating that organised crime is the operations of two or more persons who combine to obtain financial advantages or special privileges by such unlawful means as terrorism, fraud, corruption of public officers or by a combination of such methods, is not found in any legislation. See *Abadinsky Organized Crime I* 1; Edelhertz and Overcast *The Business of Organized Crime* 28-29; Woodiwiss *American Power* 241 and Von Lampe at

narcotics, labour racketeering, and other unlawful activities of members of such organisations.⁸⁹⁰ Although this definition is clear and unambiguous, it leaves the critical element of repetition that distinguishes it from predicate offences.

Washington defines the term 'organised crime' as those activities which are conducted and carried on by members of an organized, disciplined association engaging in supplying illegal goods and services and/or engaged in criminal activities in contravention of the laws of this State or of the United States.⁸⁹¹ While this definition is clear, it is too inclusive.

In Pennsylvania, the phenomenon is defined as follows:

Organized crime means any person or combination of persons engaging in or having the purpose of engaging in conduct which violates any provision of subsec (b) and also includes organised crime as defined in Section 5702.⁸⁹² In terms of Section 5702, organised crime means (1) the unlawful activity of an association trafficking in illegal goods or services, including but not limited to, gambling, prostitution, loan sharking, controlled substances, labor racketeering, or other unlawful activities; or (2) any continuing criminal conspiracy or other unlawful practice which has as its objective: (i) large economic gain through fraudulent or coercive practices; or (ii) improper governmental influence.⁸⁹³

<http://www.organized-crime.DEFI.htm> last visited on 01 June 2008.

⁸⁹⁰Tennessee Code Annotated Title 38, Chapter 6 section 102(b)(2)A [38-6-102(b)(2)A]. See also Abadinsky *Organized Crime I* 4 and the law at <http://www.lexisnexis.com/hottopics/tncode> last visited on 24 July 2011.

⁸⁹¹Abadinsky *Organized Crime I* 1-4. This definition, which is also accessible at <http://apps.leg.wa.gov/rcw/default.aspx?cite=43.43.852> last visited on 09 October 2010, <http://www.atg.wa.gov/AGOpinions/opinion.aspx?section=topic&id=14562> last visited on 09 October 2010 and Von Lampe *Definitions of Organized Crime* 18 at <http://www.organized-crime.de/OCDEF1.htm> last visited on 03 August 2009, is strictly for the purpose of RCW 43-43-850 through to 43-43-864 that deals with the establishment of the Organised Crime Intelligence Unit (OCIU).

⁸⁹²See Corrupt Organizations 18 Pa cons. Stat. ss 911(h) (8) which can also be accessed at <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.009.011.000.html> last visited on 29 August 2009.

⁸⁹³See <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.057.002.000.html> last visited on 09 October 2010. See also Gardner *Criminal Law* 494 and Lyman and Potter *Organized Crime* 26. This is the same definition used by the Pennsylvania Crime Commission of 1978.

This writer is of the view that a state, as is the case with Pennsylvania, which has more than one definition, is bound to create confusion on the understanding of the phenomenon.

In terms of Ohio Revised Code, the crime is defined as follows:

Organized criminal activity means any combination or conspiracy to engage in activity that constitutes “engaging in a pattern of corrupt activity;” any violation, combination of violations, or conspiracy to commit one or more violations of Section 2925.03, 2925.04, 2925.05, 2925.06, or 2925.11 of the Revised Code other than a violation of Section 2925.11 of the Revised Code that is a minor drug possession offense; or any criminal activity that relates to the corruption of a public official, as defined in Section 2921.01 of the Revised Code, or of a public servant of the type described in division (B)(3) of that section.⁸⁹⁴

Although this definition seems to be referring to an activity of an organised criminal group, it will assist the enforcers in understanding the extent of what is to be viewed as organised crime.

Hawaii defines the term ‘organised crime’ as any combination or conspiracy to engage in criminal activity as a significant source of income or livelihood, or to violate, aid or abet the violation of criminal laws relating to prostitution, gambling, loansharking, drug abuse, illegal drug distribution, counterfeiting, extortion, corruption of law enforcement officers and other public officers or employee.⁸⁹⁵ This definition appears to be clear.

⁸⁹⁴Title 1 Chapter 177 Section 01(E)(1). This legislation can also be accessed at <http://codes.ohio.gov/orc/177> last visited on 09 October 2010. According to Abadinsky, Ohio defines organized crime as any combination or conspiracy to engage activity as a significant source of income or livelihood, or to violate or aid, abet, facilitate, conceal, or dispose of the proceeds of the violation of, criminal laws relating to prostitution, gambling, counterfeiting, obscenity, extortion, loansharking, drug abuse or illegal drug distribution, or corruption of law enforcement officers or other public officers, officials, or employees; see Adadinsky *Organized Crime I* 1-4 and Maltz *Definition of Organized Crime* 23-24.

⁸⁹⁵Hawaii Penal Code Division 5 Title 38 Chapter 842 Section 842-1. See also <http://codes.lp.findlaw.com/histatutes/5/38> last visited on 07 October 2010 and McCormack *RICO* 9-70.

In Oklahoma, the term 'organised crime' means any unlawful activity of an association trafficking in illegal goods or services, including but not limited to, gambling; loan sharking; controlled dangerous substances; labor racketeering, or other unlawful activities; or any continuing criminal conspiracy or other unlawful practice which has as its objectives improper governmental influence or economic gain through fraudulent or coercive practices.⁸⁹⁶ Although this definition seems to be referring to an activity of organised criminal group, it will assist the enforcers in understanding the extent of what is to be viewed as organised crime.

Various academics, authors, researchers and bodies have defined organised crime in such a way that the reader might believe that a particular state has defined the concept where as such a definition is not legislated. As an example, Abadinsky has in his 1981 edition, reflected 15 definitions that include those of California, Hawaii, Pennsylvania, Tennessee and Washington as pointed out above. The definitions, which he added for other states are those of Mississippi, Delaware, Georgia, Missouri, Oregon, New Mexico, Arkansas, Louisiana and New Hampshire.⁸⁹⁷ These

⁸⁹⁶Chapter 22 Section 353 B 10.

⁸⁹⁷The definitions are not repeated here but may be accessed in Abadinsky *Organized Crime* I 1-4. The source of this definition could not be ascertained as 'organised crime' is not defined in Title 11, Chapter 15, section 1502(3) of the Delaware Criminal Code that deals with organized crime and racketeering. See <http://delcode.delaware.gov/title11/c015/index.shtml> last visited on 09 October 2010 for Delaware and <http://www.lexis-nexis.com/hottopics/gacode> last visited on 09 October 2010 for Georgia. In terms of Title 16 Chapter 14 section 3 of the Georgia RICO, Louisiana Title 15 Chapter 11 section 1352 C, Oregon RICO 166.715-735, New Mexico Chapter 30 Article 42-3 and Missouri Revised Statutes Chapter 578 Section 421 have not defined organized crime. Mississippi has legislation against organized crime under Mississippi Code of 1972 Title 97 Chapter 43 which is the RICO of 1986 and legislation against street gang or organized gang under Mississippi Code of 1972 Title 97 Chapter 44 which is the Mississippi Street gang Act of 1996. Only street gang has been defined and not organized crime. New Hampshire does not have organized crime law. The definition by Missouri Task Force on Organized Crime, 7-8, which is in *tandem* with the definition by Peterson who defines organized crime as a continuing conspiracy for profit that perpetuates itself through violence or threat of violence and by arranging for immunity through the corruption of officials is not legislated; See Peterson *The Mob* xi-xii. I was unable to find the source of Abadinsky's additional definitions.

definitions have contributed to the confusion, hence a call for a uniform definition.

Indeed, Hagan observed that the term 'organised crime' has been diversely defined or described by the general public, legislatures, law enforcement agencies, social scientists and syndicates members themselves.⁸⁹⁸ Abadinsky defines 'organised crime' as a non-ideological enterprise that involves a number of persons in close social interaction, organized on a hierarchical basis, for the purpose of securing profit and power by engaging in illegal and legal activities, which yield high profits while offering relatively low risks. Positions may be assigned on the basis of kinship or rationally assigned according to the skill. The positions are continuous and not dependent on the individuals occupying them at any particular time. Permanency is assumed by the members, who strive to keep the enterprise integral and active in pursuit of its goals. It eschews competition and strives for monopoly over particular activities on an industry or territorial basis. There is a willingness to use violence and/or bribery to achieve ends or to maintain discipline. Membership is restricted, although non-members are involved on a contingency basis.⁸⁹⁹

Definitions are often arbitrary stipulations where rare consensus of scholars exist.⁹⁰⁰ The lack of a uniform definition of the term 'organised crime' has resulted in various institutions, researchers and criminologists defining the concept that is specially designed to accomplish a specific desired objective. The definitions that will follow are those of commissions, institutions, researchers, criminologists and academics who view organised crime as an activity and those who view organised crime as a structure respectively.

⁸⁹⁸Hagan *Organized Crime Continuum* 77.

⁸⁹⁹Abadinsky *Organized Crime VII* 2-4 and Abadinsky *Oral History* 38-39. See also Carter *Organized Crime* 137.

⁹⁰⁰Homer and Caputo *Guns and Garlic* 6.

Generally, the definitions that are inclined to view organised crime as an activity appears to take a queue from Cressey. Cressey defines organised crime as continuing criminal activity in concert.⁹⁰¹ He further defines it as any crime committed by a person occupying, in an established division of labour, a position designed for the commission of crime, providing that such division of labour also includes at least one position for a corrupter, one position for a corruptee, and one position for an enforcer.⁹⁰² Similarly, Maltz defines organised crime as the criminal and other unlawful activities of large continuing, multi enterprise organizations that were established primarily for criminal purposes, and that employ corruption and violence in their activities. He has further defined organised crime as a crime in which there is more than one offender, and the offenders are and intend to remain associated with one another for the purpose of committing crimes.⁹⁰³ His latest definition states that an organised crime is a crime committed by two or more offenders who are or intend to remain associated for the purpose of committing crimes.⁹⁰⁴

Best and Luckenbill define organised crime as reference to activities by members of deviant formal organizations in pursuit of the organization's goals.⁹⁰⁵ Ianni defines the term 'organised crime' as an integral part of the American social system that brings together a public that demands certain goods and services that are defined as

⁹⁰¹*Id* n 1 *supra* at 304. See also Maltz *Defining Organized Crime* 22, Abadinsky *Organized Crime* 2 and Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 01 June 2008.

⁹⁰²Maltz *Defining Organized Crime* 22. See also Cressey *Theft of the Nation* 319, Rhodes *Organized Crime* 47, Abadinsky *Defining Oral History* 35, Abadinsky *Organized Crime* 2, Block *Organizing Crime* 8, Marion *Organized Crime* 6, Liddick *Overview of Organized Crime* 31 and Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 01 June 2008.

⁹⁰³Maltz *Defining Organized Crime* 2 and 23. He admits that in an earlier attempt to define organised crime, he too was somewhat off the mark. He states that his focus was on the fact that many organized crimes exist and the English language is misused if only certain types of organized crimes are considered organized crime. See also Abadinsky *Organized Crime* 2.

⁹⁰⁴Maltz *Development of Definition* 69.

⁹⁰⁵Best and Luckenbill *Organizing Deviance* 58.

illegal, an organization of individuals who supply those goods and services, and corrupt public officials who protect such individuals for their own profit.⁹⁰⁶ While Finckenauer and Voronin define organised crime as crime committed by criminal organizations whose existence has continuity over time and across crimes, and that use systematic violence and corruption to facilitate their criminal activities,⁹⁰⁷ Lindesmith's definition distinguish it as a crime that involves the co-operation of several different persons or groups for its successful execution.⁹⁰⁸ Lindesmith's definition differs with that of Woodiwiss who, without distinguishing the actors, simply defines it as a systematic illegal activity for power or profit.⁹⁰⁹

The definition by Lupsha is characterised by distinguishing factors such as activities, group of individuals, conscious development of task roles and specialisations, patterns of interaction, status, relationships, spheres of accountability and responsibilities, continuity, engagement in legal and illegal acts, generation of large amounts of capital, the use of violence or the threat of violence, corruption of public officials as well as agents and those in positions of responsibility and trust.⁹¹⁰ Similar in temperament, is the view by Gottschalk whose definition simply points the phenomenon as any crime committed by persons occupying, in an established division of labour, position designed for commission of crime. Accordingly, organised crime is a crime committed by criminal organisations whose existence has continuity over time and across crimes, and that may use systematic violence and corruption to facilitate their criminal activities.⁹¹¹

⁹⁰⁶Liddick *Overview of Organized Crime* 32-33.

⁹⁰⁷Finckenauer and Voronin *Russian Organized Crime* 2 and Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 01 June 2008.

⁹⁰⁸Lindesmith *Organized Crime* 119.

⁹⁰⁹Woodiwiss *The Strange Career* 3, Woodiwiss *Organized Crime* 3 and Woodiwiss *Dumbing Discourse* 1. See also Standing *Organised Crime* 247.

⁹¹⁰Lupsha *Networks versus Networking* 60-61 and Lupsha *Individual Choice* 169.

⁹¹¹Gottschalk *Organised Crime* 5.

Falcone's definition views the term 'organised crime' as an illegal pattern of activity conducted by a consortium of people and/or organizations, acting in concert, to carry out fraud, theft, extortion, intimidation, and a host of other offenses in a syndicated fashion.⁹¹² In the same vein, Albin's definition of the phenomenon views it as any criminal activity involving two or more individuals, specialised or nonspecialised, encompassing some form of social structure, with some form of leadership, utilising certain modes of operation, in which the ultimate purpose of the organization is found in the enterprises of the particular group.⁹¹³

The USA Department of Labor, USA Department of Justice, Arizona Organized Crime Project and the ITT Research Institute and the Chicago Crime Commission have defined the phenomenon focussing on the activities carried out by organised criminal groups with the motive of acquiring and maintaining profit or power.⁹¹⁴ In support of the activity notion, Homer defines the term 'organised crime' as a system of power and interaction, not as an invincible organization with mystical powers.⁹¹⁵ His explanation is that organised crime is a matrix, a set of interactions that take place over a continuous number of years and consist of a pattern of relationships based on influence and built around one or a few economic activities that bind them together.⁹¹⁶ Homogeneously, Rhodes defines the term 'organised crime' as consisting of a series of illegal transactions between multiple offenders, some of whom employ specialised skills, over a continuous period of time, for purposes of economic

⁹¹²Falcone *Hall's Dictionary* 187.

⁹¹³Albin *The American Mafia* 37-38. See also Maltz *Defining Organized Crime* 22, Maltz *Oral History* 37, Liddick *Overview of Organized Crime* 12, Hagan *Organized Crime Continuum* 79 and Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 01 June 2008.

⁹¹⁴Semiannual report to the Congress (01-10-2003 to 31-03-2004), U.S. Department of Labor 30, also accessible at <http://www.vec.virginia.gov/vecportal/employer/pdf/oigreport0105.pdf> last visited on 09 November 2011, Abadinsky *Organized Crime* 2 and 17, Edelhertz, Cole and Berk *Organized Crime Containment* 10 and Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 01 June 2008. This study is a Study of Organised Crime in Illinois, which was conducted in 1971.

⁹¹⁵Homer and Caputo *Guns and Garlic* 4.

⁹¹⁶Rhodes *Organized Crime* 39.

advantage, and political power when necessary to gain economic advantage.⁹¹⁷ Furthermore, Salerno and Tompkins define the term ‘organised crime’ as a continuous conspiracy for profit, not a haphazard flouting of the law.⁹¹⁸

In contrast with the view of those who see organised crime as an activity, the definitions that follow support the view that organised crime consists of a group of persons acting together. These definitions take their queue from President Lyndon B Johnson’s Commission on Law Enforcement and Administration of Justice, which defines the term ‘organised crime’ as a society that seeks to operate outside the control of the American people and their government. It involves thousands of criminals, working within structures as complex as those of legitimate governments. Its actions are not impulsive but rather the results of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits.⁹¹⁹ The report on Combating Organized Crime, Oysterbay, New York, defines the term ‘organised crime’ as the product of a self-perpetuating criminal conspiracy to wring exorbitant profits from our society by any means - fair and foul, legal and illegal. Despite personnel changes, the conspiratorial entity continues. It is a malignant parasite, which fattens on human weakness. It survives on fear and corruption. By one or other means, it obtains a high degree of immunity from law. It is totalitarian in its organization.⁹²⁰

The Institute for Intergovernmental Research defines organised crime as any

⁹¹⁷*Id* n 916 *supra* at 2 and 32.

⁹¹⁸Salerno and Tompkins *Crime Confederation* 111.

⁹¹⁹Woodiwiss *The Strange Career* 21. See also Marion *Organized Crime* 296, Lyman and Potter *Organized Crime* 25, Rhodes *Organized Crime* 46, Caiden and Alexander *Perspectives* 2-3, Task Force Report on Organized Crime 1, Obokata *Transnational Organised Crime* 15 and Barbat *Career in Organized Crime* 15.

⁹²⁰Combating Organized Crime: A Report of the 1965 Oysterbay: New York, Conferences on Combating Organized Crime 19. See also Wright *Organised Crime* 3-4; Kelly *Organized crime* 192 and Homer and Caputo *Guns and Garlic* 6. According to Opolot, 40 experts spent the entire day trying to agree on the definition of organised crime, which would be agreeable to all

organised group that has its leadership insulated from direct involvement in criminal acts and ensures organizational integrity in the event of a loss of leadership.⁹²¹ Companionably, the Internal Revenue Service Manual defines the term ‘organised crime’ as those self-perpetuating, structured, and disciplined associations of individuals, or groups, combined together for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while protecting their activities through a pattern of graft and corruption.⁹²²

Albanese defines the term ‘organised crime’ as a continuing criminal enterprise that rationally works to profit from illicit activities; its continuing existence is maintained through the use of force, threats, monopoly control, and/or the corruption of public officials.⁹²³ He argues that organised crime can be explained by three sets of factors: opportunity, criminal environment and special access or skills.⁹²⁴ A shared view by Finckenauer and Albanese is that organised crime is characterised by planned illegal acts involving multiple offenders who engage in ongoing or recurrent criminal activities.⁹²⁵

In terms of the USA Comptroller General, the term ‘organised crime’ is defined as self-perpetuating, structured and disciplined associations of individuals or groups, combined together for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while protecting their activities through a pattern of graft and corruption.⁹²⁶ Emphasising the element of structure, Conklin

in 1965, see Opolot *Organized Crime* 18.

⁹²¹Institute for Intergovernmental Research *Intelligence Systems* 33.

⁹²²See Internal Revenue Service Manual paragraph 9.5.6.1.1 at <http://www.irs.gov/irm/part9/irm-09-005-006.htm> last visited on 08 November 2011.

⁹²³Albanese *Causes of Organised Crime* 411 and Albanese *Organized Crime* 4. See also Gottschalk *Organised Crime* 4, Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 01 June 2008 as well as Marion *Organized Crime* 6.

⁹²⁴Finckenauer *Mafia* 80.

⁹²⁵Finckenauer and Albanese *Organized Crime* 440.

⁹²⁶The USA Comptroller General in 1981 was Elmer Boyd Staats until March and succeeded

defines the term 'organised crime' as syndicated crime, the violation of the law on a large-scale basis by ongoing, tightly structured groups devoted to the pursuit of profit through criminal means. According to him, what distinguishes organised crime from other types of structured criminal activity is the durability and complexity of syndicates, which have some of the traits of formal organizations: a division of labour, a hierarchical authority structure and co-ordination among various statutes.⁹²⁷

Similar to the definitions of the USA Comptroller General, Grennan and Britz emphasise self-perpetuation and define 'organised crime' as a recognisable, monopolistic, self-perpetuating, hierarchical organization willing to use violence and the corruption of public officials to engage in both traditional vice-related activities and complex criminal enterprises, and it ensures its organizational longevity through ritualistic practices, rules and regulations, organizational tithing, and investment in legitimate businesses.⁹²⁸ In the same vein, Kenney and Finckenauer define organised crime as including the following characteristics: a self perpetuating, organized hierarchy that exists to profit from providing illicit goods and services, uses violence in carrying out its criminal activities, and corrupts public officials to immunize itself from law enforcement.⁹²⁹ Finckenauer and Waring, jointly argue that organised crime is typically defined by three characteristics - criminal monopoly, violence and corruption.⁹³⁰

Potter defines the term 'organised crime' as the management and co-ordination of illegal enterprises connected with vice (gambling, prostitution, high-interest personal

by Charles A Bowsher. See Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 01 June 2008.

⁹²⁷Conklin *Criminology* 315.

⁹²⁸Grennan and Britz *Organized Crime* 15.

⁹²⁹Kenney and Finckenauer *Organized Crime in America* 285.

⁹³⁰Finckenauer and Waring *Russian Mafia Mystique* 5. See also

loans, pornography, and drug trafficking) and racketeering (labour and business extortion).⁹³¹ Abadinsky put down the characteristics or attributes that collectively give insights into what the term 'organised crime' comprises, namely: it is nonideological, has a hierarchical structure, has a limited or exclusive membership; is self-perpetuating (continues over time); uses violence and bribery; demonstrates a specific division of labour; is monopolistic and is governed by explicit rules and regulations (including a code of secrecy).⁹³²

The FBI defines the term 'organised crime' as any group having some manner of a formalised structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region, or the country as a whole.⁹³³ According to Mallory, the FBI describes organised crime as a continuing criminal conspiracy with an organized structure that is successful because of its use of fear, corruption and violence.⁹³⁴

Instead of referring to a structure, Winslow and Zhang use the term enterprise and define 'organised crime' as a conspiratorial enterprise pursuing profit or power through provision of illegal goods and/or services, involving systematic use of force or threat of force.⁹³⁵ However, Zhang and Gaylord admit that organised crime is

<https://www.ncjrs.gov/pdffiles1/jr000247b.pdf> last visited on 20 September 2011.

⁹³¹Potter *Criminal Organizations* 116.

⁹³²*Id* n 242 *supra* at 3. See also Mahan *Beyond the Mafia* xi. Although these attributes are academic, they are pursued in enforcement by law enforcement agencies.

⁹³³FBI at <http://www.fbi.gov/hq/cid/orgcrime/glossary.htm> last visited on 24 September 2007. See also Abadinsky *Organized Crime* 2, Madsen *Organized Crime* 15-16, Bjelopera and Finklea *Organized Crime* 5-6, Hendley *American Gangsters* 3, Katsarou *Organized Crime* 1 accessible at <http://www.hmceurope.org/2010/docs/briefings/house2-organized-crime.pdf> last visited on 08 September 2010 and Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 01 June 2008.

⁹³⁴*Id* n 472 *supra* at 5.

⁹³⁵Winslow and Zhang *A Global Perspective* 430.

arguably the least understood of all types of crime today.⁹³⁶ In a similar vein, the International Association of Chiefs of Police (IACP) defines ‘organised crime’ as an illegal enterprise possessing four major characteristics: structured organisation, profit continuity, monopoly and immunity.⁹³⁷ Companionably, Blok defines ‘organised crime’ as formulated through patron-client cliques and coalitions. Accordingly, organised crime is a system composed of underworld and upperworld individuals in complicated relations of reciprocity.⁹³⁸

As an alternative to the word structure or enterprise, Reuter and Rubinstein use the word gangs and define the term ‘organised crime’ as a set of stable, hierarchically organised gangs, which through violence or its credible threat, have acquired monopoly control of certain major illegal markets.⁹³⁹ Liddick does not agree and views the statement suggesting that criminal organizations tend to be large, long-lasting criminal enterprises which maintain monopoly control over illegal markets on a nationwide scale as a myth. According to him, numerous empirical studies of organised crime indicate that criminal enterprises tend to be relatively small, short-lived and limited in geographic scope.⁹⁴⁰ Ultimately, Reuter concedes that the term “organized crime” has never been given a satisfactory definition or description.⁹⁴¹ Equally, Blakey, who is also known as “the father of RICO”, defines ‘organised crime’ as a characteristic of an enterprise with a continuing criminal conspiracy that is motivated by profit from illicit activities demanded by the public.⁹⁴²

⁹³⁶Zhang and Gaylord *Golden Mountain* 109.

⁹³⁷Abadinsky *Organized Crime I* 18.

⁹³⁸Liddick *Overview of Organized Crime* 33.

⁹³⁹Reuter *Disorganized Crime* 174 and Reuter and Rubinstein *Organized Crime* 46, see also http://www.nationalaffairs.com/public_interest/detail/fact-fancy-and-organized-crime and http://www.nationalaffairs.com/doclib/20080820_197805302factfancyandorganizedcrimepeterreuter.pdf last visited on 19 September 2011.

⁹⁴⁰Liddick *Overview of Organized Crime* 17.

⁹⁴¹Reuter *Disorganized Crime* 174.

⁹⁴²*Id* n 472 *supra* at 7.

Organization is in other definitions, substituted for structure. In this regard, Sutherland defines the term 'organised crime' as an organization that results from the interaction of criminal organizations, either formal associations with a recognised leadership and a division of labour, or an informal similarity and reciprocity of interests and attitudes.⁹⁴³ Without dumping the word structure, Michalowski includes association in lieu of enterprise. He defines organised crime as any structurally co-ordinated and bureaucratically organized association of individuals that relies almost primarily upon illegal sub-goals and means to facilitate the accumulation of capital.⁹⁴⁴

Finckenauer argues that a clear and focused definition of organised crime is important as a legal definition assist in the development of public policy, research conducted and determining how laws are framed, investigations and prosecutions conducted. He observed that the USA President Commission on Organized Crime indicated that the problem of defining the term 'organised crime' lay not in the word crime, but in the word "organised". He cautions that a list of crimes such as hijacking, extortion, loan-sharking, bootlegging, fixing sports events and smuggling, which are generally viewed as *mala prohibita*, does not define organised crime because these offences can also be committed by criminals acting alone, or by criminals acting in groups that would not be regarded as being criminal "organizations".⁹⁴⁵ His argument is the same as that of Lyman and Potter who point out that perhaps the greatest problem in understanding 'organised crime' is not the word crime but the word organised. They concede that little agreement exists regarding what constitutes organised criminal activity.⁹⁴⁶

⁹⁴³Liddick *Overview of Organized Crime* 32.

⁹⁴⁴Michalowski *Order, Law and Crime* 368.

⁹⁴⁵Finckenauer *Mafia* 4, 9 and 19 and Finckenauer *Problems of Definition* 64. See also Finklea *Trends and Issues for Congress* 2.

⁹⁴⁶Lyman and Potter *Organized Crime* 4.

While recognizing the controversy surrounding the definition of organised crime, Finckenaueer takes note of these challenges and moves from the premise that a definition is important. He further advocates that it is not the objective of organised crime to acquire political power but its interest is the nullification of government through bribery, pay-offs to police, prosecutors or legal officials and corruption. He has harvested the dimensions of organised crime as put forward by Hagan and Maltz, partially integrating the two approaches and offers the following list as a framework for beginning to think about what organised crime is and what criminal organizations are: ideology (or lack of); structure/organised hierarchy; continuity; violence/use of force or the threat of force; restricted membership/bonding; illegal enterprises; penetration of legitimate business; and corruption.⁹⁴⁷

The definitions as pointed out above, demonstrate the lack of consistency in a single country on how to define the phenomenon. One group that include Cressey, Maltz, Lupsha, Finckenaueer, Albin, Falcone, Woodiwiss, Voronin, Gottschalk, Lindesmith, Best, Luckenbill, US Department of Labor, ITT Research Institute and Chicago Crime Commission subscribe to the notion that organised crime is an activity. The other group that include President Johnson's Commission, Albanese, Blakey, Potter, Reuter, Liddick, Hagan, Homer, Michalowski, Kenney, Sutherland, Grennan, Britz, Zhang, Gaylord, Rubinstein, Winslow, Conklin, FBI, IACP, US Comptroller General, Oysterbay Conference, Institute for Intergovernmental Research and Internal Revenue Manual, view organised crime as a structure.

The states of California, Tennessee, Washington, Ohio, Hawaii and Pennsylvania have defined organised crime in their respective laws. As observed, none of these definitions are similar.

⁹⁴⁷Finckenaueer *Mafia* 5, 8 and 9. See also Maltz *Definition of Organized Crime* 26 and 34.

7.3 ORGANISED CRIMINAL GROUPS IN THE UNITED STATES OF AMERICA

Mallory describes an organisation as a group of people who co-operate to accomplish objectives or goals and defines it as referring to two or more persons forming an association to conduct business.⁹⁴⁸ According to Grayson, every nationality from Afghanistan to Nigeria is blamed for America's drug problem.⁹⁴⁹ Van Duyne protests that organised crime is considered an un-American activity, that is, it is considered an activity by Italians and their descents, Latin and South Americans, black Americans, et cetera. He concludes that there seems to be no White Anglo-Saxon protestant or Wasp-organised crime.⁹⁵⁰ Woodiwiss blames the Kefauver Senate Investigating Committee for giving an undeserved substance and respectability to Mafia mythology by concluding, amongst others, that there is a nationwide crime syndicate known as Mafia, whose tentacles are found in many large cities.⁹⁵¹ Scherrer shares this view and argues that there was no actual proof that the Mafia existed as an organisation in the USA.⁹⁵²

During the 1920-1930, Irish gangs, Jewish gangs, polish gangs, German gangs, Italian gangs, "Unione Sicilian" and many others were formed in the USA. After the gangland wars were fought and won by the Italian-Sicilian alliance, which was called "The Mafia", the group started to fight each other.⁹⁵³ While acknowledging police jealousy, Cressey, who is in line with Southwell, states that Anslinger, Head of the Federal Bureau of Narcotics (FBN) has identified the existence of Mafia since the

⁹⁴⁸*Id* n 472 *supra* at 2 and 4.

⁹⁴⁹Grayson *War on Drugs* 148.

⁹⁵⁰Van Duyne *Fears* 3.

⁹⁵¹Woodiwiss *The Strange Career* 18.

⁹⁵²Scherrer *Transnational Organized Crime* 25.

⁹⁵³*Id* n 1 *supra* at 9. Lombardo states in the *Genesis of Organized Crime in Chicago*, that the Unione Sicilian was formed in 1895 as a lawful fraternal society designed to advance the interests of Sicilian immigrants; see <http://www.ipsn.org/genesis.htm> last visited on 21

early 1930's, while Hoover denied its existence.⁹⁵⁴ He states that there are petty jealousies among cops, even top cops, but they tend to arise over the “credit” given for investigations and arrests, not over disputes about whether crime exists. It is only in 1962 that the Director of the FBI stated that no single individual or coalition of racketeers dominates organised crime across the nation. He used “Cosa Nostra” which came into being in 1931 to refer to the “criminal fraternity” which others call the Mafia.⁹⁵⁵

The organised crime conference at Oyster Bay, New York concluded that the word ‘Mafia’ is a Sicilian term referring to a Sicilian organization, which the Americans reject because many participants in the syndicates were Americans and not Sicilians. On the other hand, Southwell states that Hoover was made to believe that there exists an organised crime group by the arrest of 58 members on 14 November 1957 at a meeting in Apalachin where more than 98 members attended.⁹⁵⁶ Roth states that all the attendees claimed that they coincidentally met to pay their ailing friend Joseph Barbara a visit. As to the number of people who attended this meeting of an organised criminal group, she submits that it remains unknown.⁹⁵⁷ However, 20 leaders were convicted and these convictions were set aside on appeal.⁹⁵⁸

The Mafia organised criminal group had its own way of life. As revealed by Mafiosi Valachi during the Arkansas Senator McClellan Committee in 1963, the oath of

February 2008.

⁹⁵⁴Cressey *Theft of the Nation* 9 and 22 and Southwell *History of Organized Crime* 38. See also Marion *Organized Crime* 170 and 249-250, James and Jacobs in Jacobs *The RICO Law* 185, Scherrer *Transnational Organized Crime* 18 and Fox *Blood and Power* 139. The FBN was disbanded and replaced by the Bureau of Narcotics and Dangerous Drugs (BNDD), which was then reorganised into the Drug Enforcement Agency (DEA).

⁹⁵⁵*Id* n 1 *supra* at 9-10.

⁹⁵⁶Southwell *History of Organized Crime* 38-39. See also Lyman and Potter *Organized Crime* 35, Albanese *Organized Crime* 139-142, Nelli *Business of Crime* 261, Allen *Merchants of Menace* 92 Marion *Organized Crime* 172-174 and Hagan *Criminology* 509.

⁹⁵⁷Roth *Organized Crime* 104.

⁹⁵⁸Task Force Report on Organized Crime 6.

secrecy, which was sworn by members, reads, “I swear to be loyal to my brothers, never betray them, and if I fail, may I burn and be turned to ashes like the ashes of the image”.⁹⁵⁹ Richards states that Mafia members are bound by an oath of five basic principles: (1) *omerta*, or code of silence, a vow never to reveal any Mafia secrets or members’ names under threat of torture and death; (2) total obedience to the “don” or boss; (3) assistance to any befriended Mafia faction, no questions asked; (4) to avenge any attack on members of the family; and (5) to avoid any and all contact with law-enforcement authorities.⁹⁶⁰

Allen put forward ten principles of *omerta* which are: refusal to recognize any legal power, except its own code; self-justice – getting one’s right by one’s own hand; obligation to assist a brother in trouble, at all costs; adherence to the death to its rule and discipline, having once embraced it; to shun publicity; to help any and all who appeal for help whether members or not; to replace law enforcement as intermediary between criminal and victim; to protect the rights of the criminal to remain free and prosper; to secure friends influential in business, political and social circles and; silence.⁹⁶¹ Ianni contends that there is no codified set of rules of organised crime. He quotes the five thieves code by Cressey, in brief as - loyalty, rationality, honour, courage and independence. He further points out the list of twelve by Salerno. He concludes with the three rules of the Lupollo family.⁹⁶² According to Richards, the Russian Mafiya, which is also called reketiry, racketeers or the ROC, or the Russian Organized Crime, or Redfellas and is bound by an 18-part “Thieves’ Code” or *vorovskoy zakon*.⁹⁶³

⁹⁵⁹Ryan *Organized Crime Handbook* 42.

⁹⁶⁰Richards *Criminal Organizations* 5. Balsimo and Carpozi state that *omerta* means noble silence; see Balsimo and Carpozi *Under the Clock* xvi. Reppetto *The Mob* 17, simply states that violation of *omerta* is punishable by death. Cressey *Structure of Syndicates* 40 refers to the other name of *omerta* as manliness.

⁹⁶¹Allen *Merchants of Menace* 9-10.

⁹⁶²Ianni *Family Business* 137-149.

⁹⁶³Richards *Criminal Organizations* 8-9.

In other places, the organised criminal groups suffered the same influence or indignation, resulting in names such as The New Orleans Mafia “The Mafia” or “The Office” or “The Arm”,⁹⁶⁴ The Detroit Mafia and The Los Angeles (L.A) Mafia. According to Fox, Mafia is called Outfit, the Office, the Clique, the Arm, the Syndicate, the Tradition, the Honored Society, the Combination, Our Thing and La Cosa Nostra at different places.⁹⁶⁵

The New York born, Alphonse “Scarface” Capone (1899-1947), who lived for 12 years in Chicago, became the most notorious Italian-American mob boss of all-time leader of Chicago Outfit, and he was later called The Outfit from 1925-1931.⁹⁶⁶ According to Southwell, when Salvatore “Boss of Bosses” Maranzano declared the creation of “Cosa Nostra” in 1931, he also recognised The Outfit.⁹⁶⁷ Balsamo and Carpozi argue that Maranzano declared himself “the boss of all bosses”.⁹⁶⁸ Marion’s version differs with that of Southwell as she points out that it is only at The Commission, which is a committee created by Charles “Lucky” Luciano, “father of organised crime”⁹⁶⁹ after the death of Maranzano, which was committed by Luciano,⁹⁷⁰ that the organised crime leaders agreed to form a new organization called La Cosa Nostra (LCN).⁹⁷¹ The

⁹⁶⁴Southwell *History of Organized Crime* 48. Southwell suggest that the New Orleans Police Chief David Hennessey who was killed on 15 October 1980, was on the payroll of the Provenzams criminal family group. See also Salerno and Tompkins *Crime Confederation* 88 and Petrakis *Organized Crime* 21.

⁹⁶⁵Fox *Blood and Power* 62.

⁹⁶⁶Southwell *History of Organized Crime* 31 and 33. See also Ryan *Organized Crime Handbook* 119 as well as Lombardo at <http://www.ipsn.org/genesis.htm> last visited on 21 February 2008.

⁹⁶⁷Southwell *History of Organized Crime* 34. See also Mario *Organized Crime* 58 and Nair *Organised Crime* 52.

⁹⁶⁸Balsamo and Carpozi *Crime Incorporated* 250 and FBI *La Cosa Nostra* 15.

⁹⁶⁹Katsarou *Organized Crime* 1.

⁹⁷⁰Nelli *Business of Crime* 140, 180 and 182.

⁹⁷¹Marion *Organized Crime* 59. According to Lewis, the original name of Lucky Luciano was Salvatore Lucania, born in 1897 in a small Sicilian town of Lercara Friddi near Palermo; he was involved in criminal activities at the age of 15 years and in addition to conviction for heroin trafficking at the age of 16, he was convicted on 43 counts of compulsory prostitution

La Cosa Nostra, which was formed in 1931 by the warring factions of Sicilian Mafia and Neapolitan Camorra organised criminal groups,⁹⁷² is composed of six families, which are Genovese, Lucchese, Bonanno,⁹⁷³ Colombo (Profaci), Gambino and Buffalo.⁹⁷⁴

Southwell states that, although organised crime is as old as civilization itself, the image and mythology of Cosa Nostra is so powerful that it often almost seems as if the underworld was invented in the USA.⁹⁷⁵ Before the Italian-American organised crime became synonymous with Mafia, it was known by a handful of other identifiers such as Black Hand, Mala Vita, Unione Siciliana and ultimately La Cosa Nostra.⁹⁷⁶ Scotti concludes that La Cosa Nostra is the principal organised criminal group in the USA which is involved in gambling, drug trafficking, business racketeering, prostitution rings and black market trade.⁹⁷⁷ The FBI and Kelly agree that the primary organised criminal group in the USA is La Cosa Nostra.⁹⁷⁸

The Cosa Nostra has never been the only player of organised crime in the USA. Kelly sums it up well by stating that there are new crime lords that are far more

in 1943; these continued and in 1935 he was convicted on 62 counts of white slavery and sentenced to 30-50 years imprisonment; see Lewis *Honoured Society* 17, Balsamo and Carpozi *Crime Incorporated* 255 and 262 and Reppetto *American Mafia* 133.

⁹⁷²Kelly *Encyclopedia of Organized Crime* 178 and Griffin *Mob Nemesis* 28-29.

⁹⁷³Joseph Bonanno was born in 1905 and illegally entered America in 1924, see Fox *Blood and Power* 41. Carlo's version is that Joseph Bonanno emigrated in 1903 with his family, see Carlo *The Butcher* 65.

⁹⁷⁴Southwell *History of Organized Crime* 39-47. Marion *Organized Crime* 59 and Peterson *The Mob* 390-409, mention five families that exclude Buffalo family. Roth *Organized Crime* 98 shows that Colombo and Profaci is the same family.

⁹⁷⁵Southwell *History of Organized Crime* 27.

⁹⁷⁶Roth *Organized Crime* 95 and Peterson *The Mob* xi. Lombardo states that Black Hand (La Mano Nera) was not an organisation but a practice by which businessmen and other wealthy Italians were extorted for money. The term Black Hand came into use because the extortion letter sent to victims usually contained a drawing of a black hand and other evil symbols such as a dagger, skull and crossbones. See <http://www.ipsn.org/genesis.htm> last visited on 21 February 2008.

⁹⁷⁷Scotti *US and Italian Organized Crime* 1.

⁹⁷⁸FBI *La Cosa Nostra* 15 and Kelly *Organized Crime in the United States* 203.

sophisticated, more international and plainly more dangerous than La Cosa Nostra, the Sicilian Mafia or the Medellin/Cali cocaine cartels ever were.⁹⁷⁹ Various authors identified numerous organised criminal groups in the USA.⁹⁸⁰

7.4 CRIMES MOSTLY COMMITTED BY ORGANISED CRIMINAL GROUPS

Crime is defined by Reid as the commission of an act prohibited by criminal law or the failure to act as required by criminal law.⁹⁸¹ Skelton defines crime as any human behaviour defined and made punishable by law. He states that Jerome defines crime as any legally proscribed human conduct causative of a given harm which coincides with a blameworthy frame of mind, and for which punishment is provided.⁹⁸² The elements of crime, as applicable to the USA Criminal Justice System, are pointed out by Reid as being: a criminal act; a criminal state of mind; concurrence of a criminal act and a criminal state of mind; and causation.⁹⁸³ The very same elements are referred by Campbell and Ohm as *actus reus*; *mens rea*, harm; concurrence of *actus*

⁹⁷⁹Kelly *The Upperworld* 227.

⁹⁸⁰These organised criminal groups include the Know-Nothings, 40 Thieves and The Kerryonians, the Biker gangs or the One-Percent Biker Clubs (“1%oers”), the Hells Angels Motorcycle Club (HAMC), Pissed Off Bastards of Bloomington (POBOB), Bandidos Motorcycle Club, Outlaws Motorcycle Club, Pagons Motorcycle Club, Sons of Silence Motorcycle Club, La Eme (also called Mexican Mafia or MM or El Eme or La Hafia and Mafioso), La Nuestra familia, Aryan Brotherhood(AB), Bluebirds gang, Diamonds Tooth gang, Black Guerrilla, Black Mafia, African Americans, the Herrera family, Jamaican Posses, Short Tails, Plug Uglies, Dead Rabbits, Bowery Boys, Five Pointers, Whyos, Cherry Hill gang, Hudson Dusters, Gophess and Broadway mobs, Ragent’s Colts, Valley gang, Mike “King Mike” McDonald gang, John “Bathhouse” Coughlin gang, Michael “Hinky Dink” Kenna gang, William “Big Bill” Thompson gang, White Hand, Ghost Shadows, Flying Dragons, White Tigers, The Taiwan Boys, Tung On Boys, El Rukns, The Main 21, The Russian Mafia, the South American drug cartels, Asian Organised Crime groups, Bloods, Crips, Biker gangs, the Society of Friends, Organizatsiya, The Latin Kings and the Latin Queens. See Cressey *Theft of the Nation* 17, Kleinknecht *Organized Crime in America* 281, Ryan *Organized Crime Handbook* 31, 37, 48, 49, 51 and 55, Abadinsky *Organized Crime* 71, Fox *Blood and Power* 36, Thio *Deviant Behavior* 374, Lyman and Potter *Organized Crime* 202-237, Ryan *Organized Crime Handbook* 31, Five Points gang, Ryan *Organized Crime Handbook* xiii, Marion *Organized Crime* 21, Barker *Biker Gangs* 76-83, Kelly *Organized Crime* 338 and Southwell *History of Organized Crime* 107-112.

⁹⁸¹Reid *Criminal Law* 13.

⁹⁸²Skelton *Criminal Law* 16.

⁹⁸³Reid *Criminal Law* 29.

reus and *mens rea*; legality; causation and punishment.⁹⁸⁴

Lyman and Potter identified the following crimes as mostly being committed by organised criminal groups in the USA: gambling, prostitution, importation of illegal commodities such as liquor, distribution of opiates and cocaine, loansharking, bootlegging and moonshining with both illegal liquor activities, corruption, pornography, trafficking in gems and gold, trafficking in arms and ammunition, counterfeiting, environmental crime, labour racketeering,⁹⁸⁵ business racketeering, high-tech crime, intellectual property violations, trafficking in women and children and money laundering.⁹⁸⁶ Marion adds extortion, trash removal, ration stamps, gasoline excise taxes⁹⁸⁷ and protection rackets on the list of these crimes.⁹⁸⁸

Southwell states that automobile theft is often thought to be a crime that is predominantly perpetrated by juvenile joyrides or solo thieves. However, the obtaining, modifying and transportation of stolen motor vehicles has increasingly become a large-scale transnational, illicit enterprise involving co-operation between criminal networks or different continents. His observation is that, although the sophistication of anti-car theft measures during the 1990s reversed an increasing trend in stolen automobiles, it did little to impact on the organised crime element of the problem. As it became more difficult to distribute stolen vehicles within national

⁹⁸⁴Campbell and Ohm *Legal Ease* 13.

⁹⁸⁵Kelly describes labour racketeering as the intrusion of members of criminal groups into positions of authority or power within labour unions; see Kelly *Encyclopedia of Organized Crime* 177.

⁹⁸⁶Lyman and Potter *Organized Crime* 135-183. While Kelly *Encyclopedia of Organized Crime* 192, states that loansharking is also called usury, which is the lending of money at a rate of interest that exceeds the legal limits, Sifakis *Mafia Encyclopedia* 217, states that loansharking is also known as shylocking or six-for-five. The terms loansharking and shylocking are similarly used by Pace *Vice, Narcotics and Organized Crime* 142 whose definition of loansharking is transaction at usurious or exorbitant rates of interest usually without collateral and with fear of physical force to guarantee payment.

⁹⁸⁷Block *Space and Time* 307, dubs these types of crimes as fuel-related tax scams.

⁹⁸⁸Marion *Organized Crime* 15-19.

borders, gangs turned towards illicitly exporting cars outside of their country of origin. He cites the examples of cars stolen from Britain finding their way in Pakistan and China as well as those stolen from the USA finding their way to Canada, Kuwait and Saudi Arabia.⁹⁸⁹

According to Bezlov and Gounev, the FBI reports that 1.2 million vehicles worth \$7.6 billion were stolen in the USA in 2005.⁹⁹⁰ Some vehicles are hijacked. Reid defines carjacking as the theft of a motor vehicle by use of force or the threat of force, especially force involving a deadly weapon. She describes it as auto theft by force or threat of force.⁹⁹¹ Skelton points out that the crime of theft combine the old crime of larceny, embezzlement and obtaining by false pretences into a single crime.⁹⁹² Larceny was defined as the caption (taking) and asportation (carrying away) of the personal property of another with the intent to deprive the owner permanently of the property.⁹⁹³ While Bergman and Berman refer to theft as larceny, Singer and La Fond simply state that larceny is a taking out of the possession of another.⁹⁹⁴

The Yakuza organised criminal group was involved in crimes that included prostitution, gambling, extortion, loan sharking rackets, control of construction and labour forces, narcotics and arms smuggling, pornography, money laundering and blackmailing.⁹⁹⁵ With regards to arms trade, Southwell states that this is one of the oldest technology-driven industries in the world. He further indicates that conflict and warfare always creates a market for weaponry, especially where advances in weapon technology can give one side a dramatic advantage. Accordingly, organised

⁹⁸⁹Southwell *History of Organized Crime* 45.

⁹⁹⁰Bezlov and Gounev *The Vehicle Market* 71.

⁹⁹¹Reid *Criminal Law* 238-239. See also the Federal Anti-car Theft Act of 1992, which is Public Law 102-519 – 25 October 1992.

⁹⁹²Skelton *Criminal Law* 133.

⁹⁹³Skelton *Criminal Law* 129 and Singer and La Fond *Criminal Law* 217-218.

⁹⁹⁴Singer and La Fond *Criminal Law* 215 and Bergman and Berman *Criminal Law* 278.

⁹⁹⁵*Id* n 989 *supra* at 58-66.

criminal groups have no qualms even in supplying to both sides in a conflict because their motive is profit.⁹⁹⁶ It is disturbing to note that when tipped about the raids by the police, they will leave some guns for the police to find so the law officers can declare a success. In some instances, they will allow a junior Yakuza member to be arrested to satisfy all the parties.⁹⁹⁷

Organised criminal groups are not restricted to the commission of similar types of offences. As long as profit can be generated from a crime, it is likely that the syndicate will commit it. Such other crimes committed by the syndicates include murder, corruption, extortion, bribery, robbery, kidnapping, gambling, cigarette smuggling (buttlegging), tax evasion, drug trafficking, vice, arms dealing, people smuggling and fraud.⁹⁹⁸ Reid defines murder as the unlawful and unjustified killing of another human being with malice aforethought. She advances the elements of the crime as follows:

1. There must be an unlawful act (or omission) committed by a human being.
2. The act must be accompanied by the requisite *mens rea*.
3. The act must be the legal cause of the victim's death.
4. The victim must be a living human being.
5. Death must occur within a reasonable period.⁹⁹⁹

Skelton and Schiffman define murder as the unjustified, unexcused killing of one human being by another human being with malice aforethought.¹⁰⁰⁰

Some syndicates tend to focus on a particular type of commodity in committing crimes. The so-called Immortal and Invincible Society of Triads are said to be on the forefront of drug and people smuggling. They were also involved in extortion, illegal

⁹⁹⁶*Id* n 989 *supra* at 62.

⁹⁹⁷*Id* n 989 *supra* at 71.

⁹⁹⁸*Id* n 989 *supra* at 7.

⁹⁹⁹Reid *Criminal Law* 151.

gambling and prostitution.¹⁰⁰¹ Balsimo and Carpozi indicate that some crimes committed are gambling, drug trafficking, coin rackets, juke box business, trucking, pizza front operations, money laundering, prostitution, extortion, smuggling, counterfeiting, laundry services, restaurants, night clubs, labour unions, garbage hauling, beer and soft drink distributorship, garment manufacturing, ready-mix concrete and involved in sports.¹⁰⁰² Notably, Skelton points out that only Hawaii and Utah prohibited gambling entirely while the rest of the States legalized some form of gambling to generate revenue.¹⁰⁰³ Ryan states that the Hong Kong-based Triads are responsible for 30% of heroin being smuggled into the USA. The main crimes committed by the Triads are prostitution, gambling, loansharking, extortion and drug dealing.¹⁰⁰⁴

The Essex gang, which was led by Dick Turpin, was responsible for multifaceted organised crime in the form of liquor, tobacco, highway robbery and housebreaking.¹⁰⁰⁵ Robbery is one of the most serious offences.¹⁰⁰⁶ Reid defines robbery as the taking or attempting to take anything of value from the care, custody or control of a person or persons by force or threat of force or violence or by putting the victim in fear. She presents the elements of robbery as a tresspassory taking; a carrying away (asportation); of the personal property; of another, and with intent to steal.¹⁰⁰⁷ Hall adds the element of use of force or threat.¹⁰⁰⁸ The definition by Campbell and Ohm contain an additional word, namely 'actual violence'.¹⁰⁰⁹ Klotter

¹⁰⁰⁰Skelton *Criminal Law* 61 and Schiffman *Criminal Justice Process* 145.

¹⁰⁰¹*Id* n 989 *supra* at 73-74.

¹⁰⁰²Balsamo and Carpozi *Crime Incorporated* xiv. See also Fox *Blood and Power* 11.

¹⁰⁰³Skelton *Criminal Law* 176. Newton points out that in 1820 the state of Louisiana banned all forms of gambling until 1823 when it changed its mind; see Newton *Chronology of Organized Crime* 47 and 48.

¹⁰⁰⁴Ryan *Organized Crime Handbook* 51 and 51.

¹⁰⁰⁵Southwell *History of Organized Crime* 115.

¹⁰⁰⁶Ashworth *Criminal Law* 382.

¹⁰⁰⁷Reid *Criminal Law* 176-177. See definition as captured in *Crime in the US* at 16 and 498.

¹⁰⁰⁸Hall *Criminal Law* 171.

¹⁰⁰⁹Campbell and Ohm *Legal Ease* 53.

submits that robbery at common law is the taking with intent to steal, property in the possession of another, from his person, or in his presence, by violence or by putting him in fear.¹⁰¹⁰ Schiffman defines robbery as the taking and carrying away of the personal property of another from his person or in his presence by use of force or threat of force, with the intent to deprive the owner permanently of the property.¹⁰¹¹ Davenport defines it as the taking of personal property from the person of another against his will, by either force or threat of force.¹⁰¹²

In describing robbery, Cross states that it is theft where an accused uses force against the victim immediately before or during the theft, or tries to put the victim in fear of being subjected to unlawful force at this time, in order to steal.¹⁰¹³ He defines theft as the dishonest appropriation of someone else's property with the intention of permanently depriving them of it.¹⁰¹⁴ Chamelin simply states that when one illegally takes property with some value from another person or in the person's presence, by using force or by threatening to use force, the common law crime of robbery has been committed.¹⁰¹⁵ Torcia states that at common law, robbery consists of larceny plus two aggravating circumstances.¹⁰¹⁶ Skelton states that robbery is common law larceny plus two other elements; it is the caption and asportation of the personal property of another with the intent to deprive the owner permanently of the property where the property is taken by the use of force or fear, and the property is taken from the person or in the presence of the victim.¹⁰¹⁷ In *State v Pitts*,¹⁰¹⁸ the accused locked the complainant into a cell before taking a moneybag from a drawer in the control room. The court ruled this act to be robbery.

¹⁰¹⁰Klotter *Criminal Law* 210.

¹⁰¹¹Schiffman *Criminal Justice Process* 150.

¹⁰¹²Davenport *Basic Criminal Law* 159.

¹⁰¹³Cross *Criminal Law* 164.

¹⁰¹⁴*Id* n 1013 *supra* at 156.

¹⁰¹⁵Chamelin *Criminal Law* 197.

¹⁰¹⁶Torcia *Criminal Law IV* 2.

¹⁰¹⁷Skelton *Criminal Law* 134-135.

As observed, there are various definitions of robberies that are influenced by the various descriptions of the phenomenon in the USA. She (USA) defines robbery as follows:

Robbery means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.¹⁰¹⁹

The examples of the various descriptions of federal robbery offences are as follows:

1. Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.¹⁰²⁰
2. Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years.¹⁰²¹
3. Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association, ... shall be fined not more than \$5 000 or imprisonment not more than twenty years, or both.¹⁰²²
4. Whoever assaults any person having lawful charge, control, or other property of the United States, with intent to rob, steal or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned not more than twenty-five

¹⁰¹⁸1985.

¹⁰¹⁹Title 18 Chapter 95 Section 1951.

¹⁰²⁰Special maritime and territorial jurisdiction: Title 18 Chapter 103 Section 2111.

¹⁰²¹Personal property of the United States: Title 18 Chapter 103 Section 2112.

¹⁰²²Bank robbery and incidental crimes: Title 18 Chapter 103 Section 2113(a).

years.¹⁰²³

5. Whoever, by violence, enters a post-office car, or any part of any car, steamboat, or vessel, assigned to the use of the mail service, or wilfully or maliciously assaults or interferes with any postal clerk in the discharge of his duties in connection with such car, steamboat, vessel, or apartment thereof, shall be fined not more than \$1 000 or imprisonment not more than three years, or both.¹⁰²⁴
6. Whoever takes or attempts to take from the person or presence of another by force or violence or by intimidation any material or compound containing any quantity of a controlled substance belonging to or in the care, custody, control, or possession of a person registered with the Drug Enforcement Administration under Section 302 of the Controlled Substances Act (21 USC. 822) shall, except as provided in subsection (c), be fined not more than \$25 000 or imprisoned not more than twenty years, or both, if (1) the replacement cost of the material or compound to the registrant was not less than \$500, (2) the person who engaged in such taking or attempted such taking travelled interstate or foreign commerce to facilitate such taking or attempt, or (3) another person was killed or suffered significant bodily injury as a result of such taking or attempt.¹⁰²⁵

The ultimate result is that various jurists and criminologists will construct their definitions aligned to any of the above mentioned descriptions. Robbery is simply stealing with force.¹⁰²⁶

Other crimes include child prostitution where criminals fallaciously believed in a myth that having sex with a virgin could cure syphilis. This necessitated the trafficking of children from France to Britain.¹⁰²⁷ Gardner tenders a list of what he calls victimless crimes in which organised criminal groups engage themselves in. These are gambling, drugs, prostitution and pornography. He believes that supplying

¹⁰²³Mail, money or other property of United States: Title 18 Chapter 103 Section 2114.

¹⁰²⁴Railway or steamboat post office: Title 18 Chapter 103 Section 2116.

¹⁰²⁵Robberies and burglaries involving controlled substances: Title 18 Chapter 103 Section 2118.

¹⁰²⁶Padfield *Criminal Law* 243.

¹⁰²⁷Southwell *History of Organized Crime* 116.

these conditions is relatively free of risk.¹⁰²⁸ Kwinty insinuates that the crimes by criminal groups include the so-called victimless crimes where he mentions prostitution, pornography, betting, marijuana and other non-violent crimes.¹⁰²⁹

The USA is not immune to the crimes of protection rackets, illegal gambling, counterfeiting of goods and copyright piracy that includes DVDs, CDs computer software, designer clothes, perfume, cigarettes and alcohol, fake pharmaceutical products and medicines, trafficking in human organs and trafficking children for sexual exploitation.¹⁰³⁰ According to Zhang and Pineda, human trafficking has gained wide attention in both developed and developing countries. In their view, it was the third-largest criminal industry in the world in 2006 after the arms and drugs trade. It generates \$9.5 billion in the USA annually.¹⁰³¹ Orthodoxically, Bales and Soodalter assert that there are approximately 27 million people in bondage, which it is thought to be the third most profitable criminal enterprise of our time, following drugs and guns.¹⁰³²

Put differently, Stoecker states that intelligence estimates that between 800 000 and 900 000 women and children are deceived, recruited, transported from their homes, and sold into slavery throughout the world per year.¹⁰³³ Kara states that there are a number of Mexican prostitutes who have been smuggled into the USA.¹⁰³⁴ Shanty and Mishra concludes that human trafficking has become a lucrative business for organised crime.¹⁰³⁵ In corroborating this view, Aradau points out that some 2.5 million people throughout the world are at any given time recruited, entrapped,

¹⁰²⁸Gardner *Criminal Law* 503.

¹⁰²⁹Kwinty *Vicious Circles* 70.

¹⁰³⁰Southwell *History of Organized Crime* 154.

¹⁰³¹Zhang and Pineda *Human Trafficking* 41 and Bjelopera and Finklea *Organized Crime* 3.

¹⁰³²Bales and Soodalter *Slave Next Door* 3.

¹⁰³³Stoecker *Human Trafficking* 13.

¹⁰³⁴Kara *Sex Trafficking* 189.

¹⁰³⁵Shanty and Mishra *From Trafficking to Terrorism* 779.

transported and exploited in a process of human trafficking.¹⁰³⁶

Human trafficking is criminalised under Chapter 77 of the USA Criminal Code. It provides as follows:

Whoever knowingly recruits, harbours, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.¹⁰³⁷

The movement of persons from one locality to the other requires a number of various roleplayers. Although there is no case study in this regard, it is classified as organised activity in the context of the Palermo Convention.

According to Cressey, the American confederation of criminals thrives because a large minority of citizens demand the illicit goods and services it has for sale.¹⁰³⁸ Madsen and Schelling support this view and the former states that organised crime is not necessarily imported into the country but that it is a symbiotic societal phenomenon, which satisfies demands for illicit goods and services.¹⁰³⁹ The submission by Southwell that the greatest tools to fighting organised crime are public awareness, understanding and education finds application.¹⁰⁴⁰ The ultimate solution would not be achieved by law enforcement alone but, the changing of human weakness by recognizing the fallacy of social acceptability of activities that create organised crime and developing the ability to establish a consistent public

¹⁰³⁶Aradau *Trafficking in Women* 12.

¹⁰³⁷Title 18 Chapter 77 Section 1590(a) of the United States Code: Peonage, Slavery and Trafficking in Persons.

¹⁰³⁸*Id* n 1 *supra* at 72.

¹⁰³⁹Madsen *Organized Crime* 13-14 and Schelling *Organized Crime* 261.

¹⁰⁴⁰Southwell *Dirty Cash* 205.

attitude toward the suppression of these crimes.¹⁰⁴¹

Cressey states that the Cosa Nostra members were involved in gambling, usury, bribery, perjury, fraud, extortion, kidnapping, murder, labour unions, race tracks, vending and liquor.¹⁰⁴² He attests that for every corrupter, there must be at least one corruptee. According to him, many policemen and public officials have been sought out and wooed to a position of corruptee.¹⁰⁴³

Beare argues that organised crime involves supplying a desired commodity or service that for some reason has been classified as illegal or illegitimate. She concludes that as long as there continues to be a market for illicit items and services, someone will offer to fill the void and violate the formal laws of the society in order to supply the market in exchange for considerable profit.¹⁰⁴⁴ Southwell states that the diamonds, gems and precious metals such as gold and platinum, have an established role as an internationally accepted alternative to hard currency and have always played a major part in the modern underworld.¹⁰⁴⁵ These crimes are the manifestation of organised crime. This absurdity of exchanging permanent commodity of gold for “a free-poison” heroin has been observed in the Golden Crescent (Iran, Afghanistan and Pakistan) and the Golden Triangle (Laos, Thailand and Myanmar).¹⁰⁴⁶ Lyman and Potter group these crimes as provision of illicit services, provision of illicit goods, conspiracy to commit crimes, penetration of legitimate business, extortion and corruption.¹⁰⁴⁷ Steffen and Candelaria, state that the Albuquerque Police Department, New Mexico states that Narcotic trafficking is a global issue and illicit

¹⁰⁴¹Pace *Vice, Narcotics and Organized Crime* 4.

¹⁰⁴²*Id* n 1 *supra* at 123.

¹⁰⁴³*Id* n 1 *supra* at 252. Corruption is discussed under paragraph 9.3.14 *infra*.

¹⁰⁴⁴Beare *Criminal Conspiracies* 39 and 40.

¹⁰⁴⁵Southwell *History of Organized Crime* 98.

¹⁰⁴⁶Naylor *The Underworld of Gold* 429. See also Abadinsky *Drug Abuse* 257 and 257 as well as Chin *The Golden Triangle* 8.

¹⁰⁴⁷Lyman and Potter *Organized Crime* 136.

drug market in the USA, and is one of the most profitable in the world which attracts aggressive and sophisticated drug traffickers and organisations.¹⁰⁴⁸

Although an attempt to commit a crime is a crime on its own, it is important to look at it from an organised crime point of view. Attempt to commit any of the crimes mentioned above is criminal. Reid submits that attempt is an act involving two basic elements: a step toward the commission of a crime and a specific intent to commit that crime.¹⁰⁴⁹ Skelton submits that attempt to commit a crime is itself a crime.¹⁰⁵⁰

In terms of the Model Penal Code, criminal attempt is defined as follows:

A person is guilty of an attempt to commit crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or (c) purposely does or omits to do anything, which under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.¹⁰⁵¹

In the case of *Mohan*,¹⁰⁵² attempt was defined as a decision by the accused to bring about, so far as it lay within his power, the commission of the offence which it was alleged that he had attempted to commit, no matter whether the accused desired that consequence of his act or not. This definition is the same as that of *Molan*, *Lanser* and *Bloy*.¹⁰⁵³

As a point of departure, perpetrators of organised crime usually start by committing

¹⁰⁴⁸Steffen and *Candelaria Drug Interdiction* 1.

¹⁰⁴⁹Reid *Criminal Law* 53.

¹⁰⁵⁰Skelton *Criminal Law* 222.

¹⁰⁵¹Reid *Criminal Law* 54 and Robinson *Criminal Law* 461. The Model Penal Code is a draft law that was drafted by group of legal experts to be adopted by the legislature, see Hall *Criminal Law* 49.

¹⁰⁵²[1975] 2 All ER 193.

a specific crime that is listed as a Schedule in the RICO. These perpetrators will be prosecuted in terms of these crimes and the gathering of evidence is governed by the specific Acts. Roth includes the following crimes as being perpetrated by organised criminal groups in the USA: Gambling, drug trafficking, alcohol, prostitution, money laundering, usurious money lending (loan sharking), labour racketeering, organized theft and fraud schemes, fraud (bust out), mortgage property, insurance fraud, weapon smuggling, smuggling antiques, diamond smuggling, organ trafficking, trash hauling, scamming, betting, intimidation, extortion and racketeering.¹⁰⁵⁴

The Nigerian drug gangs have a highly developed knowledge of American identity papers, which helps them to facilitate the movement of heroin from the Golden Crescent, which include Iran, Afghanistan and Pakistan.¹⁰⁵⁵ Southwell states that Interpol and FBI point out that there are more than 500 Nigerian gangs operating in between 60-80 countries worldwide. He concludes that Nigeria is the hub of organised crime in Africa and involved in drug trafficking, trafficking in children for sexual exploitation, bush meat smuggling, fraud and corruption. Many of the Nigerian syndicates operate the 4-1-9 scams. The young members involved in luring people in other countries to send money or provide their banking details are called “yahoo-yahoo boys”.¹⁰⁵⁶

According to Ryan, organised criminal groups make money in any way they can. He cites the most common money-making devices used by the American version of organised criminal organizations as including gambling, bookmaking, the numbers racket, illegal casinos, loansharking, labour racketeering, fencing, money

¹⁰⁵³Molan, Lanser and Bloy *Criminal Law* 180-181.

¹⁰⁵⁴Roth *Organized Crime* 233-234.

¹⁰⁵⁵Ryan *Organized Crime Handbook* 59, Richards *Criminal Organizations* 264, Lyman and Potter *Organized Crime* 287 and Abadinsky *Drug Abuse* 257. Chin *The Golden Triangle* 1 rates Afghanistan and Myanmar as the largest and second largest respective producers of opium in the world.

laundering, drug distribution, skimming, dealing in stolen securities and the scamming (infiltration of legitimate business).¹⁰⁵⁷ Reid emphasises money laundering which she defines as a process of concealing the existence, source and disposition of money secured from illegal sources. She describes it as hiding the existence, illegal use of, or illegal source of income and making that income appear legal by disguising it.¹⁰⁵⁸

In conclusion, it worth noting that the list of crimes committed by organised criminal groups is by no means exhaustive. Criminal organizations can commit any crime that will make it possible, one way or the other, to benefit financially. The list of crimes committed by organised criminal groups pointed out above is conclusive proof of the inexhaustiveness thereof. Ryan summarises it correctly by stating that organised criminal groups make money in any way they can.

7.5 RESPONSES TO THE CHALLENGE POSED BY ORGANISED CRIMINAL GROUPS

Rhodes points out that the principal problem in controlling organised crime and racketeering is gathering evidence because it is secretive, often violent, and always conspiratorial with very few angry victims eager to testify.¹⁰⁵⁹ President Johnson of the USA (1963-1969) describes organised crime as eroding the country's system of justice in all spheres of government. He compares it with a war that takes the scores of the lives each year in gang violence; a war in which billions of dollars are drained off by illegal gambling, narcotics, prostitution, loan-sharking, arson, and other forms

¹⁰⁵⁶Southwell *History of Organized Crime* 147 and 148.

¹⁰⁵⁷Ryan *Organized Crime Handbook* 10.

¹⁰⁵⁸Reid *Criminal Law* 468 [This refers to the 7th edition of 2007 as she has omitted this definition in her 8th edition].

¹⁰⁵⁹Rhodes *Organized Crime* 2.

of racketeering. He concludes that this crime is a shame of a modern nation.¹⁰⁶⁰ In responding to this challenge, it is believed that the Americans keep these concerns in mind. President Bill Clinton (1993-2001) and President George W Bush (2001-2009) understood that organised crime needs to be fought on an international plane.¹⁰⁶¹

7.5.1 Legislative response

It needs to be pointed out at the outset that organised criminal groups will violate a number of laws that will, when repeated, constitute a pattern of racketeering activity, which is organised crime. The laws of the USA are codified.¹⁰⁶² According to Klotter, common law that applied in the USA during the English colonial era is still relevant. Although the states laws are codified, Klotter and Loewy state that where the state has not defined a particular common law crime in its statute, the common law definition is applied.¹⁰⁶³

Campbell and Ohm point out that the sources of American law are the United States Constitution, acts of Congress, state constitutions, state statutes and territorial legislative acts and the common law. They explain the ranking and supremacy of the laws which is simply explained as follows:

- The law of the Constitution is greater than an act of Congress.
- When an act of Congress is in conflict with the Constitution, it is rendered void.
- In case a valid act made by Congress clashes with a state constitutional

¹⁰⁶⁰Marion *Organized Crime* 297.

¹⁰⁶¹*Id* n 1060 *supra* at 313-314.

¹⁰⁶²In terms of section 1 of Act June 25, 1948, ch. 645, 62 Stat. 683, Title 18 of the US Code, entitled Crimes and Criminal Procedure is codified and enacted into positive law that may be cited Title 18, U.S.C., §... The laws under this title are Federal Laws binding on all the states.

¹⁰⁶³Klotter *Criminal Law* 7 and Loewy *Criminal Law* 281.

provision, the latter is rendered useless.

- If a provision of a state constitution goes against the statute or law of the same state, the state law is voided.
- If a law of a state or one of its territorial legislatures conflicts with a common law provision, the latter is rendered ineffective.¹⁰⁶⁴

The statutory laws are governed by the principle of legality, which is entrenched in the USA Constitution, which provides as follows:

- No bill of attainder or *ex post facto* law shall be passed.¹⁰⁶⁵
- No state shall pass any *ex post facto* law.¹⁰⁶⁶

Kanovitz explains that a bill of attainder is a legislative act that brands a person a criminal without a trial as declaration of guilty is the responsibility of the courts. He further explains that *ex post facto* simply means ‘after the fact’.¹⁰⁶⁷ Klotter states that while the legislature is permitted to define criminal offences in any way it chooses, its decision must not be arbitrary or violative of the Constitution. If the legislation is contrary to the provisions of either the federal or state constitution, it is unconstitutional and unenforceable.¹⁰⁶⁸

Abadinsky alluded that organised crime involves the violation of numerous laws. These include laws against gambling, drugs, prostitution, extortion, assault and murder.¹⁰⁶⁹ In response to the challenge posed by organised criminal groups, the

¹⁰⁶⁴Campbell and Ohm *Legal Ease* 11.

¹⁰⁶⁵Article I, Section 9 clause 3 of the US Constitution. See US Code Annotated: Constitution of the US Annotated Articles 1, Section 8, Clause 3 to Section 10, clause 1 at 400. See also Klotter *Criminal Law* 12, Hall *Criminal Law* 277 and Kanovitz *Constitutional Law* 16.

¹⁰⁶⁶See US Code Annotated: Constitution of the US Annotated Articles 1, Section 8, Clause 3 to Section 10, clause 1 at 495. See also Loewy *Criminal Law* 278.

¹⁰⁶⁷Kanovitz *Constitutional Law* 16.

¹⁰⁶⁸Klotter *Criminal Law* 8 and 10.

¹⁰⁶⁹*Id* n 242 *supra* at 363.

USA has passed various laws including the Internal Revenue Code of 1986 (U.S.C Title 26), Controlled Substances Act, Racketeer Influenced and Corrupt Organizations (RICO)(18 U.S.C.ss 1961-1968), Continuing Criminal Enterprise (CCE) statute (21 U.S.C. s 848), Consumer Credit Protection Act (CCPA) (18 U.S.C ss 891-894), Anti money laundering provisions, Organized Crime Control Act (Title IX of 1970), and The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001.¹⁰⁷⁰

In terms of the Internal Revenue Code, criminals are similarly compelled to file income returns including illegally gained earnings. Failure to do so is punishable. This law also establishes the Internal Revenue Services (IRS) to conduct criminal investigations.¹⁰⁷¹

The USA passed the Harrison Narcotics Act on the 14 December 1914 in response to the more than 500 000 opiates addicts affected by drug traffickers.¹⁰⁷² This Act criminalised the selling or giving away of opium or opium derivatives and coca or its derivatives without written order on a form issued by the Commissioner of Revenue.¹⁰⁷³ It was also responding to the first International drug-control initiative, the 1909 Shanghai Opium Commission.

The USA enacted the USA PATRIOT Act of 2001, a complement to the Palermo Convention and Sections 373 that amends 18 USC 1960 to prohibit unlicensed money transmitting business from transferring funds.¹⁰⁷⁴ Amongst the issues addressed by this Act is money laundering which is described by Doyle as the flow of

¹⁰⁷⁰PL 107- 56, 115 statutes s 272, 2001.

¹⁰⁷¹Abadinsky *Organized Crime* 363.

¹⁰⁷²This Act was named after Representative Francis Burton Harrison of New York State.

¹⁰⁷³According to Himmelsbach *Opiate Addiction* 21, the term opiate is used to include narcotic drugs derived from opium such as morphine, heroin, and codeine.

¹⁰⁷⁴Lyman and Potter *Organized Crime* 342 and 388 and Mallory *Organized Crime* 231.

cash or other valuables derived from, or intended to facilitate, the commission of a criminal offence. It is the movement of the fruits and instruments of crime.¹⁰⁷⁵ Baldwin and Munro state that money laundering begins with dirty money, which is tainted through tax evasion or illegal generation.¹⁰⁷⁶ This Act increased the ability of law enforcement agencies to search telephone and e-mail communications, medical and financial records.¹⁰⁷⁷

The Comprehensive Drug Abuse Prevention and Control Act of 1970 allowed the placements of Federal narcotic agents to work in local communities. The Comprehensive Crime Control Act of 1984 supplemented this law. The latter authorized the doubling of sentences for drug statute offenders with previous domestic or foreign drug convictions. The Anti-Drug Abuse Act of 1986 imposes mandatory prison sentences for certain drug offenses and mandatory doubling of the minimum penalties for offenders with prior drug offences convictions.¹⁰⁷⁸ It also provides for the seizure of assets under certain conditions.¹⁰⁷⁹

The Bank Secrecy Act (BSA) of 1970 (Title I and II of the Public Law 91-508) and the Currency and Foreign Transactions Reporting Act (31 USC s 5311) which require financial institutions to keep records of financial transactions, require banks to submit reports of certain transactions and provide records for investigations if required to do so, were also passed.¹⁰⁸⁰ The Money Laundering Act of 1992, the Annunzio-Wylie Money Laundering Act of 1992 and the Money Laundering Suppression Act (MLSA) of 1994 gave the Treasury Department various tools to fight money laundering. These Acts enhanced the effectiveness of law enforcement

¹⁰⁷⁵Doyle *Legal Analysis of PATRIOT Act* 22 and Doyle *Sketch of PATRIOT Act* 116.

¹⁰⁷⁶Baldwin and Munro *Money Laundering* 3.

¹⁰⁷⁷Abadinsky *Organized Crime* 372 and Albanese *Organized Crime* 379.

¹⁰⁷⁸See also Abadinsky *Organized Crime* 364-365.

¹⁰⁷⁹See section 881 of the Act.

¹⁰⁸⁰*Id* n 242 *supra* at 377.

agencies in dealing with money laundering.¹⁰⁸¹

The conspiracy, the Continuing Criminal Enterprise (CCE), the Omnibus Crime Control and Safe Streets Act of 1968, Federal Witness Protection Program, the RICO and the Street Gangs Act are the most important pieces of legislation used as the major weapons by the government in fighting organised crime.¹⁰⁸²

The conspiracy laws stipulates as follows:

If two or more persons conspire either to commit any offence against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10 000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanour only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanour.¹⁰⁸³

This provision is intended to deal with people who conspire to commit any crime.

Title 18 Chapter 95 sections 1951-1959 are designed to deal with specific forms of racketeering. These sections are collectively known as the Hobbs Act.¹⁰⁸⁴ These laws criminalise engagement in criminal behaviour that interferes with commerce.¹⁰⁸⁵ The nine sections deals with the following:

¹⁰⁸¹*Id* n 1071 *supra* at 378.

¹⁰⁸²Ryan *Organized Crime Handbook* 92 and Albanese *Organized Crime* 250.

¹⁰⁸³U.S.C. Title 18 Chapter 19 Section 371.

¹⁰⁸⁴This law was enacted in 1946. See also Mallory *Organized Crime* 224.

¹⁰⁸⁵The word racketeering which has not been defined in this chapter, should have been spared to avoid overutilization and confusion. This view is based on the fact that the crimes under Sections 1952-1958 are included in the definition of racketeering under Section 1961 of the RICO. The word such as drug related offence could suffice. It is worth mentioning that ss 1951-1955 are also known as the Hobbs Act, which is named after Sam Hobbs. See also Abadinsky *Organized Crime* 366.

Section	Prohibition
1951(a)-(c)	Interference with commerce by threats of violence.
1952(a)-(c)	Interstate and foreign travel or transportation in aid of racketeering enterprises.
1953(a)-(e)	Interstate transportation of wagering paraphernalia.
1954(1)-(4)	Offer, acceptance, or solicitation to influence operations of employee benefit plan.
1955(a)-(e)	Prohibition on illegal gambling business.
1956(a)-(f)	Laundering of money instruments.
1957(a)-(f)	Engaging in monetary transactions in property derived from specified unlawful activity.
1958(a)-(b)	Use of interstate commerce facilities in the commission of murder-for-hire.
1959(a)-(b)	Violent crimes in aid of racketeering activity.

Figure 7.1: Sections of the Hobbs Act and the prohibitions (**Source:** Hobbs Act 1946)

In 1970, the Racketeer Influenced and Corrupt Organization (RICO), which is the primary law of addressing organised crime, was promulgated. The RICO is a chapter in the Organized Crime Control Act of 1970 (OCCA) which is Public Law 91-452 Title IX.¹⁰⁸⁶ The RICO deals with the following:

Section	Prohibition		Section	Prohibition
1961	Definitions of terms.		1965	Venue and process.
1962	Prohibition of racketeering activities.		1966	Expedition of actions.
1963	Penalties		1967	Evidence.
1964	Civil remedies		1968	Civil Investigative demand.

Figure 7.2: Sections of the RICO and the prohibitions (**Source:** RICO 1970)

Gurulé states that the RICO statute is focussed at the dismantling of an entire criminal enterprise rather than prosecuting individual members of those illegal enterprises. It is further not limited to drug trafficking violations but covers diverse criminal activity such as bookmaking, bank fraud, wire fraud, extortion, drug trafficking and violent criminal activity.¹⁰⁸⁷ The Act has the requirements of a

¹⁰⁸⁶Low *Criminal Law* 628. See also Kelly and Schatzberg *Organized Crime* 141.

¹⁰⁸⁷Gurulé *Criminal Litigation* 3.

person; conducts a pattern; of racketeering activity or collection of unlawful debt; through (a) an investment (b) maintenance of interest or (c) participation in, and enterprise for the purpose of prosecutions.¹⁰⁸⁸ The elements are listed in the American Crime Review as two or more predicate acts of racketeering activity, pattern, enterprise, effects on interstate commerce and prohibited acts.¹⁰⁸⁹ Hall provides these elements as follows: defendant received money or income; from a pattern of racketeering activity; invested that money in an enterprise; and which is in the interstate commerce or affects interstate commerce.¹⁰⁹⁰

In *US v Turkette*,¹⁰⁹¹ the Supreme Court of the USA was approached on a question as to whether the term ‘enterprise’ as used in RICO of 1970 encompasses both legitimate and illegitimate enterprise or is limited in application to the former.¹⁰⁹² Tersely, the case involved thirteen accused who were charged on nine counts of conspiracy to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C Section 1962(d) and eight counts of insurance fraud committed through arson, possession and distribution of controlled substances where they were convicted and sentenced.

The indictment described the enterprise as “a group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the USA mails to defraud insurance companies, bribing and attempting to bribe local police officers and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings”.... The argument of the respondent was based on the ground that the RICO was intended solely to protect legitimate business enterprises from infiltration by racketeers and

¹⁰⁸⁸Ryan *Organized Crime Handbook* 176.

¹⁰⁸⁹33 Am. Crim. L. Rev. 933 (1995-1996) and 35 Am. Crim. L. Rev. 1103-1165 at 1104.

¹⁰⁹⁰Hall *Criminal Law* 167.

¹⁰⁹¹452 US 576 (1981).

¹⁰⁹²Low *Criminal Law* 587 and Gurulé *Criminal Litigation* 67.

that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise. This is the argument that the Court of Appeal agreed, but the Supreme Court reversed this.¹⁰⁹³ The Supreme Court stated that in determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of “a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. The court ruled that the definition of ‘enterprise’ include both legitimate and illegitimate enterprise.¹⁰⁹⁴

In *Boyle v United States*,¹⁰⁹⁵ Boyle and others committed a series of bank thefts in several states where participants included a core group with others recruited from time to time. This loosely and informally organised core group lacked a leader, hierarchy or any long-term master plan. The court held amongst others that, an association-in-fact enterprise under RICO must have a “structure,” but the pertinent jury instruction need not be framed in the precise language Boyle proposes, that is, having “an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages”.¹⁰⁹⁶

In terms of the Tennessee Racketeer Influenced and Corrupt Organization (RICO) Act of 1989, ‘enterprise’ means any individual, sole proprietorship, partnership, corporation, business trust, union, chartered under the laws of this state, or other legal entity, or any uncharted union, association, or group of individuals associated in fact, although not a legal entity, and it includes illicit as well as licit enterprises and government, as well as other entities.¹⁰⁹⁷ This definition specifically includes

¹⁰⁹³Low *Criminal Law* 588 and Brickey *Corporate Crime* 418.

¹⁰⁹⁴452 US 576 (1981). See also Low *Criminal Law* 587-596 and Podgor and Israel *RICO* 135.

¹⁰⁹⁵(No 07-1309) 283 Fed. Appx. 825.

¹⁰⁹⁶(No 07-1309) 283 Fed. Appx. 825 at 4-12.

¹⁰⁹⁷Section 39-12-203(3) of Racketeer Influenced and Corrupt Organization Act of 1989. This

criminal and legal enterprises.

In terms of Section 848(a) of the Continuing Criminal Enterprise statutes, Title 21 of the United States Code, continuing criminal enterprise is defined as follows:

For purposes of subsec (a) of this section, a person is engaged in a continuing criminal enterprise if (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter - (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organiser, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources.¹⁰⁹⁸

Various states in the USA have defined enterprise. The element of a criminal and a legal enterprise surfaces in many of these definitions. In Arizona, enterprise means any corporation, partnership, association, labour union or other legal entity or any group of persons associated in fact although not a legal entity.¹⁰⁹⁹ In Connecticut, enterprise means any individual, sole proprietorship, corporation, business trust, union chartered under the laws of this state or other legal entity, or any unchartered union, association or group of individuals associated in fact although not a legal entity, and includes illicit as well as licit enterprises and governmental, as well as other entities. In determining whether any unchartered union, an association or a group of individuals exists, factors which may be considered as evidence of an association include, but are not limited to: (1) a common name or identifying sign,

is also accessible at <http://www.lexisnexis.com/hottopics/tncode> last visited on 24 July 2011.

¹⁰⁹⁸The Statute is also accessible at <http://caselaw.lp.findlaw.com/casecodes/21/chapters/13/subchapters/i/parts/d/toc.html> last visited on 20 February 2009. Low states that this law is called the “Drug Kingpin” statute, see Low *Criminal Law* 764.

¹⁰⁹⁹Title 13 section 2301 (D) (2) of the Arizona Organized Crime Fraud and Terrorism Act. See also <http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=13> last visited on 18 July 2009.

symbols or colours and (2) rules of behaviour for individual members.¹¹⁰⁰ In Delaware, an enterprise shall include any individual, sole proprietorship, partnership, corporation, trust or other legal entity; and any union, association or group of persons associated in fact, although not a legal entity. The word enterprise shall include illicit as well as licit enterprises, and governmental as well as other entities.¹¹⁰¹

In terms of Title 18, Article 17 which is the Colorado Organized Crime Control Act, an enterprise is defined as any individual, sole proprietorship, partnership, corporation, trust, or other legal entity or any chartered union, association, or group of individuals, associated in fact although not a legal entity, and shall include illicit as well as licit enterprises and governmental as well as other entities.¹¹⁰²

Interestingly, in New York an enterprise and a criminal enterprise are clearly distinguished in the statute. Enterprise means either an enterprise as defined in subdivision one of Section 175.00 of this chapter, or criminal enterprise as defined in subdivision three of this section.¹¹⁰³ A criminal enterprise means a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual incidents. This writer supports the view that a criminal enterprise is an envisaged element of enterprise as embodied in the definition of organised crime.

¹¹⁰⁰Title 53 Crimes Chapter 949c section 394 (c) Volume 13. See also <http://www.cga.ct.gov/2001/pub/Chap949c.htm> last visited on 01 August 2009.

¹¹⁰¹Section 1502(3) of the Delaware Criminal Code, Title 11 Chapter 15 Organized Crime and Racketeering. This can also be accessed at <http://delcode.delaware.gov/title11/c015/index.shtml> last visited on 16 March 2009.

¹¹⁰²Section 103(2) of the Colorado Organized Crime Control Act. See also <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp> last visited on 18 July 2009.

¹¹⁰³Section 460.1.2. See <http://law.oncle.com/new-york/penal/PEN0460.10.html> last visited on 29 August 2009.

The basic element of organised crime is a pattern of racketeering activity. This element must always be preceded by a racketeering activity. The USA has defined racketeering activity as:¹¹⁰⁴

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in controlled substance or listed chemical (as defined in Section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), section 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), Section 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), Section 1084 (relating to transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), Section 1344 (relating to financial institutions fraud), Section 1425 (relating to the procurement of citizenship or nationalization unlawfully), Section 1426 (relating to the reproduction of naturalization or citizenship), Section 1427 (relating to the sale of naturalization or citizenship papers), Section 1461-1465 (relating to the obscene matter), Section 1503 (relating to obstruction of justice), Section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to obstruction of State or local law enforcement), Section 1512 (relating to tampering with a witness, victim, or an informant), Section 1513 (relating to retaliating against a witness, victim, or an informant), Section 1542 (relating to false statement in application and use of passport), Section 1544 (relating to misuse of visas, permits, and other documents), Section 1581-1591 (relating to peonage, slavery and trafficking in persons), Section 1952 (relating to racketeering), Section 1953 (relating to interstate transportation of wagering paraphernalia), Section 1954 (relating to unlawful welfare fund payments), Section 1955 (relating to prohibition of illegal gambling business), Section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), Section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), Section 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), Section 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), Section 2314 and 2315 (relating to interstate transportation of stolen property), Section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), Section 2319 (relating to criminal infringement of a copyright), Section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), Section 2320 (relating to trafficking in goods or services bearing counterfeit marks), Section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), Section 2341-2346 (relating to trafficking in contraband cigarettes), Section 2421-2424 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labour organizations) or Section 501(c) (relating to embezzlement from union funds), (D) any offence involving fraud connected with a case under title 11 (except a case under Section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the

¹¹⁰⁴Section 1961(1) of the RICO of 1970. The definition can also be accessed at Floyd *RICO State by State* 59.

Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, Section 274 (relating to bringing in and harbouring certain aliens), Section 277 (relating to aiding or assisting certain aliens to enter the United States), or Section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B).

Gerber, Abadinsky and Klotter call these offences a laundry list.¹¹⁰⁵ Podgor and Israel submit that the RICO lists over 30 federal offences and 9 states offences in the list of predicate acts.¹¹⁰⁶

Various states that have passed RICO-like laws in the USA have defined racketeering. As pointed out by McCormack, the lists of state predicate offences differ with federal list as the states have incorporated state laws in the list of their statutes.¹¹⁰⁷ The length of the definitions differs from state to state. The shortest is Tennessee, which exhibit 3 state violations on its predicate or laundry list whilst Utah exhibits more than 70 of these predicate offences.¹¹⁰⁸ In Washington and California, the term is called 'profiteering'. The states, which defined racketeering, include Arizona,¹¹⁰⁹ California,¹¹¹⁰ Colorado,¹¹¹¹ Connecticut,¹¹¹² Delaware,¹¹¹³

¹¹⁰⁵Gerber *A RICO You Cant Refuse* at <http://litigation-essentials.lexisnexis.com> last visited on 16 June 2011, Abadinsky *Organized Crime* 368 and Klotter *Criminal Law* 309.

¹¹⁰⁶Podgor and Israel *White Collar Crime* 133.

¹¹⁰⁷McCormack *RICO* 9-1.

¹¹⁰⁸In terms of section 1(9) of Tennessee Code, racketeering activity means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain that is a criminal offense involving controlled substances, and the amount of controlled substances involved in the offense is included under the provisions of § 39-17-417(i) and (j) and its subparts or involving aggravated sexual exploitation of a minor or especially aggravated sexual exploitation of a minor under §§ 39-17-1004(b)(1)(A) and 39-17-1005(a)(1).

¹¹⁰⁹Section 13-2201 D 4 of Arizona Organized Crime, Fraud and Terrorism. See the Act at <http://www.azleg.state.az.us/ArizonaRevisedStatutes.asp?Title=13> last visited on 01 August 2009.

¹¹¹⁰California Penal Code, Section 186.2(a) that is also accessible at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=186-186.8> last visited on 26 August 2009. This term is also used in Washington, which states that it was formerly called racketeering; see Title 9A.82.010 (4), which is accessible at <http://apps.leg.wa.gov/RCW/default.asp?cite=9A.82.010> last visited on 09 October 2010 and <http://onecle.com/washington/washington-criminal-code/9a.82.010.html> last visited on 28

Florida,¹¹¹⁴ Indiana,¹¹¹⁵ Louisiana,¹¹¹⁶ Michigan,¹¹¹⁷ Minnesota,¹¹¹⁸ Nevada,¹¹¹⁹ New Jersey,¹¹²⁰ New York,¹¹²¹ North Carolina,¹¹²² Oregon,¹¹²³ Utah,¹¹²⁴ Virginia,¹¹²⁵ West Virginia¹¹²⁶ and Wisconsin.¹¹²⁷

The USA has not only defined racketeering activity, but has also defined a pattern of racketeering activity.¹¹²⁸ Its definition of a pattern of racketeering activity is as follows:

A pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of or prior act of

August 2009.

¹¹¹¹Section 103(3)(5) of the Colorado Organized Crime Control Act. See also <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp> last visited on 18 July 2009. Colorado and Delaware incorporate the federal definition of racketeering in their law.

¹¹¹²Title 53 Crimes Chapter 949c section 394 (a) Volume 13, which is Corrupt Organizations and Racketeering Activity Act (CORA). See also <http://www.cga.ct.gov/2001/pub/chap949c.htm> last visited on 18 July 2009.

¹¹¹³See Section 1502(9) of the Delaware Criminal Code. The Code can also be accessed at <http://delcode.delaware.gov/title11/c015/index.shtml> last visited on 16 March 2009. Colorado and Delaware incorporate the federal definition of racketeering in their laws.

¹¹¹⁴Florida RICO Act Title XLVI Chapter 895 Section 02 (1).

¹¹¹⁵Title 35 Chapter 45 Section 6 (1) Indiana RICO Act.

¹¹¹⁶Title 15 Chapter 11 section 1352 C.

¹¹¹⁷Title XXVA Chapter 750 Section 159g of Michigan Penal Code Act 328 of 1931.

¹¹¹⁸Chapter 609.52 Subdivision 5 of Minnesota Statutes 2006: Participation in a pattern of criminal activity and Chapter 609.903 of Minnesota Statutes 2006, racketeering.

¹¹¹⁹Chapter 207.360 Nevada, which is referred to as crime related to racketeering. The definition of racketeering activity in 207.390 is the same as a pattern of racketeering activity requiring at least two acts.

¹¹²⁰New Jersey Racketeering Act: N.J.Stat.Annon ss 2C:41-1(a).

¹¹²¹New York Organized Crime Control Act: ss 460-10.1; the crime is termed criminal activity.

¹¹²²North Carolina RICO of 1985: Chapter 75D-3(c) 1.

¹¹²³166.715(6) of Oregon RICO.

¹¹²⁴76-10-1602(4) of Utah Unlawful Activity.

¹¹²⁵Title 18.2 Chapter 13-513 of Virginia RICO Act of 2004.

¹¹²⁶Chapter 61 Article 13.2 of the Anti-Organized Criminal Enterprise Act, which is referred to as qualifying offence.

¹¹²⁷1946.82(4) of the Wisconsin Organized Crime Control Act (WOCCA). This law includes the crimes in 18 USC 1961(1).

¹¹²⁸See <http://www4.law.cornell.edu/uscode/18/1961.html> last visited on 20 February 2009.

racketeering activity.¹¹²⁹

Low articulates that, while the statute says at least two crimes, which perhaps implies that more is involved, any commission of two of the listed crimes during the allotted time-frame will count.¹¹³⁰ Supportingly, Klotter states that to constitute a pattern of racketeering activity, there must be evidence of two acts within 10 years.¹¹³¹ Abrams and Beale use the words pattern and series as synonymous.¹¹³² A racketeering activity is a precursor of a pattern of racketeering activity.

In a dissenting voice, Powell J argued in *Sedima SPRL v Imvex Co*¹¹³³ that the statutory definition of pattern of racketeering in the RICO, which also requires at least two acts of racketeering occurring within ten years of each other, did not require simply proving two acts to establish a violation. His submission is that there had to be both a relationship between the predicate acts and continuity of those acts to establish a pattern.¹¹³⁴

In *H J Inc v Northwestern Bell Telephone Co*,¹¹³⁵ the Supreme Court held that continuity plus relationship was required for racketeering.¹¹³⁶ It further indicated that predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy the continuity requirement.¹¹³⁷ According to Burchell, who speaks about South African law, the relationship between the acts

¹¹²⁹See Title 18 Section 1961(5) of the RICO of 1970. See also <http://www4.law.cornell.edu/uscode/18/1961.html> last visited on 20 February 2009 as well as Kruger *Organised Crime* 21.

¹¹³⁰Low *Criminal Law* 599.

¹¹³¹Klotter *Criminal Law* 310.

¹¹³²Abrams and Seale *Federal Criminal Law* 569.

¹¹³³473 US 479, 87 Ed (2d) 346.

¹¹³⁴*Id* n 33 *supra* at 978.

¹¹³⁵492 US 229 (1989), 106 L Ed 2d 195.

¹¹³⁶*Ibid* n 1135 *supra*.

¹¹³⁷492 US 229 (1989), 106 L Ed 2d 195. See also Abrams and Beale *Federal Criminal Law* 484, 488 and 569 as well as Low and Hoffman *Federal Criminal Law* 521.

can be established if the acts have the same or similar purposes, results, participants, victims or methods of commission. Where the acts are undertaken in furtherance of the purposes of an organised crime enterprise, such acts may be treated as related, even if they are functionally diverse and not directly related.¹¹³⁸

Klotter is of the view that although the RICO was passed for the purpose of prosecuting those engaged in organised crime, Congress used such general statutory language that the statute has been used to prosecute a wide spectrum of white-collar crimes far beyond the original target group.¹¹³⁹ According to Brickey, the RICO was designed to strike at the economic base of organised crime by imposing severe criminal penalties that includes forfeiture of crime-related assets.¹¹⁴⁰ While the RICO is designed to combat organised crime, the POCA, a South African version of RICO, is designed to combat organised crime, money laundering and criminal gang activities.¹¹⁴¹

The Continuing Criminal Enterprise (CCE) statute makes it a crime to commit or conspire to commit a continuing series of felony violations of the Drug Abuse Prevention and Control Act of 1970 when a series of violations are undertaken in concert with five or more persons.¹¹⁴² The CCE forms Chapter 13: Drug Abuse Prevention and Control Act of 1970 under Title 21: Food and Drugs.¹¹⁴³ As pointed out by Gurulé, the CCE statute, which is also called the “Drug Kingpin Statute” is directed at upper management, those persons who occupy a supervisory,

¹¹³⁸*Id* n 33 *supra* at 979.

¹¹³⁹Klotter *Criminal Law* 309.

¹¹⁴⁰Brickey *Corporate Crime* 417.

¹¹⁴¹Allison *RICO* 1103.

¹¹⁴²21 U.S.C. § 848. See also Abadinsky *Organized Crime* 372 and Gurulé *Criminal Litigation* 3 and 5-6.

¹¹⁴³21 U.S.C.A. §... This law can be accessed at United States Code Annotated, Title 21: Food and Drugs § 848 to end as published by West Group 1999. See also Hall *Criminal Law* 217.

management or organizational position in a large-scale drug enterprise.¹¹⁴⁴ One of the distinguishing characters of this law is that the enterprise referred to is criminal one.¹¹⁴⁵ This writer is of the view that, the lifting of the number of criminal violations and the number of criminals may serve as a gauge to eliminate the danger of calling every crime an organised crime.

In *US v Baker*¹¹⁴⁶ the court asserted that it can't fathom why two predicate offences may make a RICO pattern but three are essential to make a CCE series.¹¹⁴⁷ This argument strengthens the view that Horowitz should substitute two strikes for three strikes. Horowitz's view is aligned to the Washington and Minnesota states which depart from the requirements of two to three predicate acts.¹¹⁴⁸ In South Africa, organised crime would, in line with Horowitz's terminology, be called a "two strike" crime. Joutsen,¹¹⁴⁹ states that, a refinement to the definition of conspiracy is that the racketeering activity must involve at least two racketeering acts committed within ten years of each other as opposed to the fact that a conspiracy may be designed to commit only one wrongful act.¹¹⁵⁰

The Criminal Street Gang (CSG) statute criminalises various activities of "organised" criminal groups, which are classified as criminal street gangs. The CSG forms Chapter 26: Criminal Street Gang under Title 18: Part I: Crimes and Criminal

¹¹⁴⁴Gurulé *Criminal Litigation* 3.

¹¹⁴⁵Continuing criminal enterprise is defined in terms of section 848(a) of the CCE Statutes, Title 21 of the United States Code, as indicated in chapter five, *supra*. The Statute is also accessible at <http://caselaw.lp.findlaw.com/casecodes/21/chapters/13/subchapters/i/parts/d/toc.html> last visited on 20 February 2009. Low states that this law is called the "Drug Kingpin" statute, see Low *Criminal Law* 764.

¹¹⁴⁶905 F.2d 1100, 1103 (7th Cir. 1990).

¹¹⁴⁷*Id* n 1146 at 1103.

¹¹⁴⁸See McCormack *RICO* 9-8.

¹¹⁴⁹Joutsen *International Cooperation* 417-428.

¹¹⁵⁰*Id* n 1149 *supra* at 421.

Procedure: Section 521.¹¹⁵¹ Criminal street gang means an ongoing group, club, organization, or association of five or more persons (A) that has as one of its primary purposes the commission of one or more of the criminal offenses described in subsection (c); (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and (C) the activities of which affect interstate or foreign commerce.¹¹⁵² The offences that this statute seeks to address include trafficking in controlled substances, violence and conspiracy. However, racketeering and enterprise are not mentioned in this law. Various states have also enacted similar gang laws that are designed to deal with organised criminal groups called criminal gangs.¹¹⁵³

The Money Laundering Control Act (MLCA) of 1986 makes laundering proceeds from specified unlawful activity a federal crime.¹¹⁵⁴ The Electronic Communications Privacy Act (ECPA),¹¹⁵⁵ added electronic communications to wire and oral communications.¹¹⁵⁶ The Consumer Credit Protection Act (CCPA) was designed to combat loansharking.¹¹⁵⁷ The Victim of Trafficking and Violence Prevention Act (VTVPA) of 2000 and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003 were designed to combat

¹¹⁵¹18 U.S.C. ss 521. This law can be accessed at United States Code 2006 Edition, Titles 12-21: Supplement III January 4, 2007, to February 1, 2010 as published by West Group 2006.

¹¹⁵²18 USC ss 521(a).

¹¹⁵³These states include Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin. The list of Acts and definitions can also be accessed at <http://www.nationalgangcenter.gov/Content/Documents/Definitions.pdf> last visited on 09 November 2011.

¹¹⁵⁴18 USC ss 1956-1957. See Pub.L. No 99-570, 100 stat. 3207 (1986). See also Gurulé *Criminal Litigation* 119 and 123.

¹¹⁵⁵Public Law 90-508 Sec 801(C) 82 Stat 211-2 (1968).

¹¹⁵⁶Albanese *Organized Crime* 252.

¹¹⁵⁷*Id* n 242 *supra* at 373.

human trafficking.¹¹⁵⁸ The observation from these pieces of legislation shows that the USA has offensively engaged organised crime through various legislative fronts.

7.5.2 Institutional response

In July 1954, Attorney General Robert Kennedy established the Organized Crime and Racketeering Section (OCRS) within the Criminal division of the Department of Justice.¹¹⁵⁹ The purpose of the OCRS was to co-ordinate enforcement activities against organised crime, initiate and supervise investigations, accumulate and correlate intelligence data, formulate general prosecutive policies, and assist federal prosecuting attorneys throughout the country. As it could be seen from the establishment of the New York Organized Crime Task Force and the existence of Organized Crime Bureau within the New York Police Department, there were more units established to deal with organised crime.¹¹⁶⁰

Between January 1967 and April 1971, the OCRS established 18 Federal Strike Forces that were designed to deal with organised crime. These forces were composed of the following units, some of which were already in existence:

US Custom Service (USCS), Immigration and Customs Enforcement (ICE, established 1789), Internal Revenue Service Intelligence Division (IRS), The Office of Inspector General (OIG), Office of Investigations from the Department of Labor, Drug Enforcement Agency (DEA, established 1919), Federal Bureau of Investigations (FBI, established 1870), Immigration and Naturalization Service (INS), Securities and Exchange Commission, US Postal Inspection Service, US Marshals Service (established 1789), US Secret Service (USSS), Federal Bureau of Narcotics (FBN), US Border Patrol, Coast Guard prosecutors, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Financial Crimes Enforcement Network (Finpostal inspectors, investigators from selected local, county, Securities and Exchange Commission and state

¹¹⁵⁸*Id* n 242 *supra* at 379.

¹¹⁵⁹Ryan *Organized Crime Handbook* 77, Abadinsky *Organized Crime* 389, Finklea *Organized Crime* 62 and Marion *Organized Crime* 177.

¹¹⁶⁰*Id* n 242 *supra* at 389.

police departments.¹¹⁶¹

According to Albanese, the Strike Forces were abolished, resulting in an outcry in the Congress, which argued that their independence was needed given the higher turnover of US Attorneys as appointed officials.¹¹⁶² President Lyndon Johnson's Commission on Law Enforcement and the Administration of Justice recommended, amongst others, to assign special prosecutorial manpower to organised crime cases.¹¹⁶³

In 2001, approximately 8000 clandestine methamphetamine laboratories were seized and reported by the DEA of which 298 were classified as super labs capable of producing 10 pounds of methamphetamine every 24 hours. This was an increase in superlabs from 168 in 2000.¹¹⁶⁴ The capacity created included the designing of strategies to deal with organised crime. Amongst the Drug Control Strategies, which were deployed in the USA, it included:

Expressive Law Enforcement which suggests more police resources to maximise arrests of drug offenders; Mr Big Strategy which emphasise the targeting of high level distributors through sophisticated investigative procedures; Gang Control which has to be viewed as organised criminal enterprises and uses all the techniques that have been developed to deal with more traditional organised crime; Citywide Street-Level Drug Enforcement which disrupt open dealings and drive it behind closed doors; Neighbourhood Crackdowns which is a joint effort between the police and the community in resisting drug abuse; and Drug Abuse Prevention, which focuses on drug user rather than the dealers.¹¹⁶⁵

¹¹⁶¹Ryan *Organized Crime Handbook* 77, Marion *Organized Crime* 176-178, Abadinsky *Organized Crime* 388-397, Rhodes *Organized Crime* 76, Albanese *Organized Crime* 243-244, Finklea *Trends and Issues for Congress* 8 and Steffen and Candelaria *Drug Interdiction* 1. While Ryan and Rhodes speak of 18 Strike Forces, Albanese and Marion speak of 14 US cities.

¹¹⁶²Albanese *Organized Crime* 243.

¹¹⁶³Ryan *Organized Crime Handbook* 77 and Lyman and Potter *Organized Crime* 387.

¹¹⁶⁴Lyman and Potter *Organized Crime* 250 (This information appears in the 2007 edition). See also Richards *Criminal Organizations* 113. During the same period, the UNODC *Drug Report* 2004 recorded 8598, which suggest that about 598 were detected outside the US.

By dealing with drug traffickers, law enforcement agencies have been able to identify the characteristics of couriers as - including last minute reservations, purchasing a ticket shortly before the flight leaves, purchase a ticket with cash, false identification, little or no luggage, or inappropriate amount of luggage for length of stay, passengers hiding the fact that they are travelling together, luggage indicators, frequent flyer couriers and call back telephone numbers.¹¹⁶⁶

A number of Commissions and Committees were formed in the USA in order to deal with the challenges of organised crime. Some of these bodies are the following:

1. Chicago Crime Commission of Inquiry in 1915.
2. The Wickersham Commission of 1929.
3. The Kefauver Committee of 1950.
4. The McClellan Committee of 1960.
5. The President's Commission on Law Enforcement and the Administration of Justice in 1967.
6. The Pennsylvanian Crime Commission in 1978.¹¹⁶⁷

Marion sums it up perfectly when she states that, the USA has in response to the challenge of organised crime, amongst others, done the following:

1. Law enforcement made changes in their investigatory techniques.
2. Congress made legislative changes ensuring that it provides statutory tools by creating laws that gave law enforcement more powers to investigate organised crime. The Organized Crime Control and Safe Streets Act, the Racketeering Influenced and Corrupt Organization Act and Electronic Communications

¹¹⁶⁵Lyman and Potter *Organized Crime* 198-199.

¹¹⁶⁶Steffen and Candelaria *Drug Interdiction* 145-147.

¹¹⁶⁷Lyman and Potter *Organized Crime* 24-26, Marion *Organized Crime* 188 and Abadinsky *Organized Crime* 62-66. Marion does not include the Pennsylvanian Crime Commission while Abadinsky deals with those listed in 3-6 *supra*. See also Scherrer *Transnational Organized Crime* 24-28 and Mallory *Organized Crime* 27-28.

Privacy Act (ECPA) were amongst these enacted laws.

3. The courts prosecuted offenders like never before. The Department of Justice also formed the Organized Crime and Racketeering Section.¹¹⁶⁸

Rebovich differs with the view expressed by Marion on prosecutions. He argues that local prosecutors avoided the use of the RICO citing its language that opened the door for constitutional attack, unreasonably high standards of proof and the perceptions that judges would apply the statute narrowly ruling out practical application of the statute to white collar crime.¹¹⁶⁹

7.6 CONCLUSION

The USA ratified the Palermo Convention in 2005.¹¹⁷⁰ Although it has no statutory definition, seven definitions of 'organised crime' have been legislated by some states. Even though each State has its own codified law, most of these laws do not define organised crime. The majority of definitions in the USA are those crafted by criminologists, experts and academics. The various definitions of organised crime in paragraph 7.2.1.2 *supra* demonstrate the involvement of academics, legislators, politicians and ordinary Americans in dealing with organised crime. However, it is encouraging to note that most terminologies in the various laws have been defined in order to avoid confusion and conflicting interpretations.

In response to the challenges posed by organised crime, the USA promulgated various laws. The country also set up commissions of inquiries and created investigation and prosecution units to address the phenomenon.

¹¹⁶⁸Marion *Organized Crime* 176-182.

¹¹⁶⁹Rebovich *Avoidance of RICO* 159.

¹¹⁷⁰Finklea *Trends and Issues for Congress* 9 and Finklea *Organized Crime* 67.

CHAPTER EIGHT

ORGANISED CRIME IN THE UNITED REPUBLIC OF TANZANIA

8.1 INTRODUCTION

The scourge of organised crime did not spare the United Republic of Tanzania. This phenomenon is on the increase in Tanzania. According to Peter, Tanzania is a useful transit route for drugs enroute to the southern part of the continent.¹¹⁷¹ As pointed out by Gastrow, the police authorities in Tanzania have cautioned that transnational organised criminal groups have targeted the East African region, of which Tanzania is a part. It is considered as a major transshipment centre for a variety of narcotics. This conduit for illicit drugs connects America, Europe and other areas in the world. The coastline of 1 424 km and land borders of 3 402 km is an overwhelming task for the police to secure against smuggling and other criminal activities.¹¹⁷²

Likewise, Bagenda views Tanzania as strategically located between the countries in the East, Central and Southern Africa, which has both benefits and the negative consequences. The negative consequences are derived from the fact that transnational organised crime groups exploit opportunities and incentives in Tanzania.¹¹⁷³ This position finds support in the 2001 report of the UN that listed Tanzania as a transit country for the blood diamonds from Angola and the

¹¹⁷¹Peter *Organised Crime* 73.

¹¹⁷²*Id* n 242 *supra* at 26.

¹¹⁷³Bagenda *Tanzania* 75. Lyman and Potter support this view and state that just like Kenya and Ethiopia, Tanzania is located along the natural narcotics trafficking routes from east to west and offers traffickers numerous accessible points from entry by air, sea or land which are through Dar es Salaam airport, Zanzibar airport and Kilimanjaro airport as well as Tanga and Mtwara, see Lyman and Potter *Organized Crime* 293.

Democratic Republic of Congo (DRC).¹¹⁷⁴ Hübschle concurs with this view and states that it is also a transit point for vehicles that have been stolen elsewhere to the DRC, Burundi and Malawi.¹¹⁷⁵

Mahalu states that organised criminal gangs began infiltrating into Tanzania in 1980 and plunged it into the international criminal network in 1983. He argues that, it came to their knowledge that the growing trend and spread of this form of crime was facilitated mainly by the developments in science and technology. Criminal gangs, as he refers to organised criminal groups, used these facilities to commit crimes without being detected or with less risk. The essence of the message was that, organised criminal groups tended to adapt to the economic and social changes and used improved transportation and communication technologies to curtail law enforcement efforts against them. This, he concludes, meant that the law enforcement agencies had to apply those same technologies to combat organised crime.¹¹⁷⁶

Mwema states that the early symptoms of organised crimes were first detected in 1983. He, however, concedes that the application of the law on organised crime has been very difficult and below the required standards.¹¹⁷⁷ As pointed by Nyadunga and Manning, it is worth noting that the source of law for the United Republic of

¹¹⁷⁴Bagenda *Tanzania* 86.

¹¹⁷⁵Hübschle *Organised Crime* 36.

¹¹⁷⁶See the UN press release L/PMO/11 dated 14 December 2000 of Speakers address on issues of corruption, law enforcement, capacity-building at Palermo Crime Convention meeting at www.unis.unvienna.org/unis/en/press-release.html?Y=2000&M=12 last visited on 18 May 2009 as well as www.unis.unvienna.org/pressrels/2000cp391.html last visited on 18 May 2009. Mahalu is himself, facing charges of the loss of 2 065 837-60 Euros for the purchase of an embassy house in Italy, whereas the purchase price is less. See <http://kuraya.com/ipp/guardian/2007/07/25/95088.html> last visited on 18 May 2009 and <http://www.thisday.co.tz/News/3667.html> last visited on 18 May 2009.

¹¹⁷⁷Mwema *Money Laundering* 428. See <http://www.unafei.or.jp/english/pdf/PDF-rms-all/no58.pdf> last visited on 25 July 2010. Mwema is the Inspector General of the Tanzanian Police Force.

Tanzania is the 1977 Constitution, the English common law, statutes, case law, Received Laws, Customary law, Islamic Law and International Law.¹¹⁷⁸ Gastrow has observed that the term organised crime has been loosely and generically used internationally to describe the criminal activities of organised criminal groups consisting of three or more persons who commit serious crimes over a period of time for profit. He notes that in most countries, the police and lawyers have struggled to develop a satisfactory definition for organised crime mainly because the nature of organised crime trends tends to differ from country to country. Contrastingly, Tanzania did not fall into this trap, but paved a clear path by defining the phenomena *infra*.¹¹⁷⁹

8.2 DEFINITION OF ORGANISED CRIME IN TANZANIA

Shaidi argues that, although it is difficult to attempt an accurate definition of a crime, it is necessary to attempt a general definition so that students do not proceed with their own preconceived notions on the matter.¹¹⁸⁰ Similarly, Smith states that it is now rather unfashionable to begin law books with definitions because of the difficulties frequently encountered in defining the subject matter. He, however, concludes that a book about crimes, which does not tell the reader what a crime is, allows him to proceed with his own preconceived notions.¹¹⁸¹ This view is applicable on any matter that requires a clear understanding. In Tanzania, 'organised crime' is defined 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

¹¹⁷⁸<http://www.nyulawglobal.org/globalex/tanzania.htm> last visited on 13 September 2011.

¹¹⁷⁹*Id* n 242 *supra* at 29.

¹¹⁸⁰<http://www.out.ac.tz/current/course-outlines/law/OLW102.pdf> last visited on 26 June 2011.

¹¹⁸¹Smith *Criminal Law* 15.

with, related to or capable of producing the offence in question.¹¹⁸² This definition requires no pattern of racketeering activities as an element, which is in line with the Hawaii and Rhode Islands statutes in the USA.¹¹⁸³ It is therefore not surprising to see that the Act requires no predicate offence.¹¹⁸⁴

Criminal racket is defined as any combination of persons or enterprises engaging, or having the purpose of engaging, whether once, occasionally or on a continuing basis, in conduct which amounts to any offence under this Act. Racket is defined as any combination of persons or enterprises. Enterprise includes 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.¹¹⁸⁵

The law stipulates 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 the connivance or collaboration of a person or persons not known to the court, the commission of the offence shall be deemed to have been organised, and the offence to be organised crime for the purpose of sentence.¹¹⁸⁶ My analysis suggests that the Act follows the notion that organised crime is an activity as opposed to a group.

¹¹⁸²Section 2(1) of the Economic and Organised Crime Control Act of 1984: Chapter 200 of the Penal Code. See also Von Lampe at <http://www.organized-crime.DEFI.htm> last visited on 01 June 2008 and <http://www.parliament.go.tz/Polis/PAMS/Docs/13-1984.pdf> last visited on 21 February 2009, Lebeysa at <http://etd.unisa.ac.za/ETD-db/theses/available/etd-06172008-094504/unrestricted/dissertation.pdf> last visited on 21 February 2009, Gastrow *Police Perceptions* 34 and Peter *Organised Crime* 73.

¹¹⁸³McCormack *RICO* 9-7.

¹¹⁸⁴The law that has predicate offences is the Anti-Money Laundering Act 12 of 19

¹¹⁸⁵See section 2(1) of the EOCCA of 1984. The law is also accessible at <http://www.parliament.go.tz/Polis/PAMS/Docs/13-1984.pdf> last visited on 21 February 2009.

¹¹⁸⁶See section 2(3) of the EOCCA of 1984. The law is also accessible at

Tanzania did not attempt to distinguish between organised criminal group and a criminal gang. The legislature criminalised the leading of organised crime. Section 5(1) of the First Schedule to the Economic and Organized Crime Control Act (EOCCA) of 1984, hereafter referred to as EOCCA, states as follows:

A person is guilty of the offence of leading organized crime who:

- (a) Intentionally or wilfully organizes, manage, directs, supervises or finances a criminal racket.
- (b) Knowingly incites or induces others to engage in violence or fraud or intimidation for the purposes of promoting or furthering the objects of a criminal racket.
- (c) Knowingly furnishes advice, assistance or direction in the 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 further the criminal objectives of the criminal racket.
- (d) Being a public official and in violation of his official duty, intentionally promotes or further the objectives of a criminal racket by inducing or committing any act or omission.¹¹⁸⁷

The Act stipulates clearly that a person shall not be convicted of an offence under this paragraph based on accountability, as an accomplice unless he aids or participates in the contravention of this paragraph.¹¹⁸⁸

8.3 ORGANISED CRIMINAL GROUPS IN TANZANIA

Although organised criminal groups may not be known by specific names, such as 'mafia', Gastrow submits that South African nationals are considered the most serious threat involved in organised criminal activities in Tanzania.¹¹⁸⁹ He further

<http://www.parliament.go.tz/Polis/PAMS/Docs/13-1984.pdf> last visited on 21 February 2009.

¹¹⁸⁷Section 5(1) of the First Schedule to the EOCCA. See also Mwema *Money Laundering* 430.

¹¹⁸⁸Section 5(2) of the First Schedule to the EOCCA.

¹¹⁸⁹*Id* n 242 *supra* at 9.

submits that, in addition to South Africa, Pakistan and Kenya are the other two countries whose nationalities are believed to be members of transnational organised criminal groups operating in Tanzania.¹¹⁹⁰ Hübschle adds Mozambicans and Botswana nationals on the list.¹¹⁹¹

Bagenda identifies categories of organised criminal groups into two, namely, indigenous organised criminal group and transnational organised criminal group. He describes the former as comprising individuals who are citizens of Tanzania and who engage in organised criminality within the borders of that country. He argues that indigenous organised crime has taken place in Tanzania for many years while transnational organised crime is a relatively recent development. This argument is based on the perception that a traditional mode of life predominates in Tanzania.¹¹⁹² Gastrow also describes indigenous organised criminal groups as those that are made up primarily of nationals from the country concerned and involved mainly in criminal activities within the borders of the country.¹¹⁹³ Bagenda explicates that cannabis cultivation on contract is a well-organised criminal activity involving Tanzanians, Somalis, Arabians, and Kenyans.¹¹⁹⁴

8.4 CRIMES MOSTLY COMMITTED BY ORGANISED CRIMINAL GROUPS

According to Siegel, criminals are involved in smuggling diamonds to a processing country such as Belgium from countries such as Tanzania and the Central African Republic or Guinea.¹¹⁹⁵ Since 1985, the crimes committed by organised criminal groups, as observed by Mwema, include illegal arms deals, frauds, poaching,

¹¹⁹⁰*Id* n 1174 *supra* at 64.

¹¹⁹¹Hübschle *Organised Crime* 36.

¹¹⁹²*Id* n 1174 *supra* at 75 and 76.

¹¹⁹³Gastrow *Police Perceptions* 55. See also Hübschle *Unholy Alliance* 3.

¹¹⁹⁴*Id* n 1174 *supra* at 81.

¹¹⁹⁵Siegel *Diamonds* 89.

corruption, violent crimes, smuggling, economic crimes, drug trafficking and terrorism.¹¹⁹⁶ Hübschle supports Mwema's view that illicit trade in wildlife and bush meat is a highly profitable organised crime market in Tanzania. She categorises Tanzania as a transit and source country of human smuggling.¹¹⁹⁷

On the other hand, Peter is of the view that the main threat in Tanzania is drug trafficking. While assenting that Tanzania is used as a transit country, his contestation is that some of the drugs remain in the country and is sold to the middle and upper class community in the major towns. He argues that, the discovery of a machine to manufacture mandrax tablets, raw material and heroin on the outskirts of Dar es Salaam and the arrests of two suspects indicates that the problem is far from over. He believes that some of these drugs emanates from Pakistan.¹¹⁹⁸ In harmonization with Peter's view, Bagenda states that the police closed a clandestine factory processing illicit drugs in Dar es Salaam in February 2001.¹¹⁹⁹

Gastrow enumerates the five crimes mostly committed by organised criminal groups in Tanzania as - theft and hijacking of motor vehicles; robbery; drug related offences; illicit dealing in gold, diamonds and emeralds; and illicit dealing in firearms and ammunition.¹²⁰⁰ In explaining what robbery entails, Chipeta elucidates that a person who steals anything and at, or immediately before or immediately after such stealing, he uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, commits robbery. He cites the elements as (1) that the accused stole something; (2) that immediately before or immediately after such

¹¹⁹⁶Mwema *Money Laundering* 428.

¹¹⁹⁷*Id* n 1191 *supra* at 53 and 76.

¹¹⁹⁸Peter *Organised Crime* 74-75.

¹¹⁹⁹*Id* n 1174 *supra* at 83.

¹²⁰⁰*Id* n 242 *supra* at 8.

stealing he used or threatened to use actual violence to any person or property; and (3) that the use of or threat to use such violence to any violence was with intent to obtain or retain, or prevent or overcome resistance to its being stolen or retained.¹²⁰¹ However, as pointed by Hübschle, theft of motor vehicle between 2005 and 2008 was lowly recorded as 309, 287, 254 and 139 respectively.¹²⁰² Manumba submits that more imported stolen motor vehicles from Japan are entering the Tanzanian market in an organised crime facilitated through the internet and cellular phones.¹²⁰³

Bagenda views stock theft, poaching, the killing of witches, cultivation of cannabis, theft and smuggling of motor vehicles, and armed robbery as the crimes in which indigenous organised crime manifests.¹²⁰⁴ This writer is unable to agree with the notion that the killing of witches has anything to do with organised crime, and the reasons pointed out as including the fact that the executioners may receive benefits in the form of a reward such as beer, goats or cattle are not persuasive. He expounds that transnational organised criminal groups are involved in drug trafficking, gems smuggling, small arms smuggling, vehicle theft and money laundering.¹²⁰⁵ In describing money laundering, Mwema submits that money laundering is part of organised crime offences.¹²⁰⁶ Ashworth acknowledges that the ostensible purpose of anti-money laundering provisions is to catch the godfathers who live off organised crime, but attacks the confiscation that are not dependent on conviction as draconian.¹²⁰⁷

¹²⁰¹Chipeta *Public Prosecutors* 143. He quotes section 285 of the Tanzanian Penal Code.

¹²⁰²*Ibid* n 1201 *supra*.

¹²⁰³Senior Assistant Commissioner Robert Sungura Manumba at <http://www.trinityafer.com/en/index.php/news/5621-imported-stolen-cars-on-increase-says-police-Tanzania> last visited on 16 May 2011.

¹²⁰⁴*Id* n 1174 *supra* at 75-76.

¹²⁰⁵*Id* n 1174 *supra* at 82.

¹²⁰⁶Mwema *Money Laundering* 429.

¹²⁰⁷Ashworth *Criminal Law* 391.

The EOCCA does not have a list of predicate offences. However, it has a similar list, which is attached as First Schedule.¹²⁰⁸ In terms of Section 56(1) of the EOCCA, the offences prescribed in the First Schedule to this Act are known as economic offences. The offences are not a laundry list or racketeering acts, but they are complete offences to be prosecuted as such. These offences are what should be considered as a serious offence for the purpose of the EOCCA of 1984. These offences include the following:

1. A person is guilty of an offence under this paragraph who commits any offence under the Exchange Control Ordinance--- (a) which is beyond the statutory power of the Governor to compound; or (b) which, considering the circumstances of its commission, the Governor is of the opinion, which he shall certify to the Director of Public Prosecutions, that it is unsuitable to compound. **2.** A person is guilty of an offence under this paragraph who commits any offence under the Prevention of Corruption Act, 1971. **3.**-(1) Any person who knowingly and wilfully gives, promises or offers to- (a) any amateur or professional player or boxer; or (b) any player, referee or linesman or other official who participates, has participated or expects or is expected to participate in any amateur or professional game or sport; or (c) any manager, coach, handler, trainer or other official of any team; or (d) any participant or prospective participant in any sports contest, any benefit or valuable thing with intent to- (i) influence him to lose or try to lose or cause to be lost or to limit his or his team's margin of victory or defeat; or (ii) affect his decisions or the performance of his duties in any way, is guilty of the offence of bribery in sports under this paragraph. (2) For the purposes of this paragraph, the player, participant, referee or other official involved should be taking part, expecting or expected to take part in or having any duty or connection with, sports in general or the sports contest in question. **4.**-(1) A person, whether or not licensed to carry on the business of selling commodities of any description, is guilty of the offence of hoarding commodities against this paragraph if, not being a manufacturer or producer of the commodities- (a) he is found in possession of an unusually large or big amount or quantity of commodities which are in demand by the public in the locality concerned, in circumstances in which it can be inferred that they are not displayed or stocked for lawful sale or use or available for purchase by any persons offering the lawful price; or Exchange control offences (b) he sells or offers any commodity for sale at a price or subject to a term or condition which is unlawful or which, having regard to all relevant circumstances, is unreasonable; or (c) in the course of carrying on the business of selling any commodity, he engages in any trade practice which is intended or likely- (i) to create an artificial shortage in the supply of any commodity; or (ii) to aggravate an actually existing shortage in the supply of any commodity; or (iii) to cause an unlawful increase or decrease in the official or commercially accepted price of any commodity; or (iv) to adversely affect the fair distribution of any commodity amongst the purchasing population of the area concerned. **5.** A person is guilty of the offence of leading organized crime who- ((a) intentionally or wilfully organizes, manages, directs, supervises or finances a criminal racket; (b) knowingly incites or induces others to engage in violence or fraud or intimidation for the purposes of promoting or furthering the objects of a criminal racket; (c) knowingly furnishes advice, assistance or direction in the 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 (d) being a public official, and in violation of his official duty, intentionally promotes or furthers the objectives of a criminal racket by inducing or committing any act or omission. **6.**(I) A person is guilty

¹²⁰⁸Section 56(1) of the EOCCA. This list includes section 5 that deals with leading organised crime.

of an offence under this paragraph if he is found in possession of an amount of liquid money which- (a) considering the circumstances of its acquisition, possession and actual, potential or intended use, is unnecessary; or (b) considering its potential or intended use would or is likely to facilitate interference with or disruption of the normal or ordinary circulation of money within the national economy; or (c) considering all factors relevant to the person concerned and the business in the carrying on of which he requires the use of liquid money, would or is likely to be used for unlawful purposes. **7.** Any person who, pursuant to a scheme or artifice to defraud-- (a) by means of false or fraudulent pretences, representations, promises or material schemes' omissions; or (b) by means of false pretences representations, or deception to gain the confidence of any person, knowingly obtains from any person any benefit, is guilty of an offence under this paragraph. S.-41) Any person who- (a) on being detained as a result of the exercise of the power conferred by section 24 of the Criminal Procedure Code, or Section 22 of this Act, is found in possession of, or conveying in any manner, anything which may be reasonably suspected of having been stolen or otherwise unlawfully acquired; or (b) is found by any police officer possession of or having control over any property which may, having regard to all the circumstances, be reasonably suspected of or having been stolen or otherwise unlawfully acquired, may be charged with being in possession of, or conveying, or having control over as the Case may be the property which is suspected of having: been stolen or otherwise unlawfully acquired and shall, if he fails to satisfy the Court that he did not steal or otherwise unlawfully acquire the property, be guilty of the offence with which he is charged and be liable, on conviction, to imprisonment in accordance with this Act. **9.**-(1) A person is guilty of an economic offence, under this paragraph who not being an authorized trader in terms of section 2 of the Regulation of Trade Act 1980 sells or offers for sale any designated goods of any description contrary to the provisions sale of designated goods of that Act. (2) A person is guilty of an economic offence under this paragraph who, being a supplier or distribution of designated goods in accordance with the provisions of the Regulation of Trade Act, 1980, sells or distributes designated goods to a person who is not an authorized trader, contrary to Section 4 of the Regulation of Trade Act, 1980. **10.**-(1) Any person who, being in authority, knowingly and without lawful excuse, causes or procures a supplier or distributor to supply designated goods to a person who is not an authorized trader for purposes of resale, or to supply designated goods or quantities to any authorized trader, is guilty of an offence (2) A person shall be deemed to be in authority if, being the holder of any elective or appointive office in any specified authority, he gives a direction, suggestion or advice whether or not in writing, to a supplier or distributor in connexion with the disposition, of any designated goods in the manner referred to in subparagraph (1), and the said supplier or distributor acts in accordance with the direction, suggestion or advice. (3) An amount or quantity of designated goods shall be deemed to be inordinate if- (a) where the supply is done once, the amount or quantity is an excess of the amount or quantity ordinarily supplied or sold to the majority of the other purchaser of the same goods in the same locality with the same right, financial ability and willingness to purchase the goods in question; or (b) where the supply is done on more than one occasions, the frequency of such occasions is extraordinary compared to the frequency at which the same goods are supplied over a given period to other purchasers in the locality with the same right, financial ability and willingness to purchase the goods in question. (4) It shall be a good defence for a person charged with an offence under this paragraph if he satisfies the Court that there existed any circumstances which constituted a reasonable or lawful excuse for his action or that his action was motivated by anything that was beneficial to the public interest. 11 .-(I) Any person who, whether or not he is an employee of a specified authority by any wilful act or omission, or by his negligence or misconduct, or by reason of his failure to take reasonable care or to discharge his duties in a reasonable manner, causes any specified authority to suffer a pecuniary loss or causes any damage to any Property owned by or in the possession of an specified authority, is notwithstanding any written law to the contrary, guilty of an offence under this paragraph (2) A specified authority shall for the purposes of subparagraph (1), be deemed to have incurred a pecuniary loss notwithstanding- (a) that it has received or is entitled to receive any payment in respect of such loss under any policy of insurance; or (b) that it has been otherwise compensated, or is entitled to be compensated, for that loss. (3) For the avoidance of doubt it is hereby declared that where any person charged with stealing

anything, or with any other Offence under any written law, in relation to a specified authority, is acquitted, he may be subsequently charged and tried for an offence under this paragraph even if the subsequent charge under this paragraph is based on the same acts or omissions upon which the Previous charge was based. (4) Where the Court convicts a person of an offence under this paragraph, it shall, in addition to any other penal measure it imposes, order such person to pay to the specified authority compensation of an amount not exceeding the amount of the actual loss incurred by the specified authority and in assessing such compensation the court shall have regard to any extenuating circumstances it may consider relevant. (5) Where an order is made under subparagraph (4), the specified authority in whose favour such order is made may file an authenticated copy of the order in the district court having jurisdiction over the area over which the Court has jurisdiction, and upon being so filed the order shall be deemed to be a decree passed by that district court and may be executed in the same manner as if it were a decree passed under the Provisions of the Civil Procedure Code, 1966, and the district court shall have jurisdiction to execute that decree notwithstanding that the amount of the compensation awarded exceeds the pecuniary jurisdiction of the district court. **12.**-(1) A person is guilty of an offence under this paragraph who steals any of the animals to which this paragraph applies; (2) Where a person kills any animal to which this section applies with intent to steal its skin or carcass, or any part of its skin or carcass, he shall for the purposes of this paragraph, be deemed to have stolen the animal; (3) This paragraph applies to a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig. **13.** A Person is guilty of an offence under this paragraph who commits any offence under the Stock Theft Ordinance. Stock theft. **14.** A Person is guilty of an offence under this para.....

The Anti-Money Laundering Act¹²⁰⁹ makes provision for predicate offences or the so-called “laundry list” which it defines as follows:

Predicate offence means (a) any dealing which amounts to illicit drug trafficking under the law for the time being relating to narcotic drugs and psychotropic substances; (b) terrorism, including terrorist financing; (c) illicit arms trafficking; (d) participating in an organized criminal group and racketeering; (e) trafficking in human beings and smuggling immigrants; (f) sexual exploitation, including sexual exploitation of children; (g) illicit trafficking in stolen or other goods; (h) corrupt practice; (i) counterfeiting; (j) armed robbery; (k) theft; (l) kidnapping, illegal restraint and hostage taking; (m) smuggling; (n) extortion; (o) forgery; (p) piracy; (q) hijacking; (r) insider dealing and market manipulation; or (s) illicit trafficking or dealing in human organs and tissues; (t) poaching; (u) tax evasion; (v) illegal fishing; (w) illegal mining; (x) environmental crimes; or (y) any other offence which the Minister may, by notice published in the *Gazette*, declare, whether committed within the national boundaries of the United Republic or outside the country.¹²¹⁰

¹²⁰⁹12 of 2006.

¹²¹⁰Section 3 of Anti-Money Laundering Act 12 of 2006.

According to Bagenda, organised criminal groups involved in stock theft can be divided into two categories, which are more-or-less traditional cattle raiders who trek distances of 20-30 km from their village to steal cattle from other villages, and groups recruited by rich cattle dealers, who seek to profit from the sale of stolen cattle. He points out perpetrators as organised criminal groups of between 04 and 10 people from Somalia and Burundi.¹²¹¹ He further adds robberies committed against commercial establishments, car hijackings, bus hijackings and attacks on homes, which are exacerbated by the advantage of an increased flow of small arms smuggled from Rwanda, Burundi and the DRC.¹²¹² Concerning financial institutions, 17 cases involving US\$2.5 million were reported in Dar es Salaam in 2001. In enlightening on drug trafficking, he indicates that most people who were arrested for drug trafficking in Tanzania are couriers or mules. These, he submits, are people recruited by Tanzanian intermediaries who sent them to Dubai, Pakistan, India, Thailand and Hong Kong where they have Tanzanians as contact persons in those source countries.¹²¹³

8.5 RESPONSES TO THE CHALLENGE POSED BY ORGANISED CRIMINAL GROUPS

8.5.1 Legislative response

According to Peter, Tanzania enacted a number of statutes that directly and indirectly address organised crime.¹²¹⁴ These include the Proceeds of Crime Act¹²¹⁵ that assist in attaching the assets derived from crime; the Mutual Assistance in

¹²¹¹*Id* n 1174 *supra* at 76-77.

¹²¹²*Id* n 1174 *supra* at 79-80.

¹²¹³*Id* n 1174 *supra* at 82.

¹²¹⁴Peter *Organised Crime* 75.

Criminal Matters Act¹²¹⁶ that assists in ensuring international co-operation; the Armaments Control Act¹²¹⁷ and the Arms and Ammunition Act¹²¹⁸ that supports the strategies of minimising the circulation of illegal firearms; the Drugs and Illicit Traffic in Drugs Act¹²¹⁹ that helps in fighting drug trafficking; the Tanzanian Intelligence and Security Service Act¹²²⁰ that helps in providing intelligence to law enforcement agencies, the Extradition Act¹²²¹ and the Fugitive Offenders (Pursuit) Act¹²²² that expands the effectiveness of law enforcement across the border; the Witness Summonses (Reciprocal Enforcement) Act¹²²³ that helps in strengthening the prosecution of perpetrators and the Economic and Organised Crime Control Act¹²²⁴ that serve as an umbrella law that deals with organised crime; the Anti-Money Laundering Act¹²²⁵ that deals with the proceeds of crime and money laundering; the Anti-Trafficking in Persons Act¹²²⁶ that prohibits trafficking in persons; and Merchandise Marks Act¹²²⁷ that combat counterfeiting of goods.

Peter connotes that one of the characteristics of the EOCCA is to have the cases tried at High Court. Before any case is commenced, it requires the consent of the

¹²¹⁵25 of 1991. In terms of section 17(2) of this Act, the proceeds of crime means any property that is derived from the commission of an offence. As pointed out by Peter *Organised Crime* 77, the Act is aimed at ensuring that criminals do not enjoy their illegally acquired wealth.

¹²¹⁶24 of 1991.

¹²¹⁷1 of 1991.

¹²¹⁸2 of 1991.

¹²¹⁹9 of 1995.

¹²²⁰15 of 1996.

¹²²¹15 of 1965.

¹²²²1 of 1969.

¹²²³14 of 1969.

¹²²⁴13 of 1984.

¹²²⁵12 of 2006.

¹²²⁶6 of 2008.

¹²²⁷1963 [CAP 85]. The Merchandise Marks Regulations of 2008 have enhanced the capacity to fight counterfeit goods by establishing an Interdepartmental Task Team comprising of representatives from Attorney General Chambers, Tanzania Revenue Authority, Tanzania Police Force, Tanzania Bureau of Standards, Foods and Drugs Authority and Public office; see <http://afro-ip.blogspot.com/2008/08/new-merchandise-marks-regulations-2008.html> last visited on 19 November 2011.

Director of Public Prosecutions.¹²²⁸ This position is similar to the one practiced in South Africa where the NDPP must authorise prosecution in terms of section 2(4) of POCA.

8.5.2 Institutional response

In response to the challenges posed by organised crime, Tanzania established five types of police units. These units are the Anti Narcotic Unit, Anti-Terrorist Squad, Stock Theft Prevention Unit, Anti-Robbery Squad, and Criminal Intelligence Unit.¹²²⁹ The Defence Force has also been assigned to patrol the border, which has strengthened the fight against stock theft.¹²³⁰ The Financial Intelligence Unit (FIU) was also created through the Anti-Money Laundering Act.¹²³¹ The Interdepartmental Task Force has been added to the units fighting organised crime.¹²³²

Tanzania's reaction to the development of international organised crime was to deploy the law enforcement agencies in a serious fight against all types of organised crime. As a matter of necessity, law enforcement and other agencies work together to effectively combat crime. Such co-operation, at an international level, requires the States with capacity to render technical assistance and training to those with insufficient expertise and resources. Otherwise, it might not be possible for some States, probably from developing countries, to effectively discharge the obligations arising from the Convention.¹²³³ Finklea agrees with this view and emphasises that

¹²²⁸Peter *Organised Crime* 75.

¹²²⁹*Id* n 242 *supra* at 36. The Anti-Terrorist Squad that deals with both terrorism and armed robberies and the Stock Theft Prevention Unit that deals with stock theft were also established; see Bagenda *Tanzania* 77 and 80.

¹²³⁰*Id* n 1174 *supra* at 77.

¹²³¹Section 4 of the Anti-Money Laundering Act 12 of 2006.

¹²³²See <http://afro-ip.blogspot.com/2008/08/new-merchandise-marks-regulations-2008.html> last visited on 19 November 2011.

¹²³³See the UN press release L/PMO/11 dated 14 December 2000 of Speakers address issues of corruption, law enforcement, capacity-building at Palermo Crime Convention meeting at

as organised crime becomes increasingly transnational, so may the need for international organised crime working groups, task forces and law enforcement co-operation.¹²³⁴

8.6 CONCLUSION

Tanzania identified the need to address 'organised crime' fourteen years before South Africa. There exists no confusion regarding the meaning of organised crime because this notoriously dicey terminology has been legislatively defined. Unlike in South Africa, where the phenomenon has not been defined, it is not a matter that will require various jurists to understand what the legislature intended to address. Not only did the law define the phenomenon but it has also described it. These commendable legislative developments have to serve as beguiling factors for other jurisdictions such as South Africa to follow suit.

Bagenda's perception that there is little risk of arrest for serious crimes and successful prosecution and that whatever risk may be there, is further reduced by attempts to corrupt the system is an indictment to the police and the Prevention and Combating of Corruption Bureau. Similarly, Marshall concludes that there is extensive corruption in Tanzania.¹²³⁵ To reverse these discernments, the act of stealing must be made a risky undertaking so that the public should be afraid to steal because of the legal consequences.¹²³⁶ In situational prevention of organised crime, the risk must be increased while the rewards are reduced.¹²³⁷

www.unis.unvienna.org/unis/en/press-release.html?Y=2000&M=12 last visited on 18 May 2009; www.unis.unvienna.org/unis/en/pressrels/2000cp391.html last visited on 18 May 2009; <http://kuraya.com/ipp/guardian/2007/07/25/95088.html> last visited on 18 May 2009 and <http://www.thisday.co.tz/News/3667.html> last visited on 18 May 2009.

¹²³⁴Finklea *Organized Crime in the USA* 26.

¹²³⁵Lahneman and Lewis *Organized Crime* 13.

¹²³⁶*Id* n 1174 *supra* at 79.

¹²³⁷Korsell and Skinnari *Organised Crime* 161.

CHAPTER NINE

MANIFESTATIONS OF ORGANISED CRIME IN SOUTH AFRICA

9.1 INTRODUCTION

Organised crime is bound to manifest in different ways because its presence is influenced by the predicate offences. The longer the list of predicate offences, the higher the chances that organised crime will be perpetrated. Irish-Qhobosheane and Qhobosheane state that, while some organised criminal groups specialise in one type of crime, others are involved in a variety of crimes. These crimes are vehicle theft, vehicle hijackings, stolen commodities, dealing in grey products, customs fraud, drugs, gold smuggling, diamond smuggling, dealing in endangered species, arms trade, trafficking in humans, fraud, armed robberies, cash-in-transit heists, kidnappings and money laundering.¹²³⁸ These crimes are believed to represent the manifestation of organised crime.

According to Pace and Styles, no particular crime is excluded from the definition of 'organised crime'. They argue that, because of the diversification and variation of criminal activities engaged in by organised criminal groups, there could be no true ranking of priority for the criminal activity.¹²³⁹ The distinction between predatory offences and organised crime should not be confused. Observing the confusion associated with the understanding of organised crime, Edelhertz, Cole and Berk reiterate that organised crime, however defined and whatever its manifestation, will not cease to be a challenge in two, four or twenty years. To them, it is not an identifiable group of people or organizations, but a pattern of antisocial response to

¹²³⁸Irish and Qhobosheane *South Africa* 71-135.

¹²³⁹Pace and Styles *Organized Crime Concepts* xiv.

be everlastingly contained like weeds in a field.¹²⁴⁰ Contrastingly, Albin believes that an organisation is organised crime. This view is evident from his classification of organised crime into four major forms, which are - political-social organised crime, mercenary organised crime, in-group organised crime, and syndicated organised crime.¹²⁴¹

Organised crime is on the increase in South Africa. This can be ascribed to the fact that South Africa has very porous borders where contraband can be smuggled by just walking across the borders. Furthermore, the availability of gold, diamonds, ivory, rhino horn, abalone and motor vehicles act as contributory factors.¹²⁴² While poverty does not directly lead to higher crime levels, when combined with a range of other socio-political and cultural factors, it contributes to conditions for an increase in crime and the growth of criminal syndicates and gangs.¹²⁴³

Instead of categorising each possible organised crime activity based on commodity, Albanese categorised them into three typologies, to wit, provision of illicit goods, provision of illicit services, and infiltration or abuse of legitimate business.¹²⁴⁴ Although some authors call the manifestation of organised crime as typologies of organised crime, this writer prefers the reference of manifestations.¹²⁴⁵ In this chapter, the existence of organised crime, organised criminal groups and the various manifestations of organised crime in South Africa is analysed.

The number of new organised criminal groups that were identified in South Africa

¹²⁴⁰Edelhertz, Cole and Berk *Organized Crime Containment* 86.

¹²⁴¹Albin *Organized Crime* 156.

¹²⁴²De Kock *Generators of Crime* 11-12. He erred in insinuating that up to 1998, South Africa did not really have the money laundering legislation and measures to fight money laundering effectively. He should have opined that it is up to 1996 as the Proceeds of Crime Act of 1996 was addressing money laundering.

¹²⁴³See <http://www.saps.org.za/strategic/index.htm> last visited on 31 December 2007.

¹²⁴⁴Albanese *Control of Organized Crime* 20.

for the financial years 2003/2004 - 2010/2011 is as follows:

Financial Year	2003/2004	2004/2005	2005/2006	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011
Number	120	186	115	109	72	51	121	179

Figure 9.1: The number of organised criminal groups identified in the RSA for the period 2003/2004 - 2010/2011 (Source: SAPS Annual Reports)¹²⁴⁶

9.2 ORGANISED CRIMINAL GROUPS IN SOUTH AFRICA

Various organised criminal groups that operate in South Africa, which are sometimes called gangs, have come to the attention of researchers and experts.¹²⁴⁷

¹²⁴⁵Albanese *Organized Crime* 7-10.

¹²⁴⁶See SAPS Annual Reports for the period mentioned, e.g., 2010/2011 page 94. The huge difference between the financial years 2008/2009 and 2009/2010 came as a result of the combination of the projects from the SAPS and the former Directorate for Special Operations (DSO).

¹²⁴⁷This list of organised criminal groups is intended to mitigate the misconception created by some researchers that organised crime is synonymous with 'mafia'. These groups include the Hard Livings, the Americans, the Sexy Boys, the Asbestos Boys, the Bad Boys, Fancy Boys, Glamour Boys, the Ghetto Boys, Bun Boys, Corner Boys, the Dixie Boys (the Dixies), Flat Boys, Future Boys, the School Boys, Stoepa Boys, Homeboys, the Puma Boys and the Nike Boys, the Junky Funky Kids (Funkies or JFK), New Yorkers (NY translated Never Ending Warriors, Young Original Red Killer), the Skollies, the Chinese 14K Hau, 14K triad, Wo Shing Wo triad, the Wohing Wo Triads, the Firm, the Community Outreach Forum (Core), the Terrible Pipe Killers (TPK), the Cat Pounds (Cats), the Globe, the Robies, the Naughty Angels, the Sexy Young Ones, Junior Mafia, Junior Young Ones, Impossible Ones (IOs), Genuine TV Kids, Pound Lovers, Mongrels, the Casanovas (Cats), the Peacemakers, the Homeguard, the Majimbos, Ma se Kinders, Cool Cats, Dirty Night Pigs, Duckings, D12, Lucky Busted, Roiduiwels, Terrible Josters, Vulture Kids, Wonder Kids and the Varados, the Table Mountain Taiwanese gang, the Number or Numbers, the Prison Numbers, Number gangs that consists of 26, 27 and 28; Junkey Funkeys, the West Siders, the Scorpions, the Virgin Breakers, the Dagger Kids, Fluffy gang, the Regiment of the Hills (later known as Ninevites), People of the Stone, Amalitas, Nongolozas, the Scotlanders, Table Mountain gang, Sun Yee On, United Bamboo Gang (or Chu Lien Pang), Four Seasons gang (or Sei Hoi), 14K-Ngai group, Foster gang, Msomi gang, Spoiler gang, Sheriff Khan gang, Rolex gang, Durban gang, Y gang, Young Americans gang, Goofies, Red Cats, Mongrels, Cisco Yakis, Cape Town Scorpions, Dochs and Serpents, the Dougans, Born Free Kids, Magabaza, Marashea, Boere Mafia, Commodores, Italians and the Zebra Force. See Bresler *Trail of Triads* 123, Robinson *The Merger* 288-291, Kinnes and Steinberg *Criminal Empires* 1, 2, 4, 7 and 11, Jensen *Gangs* 57, 58, 62, 71, 75, 76, 78, 171, 172, 185 and 190, Hübschle *Organised Crime* 50, Roth *Organized Crime* 456-461, Standing *Organised Crime* 11, 15, 40, 103 and 282, Lewis *Gangsters* 20 and 21, Kemp *Gangs* 179 and 207, Gastrow *Chinese Organised Crime* 1 and 4 and Nicaso and Lamothe *Criminal Empires* 240.

Some of the groups were not known by name, but they were known by their nationality.¹²⁴⁸

Kinnes and Steinberg mention the Italian/Sicilian Mafia as operating in South Africa. Their argument is based on the presence of Vito Roberto Palazollo. While it is believed that he met Rashied Staggie, leader of the Hard Livings, they concede that the businesses in which he is alleged to be involved are not known and the information is sketchy.¹²⁴⁹ This writer is of the view that Kinnes and Steinberg should have refrained from insinuating that Mafia is in South Africa, because they have not established conclusive evidence of such statement.¹²⁵⁰ The same argument may hold water for Robinson.¹²⁵¹ The loose usage of the concept 'Mafia' can also be seen in the statement advanced by Limpopo Premier Cassel Charlie Mathale who vehemently disputes the existence of Limpopo Mafia, which he branded as its Godfather.¹²⁵² In essence, Varese notes that Mafia is not liquid in South Africa and that it is in fact a difficult industry to export as it is heavily dependent on the local environment.¹²⁵³

¹²⁴⁸These include the Columbians, Peruvians, Bulgarians, Moroccan Protection gangs, Chinese, Nigerian cocaine cartels, Somalians, Pakistanis, Portuguese and Congolese. The presence of the Chinese criminal organisations support the view expressed by Bresler who states that wherever the Chinese community may be in the world, they take their home environment with them.

¹²⁴⁹Kinnes and Steinberg *Criminal Empires* 28 and Robinson *The Merger* 288-291. Robinson states that Vito Roberto Palazzolo @ Roberto von Palace Kolbatschenko, an Italian and the USA fugitive, was linked to the Hard Livings gang, hence a belief that he was Mafia's chief laundryman in Southern Africa and the Godfather of South Africa. He was arrested on 30 March 2012 in Thailand.

¹²⁵⁰Kinnes and Steinberg *Criminal Empires* 16, 28, 50, and 51. This monograph seems to be overwhelmed with errors and need to be read with caution; it refers to Fivas instead of Fivaz, DSI instead of DSO for Scorpions and worse, the omission of the co-author, Jonny Steinberg from the original publication.

¹²⁵¹Robinson *The Merger* 288-291.

¹²⁵²See the article by Piet Rampedi in City Press of 04 September 2011 at page 4.

9.3 CRIMES COMMITTED BY ORGANISED CRIMINAL GROUPS IN SOUTH AFRICA

Organised criminal groups can commit any crime, which will advance their chances of benefiting financially or materially. Geldenhuys states that criminals traffic drugs, illegal immigrants, contraband goods, are involved in prostitution rings, and commit crimes ranging from murder, robbery, fraud, burglary, extortion to organised or simple theft in order to make money from these activities.¹²⁵⁴ Similarly, Gastrow exemplifies that the Chinese organised criminal groups were involved in dealing in counterfeit watches, clothing, shoes, electronic equipment, abalone trade, rhino horns trafficking, shark fin trafficking, illegal gambling and drug trafficking.¹²⁵⁵ Underneath follow the types of crimes in which organised criminal groups feature.

9.3.1 Murder

Murder is the unlawful and intentional causing of the death of another human being.¹²⁵⁶ Snyman states that a person commits murder if he unlawfully and intentionally causes another person's death.¹²⁵⁷

The elements of this crime are causing the death, of another person, unlawfulness, intention and punishment.¹²⁵⁸ Klotter phrases the elements as unlawful killing, a human being, by another human being and malice aforethought.¹²⁵⁹ Wallace and Roberson offer only two elements, which are that the defendant must have acted

¹²⁵³Varese *Mafias on the Move* 4 and 13.

¹²⁵⁴Geldenhuys *Assets Forfeiture Unit* 32.

¹²⁵⁵Gastrow *Chinese Organised Crime* 1, 2 and 5.

¹²⁵⁶*Id* n 14 *supra* at 447.

¹²⁵⁷Snyman *Draft Criminal Code* 26.

¹²⁵⁸*Id* n 14 *supra* at 447-449.

with the necessary, express or implied specific intent to kill and that the defendant's conduct must have caused the death of another human being.¹²⁶⁰

Murder represents the single greatest threat to personal security.¹²⁶¹ It will be very strange to have a criminal group whose purpose is just to commit murder as the ultimate motive. If that was the case, the element of financial or other material benefit was going to be lacking. The basis for this argument is that the main purpose of organised crime is financial benefit. Ince excludes the crimes of rape, murder, assault and violent against property for the sole purpose of committing crime in the definition of organised crime.¹²⁶² The crime is organised where the motive is either financial or other material benefit. Indeed, Balsamo and Carpozi believe that, unlike the old bloody days when bootlegging was one of the chief sources of income for the Mob and the gunfire-tattooed syndicate's enforcement aims, today organised criminals shy away from violence and murder as much as they can.¹²⁶³

In an organised criminal group that was investigated under an Organised Crime Project Investigation (OCPI) codenamed "Coffin", a number of murder cases were committed in Kwa-Zulu Natal where the group used this information to defraud insurance companies who insured the deceased. The *modus operandi* was to insure certain people by using fictitious information, they will then kill them and thereafter cash up the policies taken in their names. In this regard, a combination of murder and fraud, which are repeatedly perpetrated by an organised criminal group constitute organised crime.

¹²⁵⁹Klotter *Criminal Law* 66-67.

¹²⁶⁰Wallace and Roberson *Criminal Law* 130.

¹²⁶¹Cockayne Response to a Rising Threat 1.

¹²⁶²Ince *Organised Crime in China and Italy* 3.

¹²⁶³Balsimo and Carpozi *Under the Clock* xiii.

9.3.2 Motor Vehicle Theft

In defining theft, Snyman states that 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.¹²⁶⁴ Burchell defines theft as consisting in an unlawful appropriation with intent to steal of a thing capable of being stolen.¹²⁶⁵ Milton defines theft as consisting in an unlawful *contractatio* with intent to steal of a thing capable of being stolen.¹²⁶⁶

The key elements of this crime are an act of appropriation, in respect of certain kind of property, which is committed unlawfully and intentionally.¹²⁶⁷ Burchell lists the elements as - unlawful, appropriation, property, and intention.¹²⁶⁸ Any assumption by a person of the rights of an owner amounts to appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.¹²⁶⁹

¹²⁶⁴*Id* n 14 *supra* at 483.

¹²⁶⁵*Id* n 33 *supra* at 782.

¹²⁶⁶Milton *Common Law* 59.

¹²⁶⁷*Id* n 14 *supra* at 484.

¹²⁶⁸*Id* n 33 *supra* at 785.

¹²⁶⁹Section 3(1) of the Theft Act of 1968. See also Ormerod and Williams *Law of Theft* 19.

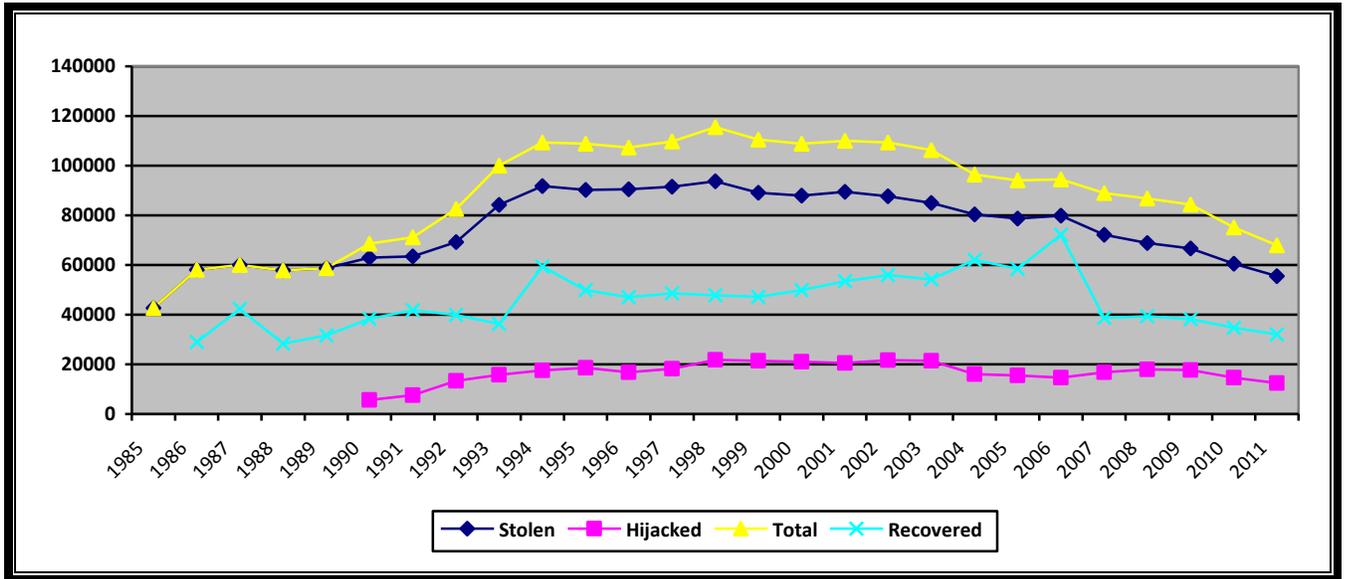


Figure 9.2: Graph showing motor vehicles stolen, hijacked and recovered in the RSA for the period 1985 - 2011 (**Source:** SAPS Crime Statistics)¹²⁷⁰

Country	Angola	Botswana	Lesotho	Malawi	Mozambique	Namibia	South Africa	Swaziland	Tanzania	Zambia	Zimbabwe
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

Figure 9.3: The number of motor vehicles stolen in RSA and seized during the SARPCCO joint operations for the period 2005 - 2007 (**Source:** SAPS Crime Reports)

¹²⁷⁰The monitoring of hijacking was started in 1990. Although Robertshaw *et al.*, Durban 78, find 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. The recovery was worse in 2007 and 2008.

Nationality	Angola	Botswana	Lesotho	Malawi	Mauritius	Mozambique	Namibia	South Africa	Swaziland	Tanzania	Zambia	Zimbabwe
Number arrested	22	3	89	0	0	183	5	24 450	43	0	14	61

Figure 9.4: Nationalities of suspects arrested for motor vehicle theft for the period 2005 – 2007

(Source: SAPS Crime Reports)

Zinn found that organised crime is manifested in motor vehicle and truck hijackings in Gauteng. He reached this conclusion after interviewing thirty (30) hijackers who were sentenced to imprisonment for a period of between eight (8) and sixty five (65) years.¹²⁷¹ As proof of his findings, he tabulated crime figures for hijackings of motor vehicles and trucks for the period 1996 - 2000. Interestingly, 50% of these prisoners indicated that they belong to a syndicate while the other 50% indicated that they do not belong to any syndicate.¹²⁷² He further found that 27% belong to gangs whereas 73% do not belong to any gang.¹²⁷³ Buys has correctly observed that the hijacking of trucks carrying freight is by its nature a crime that is committed by organised criminal groups/syndicates.¹²⁷⁴

According to Irish-Qhobosheane, South Africa is the major source of vehicles that

¹²⁷¹Zinn *Motor Vehicle Hijackers* 27.

¹²⁷²*Id* n 1271 *supra* at 248. By syndicate, he quotes Longman's dictionary which provides that syndicate is a group of people or companies (criminals) who join together in order to achieve a particular aim (crime).

¹²⁷³*Id* n 1271 *supra* at 249. By gang, he quotes Longman's dictionary, which provides that a gang is a group of young people who spend time together and often cause trouble and fight other groups. In terms of Section 186.22 (1987 of the California Penal Code, 3-4), a gang is a group of associating individuals which (a) has an identifiable leadership and organisational structure; (b) either claims control over particular territory in a community, or exercises control over an illegal enterprise; and (c) engages collectively or as individuals in acts of violence or serious criminal behaviour. This Californian definition of gang can also be accessed in Roth *Organized Crime* 55.

are smuggled within the SADC region, ranging from 96% to 98% of all vehicles acquired illicitly.¹²⁷⁵ During 2006/2007 SARPCCO year (August 2006 - July 2007), the number of motor vehicles stolen in South Africa and recovered in the other SARPCCO member's countries was 1190. Of these vehicles, only 321, which is 27% were repatriated back to South Africa leaving 801 pending. In 2010, the figure deteriorated to 260 of 1295, which is 20%. The repatriation of motor vehicles is a challenge in some countries and it is believed that this problem is going to persist. Some insurance companies have resolved not to send owners for identification, as they do not get the vehicles afterwards. This has the potential of undermining the purpose of SARPCCO joint operations as the thieves will identify and base their operations on the weakness of the responses. As correctly pointed out by Shaw and Wannenburg, the hijacking and theft of motor vehicles in South Africa cannot be controlled without an examination of regional factors such as crime bosses who are from within and outside the borders and the markets in Mozambique, Zambia and Zimbabwe.¹²⁷⁶

9.3.3 Narcotic Drugs

Gilmore submits that drug trafficking is by its nature global in character, requiring the international movement of products from producer countries to the major drug consumer nations.¹²⁷⁷ According to Ryan, drug distribution and sales are the primary sources of income for all organised crime groups. He argues that wholesale drug dealing transactions, with the exceptions of marijuana and synthetic or designer drugs, take on an international character.¹²⁷⁸ Santino agrees that the

¹²⁷⁴ Buys *Hijacking of Trucks* 68.

¹²⁷⁵ Irish *Beit Bridge* 1.

¹²⁷⁶ Shaw and Wannenburg *Organized Crime* 377.

¹²⁷⁷ Gilmore *Dirty Money* 15.

¹²⁷⁸ Ryan *Organized Crime Handbook* 22 and 43.

biggest part of the proceeds arise from drug trafficking.¹²⁷⁹ Fukumi agrees that drug trafficking is the most popular and profitable economic activity of transnational criminal organisations (TCOs) including mafias- so much so, that it is even considered as their 'economic mainstay'.¹²⁸⁰ Mazzitelli points that while drug trafficking remains by far the most lucrative transnational criminal activity, today's criminal networks have diversified their portfolios in order to reduce risks and to make it more difficult for law enforcement agencies to trace them.¹²⁸¹

Organised criminal groups care less about the physical and mental wellbeing of drug users. As observed by Lyman and Potter, their involvement in drug trafficking in a particular locality is discernible, amongst others, through the overburdened public health institutions, economic well-being,¹²⁸² litter in the streets, growing number of vacant buildings, increased number of teen groups hanging out, broken windows throughout the neighbourhood, prostitutes working openly in the streets, move out of long-time residents, increase in divorce, unwanted pregnancies, burglaries, robberies, carjackings, violence and murders.¹²⁸³ Kopp is correct in submitting that drugs consumption does not affect the consumer only because the behaviour of some people, after taking the substance, affects others.¹²⁸⁴

In policing drug-related crime, the Drugs and Drug Trafficking Act¹²⁸⁵ is applied. As a signatory to the International Instruments, controlled deliveries are used to deal with transnational organised crime. The Drugs and Drug Trafficking Act of 1992

¹²⁷⁹See www.centroimpastato.it/publ/online/mafia-in-Italy.htm last visited 28 August 2011.

¹²⁸⁰Fukumi *Drug-Trafficking* 93.

¹²⁸¹Mazzitelli *Transnational Organized Crime* 1074. See also <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2346.2007.00674.x/pdf> last visited on 07 May 2011.

¹²⁸²Robinson *The Merger* 337. According to Robinson, drug crime accounts for 2% of the world economy.

¹²⁸³Lyman and Potter *Organized Crime* 223 and 257 (This information appears in the 2007 edition).

¹²⁸⁴Kopp *Illegal Drugs* 2.

creates nine (9) offences ranging from possession to dealing in these substances.¹²⁸⁶

The drug trade is exorbitantly profitable.¹²⁸⁷ On the crime of trafficking in drugs, a number of couriers have and are still continuously arrested from the ports of entry, especially flights that land at O R Tambo International Airport from Sao Paulo. That signal the route used by drug traffickers. These drugs are hidden in cargo, luggage or swallowed. Suggesting the role of corruption, Rustello asks why tons, ships, cargo planes and containers get all the merchandise through harbours and airports that are equipped with the most sophisticated means of detection.¹²⁸⁸ Robinson has observed that, as police and Customs officials at Johannesburg International Airport becomes more vigilant, traffickers simply divert to Cape Town or bring drugs in overland from Mozambique, Zambia, Zimbabwe and Namibia.¹²⁸⁹ The movement of drugs from one national jurisdiction to the other is termed transnational drug-trafficking. Allum and Siebert quote Savona stating that the emergence of organised crime groups, which have a home base in one state but operate in one or more host states where there are favourable market opportunities, has prompted analysis to term them ‘transnational criminal organisations’.¹²⁹⁰

In 2001, the Honourable Minister of Safety and Security, Mr Steve Tshwete, as he then was, stated that the Organised Crime Threat Analysis (OCTA) also identified drugs as the top organised crime threat. He indicated, that out of 311 threats, 102 concerned drugs.¹²⁹¹ Bucquoye and others stated that refrigerator trucks are often attractive for drug smugglers because the perishable load allows them to hide the drugs in the knowledge that these trucks are less controlled due to the characteristic

¹²⁸⁵140 of 1992.

¹²⁸⁶These offences are reflected in sections 13(a)-13(f), 15(1), 16(a)-16(d).

¹²⁸⁷Gilmore *Dirty Money* 19.

¹²⁸⁸Rastello *The Market* 17.

¹²⁸⁹Robinson *The Merger* 287-288.

¹²⁹⁰Allum and Siebert *Organized Crime* 8.

nature of the load that makes it difficult to trace the drugs.¹²⁹²

Most of the cocaine consumed in South Africa is smuggled by transnational criminal organisations from source countries, such as Colombia, Peru, Bolivia and Mexico.¹²⁹³ Lyman and Potter acquiesce that for several years, Nigerian organised criminal groups moved substantial quantities of cocaine through Argentina or Brazil to Angola or Namibia for transshipment to Europe, North America, or South Africa.¹²⁹⁴ In assenting to this view, Robinson points that drugs from Brazil are trucked to Colombia and then flown across to South Africa. He concludes that some of these drugs are sold in South Africa while the rest are moved north to Europe.¹²⁹⁵ Over and above, some of the cocaine was smuggled directly into South Africa. Accordingly, the importation of cocaine through Colombia and Brazil is one of the major sources of income for the developing syndicates.¹²⁹⁶

Acknowledging the uneasy task of policing drugs problem, Lyman and Potter conclude that arrests do not seem to do much to deter future criminal activity, and as a result, the police feel trapped between rising crime rates and an angry, unappreciative citizenry who demand immediate results to unyielding problems. They orate South Africa as a major source country for cannabis (dagga/marijuana), most of which is exported to Europe, North America and Asia.¹²⁹⁷ In support of this view, Kopp groups South Africa with Morocco, Nigeria, Afghanistan, Pakistan,

¹²⁹¹See <http://www.pmg.org.za/briefing/010911safety.htm> last visited on 19 January 2008.

¹²⁹²Bucquoye *Road Transport* 143-144.

¹²⁹³Lyman and Potter *Organized Crime* 288-289. In addressing the High Level Segment of the 52nd Session of the United Nations Commission on Narcotics Drugs, the President of Bolivia challenged the continued listing of the coca leaf on Schedule 1 of the 1961 Single Convention on 11-02-2009 in Vienna International Conference Center. His argument is based on the grounds that the leaf is medicinal and that he is living evidence as one of the 10 million people who chew it in Bolivia. His submission is that, what is needed is to address the markets.

¹²⁹⁴*Ibid* n 1293 *supra*.

¹²⁹⁵Robinson *The Merger* 292.

¹²⁹⁶*Ibid* n 1293 *supra*.

¹²⁹⁷*Id* n 1293 *supra* at 288.

Mexico, Colombia and Jamaica as the main producers of cannabis.¹²⁹⁸ Furthermore, the largest seizures of cannabis in the world, which were reported in South Africa during 2008, which is 359 tons, implies the existence of organised criminal groups.¹²⁹⁹

The argument by Allum and Kostakos, who are of the view that organised crime exist and affects our lives as the perpetrators produce and traffic drugs, remains correct in the South African situation.¹³⁰⁰ Allum and Siebert follow the same argument and point out that, slowly but surely, the tentacles of organised criminal groups are spreading in the different countries in different guises. They further point out the number of drug seizures and drug addicts, of smuggled and counterfeit goods, of shoot-outs, of illegal criminals trying to enter the country and unusually large bank transfers as evidence of the existence of organised criminal groups.¹³⁰¹ The number of arrests for drugs related offences, and the detection and dismantlement of clandestine laboratories, as indicated below, signifies the existence of organised criminal groups in South Africa.

¹²⁹⁸Kopp *Illicit Drugs* 16.

¹²⁹⁹INCB Report 2008 at 51.

¹³⁰⁰Allum and Kostakos *Understanding Organized Crime* 3.

¹³⁰¹*Id* n 1300 *supra* at 2.

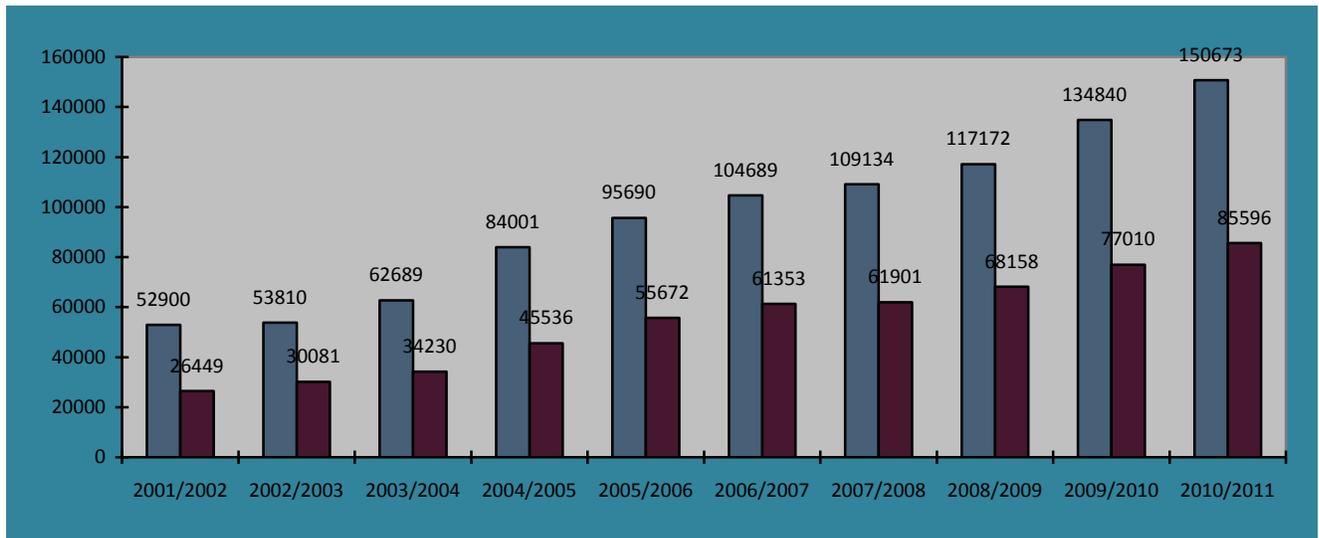


Figure 9.5: Chart showing drug related arrests (blue) and convictions (plum) for the period 2001/2002 - 2010/2011 (**Source:** SAPS Crime Statistics)

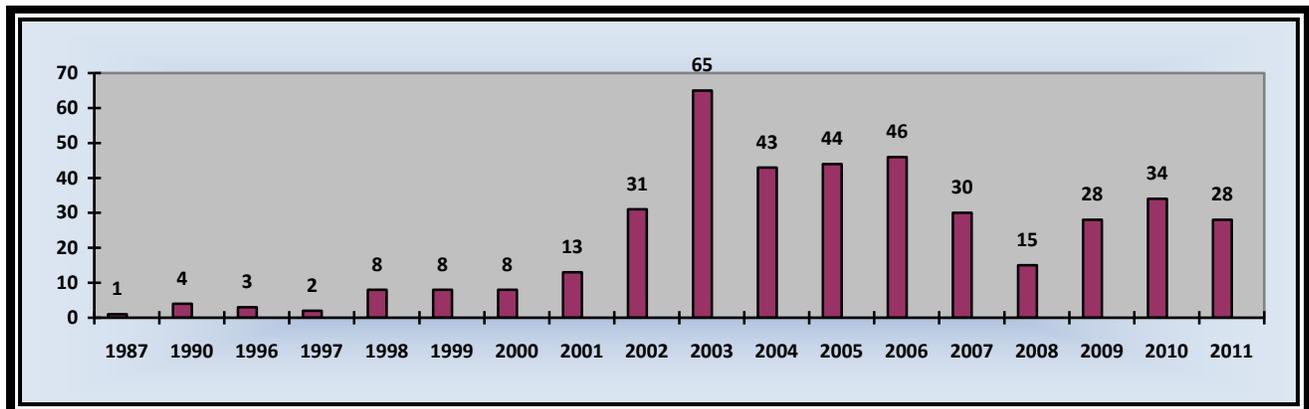


Figure 9.6: Chart showing the number of clandestine laboratories dismantled for the period 1987 - 2011 (**Source:** SAPS Crime Statistics)

9.3.4 Robberies

Snyman defines robbery as consisting of 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.¹³⁰² In his draft Criminal Code, he has indicated that a person commits robbery if he steals property by unlawfully and intentionally uses violence or threats of violence to take the property or to induce submission to its taking.¹³⁰³ 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.¹³⁰⁴ 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.¹³⁰⁵ Zannoni describes robbery as a form of interpersonal violence, a category of contact crime that requires the physical taking of property from another either by threat or by use of force. He defines it as a predatory crime, a typically urban phenomenon, committed violently or accompanied by threat of violence against persons and businesses.¹³⁰⁶

Buys adopted the definition of Hunt that defines robbery as the theft of property by intentionally using violence or threats of violence to induce submission to taking of property from another.¹³⁰⁷ Robbery is differentiated from the primary offence of theft by the additional, aggravating element of force or threats thereof.¹³⁰⁸ The South African Banks Risk Information Center (SABRIC) defines bank robbery as the unlawful, intentional and violent removal and appropriation, or attempted removal

¹³⁰²*Id* n 14 *supra* at 517.

¹³⁰³Snyman *Draft Criminal Code* 37.

¹³⁰⁴*Id* n 33 *supra* at 817.

¹³⁰⁵Milton *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.

¹³⁰⁶Zannoni *Jewellery Store Robbery* 17.

¹³⁰⁷Buys *Hijacking of Trucks* 10.

¹³⁰⁸Molan, Lanser and Bloy *Criminal Law* 337.

and appropriation of movable property whilst it is under the control of a bank by means of violence or a threat of violence, where the victim has to believe that the perpetrator will, or is able to use the indicated violence.¹³⁰⁹

Experience suggests that groups of criminals, usually grouped in more than five persons, commit bank robberies. These groups are heavily armed and do not hesitate to harm their victims. They make use of automatic rifles such as AK47s and R5s. The history of South Africa's bank robbery dates back in the 1970s when a police detective captain, Andre Charles Stander learnt the tricks from Homicide/Robbery Police Unit and turned a robber. Stander who was a captain in charge of the Detective Service, Kemptonpark led a three-man organised criminal group of Allan Heyl, Patrick Lee McCall and himself. They robbed more than 48 banks. McCall died when the police stormed his hideout in Houghton and Stander died when the police in Florida, US tried to stop him from escaping after his arrest for stealing his car from the police pound. Allan Heyl, who was extradited to South Africa after serving nine years in England, was released from Krugersdorp prison in 2005.¹³¹⁰

The essential elements of robbery are theft, violence, submission and intention.¹³¹¹ Milton simply puts the essential elements as theft, violence or threats, which causes submission to the taking and *mens rea*.¹³¹² Masango concurs with Milton but he adds that the property must have been taken from another person.¹³¹³ Snyman puts forward the elements of robbery as the theft of property, through the use of either

¹³⁰⁹Servamus October 2009 page 38.

¹³¹⁰<http://www.imdb.com/title/tt0326208/plotsummary> last visited on 20 September 2009, <http://www.mg.co.za/article/2005-05-18last-remaining-stander-gang-member-leaves-prison> last visited on 20 September 2009 and Cape Argus of 11 October 2001 at <http://www.iol.co.za/index.php?> last visited on 20 September 2009.

¹³¹¹*Id* n 33 *supra* at 818.

¹³¹²Milton *Common Law* 647.

¹³¹³Masango *Criminal Law* 200.

violence or threats of violence, a causal link between the violence and the taking of the property, unlawfulness and intention.¹³¹⁴

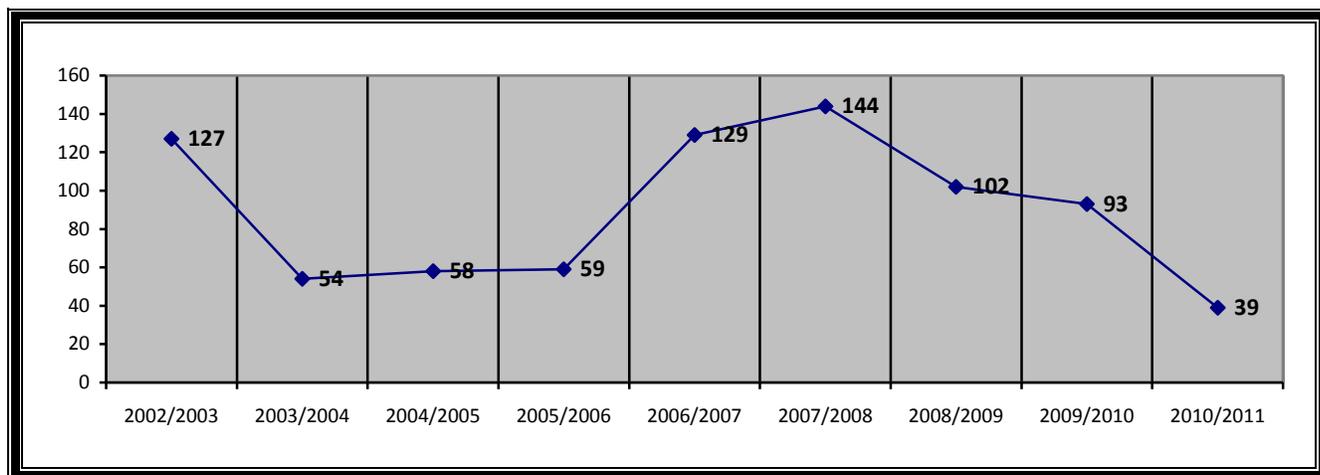


Figure 9.7: Statistics of bank robberies for the period 2002/2003 - 2010/2011 (Source: SAPS Annual Reports)¹³¹⁵

According to Botes, law enforcement agencies define Cash-in-Transit (CIT) robbery as the unlawful, intentional and violent removal and appropriation of cash while in transit and under the control of a security company.¹³¹⁶ Groups of criminals, usually grouped in more than ten persons, commit cash-in-transit robberies. These groups are heavily armed with similar weapons as those used in bank robberies and do not hesitate to harm their victims. Botes argues that CIT robberies are directly linked to organised crime groups operating in South Africa and play a central role in the billions of rands that are laundered through the financial system.¹³¹⁷ When caught, the organised criminal group is usually prosecuted for robbery under aggravating circumstances. If the element of repetition is present, they can be prosecuted in

¹³¹⁴*Id* n 14 *supra* at 517.

¹³¹⁵SAPS Annual Report 2007/2008 at 7 and 2008/2009 at 110.

¹³¹⁶Botes *Money Laundering* 53. These types of crimes are not treated as different crimes than robbery in South Africa and other countries that form part of this research.

¹³¹⁷*Ibid* n 1316 *supra*.

terms of the POCA. Botes concludes that 1 852 CIT cases were reported in South Africa for the period April 1996 to March 2003.¹³¹⁸

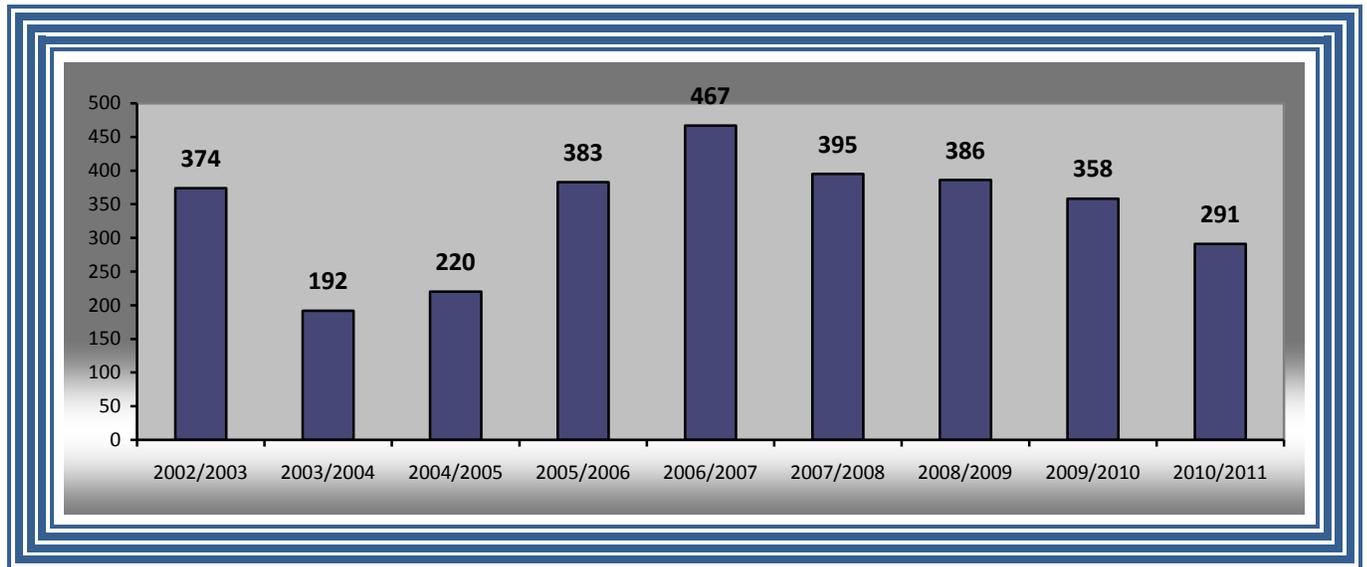


Figure 9.8: Statistics of CIT robberies for the period 2002/2003 - 2010/2011(**Source:** SAPS Annual Reports)¹³¹⁹

Business robberies, which are robberies committed against business institutions, are committed by groups of criminals who are usually committing them in groups of more than five persons. These groups are heavily armed and do not hesitate to harm their victims. They make use of similar weapons as those used in bank robberies.

¹³¹⁸*Ibid* n 1316 *supra*. This information is taken from SAPS crime statistics for the period 1994/1995 to 2002/2003 financial years, which is accessible at <http://www.saps.gov.za/8-crimeinfo/200309rsato2.htm> last visited on 10 September 2010.

¹³¹⁹SAPS Annual Report 2007/2008 at 7, 2008/2009 at 110 and 2010/2011 Annexure A at 4.

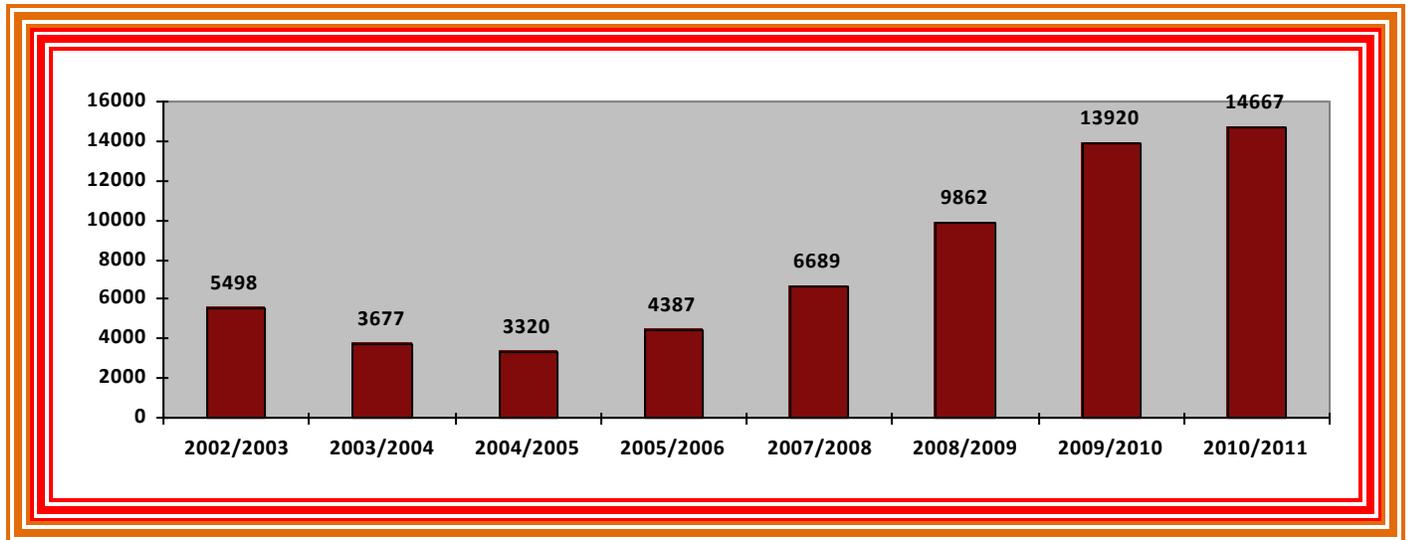


Figure 9.9: Statistics of business robberies for the period 2002/2003 - 2010/2011 (Source: SAPS Annual Reports)¹³²⁰

House robberies are committed by a limited number of criminals, usually not exceeding five. The suspects make use mostly of pistols, and in some instances, they also harm their victims including rape.¹³²¹ Illegal foreign nationals appear to play a major role. Some goods which have been stolen from these robberies were recovered en route to Mozambique. Suspects who commit house robberies appear also to be involved in house breaking with the intention to commit crime. It remains unclear as to whether this understanding supports the perception of Shelly who argues that there has been a major organised crime penetration into the State in

¹³²⁰*Ibid* n 1319 *supra*.

¹³²¹Reid *Criminal Law* 179. According to Reid, this type of crime is called home-invasion robbery. She describes it as a fear-creating event where people are robbed within their homes. She quotes the definition of this crime from the statute of Florida. Home-invasion robbery means any robbery that occurs when the offender enters a dwelling with the intent to commit a robbery, and does commit a robbery of the occupation therein. She also puts it differently that home-invasion robbery is robbery that occurs when a person enters a dwelling for the purpose of committing a robbery and engages in a robbery of the occupant.

Mozambique.¹³²²

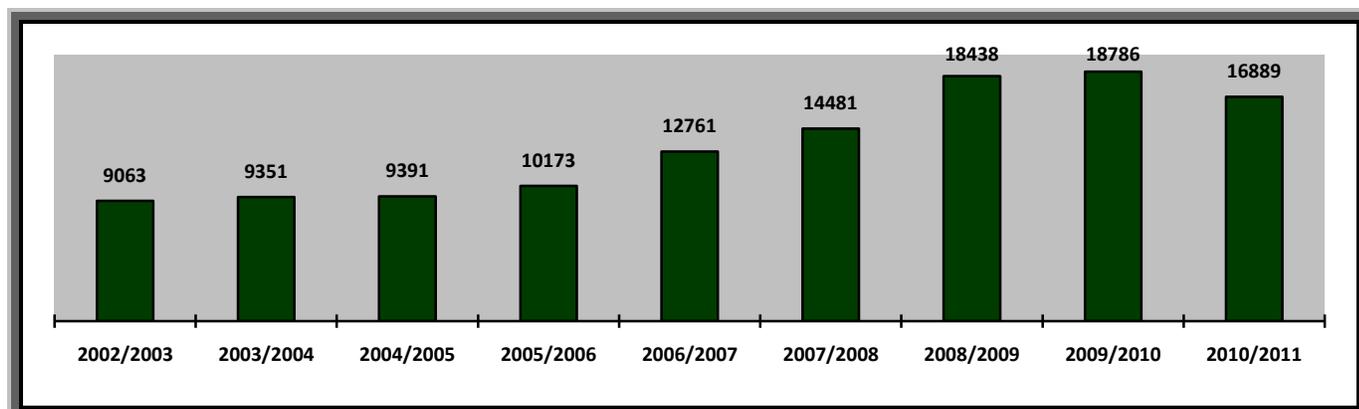


Figure 9.10: Statistics of house robberies for the period 2002/2003 - 2010/2011 (Source: SAPS Annual Reports)¹³²³

Although the crime of motor vehicle robbery or car hijacking is classified as a separate crime from robbery in some countries, it is not a separate crime from robbery in South Africa

Accurately so, Brussow and Brussow describe 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 therefore be charged with “robbery with aggravating circumstances” in court and not with “vehicle hijacking”.¹³²⁴ 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 the person.

¹³²²Lahneman and Lewis *Organized Crime* 2.

¹³²³*Ibid* n 1319 *supra*.

¹³²⁴Brussow and Brussow *Hijack* 1 at <http://www.matrix.co.co.za/content/hijack-guidelines.htm> last visited on 16 September 2007.

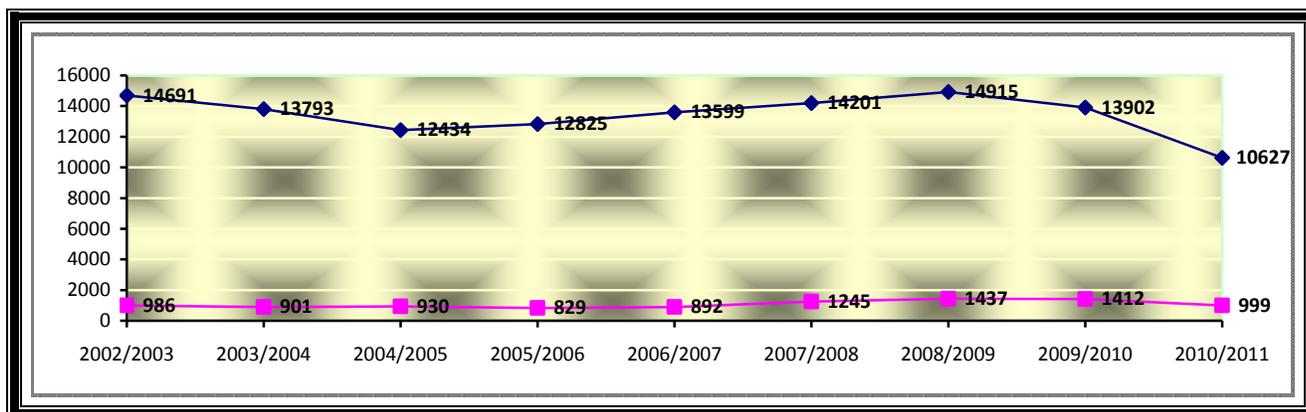


Figure 9.11: Statistics of hijacking of motor vehicles (blue) and trucks (purple) for the period 2002/2003- 2010/2011(**Source:** SAPS Annual Reports)¹³²⁵

9.3.5 Housebreaking with the intention to commit crime

Snyman defines housebreaking with the intent to commit a crime as consisting of unlawfully and intentionally breaking into and entering a building or structure with the intention of committing some crime in it.¹³²⁶ The elements of this crime are: breaking; entering; a building or structure; unlawfully; and intentionally.¹³²⁷

¹³²⁵SAPS Annual Report 2007/2008 at 7 and 2008/2009 at 110.

¹³²⁶See <http://www.is.org.za/new-component/legal-definitions.htm> last visited on 20 February 2008 and Snyman *Criminal Law* 549. It is important to note that housebreaking is defined differently in South Africa and the USA.

¹³²⁷*Id* n 14 *supra* at 549. Reid calls this crime burglary. She defines it as the breaking and entering of an enclosed structure without consent and with the intent to commit a felony therein. She furnishes the elements of this crime as a breaking and entering; of the dwelling of another; during the night-time and with intent to commit a felony therein. Chamelin and Torcia share this definition. Similarly, Skelton defines burglary as the breaking and entering of the dwelling house of another in the night-time with the intent to commit a felony therein. While reverberating the elements pointed out by Reid, he admits that the element of night-time seems silly today but made sense in the past when people were only at home during the night. The phraseology by Klotter states that burglary is the breaking into a house in the night season with intent to commit a felony, and if a house is so entered, it is burglary, whether the felony be executed or not, and regardless of the kind of felony intended or the manner in which the felony may be frustrated, or the value of the property taken, or any other circumstance which is not intrinsic. Bergman and Berman define burglary as a culprit breaking into and enters a building without consent and with intent to commit a felony or to steal property, even if the theft itself would only be a misdemeanour. See Reid *Criminal Law* 215, Skelton *Criminal Law* 109-110, Klotter *Criminal Law* 185, Chamelin *Criminal Law* 206,

Schiffman submits the definition as the unlawful entry of the building or structure of another with the intent to commit a crime unless the premises are at the time open to the public or the actor is licenced or privileged to enter.¹³²⁸

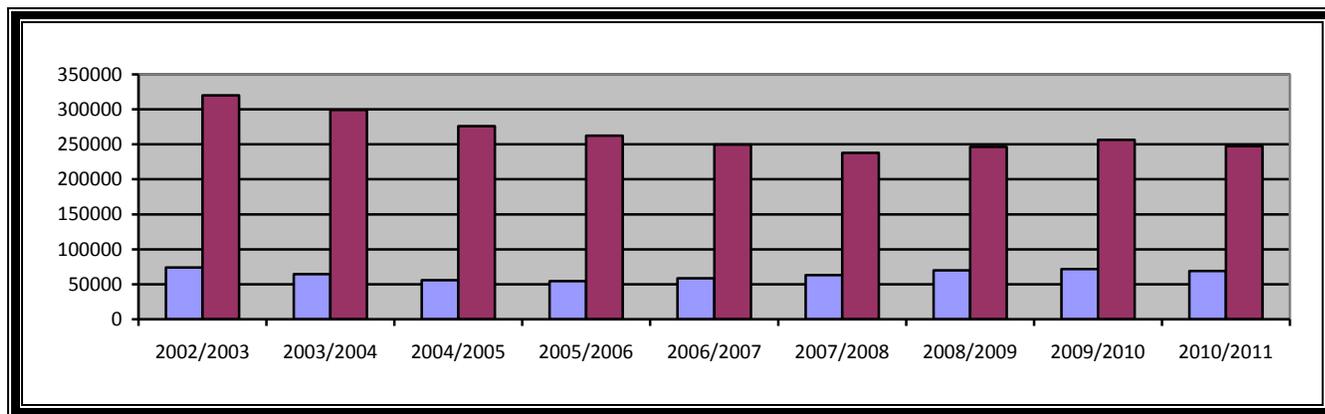


Figure 9.12: Statistics of business (blue) and residential (plum) burglaries for the period 2002/2003 - 2010/2011 (**Source:** SAPS Annual Reports)¹³²⁹

9.3.6 Trade in Endangered Species

Endangered species is a commodity mostly targeted by organised criminal groups who take these species from one country to the other. International Protocols and municipal laws protect these species. Internationally, the Convention on International Trade in Endangered Species (CITES) of Wild Fauna and Flora that regulates the trade in all species of wild fauna and flora that are presently facing extinction or may inevitably face it.¹³³⁰ In terms of Article I(a) of this Convention, species means any species, subspecies or geographically separate population thereof. South Africa is a signatory to this Protocol. Endangered and protected

Torcia *Criminal Law III* 223 and Bergman and Berman *Criminal Law* 273.

¹³²⁸Schiffman *Criminal Justice Process* 149.

¹³²⁹*Ibid* n 1319 *supra*.

¹³³⁰See Shanty and Mishra *From Trafficking to Terrorism* 528-539 and <http://www.cites.org/eng/disc/text.shtml> last visited on 18 February 2009.

species in the form of wild animals are harvested from the production areas to receivers within and outside the country for their horns, hoofs and tusks, which are in demand for those who intend producing ornaments and jewellery.

Abalone, a group of shellfish in the family of Haliotidae and *Haliotis midae* genus,¹³³¹ also called perlemoen, a name derived from a Dutch term Paarlemoer is one of the highly sought species. The unrestricted commercial harvesting of abalone began in 1949. The annual quota or Total Allowable Catch (TAC) was introduced in 1970. He concludes that poaching is as old as quotas.¹³³² The nature of the offences involving abalone is catching the undersized abalone, harvesting without a permit and exceeding the quota. According to the Marine Coastal Management (MCM), poaching or the illegal harvesting of abalone is the single biggest threat to the South African abalone resources. They argue that the poachers are criminals, some of whom form part of powerful and highly organised gangs.¹³³³

Steinberg proclaims that abalone was bartered with methaqualone between the Chinese organised criminal groups and the drug lords in the Western Cape. However, he concedes that nobody knows what proportion of the illicit abalone catch is bartered for methaqualone. Abalone is mostly harvested from the Eastern Cape, Western Cape and Northern Cape, and is transported by road to Gauteng Province where the cargo will be dried, packed and exported. He admits that it is not possible to say precisely how abalone is smuggled across South African borders. His observation is that commercial land borders and unlogged airstrips are used to smuggle abalone out of the country, and is thereafter exported from Mozambique, Namibia, Tanzania, Swaziland and Zimbabwe to Hong Kong.¹³³⁴

¹³³¹Krause *Crime Threat Analysis* 70.

¹³³²Steinberg *Illicit Abalone* 1.

¹³³³<http://sacoast.uwc.ac.za/education/resources/abalone.htm> last visited on 23 May 2009.

¹³³⁴Steinberg *Illicit Abalone* 3 and 4.

In 2000, the law enforcement agencies arrested more than 286 poachers in just three months of the implementation of Operation Neptune II, which was a joint venture between the MCM and the SAPS. They seized 15 432 abalone during the arrests.¹³³⁵ Gastrow states that abalone is a delicacy and aphrodisiac in China, which is why it is smuggled to Hong Kong and Singapore.¹³³⁶ The demand for South African abalone is the greatest in South East Asia and East Asia, especially China, Japan, Korea where the flesh is considered a delicacy and is even believed to have aphrodisiac properties.¹³³⁷ Almost all South African abalone is sold overseas, mainly in Hongkong and mainland China.¹³³⁸

These challenges of poaching prompted the South African Government to establish an environmental court at Hermanus, Western Cape on 06-03-2003 to ensure speedy trials for environmental offenders.¹³³⁹ With regards to the law, the Legislature has enacted the Marine Living Resources Act (MLRA) that created eight offences, to wit, contravention of Sections 58(1)(a)(i), 58(1)(a)(ii), 58(1)(a)(iii), 58(1)(b), 58(2)(a), 58(2)(b), 58(3) and 58(4).¹³⁴⁰ The penalties for these crimes include a fine not exceeding five million rands.¹³⁴¹

¹³³⁵<http://sacoast.uwc.ac.za/education/resources/abalone.htm> last visited on 23 May 2009.

¹³³⁶Gastrow *Chinese Organised Crime* 2.

¹³³⁷See Servamus: A Century of Services: From Nongyai to Servamus: A Special Commemorative Issue: 1907-2007. It is also accessible at <http://servamus.co.za/index.php?option=com-content&task=view&id=72&itemid=9> last visited on 23 May 2009. Steinberg point out that the military was also part, see Steinberg *Illicit Abalone* 7.

¹³³⁸<http://www.iol.co.za/index.php?click-id=138set-id=vn20090109063703655C988206> last visited on 23 May 2009.

¹³³⁹<http://www.iol.co.za/index.php?click-id=138set-id=vn20090109063703655C988206> last visited on 23 May 2009.

¹³⁴⁰18 of 1998.

¹³⁴¹The penalties are reflected in section 58 of the Marine Living Resources Act 18 of 1998.

As prove of the threats that continue to be posed by organised criminal groups that poach abalone in South Africa, various cases can be cited. Although the accused were not necessarily convicted of contravention of the POCA, the trade is prosecuted in terms of contravention of the Marine Living Resources Act of 1998 and indicates that organised criminal groups are behind these crime.

Citation of the case where criminal prosecution was conducted	Number of abalone confiscated
<i>NDPP v Swart</i> ¹³⁴²	190
<i>NDPP v Gouws</i> ¹³⁴³	62
<i>NDPP v Engels</i> ¹³⁴⁴	916
<i>S v Sue</i> ¹³⁴⁵	8200
<i>S v Van Dyk</i> ¹³⁴⁶	378
<i>S v Packereysammy</i> ¹³⁴⁷	6 157
<i>NDPP v Zhong</i> ¹³⁴⁸	Large number

Figure 9.13: Cases of seizure of abalone executed by the authorities (Source: Case law)

Amongst the challenges pointed out by Steinberg is that policing abalone is a difficult undertaking by the SAPS, because their Chinese counterparts are less enthusiastic, as importing and trading in abalone is a legitimate commercial activity in all consumer countries of East Asia.¹³⁴⁹

There are various species, which are protected. The latest case indicating this

¹³⁴²2005 (2) SACR 186 (SE). These shucked abalone were found inside a motor vehicle after a high-speed chase with law enforcement. The vehicle was ultimately forfeited to the State.
¹³⁴³2005 (1) SACR 193 (SE). These units were also found inside a motor vehicle as reflected in page 194.
¹³⁴⁴2005 (3) SA 109 (C). The units were found inside a boat.
¹³⁴⁵2007 (2) SACR 208 (W).
¹³⁴⁶2005 (1) SACR 35 (SCA).
¹³⁴⁷2004 (2) SACR 169 (SCA).
¹³⁴⁸2005 (3) SACR 544 (W).

challenge is *Zurich v The State*.¹³⁵⁰ The appellant who was a practising attorney at Upington appealed against a conviction of unlawful trade in ivory. He was charged on various counts with a co-accused on charges relating to the contravention of the Northern Cape Nature and Environmental Conservation Ordinance 19 of 1974. This prosecution emanates from an undercover project of the SAPS codenamed “Operation Rhino” that dealt with diamonds and endangered species in Upington. According to Wildlife Society of South Africa, the figures of rhinoceros (rhino) illegally killed by poachers for their horns are 2000:7, 2001:6, 2002:25, 2003:22, 2004:10, 2005:13, 2006:24, 2007:13, 2008:83, 2009:122, 2010:333, and 2011:448.¹³⁵¹ Some protected plants such as Hoodania Godonia and cycads are harvested from the Northern Cape and Limpopo and distributed to the cities. All these activities, signal the existence of organised criminal groups.

9.3.7 Precious Metals and Stones

South Africa has promulgated the Precious Metals Act¹³⁵² to counter illegal activities relating to precious metals. The Act creates seven offences, which are contraventions of Sections 20(1)(a), 20(1)(b), 20(1)(c), 20(2)(a), 20(2)(b), 20(2)(c) and 20(2)(d) of the Precious Metals Act.¹³⁵³ There are two types of penal provisions for these offences.

¹³⁴⁹Steinberg *Illicit Abalone* 11.

¹³⁵⁰(42/09 ZASCA 108 (22 September 2009).

¹³⁵¹See <http://www.wessa.org.za/index.php/WESSA-content/Help-WESSA-to-curb-illegal-Rhino-poaching.html> last visited on 22 June 2011 and <http://newswatch.nationalgeographic.com/2011/12/14/records-rhinos-killed-by-poachers-in-South-Africa-in-2011/> last visited on 06 January 2012. On 14 November 2011, 33 rhino horns, 758 ivory chopsticks and 127 ivory bracelets from Cape Town were seized in Hong Kong by Customs. Although 199 poachers were arrested in 2011 as compared to 165 in 2010, this suggest that the existence of markets abroad, promotes the mushrooming of syndicates in South Africa; see The Star, page 1 and Cape Argus, page 8 of 16 November 2011. See also Geldenhuys *Rhino Poaching* 14.

¹³⁵²37 of 2005.

¹³⁵³37 of 2005. In terms of Section 1 of the Act, precious metal means (a) the metals gold, any metal of platinum group and the ores of such metals; and (b) any other metal that the Minister has declared by notice in the Gazette to be a precious metal for the purposes of this

These types are for contravention of the group of offences in Section 20(1) and Section 20(2). The sentences are a fine not exceeding R1m or imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment in respect of the former and half of the above in respect of the latter.¹³⁵⁴

The involvement in illegal activities concerning precious metals cannot be a one-man business. It is unimaginable to find an individual digging, processing and disposing of precious metals alone. These activities require the involvement and cooperation of more than one person. It is for this reason that one finds the contraventions of the Precious Metals to be a highly organised criminal activity. In conformity with this view, Fihla stated that in 2005 the SAPS estimated that 15 criminal syndicates were involved in stealing precious metals and stones.¹³⁵⁵ In 2010/2011, the SAPS arrested 653 persons for the illegal purchase, theft, and possession of uncut and unwrought precious metals.¹³⁵⁶

9.3.7.1 Dealing in unwrought gold

Organised criminal groups are involved in trafficking unwrought precious metals.¹³⁵⁷ This includes their involvement in illegal mining. South Africa is ranked first in respect of gold and platinum group metal (PGM) reserves.¹³⁵⁸ It therefore makes

Act, and the ores of any such metal.

¹³⁵⁴See section 20(1) and (2) of the Precious Metals Act of 2005.

¹³⁵⁵See <http://www.fin24.com/articles/default/display-article.aspx> last visited on 25 February 2008.

¹³⁵⁶SAPS Annual Report 2010/2011 at 94.

¹³⁵⁷In terms of Section 1 of the Precious Metals Act 37 of 2005, unwrought precious metal means: (a) precious metal that (i) is unrefined (including concentrate and matte), or has been refined to a purity less than 99,9% and has not undergone any manufacturing process other than being refined or formed into a bar (but not a minted bar), an ingot, a button, plate, sponge, powder, granules, (excluding granules made from precious metal that has been refined to or beyond 99,9% purity, and carat gold alloys), solution; or (b) any article or substance containing or consisting of precious metal contemplated in paragraph (a).

¹³⁵⁸Gastrow *Mines and Refineries* 7 and 8. RPG includes platinum, palladium, rhodium, ruthenium, iridium and osmium.

sense that organised criminal groups would target this commodity. Refined precious metal means precious metal that has been refined to or beyond 99.9% purity.¹³⁵⁹ Unwrought gold is usually stolen from the mines where some illegal miners in the Free State and Mpumalanga are conducting illegal mining from legitimate mines. The ultimate intention is to export the product. Gastrow has raised a legitimate concern that, despite the widespread theft of precious metals from mines and refineries, very few of the top illicit and platinum group metal dealers have been arrested.¹³⁶⁰

The Precious Metals Act of 2005 is designed to counter illegal activities relating to acquisition, possession or disposal of unwrought precious metals. Section 4(1) of the Precious Metals Act of 2005 provides that no person may acquire, possess or dispose of, either as principal or as agent, any unwrought precious metal. The exceptions to this provision are stipulated in (a)-(f).¹³⁶¹ Section 4(3) prohibits possession of any unwrought precious metal unless it is a person contemplated in subsec (1) or is in possession of such precious metal in fulfilment of a contract of employment with any person contemplated in subsec (1). Section 4(4) states that no person may deliver unwrought precious metal in payment of any debt owed by him or her, or any other person, or in consideration of any service rendered, or to be rendered to him or her or any other person. The Act further prohibits the acquisition, possession or disposal of semi-fabricated precious metal in the same fashion as the unwrought precious metal.¹³⁶²

¹³⁵⁹Section 1 of the Precious Metals Act 37 of 2005.

¹³⁶⁰Gastrow *Mines and Refineries* 1-2.

¹³⁶¹Section 1 of the Precious Metals Act 37 of 2005.

¹³⁶²See section 5(1) and (2) which is worded in the same fashion as Sections 4(1) and 4(2) of the Act. Section 1 of the Act defines semi-fabricated precious metal as refined precious metal that is in the form of sheet, tube, wire, granule, plate, strip, rod, or sponge (including carat gold alloys as prescribed), or such other refined precious metal as may be prescribed.

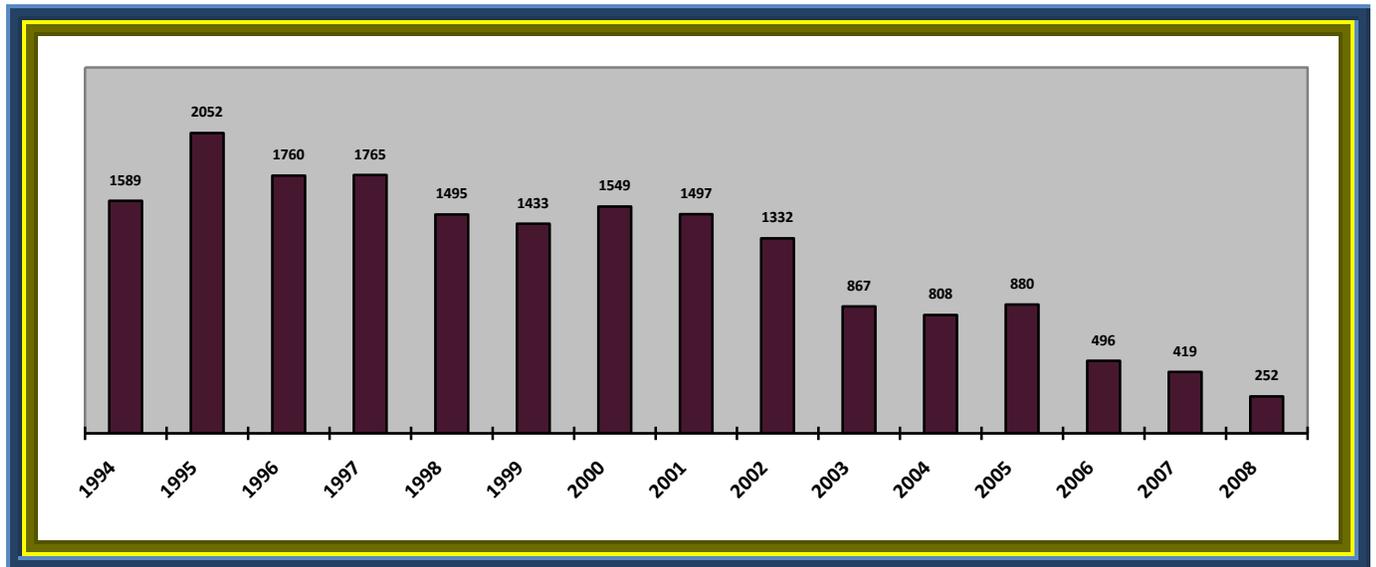


Figure 9.14: Statistics of arrests involving cases of illegal dealing and possession of gold for the period 1994 - 2008 (**Source:** SAPS Crime Statistics)¹³⁶³

One of the challenges, as highlighted by Gastrow, is the number of illegal smelting houses in the goldfields of the Free State that stood at 170 in 1997. Smelting is prohibited in terms of Section 4(5) of the Precious Metals Act of 2005. It provides that only a person contemplated in subsection (1) (a), (c), (e), or (f) may make up, smelt or change the form of any unwrought precious metal in his or her possession in terms of that subsection. According to him, 25 syndicates were identified in Welkom. Retrenched mineworkers return to the mine to illegally retrieve gold-bearing material.¹³⁶⁴ The legislature has put in place Section 13 of the Act, which stipulates that a person may not transport or in any manner convey any semi-fabricated or unwrought precious metal outside the boundaries of any mine, works or other property or place where such metal is mined, refined or worked with, unless

¹³⁶³Gastrow *Mines and Refineries* 14 and Coetzee and Horn *Precious Metals* 34-36. See also <http://www.iss.co.za/pgcontent.php?UID=15720> last visited on 5 December 2011.

¹³⁶⁴Gastrow *Mines and Refineries* 17, 21 and 33.

he or she is in possession of the prescribed documentation.¹³⁶⁵ In order to curtail the chances of licenced people from conducting illegal activities elsewhere, the law prohibits them from doing business at a place other than the one, which has been authorised by the competent authorities.¹³⁶⁶

The law further restricts the importation of precious metals. No person may import any unwrought or semi-fabricated precious metal into the Republic unless he or she is issued with an import permit for such specified metal.¹³⁶⁷ The importer is obliged to provide a copy to the Forensic Science Laboratory in order to create and maintain a database.¹³⁶⁸ To ensure the proper checks and balances, the Act authorises the Regulator or the SAPS to inspect any precious metal at any time and take such sample as may be reasonable to establish or confirm the origin and content of such precious metal.¹³⁶⁹ Furthermore, the SAPS is empowered to, at any reasonable time, enter with or without a search warrant and search any premises that have a bearing on an investigation.¹³⁷⁰

Not only does the law control the imports of precious metals but the export thereof. No person may export any unwrought or semi-fabricated gold except with the approval of the National Treasury in terms of the Exchange Control Regulations made under the Currency and Exchanges Act 9 of 1933, granted with the concurrence of the Minister.¹³⁷¹ The Act further provides that no person may export any unwrought or semi-fabricated metals of the platinum group except with the written approval of the Minister, which shall be granted subject to the promotion of

¹³⁶⁵Section 13 of the Precious Metals Act of 2005.

¹³⁶⁶Section (7)5 and (6) of the Precious Metals Act of 2005.

¹³⁶⁷Section 10 of the Precious Metals Act of 2005.

¹³⁶⁸Section 22 of the Precious Metals Act of 2005.

¹³⁶⁹Section 10(3) of the Precious Metals Act of 2005. The Regulator is defined in Section 1 of this Act as the South African Diamond and Precious Metals Regulator established by section 3(1) of the Diamonds Act 56 of 1986.

¹³⁷⁰Sections 16 (1) and 18 of the Precious Metals Act of 2005.

equitable access to, and the orderly local beneficiation of such metals.¹³⁷² All these laws have been designed to, amongst others, mitigate the involvement of organised criminal groups.

9.3.7.2 Dealing in unpolished diamonds

Flynn agrees with the view that diamonds were discovered in South Africa in 1882.¹³⁷³ As Jojarth puts it, like drugs, diamonds are a high rents commodity that attracts gangsters and rebels alike.¹³⁷⁴ The Diamond Control Act,¹³⁷⁵ the Precious Stones Act¹³⁷⁶ and the Diamond Cutting Act¹³⁷⁷ previously governed diamonds. The Diamond Act of 1986 currently governs them.¹³⁷⁸ It creates twenty six offences under sections 25A, (3), 82(a)-82(d), 83(a)-83(e), 84(a)-84(d) and 85(a)-85(i). These contraventions have to be read with Sections 18-24 that regulate possession, selling, purchasing, polishing, erecting or operating any machine designed or adapted for the polishing of diamonds and exporting.¹³⁷⁹ The penal provisions for contravention of this Act are detailed in Section 87 of the Act.

In *Dos Santos v The State*,¹³⁸⁰ Tony Dos Santos was convicted of the contravention of Section 20 of the Diamonds Act¹³⁸¹ while Derrick Mbatha was convicted of Section 19 of the Act. With the law enforcement agencies having confiscated 177 diamonds

¹³⁷¹Section 12(1) of the Precious Metals Act of 2005.

¹³⁷²Section 12(2) of the Precious Metals Act of 2005.

¹³⁷³Flynn *Undercover Operations* 28, which is also accessible at <http://uir.unisa.ac.za/bitstream/10500/3251/1dissertation-flynn-h.pdf> last visited on 17 July 2010.

¹³⁷⁴Jojarth *Global Trafficking* 182.

¹³⁷⁵Section 21 of Diamond Control Act of 1925. This law has been repealed.

¹³⁷⁶73 of 1964. This law has been repealed.

¹³⁷⁷33 of 1955. This law has been repealed.

¹³⁷⁸56 of 1986.

¹³⁷⁹See sections 18 to 24 of the Diamonds Act of 1986.

¹³⁸⁰726/07[2010] ZASCA 73.

¹³⁸¹56 of 1986.

from Dos Santos, Ponnann J, whose judgement is concurred by Cloete JA and Majied AJA, concludes that Port Nolloth with a community of 12000 residents and some 220 businesses, has become, as evidence suggests, a hotbed of illicit diamond dealing and related activity. This view is supported by the previous police operations such as operation Steenbra and Operation Solitaire.¹³⁸²

In terms of the Kimberley Process, trading in rough diamonds is only permitted between countries that participate in the Kimberley Process Certification Scheme (KPCS) for rough diamonds.¹³⁸³ Unfortunately, the illegal diamond dealers are not covered by this agreement.¹³⁸⁴ Unpolished diamonds coming from elsewhere are also smuggled into the country because they are channelled into legitimate businesses. According to Metrowich, Smith was engaged in trafficking in diamonds from Kimberley to Free State using different concealment methods that included the swallowing of diamonds by his dogs that were fed with stake laced with laxatives. He appears to have learnt the swallowing trick from a family, which was using a horse bought from the market.¹³⁸⁵

9.3.7.3 Theft of non-ferrous metals

Non-Ferrous metals are metals that are free of iron or comparatively so.¹³⁸⁶ According to Maphango, the minerals that fall under this category are aluminium, antimony, cobalt, copper, lead, magnesium, nickel, tantalum/niobium, titanium, tungsten, zinc and zirconium.¹³⁸⁷ The seriousness of theft of Non-ferrous metals

¹³⁸²See *Dos Santos* case under n 417 *supra* at 3.

¹³⁸³*Siegel Diamonds* 88.

¹³⁸⁴*Ibid* n 1383 *supra* at 89.

¹³⁸⁵*Metrowich Scotty Smith* 44-45.

¹³⁸⁶See <http://metals.about.com/od/metalterminology/1/bldefnonferrous.htm> last visited on 09 October 2009.

¹³⁸⁷See producers of Non-Ferrous Metal Commodities in South Africa 2005 at <http://www.dme.gov.za/pdfs/minerals/d10-2005.pdf> last visited on 25 February 2008 pages

becomes noticeable when it directly affects the community. This is usually in the form of termination of a telephone service, non-functioning of the traffic control lights (robots), disruptions of electricity in some locations and the halting of a train service. These metals are usually stolen from existing amenities in the form of electrical cables and telephone lines, and are sold to scrap-metal dealers. Coetzee submits that criminals are constantly attacking South Africa's national infrastructure: telecommunications, rail transport, mining, petrochemical installations and electricity networks.¹³⁸⁸ The cases of Non-Ferrous metals in South Africa remain alarmingly high.

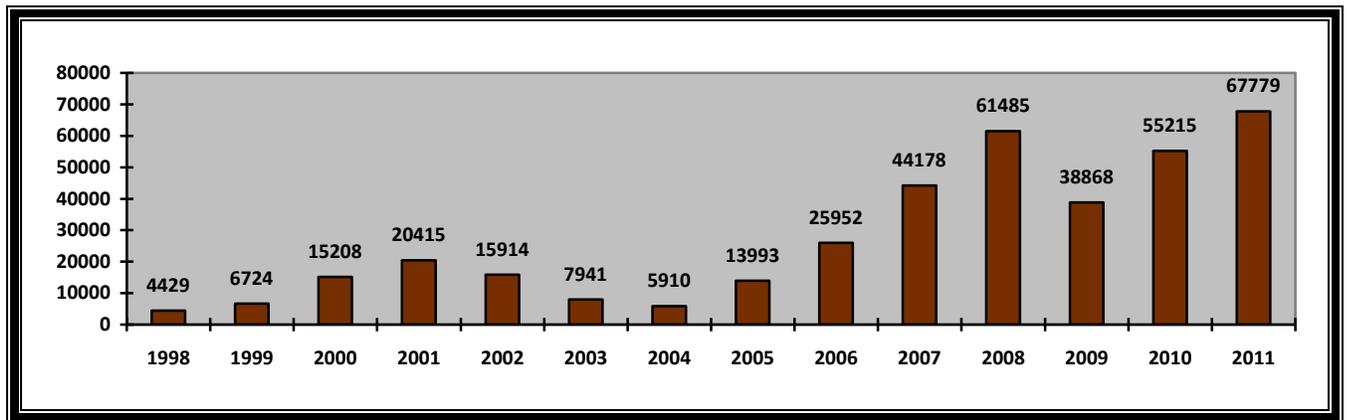


Figure 9.15: Cases of non-ferrous metals in the RSA for the period 1998 - 2011(**Source:** SAPS Crime Statistics)

As stated by Fihla, the police arrested 1 303 suspects for illegally buying, stealing and possessing uncut diamonds and unwrought metals and recovered over R40m in 2004 and 2005. He estimates that the theft of gold-bearing material and platinum might amount to R2bn and R500m a year respectively. In 2005, the SAPS estimated that at least six organised criminal groups were involved in the theft of non-ferrous

1,3,5,9,16,19,20,26,27,31,32 and 35.

¹³⁸⁸See ISS Today titled Copper-Cable Thieves not Terrorists dated 26 May 2008. It can also be accessed at <http://www.issafrica.org/index.php?link-id=24&link-id=5592-type=12&slink->

metals.¹³⁸⁹

Violante argues that, because organised crime amasses wealth, corruption is a low-cost, low-risk instrument of great utility, both in the present and for the future. His view is that, policing this phenomenon by corrupted officials at ports of entry is problematic, because once corrupted they will be corruptible for the second time, and in any event, will always be vulnerable to blackmail.¹³⁹⁰ His argument on corruption is based on the fact that the many national frontiers that drugs, arms and people cross to reach the country of destination from that of provenance would not be so easily overcome were it not for the functioning of a well-oiled system of corruption within many of these countries.¹³⁹¹ If this crime continues at the spiralling level it currently is, transport, telecommunication and related matters will be seriously fettered.

9.3.8 Fraud

Snyman defines 'fraud' as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.¹³⁹² Burchell phrases the definition as consisting in unlawful making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.¹³⁹³ He points out the decision in *S v Friedman*,¹³⁹⁴ in which the accused was convicted of fraud.¹³⁹⁵ The accused's

[type=12&tmpl-id=3](#) last visited on 08 June 2008.

¹³⁸⁹See <http://www.fin24.com/articles/default/display-article.aspx> last visited on 25 February 2008.

¹³⁹⁰Jamieson *Antimafia* x.

¹³⁹¹*Id* n 1390 *supra* at xi.

¹³⁹²*Id* n 14 *supra* at 531. The Legal Service Division of the SAPS shares this definition. See definitions of common law offences at <http://www.is.org.za/new-components/legal/legal-index.htm> last visited on 05 October 2007.

¹³⁹³*Id* n 33 *supra* at 833.

¹³⁹⁴1996 (1) SACR 181 (W).

counsel submitted that the common law crime of fraud was too wide in its definition of potential prejudice and resulted in the accused's rights to a fair trial being infringed. In his judgement, Cloete J stated as follows:

I do not find the breadth of the common law definition of fraud repugnant to the provisions of the Constitution to which counsel has referred. I find nothing objectionable in the approach which punishes fraud, not because of the actual harm it causes, but because of the possibility of harm prejudice inherent in the misrepresentation.¹³⁹⁶

Milton and Masango define 'fraud' as consisting in unlawfully making, with intent to defraud, a misrepresentation, which causes actual prejudice or which is potentially prejudicial to another.¹³⁹⁷ The elements of fraud are: unlawfulness, misrepresentation, prejudice, and intention.¹³⁹⁸ Snyman adds the element of potential prejudice while Milton adds the element of causing.¹³⁹⁹

The 419 scam is a type of fraud named after Section 419 of the Nigerian Criminal Code.¹⁴⁰⁰ It originated in Nigeria and the perpetrators are mostly Nigerians.¹⁴⁰¹ This section was used to prosecute offenders and as a result, Advance Fee Fraud (AFF) has come to be popularly known as "419 Fraud" or "OBT", a Nigerian acronym for obtaining property by false pretences.¹⁴⁰² This section states as follows:

Any person who by any false pretence and with intent to defraud, obtains from any other

¹³⁹⁵Burchell *Criminal Law* 29.

¹³⁹⁶*Id* n 1396 *supra* at 194-195.

¹³⁹⁷Milton *Common Law* 702 and Masango *Criminal Law* 228.

¹³⁹⁸*Id* n 33 *supra* at 835.

¹³⁹⁹Snyman *Criminal Law* 531 and Milton *Common Law* 707. In terms of the Fraud Act of 2006, a person is guilty of fraud if he is in breach of any of the sections listed in subsec 2. Subsection 2 covers fraud by false representation, fraud by failing to disclose information and fraud by abuse of position. Ormerod and Williams point out that the common elements of fraud are dishonesty, with intent to gain or cause loss or to expose to a risk of loss, false representation, knowing that the representation is or knowing that it might be false, failing to disclose; see Ormerod and Williams *Law of Theft* 127-128, 131, 135, 157 and 168.

¹⁴⁰⁰Cap 77 of 1990. See also Abadinsky *Organized Crime* 206, Roth *Organized Crime* 451, Bjelopera and Finklea *Organized Crime* 19 and Simon *Advance-Fee Fraud* 7.

¹⁴⁰¹Tanfa *Advance Fee* 21.

¹⁴⁰²Holmes and Kaufmann *Nigerian Advance Fee* 4 accessible at 314

person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a felony, and is liable to imprisonment for three years. If the thing is of value of one thousand naira or upwards, he is liable to imprisonment for seven years. It is immaterial that the thing is obtained or its delivery is induced through the medium of a contract induced by the false pretence.¹⁴⁰³

South Africa has not been spared the blight and plight of the 419 scams. According to Tanfa, the reason for the 419 scammers being attracted to South Africa is the fact that the country is regarded as a modern society, with the most recent technological development compared to other developing countries.¹⁴⁰⁴ For the period 2002-2007, 1 061 incidents were reported. The suspects who pretend that there is a loot, an accurate ill business, which will benefit them, invite victims. The victims will be cunningly manipulated into parting with their money. Graycar states that deceptive variant conduct of an advance fee scheme has been used to defraud anyone in the world who is willing to succumb to the temptation offered to make some quick money.¹⁴⁰⁵ The different manifestations of this type of crime include lotto scams where victims are told that they have won a lottery, inheritance scams and black dollar scam. With regards to black dollar scams, people are lured into believing that certain dyed papers are legitimate dollar bills that can be washed clean by a certain expensive chemical. After washing the few legitimate dollars, which are usually placed at the top, the victim falls into the trap and pays the money to the suspects to buy the chemicals, which they will ultimately lose.

The 419 confidence scams are only limited by the perpetrator's imagination. However, Tanfa singles out the following as the most common forms of these

<http://www.aic.gov.au/publications/tandi/ti121.pdf> last visited on 19 April 2009.

¹⁴⁰³Nigerian Penal Code- Criminal Law: Section 419. The law can also be accessible at <http://nigerianlawresources.com/laws-of-the-federation-of-nigeria.html> last visited on 19 April 2009.

¹⁴⁰⁴*Id* n 1400 *supra* at 97.

¹⁴⁰⁵Smith, Holmes and Kaufmann *Nigerian Advance Fee* 1.

fraudulent business proposals: transfer of funds from over-invoiced contracts, contract fraud (COD of goods and services), conversion of hard currency (black-money, money cleaning or “wash-wash”), sale of crude oil at below market prices, purchase of real estate, disbursement of money from wills (benefactor of a will), held for ransom/kidnapping and murder, box method, and “spiritism”.¹⁴⁰⁶ Roth lists various categories of business proposals employed by 419 scammers that include forgotten accounts, lottery winnings and left fortunes.¹⁴⁰⁷

Levi is of the view that almost all advanced fee fraud is transnational and that it is commonly associated with Nigerians. He argues that the stringent measures by the Nigerian government and the Central Bank have driven the phenomenon to shift to other African Countries such as Ghana and South Africa. He correctly points out that the “victims” know that they are behaving criminally, which inhibits them from complaining. He concludes that the quantity of “419 letters” supplemented by e-mails is unknown.¹⁴⁰⁸ Tanfa, Smith, Holmes and Kaufmann point out correctly that, this type of fraud usually entails enlisting the services of a prospective victim to assist in an activity of questionable legality, thus providing some assurances that the victim, once defrauded, would be unlikely to report the matter to the police.¹⁴⁰⁹ Smith, Holmes and Kaufmann argue further that the victim would, rightly, be apprehensive that he or she had aided and abetted some criminal activity and would be reluctant to make public the fact of his or her gullibility, particularly if adverse media coverage was a possibility. Thus, the offender is able to carry out the scheme

¹⁴⁰⁶*Id* n 1400 *supra* at 34, 58-69 and 97. Fimash is a practice where victims are told that there are negatives for producing money and all that they need is chemicals to clean them while spiritism is applicable where victims resort to spiritual beliefs to manipulate the victim that the spirit is going to make him/her rich.

¹⁴⁰⁷Roth *Organized Crime* 452.

¹⁴⁰⁸Levi *Financial Crime* 57. The copy of the warning can be accessed in Baines *Nigerian Scam* 103-104.

¹⁴⁰⁹Tanfa *Advance Fee* 28 and Smith, Holmes and Kaufmann *Nigerian Advance Fee* 1.

repeatedly, sometimes in respect of the same victim, whilst police are faced with difficulties in finding witnesses and securing evidence.¹⁴¹⁰

Tanfa argues that advance fee fraud is an organised crime that is complex and is a relatively new universal threat. Advance fee fraud is a form of organised crime that has developed to such an extent that it can be understood as a new form of geopolitics, with its own character and logic, its own structures and support systems.¹⁴¹¹ He defines ‘advance fee fraud’ as an upfront payment, by a victim to a fraudster, to allow him to take part in a much larger financial transaction, which he believes will either bring him profit or will result in credit being extended to him.¹⁴¹² A fraudster is also known as “419er” and the victim who has been invited is said to have been “419ed”.¹⁴¹³ He submits that, it is precisely due to the covert activities of organised crime syndicates that the public, in particular, is not aware of the destructive and corroding impact that it has on society. His view is that it contributes to high crime rates and corrupt law enforcement officials that threaten to derail the efforts to defeat such organised criminal activities.¹⁴¹⁴

Simon reminds one that Nigeria has enacted the Advance Fee Fraud and Other Related Offences Act¹⁴¹⁵ to widen the scope of the definition of the initial advance fee fraud. This includes prosecution for sending a letter that conveys a false pretence and invitation of foreigners for committing an offence.¹⁴¹⁶ Having entered the cyberspace, Verma has correctly observed that the Nigerian letter scam is one of the

¹⁴¹⁰Smith, Holmes and Kaufmann *Nigerian Advance Fee* 1 accessible at <http://www.aic.gov.au/publications/tandi/ti121.pdf> last visited on 19 April 2009.

¹⁴¹¹*Id* n 1400 *supra* at 4-5.

¹⁴¹²*Id* n 1400 *supra* at 10.

¹⁴¹³Roth *Organized Crime* 451.

¹⁴¹⁴*Id* n 1400 *supra* at 28.

¹⁴¹⁵1995.

¹⁴¹⁶Simon *Advance-Fee Fraud* 15.

most prevalent internet scams.¹⁴¹⁷

The Road Accident Fund (RAF) is mostly targeted by a group of criminals consisting of lawyers, medical practitioners, drivers and ordinary people who tout for people who are prepared to participate in the scam. The method used is to stage an accident, and for the rest of the processes such as reporting, medical certificates are arranged. The Commercial Crime Component of the SAPS has established a Team that works closely with the RAF. Other fraud cases include defrauding of Medical Aid schemes where people will buy items from pharmacies and claim from the schemes. Credit cards are also skimmed and duplicated. Insurance fraud is targeted by clients who report false cases like theft of a motor vehicle whereas such a vehicle is not stolen. With regards to fuel, cases where fuel was stolen and replaced with water were reported. Some petrol attendants also used stolen petrol cards to steal cash from the service stations.

The RAF fraud is committed by organised criminal groups. In February 2002, the Organised Crime Investigation Unit of Potchefstroom registered an OCPI code-named Eagle Eye, which dealt with fraud against the RAF. The team registered 66 case dockets with 180 charges against 137 suspects involving more than R5 000 000-00. The suspects were claimants, tauters, civilians in the police, police members, traffic officials, drivers, panel beaters, staff at hospitals, attorneys and medical doctors. One hundred and seventeen (117) accused were convicted and sentenced. The charges were withdrawn against 20 suspects who were found to have had no intention of defrauding and were used as state witnesses in terms of Section 204 of the Criminal Procedure Act 51 of 1977. The crime committed is organised crime, but the accused were not charged as such. If the accused were prosecuted in terms of the POCA, they may well have been convicted.

¹⁴¹⁷Verma *Cyber Crimes* 201.

9.3.9 Trafficking in firearms

The current system that control firearms in South Africa is the Firearms Control Act of 2000.¹⁴¹⁸ Firearms, which found their way in South Africa, include those that came from countries, which were experiencing conflict, such as Mozambique and Angola. There are also homemade firearms that add to the existing normal pool of illegal firearms. The number of firearms in circulation is minimised by mostly, destructing those that have been seized by the police.

Year	2004/2005	2005/2006	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011	Total
Number	68343	107 468	160 718	64 408	111 491	167 240	46 527	970 349

Figure 9.16: The number of firearms destructed for the period 2004/2005 – 2010/2011
(Source: SAPS Crime Statistics)

9.3.10 Stock theft

The primary laws used to police stock theft are the Stock Theft Act¹⁴¹⁹ and the Animal Identification Act.¹⁴²⁰ Cases of stock theft are mostly committed along borderline areas. The stock is mostly stolen for slaughtering. Stock theft has been a known crime since the tribal wars where one tribe would fight another and steal their stock.

¹⁴¹⁸60 of 2000.

¹⁴¹⁹57 of 1959.

¹⁴²⁰6 of 2002.

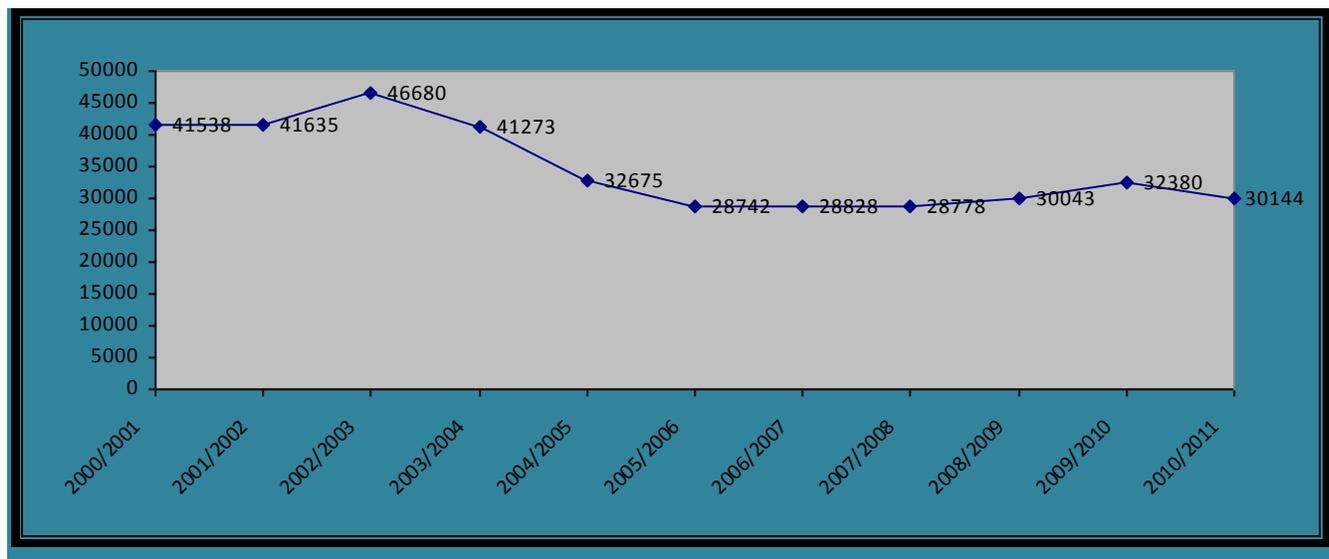


Figure 9.17: The cases of stock theft reported for the period 2000/2001 – 2010/2011
 (Source: SAPS Annual Reports)¹⁴²¹

9.3.11 Trafficking in persons and human smuggling

Human trafficking touches about every country in some aspects, in that, there are sending countries where prospective victims are recruited and transported; transit countries that serve as way stations and destination countries where vice lords eagerly await fresh supplies of women and children which is done as a result of poverty in the source countries.¹⁴²² Nikolić-Ristanović professes that human trade is one of the most profitable illegal markets that exists on national, regional and global level, with the black market for illegal immigration permanently changing in the legal framework.¹⁴²³ She further acknowledges that trafficking as a form of transnational crime, is often confused with people smuggling, as explained under paragraphs 9.3.11.1 and 9.3.11.2 *infra*. The reason for this confusion is that, they are done by

¹⁴²¹SAPS Annual Report 2009/2010 at 98 and 2010/2011 at 89.

¹⁴²²Zhang and Pineda *Human Trafficking* 42 and 44.

¹⁴²³Nikolić-Ristanović *Human Trade* 126.

the same criminal groups in connection with human migration.¹⁴²⁴

Similarly, Vermeulen and others emphasise the importance of underlining the difference between trafficking in persons and smuggling of migrants, as both terms are still often confused. The most distinguishing characteristics are that smuggling requires the elements of consent and transnationality whereas trafficking requires exploitation.¹⁴²⁵ Truong points that international human trafficking was previously known as the slave trade, which was formally abolished.¹⁴²⁶

In rejecting the ideology that organised crime is a local problem in general, Serrano argues that the phenomenon has external ramifications and transnational underpinnings.¹⁴²⁷ This means that organised crime is not a problem that affects the country from which organised criminal groups emanate, but that other countries are also affected by receiving such organised criminal groups and subjected to their criminal activities. This view is espoused by Vermeulen who states that trafficking in human beings is a phenomenon that has become a serious problem throughout the world.¹⁴²⁸

Aromaa who has the same view as Scarpa, affirms that the major problem in studying and combatting trafficking in persons is the scarcity, unavailability, unreliability and non-comparability of existing international and national data.¹⁴²⁹ The consequences of these shortcomings, as Kangaspunta puts it, is that the given figures on trafficking are based on estimates of the level of trafficking and usually,

¹⁴²⁴*Id* n 1123 *supra* at 120.

¹⁴²⁵Vermeulen, Van Damme and De Bondt *Organised Crime* 22.

¹⁴²⁶Truong *Human Trafficking* 53. Likewise, Violante points out that trafficking in human beings has become the new version of the old slave trade, see Jamieson *Antimafia* x.

¹⁴²⁷Serrano *Transnational Organized Crime* 23.

¹⁴²⁸Vermeulen *Rhetoric to Evidence* 107.

¹⁴²⁹Aromaa *Trafficking in Human Beings* 20.

no explanation is given on how these figures were calculated.¹⁴³⁰ Savona and Stefanizzi conclude that the growing demand for illegal migration coming from the less advantaged regions and countries, coupled with the growing demand for prostitutes and manual workers in those countries where there are no national supplies, increases the phenomenon. Their contention is that, although it may still be difficult to estimate the value of the trade in human beings, particularly due to the lack of homogeneous and accurate data, trafficking in human beings constitutes a desperate problem on a global scale.¹⁴³¹

9.3.11.1 Trafficking in persons

As indicated above, South Africa is a signatory to the Transnational Organized Crime Convention, which was signed on 14 December 2000 in Palermo, Italy. One of the Protocols supplementing this Convention is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. As observed by Agarwal, the victims could be men, women or children.¹⁴³² Qaba submits that, law enforcement agencies and research institutions have identified South Africa as a source, transit and destination of human trafficking.¹⁴³³ This view is compatible with the United Nations High Commissioner for Refugees.¹⁴³⁴

Trafficking in persons is defined in terms of Article 3(a) of the Protocol as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or

¹⁴³⁰Kangaspunta *Human Trafficking Data* 27 and Scarpa *Trafficking in Human Beings* 9.

¹⁴³¹Savona and Stefanizzi *Human Trafficking* 2 and 125.

¹⁴³²Agarwal *Child Trafficking* 225.

¹⁴³³<http://www.stoptrafficking-of-people.files.wordpress.com/2010/02/South-African-government-human-trafficking-strategy.pdf> last visited on 23 July 2011 or <http://www.info.gov.za/issues/humantrafficking/strategy.htm> last visited on 23 July 2011.

receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.¹⁴³⁵ Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁴³⁶

In compliance with the Palermo Convention, South Africa is yet to fully criminalise human trafficking as organised crime, which will ensure that the interpretation is the same as those of other countries. However, trafficking in children has been criminalised in terms of the Children's Act.¹⁴³⁷ Chapter 18 of this Act is dedicated for trafficking in children by giving effect to the UN Protocol to Prevent Trafficking in Persons and combat trafficking in children.¹⁴³⁸ In terms of Section 282, the UN Protocol to Prevent Trafficking in Persons is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act. In this Act, trafficking, in relation to a child implies:

- (a) The recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic- (i) by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or (ii) due to a position of vulnerability.
- (b) Includes the adoption of a child facilitated or secured through illegal means.¹⁴³⁹

Furthermore, human trafficking is treated as a predicate offence that may bring

¹⁴³⁴<http://www.unhcr.org/refworld/docid/4c1883c632,0.html> last visited on 23 July 2011.

¹⁴³⁵Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.

¹⁴³⁶This Protocol was adopted by the General Assembly in its resolution 55/25 of 15 November 2000 (annex II). See also Zhang and Pineda *Human Trafficking* 41, Kara *Sex Trafficking* 4, Deegan *The Fire Behind the Smoke* 133 and Ebbe *Trafficking in Women* 7.

¹⁴³⁷38 of 2005.

¹⁴³⁸See section 281 of the Protocol.

¹⁴³⁹Section 1 of Act 38 of 2005.

about organised crime if it is for sexual purposes. Over and above, transitional provisions relating to trafficking in persons for sexual purposes have been promulgated in the Criminal Law (Sexual Offences and related matters) Amendment Act of 2007 (CLAA of 2007).¹⁴⁴⁰ Trafficking is defined as follows:

Trafficking includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of: (a) a threat of harm; (b) the threat or use of force, intimidation or other forms of coercion; (c) abduction; (d) fraud; (e) deception or false pretences; (f) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or (g) the giving or receiving of payments, compensation, rewards, benefits or any other advantage; for the purpose of any form or manner of exploitation, grooming, or abuse of a sexual nature of such person, including sexual offence or any offence of a sexual nature in any other law against such person, or performing any sexual act with such person, whether committed in or outside the borders of the Republic, and “trafficks” and “trafficked” have a corresponding meaning.¹⁴⁴¹

Zhang and Pineda distinguish human trafficking from human smuggling by accepting that human trafficking refers to not only the surreptitious entry of people but also the use of force, fraud, coercion and violence during the process of transportation for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.¹⁴⁴² According to Nikolič-Ristanović, human trafficking is understood in its transnational form as a criminal activity extending into and

¹⁴⁴⁰32 of 2007. The purpose of the Act includes the making of interim provision relating to the trafficking in persons for sexual purposes. Section 70(1) of the CLAA of 2007 provides that, pending the adoption of legislation in compliance with the United Nations Protocol to Prevent and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Trans-National Organised Crime and the repeal of this Part, the transitional provisions in this Part relating to the trafficking in person for sexual purposes are provisionally provided for in partial compliance of international obligations to deal with this rapidly growing phenomena globally.

¹⁴⁴¹See section 70(2)(b) of the CLAA of 2007.

¹⁴⁴²Zhang and Pineda *Human Trafficking* 42.

violating the laws of several countries.¹⁴⁴³ Ruggiero notes that human beings that are trafficked to Europe are in search of employment, which is in many cases illegal. He has also observed that illegal migration and illegal employment presupposes illegal operating entrepreneurs. He has further noted that trafficking in human beings is also carried out by enterprises involved in sexual exploitation of young males and females. His conclusion is that organised crime provides a service to these entrepreneurs, as they smuggle human beings on request.¹⁴⁴⁴

A person (“A”) who trafficks any person (“B”), without the consent¹⁴⁴⁵ of B is guilty of the offence of trafficking in persons for sexual purposes.¹⁴⁴⁶ A person who - (a) orders, commands, organises, supervises, controls or directs trafficking; (b) performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking; or (c) incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause, bring about, promote, perform, contribute towards or participate in trafficking - is guilty of an offence of involvement in trafficking in persons for sexual offences.¹⁴⁴⁷

The Witness Protection Act of 1998¹⁴⁴⁸ has also been amended to include human trafficking in the Schedule of offences in respect of which a witness or related person may be placed under protection. A person who has been trafficked is not liable to stand trial for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked.¹⁴⁴⁹

¹⁴⁴³*Id* n 1122 *supra* at 119.

¹⁴⁴⁴Ruggiero *Organized Crime* 140 and 142.

¹⁴⁴⁵Consent is defined in terms of section 71(3) of the CLAA of 2007 as voluntary or uncoerced agreement.

¹⁴⁴⁶See section 71(1) of the CLAA of 2007.

¹⁴⁴⁷See section 71(2) of the CLAA of 2007.

¹⁴⁴⁸112 of 1998. See 10A of the Schedule.

¹⁴⁴⁹See section 71(5) of the CLAA of 2007.

A commercial carrier¹⁴⁵⁰, which brings a person into, or removes a person from the Republic and upon entry into or departure from the Republic, the person does not have the travel documents required for lawful entry into the Republic or departure from the Republic commits an offence.¹⁴⁵¹ Bucquoye, Verpoest, Defruyter and Vander Beken state that the harsher asylum policies have stimulated the development of a 'migration business', acting on the demand for the many migrants, by supplying them with a visa, transport and prospects for jobs in exchange for money. They argue that this is how the phenomenon of illegal trafficking has increasingly become more organized.¹⁴⁵²

Nikolić-Ristanović explains that trafficking of people can be done within the same country. She argues that it is always accompanied by the wish by the perpetrator to exploit someone or bringing someone in conditions of slavery.¹⁴⁵³ Trafficked persons are deceived or pressurised into economic dependence. A trafficked person pays either a percentage or nothing, is kept in debt bondage, and cannot walk away from the trafficker.¹⁴⁵⁴

Trafficking of women and girls for commercial sex has become a major global

¹⁴⁵⁰Commercial carrier is defined in terms of Section 70(2)(a) of the CLAA of 2007 as including a company, or the owner, operator or master of any means of transport, that engages in the transportation of goods or people for commercial gain.

¹⁴⁵¹See section 71(6)(a) of the CLAA of 2007.

¹⁴⁵²Bucquoye *Road Transport* 141.

¹⁴⁵³*Ibid* n 1122 *supra*.

¹⁴⁵⁴*Ibid* n 1122 *supra*. Ebbe argues that the crime of trafficking in women and children is so horrendous that without some meaningful and speedy effort to control it, the sanctity and quality of humanity will be obliterated. His view is that many women and children have been killed, some committed suicide and others are living in perpetual anguish during existence as trafficked human beings. He concludes that those who survived the inhuman treatment of living in debt-bondage, sexual slavery, forced prostitution and child labour live in the nightmares of their painful past; see Ebbe *Prevention of Trafficking* 39.

problem.¹⁴⁵⁵ In contextualising prostitution, Nikolič-Ristanović states that in a contemporary ‘market society’ everything is for sale: everything is ‘commodity’ including the human body and sexuality. The strong pull factor for women, mostly from the undeveloped countries is the unrealistic expectations about the West or by luring them into the sex industry including local prostitution and other dubious jobs.¹⁴⁵⁶ Stoecker calls this phenomenon “commodification of persons”.¹⁴⁵⁷ Kara points out that generating huge profits for their exploiters, sex slaves form the backbone of one of the world’s most profitable illicit enterprises, for unlike narcotics, which must be grown, harvested, refined and packaged, the female body requires no such processing and can be repeatedly consumed.¹⁴⁵⁸

The accurate observation by Kangaspunta reveals that trafficking of women and children, particularly for sexual exploitation, has dominated national and international discussions concerning human trafficking. She further states that trafficking for forced labour has received limited attention, and the identification of trafficking victims who are exploited through forced labour has even been less successful than in the case of sexual exploitation.¹⁴⁵⁹

While conceding that there is no case law on this matter, Judge Fausto Pocar argues that human trafficking is a crime against humanity. His argument is based on the interpretation of Article 7 of the Rome Statute. Crimes against humanity include

¹⁴⁵⁵Williams *Trafficking in Women* 126.

¹⁴⁵⁶*Id* n 1122 *supra* at 122.

¹⁴⁵⁷Stoecker *Human Trafficking* 13.

¹⁴⁵⁸Kara *Sex Trafficking* cover page. See also paragraph 5.61 of the South African Law Reform Commission (discussion Paper 111) of 2006. Roth echoes Nikolič-Ristanović by stating that the smuggling and trafficking of human beings generates huge profits for organised crime groups, see Roth *Organized Crime* 259. Williams points out that one of the most pernicious and demanding aspect of trafficking in women and children is that it reduces people to the status of commodities, see Abadinsky *Organized Crime* 289.

¹⁴⁵⁹Kangaspunta *Human Trafficking Data* 30. Ebbe and Das argue that human trafficking is described as modern day slavery, see Ebbe and Das *Global Trafficking* 9 as well as Abadinsky *Organized Crime* 290.

enslavement, deportation or forceable transfer of population, imprisonment or other severe deprivation of physical liberty, sexual slavery, enforced prostitution or any other form of sexual violence of comparable gravity or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹⁴⁶⁰ Ebbe submits that the Chinese Triads who include the Sun-lee On Triad, 14K Triad, Wo Hop To Triad, United Bamboo Gang and Fuk China Gang are reported to be supplying women to brothels in South Africa.¹⁴⁶¹

According to Interpol, trafficking for sexual exploitation is a high profit-low risk activity that destroys the quality of life and sometimes the very lives of victims. Once organised trafficking for sexual exploitation has gained a foothold in a country it expands rapidly and feeds on the most vulnerable in society, such as women and children.¹⁴⁶² As pointed out by the South African Law Reform Commission (SALRC), trafficking in persons, which is becoming a multimillion industry, is considered part of the activity of an organised criminal group that can be divided into recruitment, transportation and exploitation environment.¹⁴⁶³ Observers have argued that, organised criminal groups expand following the maximisation of opportunities and minimisation of risks.¹⁴⁶⁴ This argument is companionable with that of Mazzitelli who states that organised criminal groups operate according to strict rational principles aimed at minimising the risk and maximising profit.¹⁴⁶⁵ In line with these arguments, this writer submits that the fight against organised crime needs the minimisation of opportunities and the maximisation of risks.

¹⁴⁶⁰Pocar *Human Trafficking* 7-8.

¹⁴⁶¹Ebbe *Women and Children* 19.

¹⁴⁶²UNDP: Department of International Development: Human Trafficking Investigations: Page 5 accessible at <http://www.prp.org.bd/downloads/THBEnglish.pdf> last visited on 02 July 2011.

¹⁴⁶³Paragraphs 5.31 and 5.61 of the SALRC (Discussion Paper III of 2006).

¹⁴⁶⁴Vander Beken and Defruyter *Assessing Organised Crime* 55 and 58. Risk is defined as the chance of something happening that will have an unwanted impact on objects or interests.

¹⁴⁶⁵Mazzitelli *Transnational Organized Crime* 1073.

The SALRC's report on trafficking in persons states that the demand that leads to the trafficking of women and girls into the sex industry is not distinct from the demand of prostitution. The demand to import trafficked women arises from a developing sex industry, which is unable to find enough local women who are willing to engage themselves into prostitution. The traffickers' destinations are usually to fill brothels, which is the key to their financial success. This report further states that the demand for prostitution and other forms of commercial sexual services is what makes vulnerable women and children such enticing cargo for traffickers.¹⁴⁶⁶ Ebbe submits that some countries including South Africa, experience both intraregional and interregional trafficking. He points out that, although these countries are origination countries, some of them, such as South Africa, also have brothels, camouflaged as night clubs that import women from within and outside of their countries and continents.¹⁴⁶⁷

Prostitution, particularly the brothel scenario, cannot be viewed in isolation; it has to be understood within the broader context of organised crime and human trafficking where prolific international organised crime groups are involved. Some of the local brothels and flourishing sex industry constitute an attractive market for prostitutes and exotic dancers originating from Thailand, China, Russia, Bulgaria as well as other Eastern European countries. Ebbe suggests that many trafficked women from Mexico, Asia and Latin America are willing international prostitutes, who can also be found in cities in Nigeria, Ghana, Kenya and South Africa.¹⁴⁶⁸ Laczko is critical that, most research on trafficking has been concerned with international trafficking and less with internal trafficking inside particular countries. On a lesser scale, women and children are also trafficked inter-country and from

¹⁴⁶⁶South African Law Reform Commission (Discussion Paper III of 2006).

¹⁴⁶⁷Ebbe *Women and Children* 18.

¹⁴⁶⁸*Id* n 1467 *supra* at 21 and 30.

SADC countries for purpose of sexual exploitation.¹⁴⁶⁹

The extra-regional trafficking of exotic women into South Africa to supply the brothels and the sex industry seems tangible. The procuring of these women is a major attraction and a huge money-spinner for South African domestic brothels. Some of the major brothels recently raided by SAPS had between 15 to 30 Thai females working as prostitutes. Amongst the 32 cases of trafficking in human beings as on 19 July 2011, are the two (2) cases of racketeering that were approved against the brothel owners in KwaZulu-Natal. One of these cases (unreported) is *S v Basheer Sayed and Somcharee Chuchumporn* who, as explained by Kruger, “the POCA man” that they have used the racketeering law to prosecute them. These couple are still appealing the conviction on the grounds that the interpreter was not a sworn translator.¹⁴⁷⁰

Kara submits that sex slaves primarily occur in five ways, which are deceit, sale by family, abduction, seduction or romance, or recruitment by former slaves.¹⁴⁷¹ While Allain discussed the case of *S v Netcare Kwa Zulu Natal (Pty) Ltd*¹⁴⁷² under the title of trafficking of persons, the accused were in essence charged with a case of 109 illegal transplants of kidneys of foreign Israelites who were donors and recipients between 2001 and 2003.¹⁴⁷³

¹⁴⁶⁹Laczko *Enhancing Data* 40.

¹⁴⁷⁰See <http://www.sagoodnews.co.za/index2php?option=com-content&do-pdf> last visited on 02 July 2011.

¹⁴⁷¹Kara *Sex Trafficking* 6.

¹⁴⁷²SCC case 41/1804/2010. The case is also accessible at <http://O-medlaw.oxfordjournals.org.oasis.unisa.ac.za/content/19/1/117> last visited on 10 May 2011.

¹⁴⁷³Allain *Trafficking in Persons* 117.

In tabling the Prevention and Combating of Trafficking in Persons Bill,¹⁴⁷⁴ South Africa submitted in its preamble that its common and statutory laws do not deal with the problem of trafficking in persons adequately.

Table 9.1: Offences proposed in the Prevention and Combating of Trafficking in Persons Bill (**Source:** Bill)

Number	Section of the Prevention and Combating of Trafficking in Persons Bill	Details of the activities prohibited (these are the activities that creates an offence specified in the middle column of this table)
1	Contravention of Section 4(1)	A person is guilty of an offence of trafficking in persons if that person trafficks another person.
2	Contravention of Section 4(2)	A person is guilty of an offence of involvement of trafficking in persons if that person—(a) performs any act aimed at committing an offence under this Chapter; (b) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit an offence under this Chapter; or (c) conspires with any other person to commit an offence under this Chapter or to aid in the commission thereof.
3	Contravention of Section 5	Any person who intentionally engages in conduct that causes another person to enter into debt bondage is guilty of an offence.
4	Contravention of Section 6	Any person who has in his or her possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported identification document, passport or other travel document of a victim of trafficking in facilitating or promoting trafficking in persons is guilty of an offence.
5	Contravention of Section 7	Any person who intentionally benefits, financially or otherwise, from the services of a victim of trafficking or uses or enables another person to use the services of a victim of trafficking and knows or ought reasonably to have known that such person is a victim of trafficking, is guilty of an offence.
6	Contravention of Section 8(1)	A person is guilty of an offence, if the person— (a) intentionally leases or subleases any room, house, building or establishment for facilitating or promoting trafficking in persons or allows it to be used or ought reasonably to have known that it will be used for facilitating or promoting trafficking in persons; or (b) advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcast or distribution of information that facilitates or promotes trafficking in persons by any means, including the use of the internet or other information technology, and knows or ought reasonably to have known that it will be used for facilitating or promoting trafficking in persons.
7	Contravention of Section 8(2)	(2) An internet service provider operating in the Republic— (a) must take all reasonable steps to prevent the use of its service for the hosting of information referred to in subsection (1)(b); and (b) that has knowledge that any internet address on its server contains information referred to in subsection (1)(b) must— (i) without delay report that internet address, as well as the particulars of the person maintaining or in any manner contributing to that internet address, to the South African Police Service; (ii) take all reasonable steps to preserve any evidence for purposes of investigation and prosecution by the relevant authorities; and (iii) without delay take all reasonable steps to prevent access to that internet address by any person. (3) An internet service provider who fails to comply with the provisions of subsection (2) is guilty of an offence.

¹⁴⁷⁴B7-2010 as published in Government Gazette no 32906 of 29 January 2010. The Bill was tabled in the National Assembly on 16 March 2010; see also <http://www.salawreform.justice.gov.za/reports/T/pr131-trafficking2008.pdf> last visited on 01 July 2011.

8	Contravention of Section 9(1)	A carrier who brings a victim of trafficking into or removes a victim of trafficking from the Republic knowing that the victim of trafficking does not have a passport and, where applicable, a valid visa required for lawful entry into or departure from the Republic, is guilty of an offence.
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Shannon states that the global industry is never diminishing, as paedophiles are always in search of an outlet for their perversion, men who prefer unnatural expression of their sexuality over normal, mutually consenting interactions and criminals willing to overlook other people’s humanity in order to make a lot of money.¹⁴⁷⁵ Organised crime has exacerbated the corruption of human sense of morality and left us in moral contempt. Human beings are commodifying everything including human body and sexuality. With consumers still not ready to decline this type of service, the service that is demand driven, the war against human trafficking is far from being won.

9.3.11.2 Human smuggling

The relevancy of assessing human smuggling in the process of researching organised crime can better be explained by the Ianni’s kinship group model, which suggests that such immigrants will engage in criminal activities.¹⁴⁷⁶ This is also supported by Bell’s Queer ladder of Mobility theory, which provides that the Italian community has achieved wealth and political influence much later and in a harder way than previous immigrants groups. Excluded from the political ladder and finding few open routes to wealth, some turned to illicit ways in the USA.¹⁴⁷⁷ Paoli and Reuter state that blocked opportunity and the “queer ladder” may also explain participation in

¹⁴⁷⁵Shannon *The Global Sex Trade* 300. The article is also accessible at Criminal Justice Center (CJC), Crime and Justice International: *The Global Sex Trade* Vol 15 Issue 28: May 1999 at <http://www.cjimagazine.com/archives/cji67d3.html?id=288> last visited on 13 August 2011.

¹⁴⁷⁶See paragraph 4.3 *supra*.

¹⁴⁷⁷Lyman and Potter *Organized Crime* 66-67, Homer and Caputo *Guns and Garlic* 77 and Bell *A Queer Ladder* 14.

organised crime by members of the immigrant community in Europe.¹⁴⁷⁸ While admitting the insignificance of the distinction, Albanese submits that human trafficking and alien smuggling are distinguished by the added elements of coercion and voluntary participation by those being trafficked and smuggled respectively.¹⁴⁷⁹

Human smuggling is a voluntary movement by people who want to see themselves at the envisaged destination. It is a commercial transaction between two willing parties who go their separate ways once their business is complete.¹⁴⁸⁰ This phenomenon is termed smuggling of migrants by the UN. It is defined in terms of Article 3(a) of Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the Palermo Convention as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.¹⁴⁸¹ Finckenauer simply explains human smuggling as arising from the desire of people to migrate from where they are to somewhere else.¹⁴⁸² The people use either the legal methods to enter the country or illegal methods through ungazetted entry points. Nickolič-Ristanovič explains human smuggling as bringing someone across the border for money. It is always accompanied by the wish of a smuggled person to be smuggled. Where smuggled, people turn to illegal markets for job opportunities. This may bring them into exploitation or slavery and often turns them into victims of trafficking, which blurs the distinction between smuggling and trafficking.¹⁴⁸³

Despite the fact that it is impossible to have the exact figure of the people who cross through the ungazetted entry points, it is easy to know those who enter through

¹⁴⁷⁸*Id* n 242 *supra* at 17.

¹⁴⁷⁹Albanese *Criminal Network* 56.

¹⁴⁸⁰Deegan *The Fire Behind the Smoke* 134.

¹⁴⁸¹This Protocol was adopted by the General Assembly in its Resolution 55/25 of 15 November 2000 (annex III).

¹⁴⁸²Finckenauer *Mafia* 143.

legal borders and remain in the country. It is estimated that there are 3-4 million illegal immigrants in South Africa.¹⁴⁸⁴ Tanfa believes that there is a lack of control at several airports in South Africa and neighbouring countries. His pessimistic view is an expectation of an even further increase of illegal immigrants into South Africa, compounding most current socio-economic problems, especially the 419-scam type of crime.¹⁴⁸⁵ The information kept by the Department of Home Affairs (DHA) is used to analyse the possible number of foreigners who may have arrived legally in the country and failed to leave. An analysis by Lehohla, the Statistician-General of Statistics South Africa (SSA) on foreign travellers who were arriving and leaving between the 1970s and 1980s are fairly similar in pattern. He observed that prior to 1986, the number remained steady around 500 000 per annum with a gradual increase from 1986 to 1990.¹⁴⁸⁶

Whilst 41 282 persons departed as compared to 36 707 who arrived in 1945, these figures respectively rocketed to 5 701 755 and 8 437 921 in 2006. Schraivesande states that the number of illegal immigrants entering South Africa has dramatically increased since 1994.¹⁴⁸⁷ The picture painted by this statement is that South Africa is a haven for illegal immigrants, which is a perception that this writer is painfully unable to find reasons to differ with. The analysis of the information suggests that

¹⁴⁸³*Ibid* n 1122 *supra*.

¹⁴⁸⁴<http://en.wikipedia.org/wiki/illegal-immigration#South-Africa>,
<http://muse.jhu.edu/login?uri=journals/Mediterranean-quartely/vol16/16.4solomon.html>
and <http://www.sairr.org.za/press-office/archive/201cillegal201d-immigrats-are-a-perment-feature-of-soutrh-africa2019s-population-13th-may-2008.html>] last visited on 07 October 2009.

¹⁴⁸⁵Tanfa *Advance Fee* 5.

¹⁴⁸⁶See <http://www.statssa.gov.za/publications/Report-03-51-02/Report-03-51-022000.pdf> last visited on 06 January 2008. The figures in the statistics are according to him, excluding data of nationals of Botswana, Lesotho and Swaziland for the period 1980 to 1991. Between 1990 and 1993, there was a steep rise. After 1993, the pace of increase of arrivals continued but there was a marked lag between the number of arrivals and departures.

¹⁴⁸⁷See <http://www.queensu.ca/samp/sampresources/samppublications/pressarticles/2001/Haven.htm> last visited on 23 February 2008.

the number of foreign nationals who entered the borders and did not depart for the period 1990-2006 is as follows:

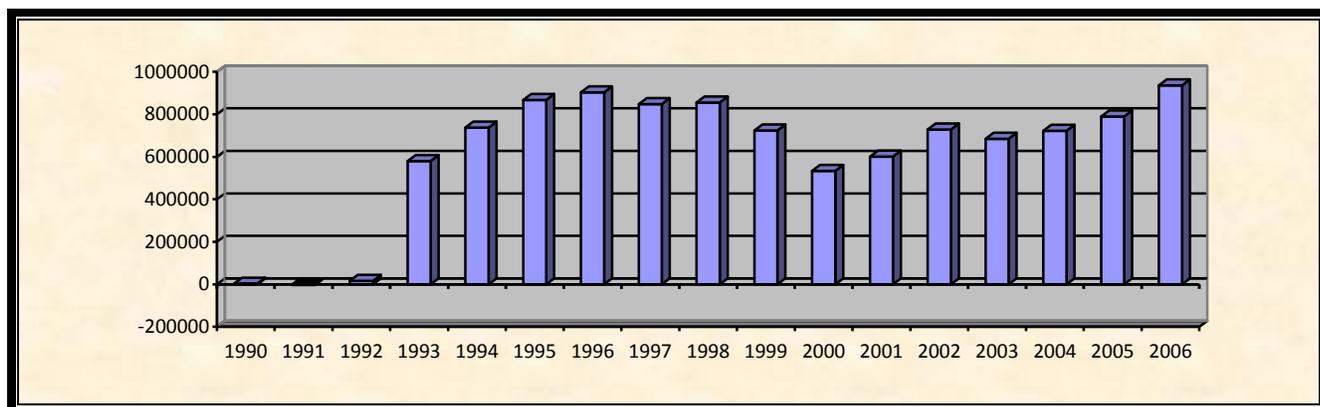


Figure 9.18: The number of persons who entered the RSA legally but failed to depart for the period 1990 - 2006 (**Source:** Statistics South Africa)¹⁴⁸⁸

The number of organised criminal groups involved in people smuggling and the number of illegal immigrants facilitated into South Africa are unknown. However, all indications are that the scale of people smuggling is bigger than that of human trafficking.¹⁴⁸⁹ Kara explains that smuggling involves an individual who chooses to cross the border illegally, alone or with the help of an expert. He further points out that trafficking is smuggling with coercion or fraud at the beginning of the process and exploitation at the end.¹⁴⁹⁰ Bucquoye and others state that, amongst the methods used by traffickers include false compartments in trucks, hiding the people

¹⁴⁸⁸See <http://www.statssa.gov.za/publications/statspastfuture.asp?PPN=P0351&SCH=3929> last visited on 06 January 2008.

¹⁴⁸⁹People smuggling is punishable as a contravention of the Immigration Act 13 of 2002.

¹⁴⁹⁰Kara *Sex Trafficking* 189.

and driving through, false travel documents and bribing of border officials.¹⁴⁹¹

Unlike in Europe, illegal immigration is seen as threat number one amongst the organised crime priorities involving about four million people, whilst this is not the case in South Africa.¹⁴⁹²

9.3.12 Theft from Auto Teller Machines (ATM)

Theft from an ATM is done in various ways. This includes jamming machines, cutting the machines by angle grinders and blasting by commercial explosives.¹⁴⁹³ The last mentioned, which is blasting of an ATM with explosives for stealing cash is the worst aggressive method deployed by organised criminal groups. This offence is classified as malicious damage to property and theft. A person commits malicious injury to property if he unlawfully and intentionally damages (a) property belonging to another; or (b) his own insured property, intending to claim the value of the property from the insurer. The elements of the crime are damaging; property; unlawfulness and intention. In line with Snyman's explanation, property is corporeal, movable or immovable that belongs to the financial institutions.¹⁴⁹⁴

¹⁴⁹¹Bucquoye *Road Transport* 142.

¹⁴⁹²See <http://www.people.ex.ac.uk/watupman/undergrad/Neilson/activities.html> last visited on 25 February 2008. See also page 8 of 2007 OCTA report at [http://www.europol.europa.eu/publications/European-Organised-Crime-Threat-Assessment-\(OCTA\)/OCTA2007.pdf](http://www.europol.europa.eu/publications/European-Organised-Crime-Threat-Assessment-(OCTA)/OCTA2007.pdf) last visited on 26 February 2008.

¹⁴⁹³In terms of section 1 of the Explosives Act 15 of 2003, explosive means – (a) a substance, or a mixture of substances, in a solid or liquid state, which is capable of producing an explosion; (b) a pyrotechnic substance in a solid or liquid state, or a mixture of such substances, designed to produce an effect by heat, light, sound, gas or smoke or a combination of these, as the result of non-detonative self-sustaining exothermic chemical reaction, including pyrotechnic substances which do not evolve gases; (c) any article or devise containing one or more substances contemplated in paragraph (a); (d) any plastic explosive; or (e) any other substance or article which the Minister may from time to time, by notice in the *Gazette*, declare to be an explosive.

¹⁴⁹⁴*Id* n 12 *supra* at 545 and 546.

The seriousness of the crime of malicious damage to property is dependent on the nature of the commodity being damaged. This crime forms part of the POCA list. As the crime is usually committed by a group of persons who repeats these activities, it is important to prosecute the perpetrators for a pattern of racketeering activity in terms of the POCA. As if this is not bad enough, organised criminals have now resorted to a more aggressive approach where they arm themselves with heavy calibre firearms and engage whoever confronts them, which turns the crime into an armed robbery.

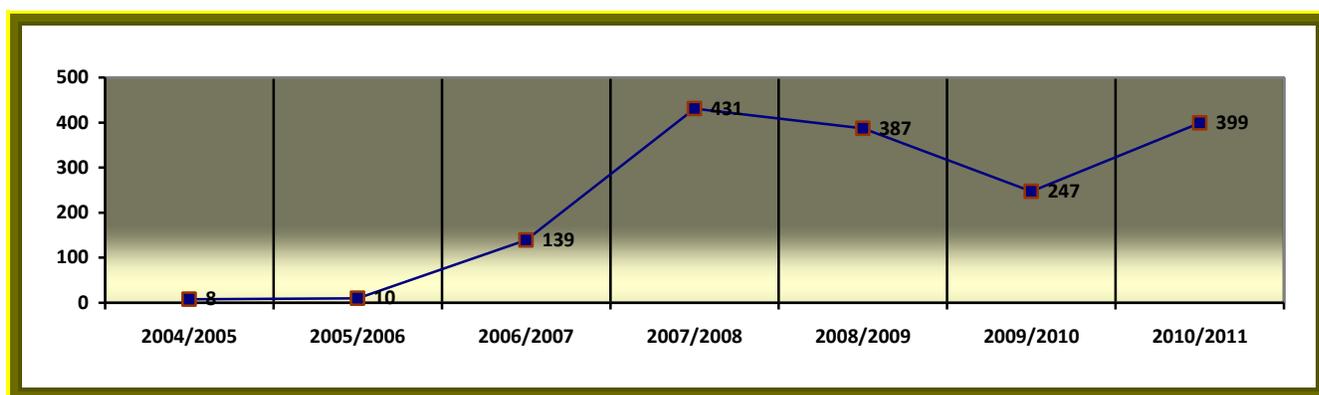


Figure 9.19: Statistics of ATM blasts for the period 2004/2005 – 2010/2011 (Source: SAPS Annual Reports)¹⁴⁹⁵

9.3.13. Illegal gambling

Pace and Styles believe that gambling has historically been the financial foundation of organised crime until the 1970s when drugs became the major source of revenue.¹⁴⁹⁶ One of the old gambling activities, which have been with South Africans, is Fafi. This is primarily run by the Chinese living in South Africa. In recent days, other nationalities have joined the game. The victims are usually the poor African

¹⁴⁹⁵SAPS Annual Report 2010/2011 Annexure A at 20.

¹⁴⁹⁶Pace and Styles *Organized Crime Concepts* 23.

people wherever they are accessible. The gamblers usually run their rounds three times a day. There is also a belief that dreams can be interpreted into numbers where one stands a good chance to win. It is further believed that more than 99% of the gamblers always lose. Few of these gamblers were killed in an attempt to rob them, as criminals are aware that they are carrying cash while making their rounds. This prompted the gamblers to use bulletproof cars and seem to be operating freely as if their games are legal. Fafi is run by a leader who has people receiving bets on his behalf all over, which constitutes organised crime.

9.3.14 Corruption

Organised crime relies on corruption for survival. As His Excellency, the former State President and Deputy President Kgalema Petrus Motlanthe puts it, the pestilence of cancerous corruption menacing the soul of our democracy is a life-and-death matter that chokes off key societal institutions on which our future depends. He further states that corruption is an immoral force, a pestilence that chokes the potential of a blossoming democracy. It hollows out the democratic vision, creating despair where hope was supposed to flourish, instilling pessimism where optimism was supposed to take root.¹⁴⁹⁷ Corruption is not only insidious and ferocious, it is so corrosive and cancerous that it needs to be diagnosed early and be tackled head-on wherever it raises its ugly tentacles, otherwise it institutionalizes itself until good men and women do nothing, which results in justice giving way to injustice. Compatibly, Van Dijk submits that in countries where organised crime is most prevalent, investigations into such crimes will be hampered by police corruption and political interference in prosecution and sentencing.¹⁴⁹⁸

¹⁴⁹⁷<http://timeslive.co.za/?i=3692/0/0&artId&4160046&showonly1> last visited on 18 August 2011 and www.thepresidency.gov.za/pebble.asp?relid=6560 last visited on 25 August 2012.

¹⁴⁹⁸Van Dijk *Assessing Organized Crime* 40. See also <http://arno.uvt.nl/show.cgi?fid=80848> last visited on 07 May 2011.

Corruption is criminalised in terms of the Prevention and Combating of Corrupt Activities Act (PRECCAA) of 2004.¹⁴⁹⁹ This Act has repealed the Corruption Act of 1992,¹⁵⁰⁰ which is the first statutory law that repealed the common law crime of bribery. Tambulasi argues that there is a direct link between corruption and organised crime. He agrees with the argument that corruption does not only give rise to organised criminal groups but also acts as a lubricant for the effective operation and survival of such groups.¹⁵⁰¹ Madsen states that corruption is the lubricant, which allows the various mechanisms to operate smoothly.¹⁵⁰² Maltz submits that organised crime almost always involves corruption.¹⁵⁰³

Generally, the offence of corruption is defined in terms of Section 3 of PRECCAA, as follows:

Any person who, directly or indirectly (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner (i) that amounts to the (aa) illegal, dishonest, unauthorised, incomplete, or biased; or (bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; (ii) that amounts to (aa) the abuse of a position of authority; (bb) a breach of trust; or (cc) the violation of a legal duty or a set of rules, (iii) designed to achieve an unjustified result; or (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.¹⁵⁰⁴

¹⁴⁹⁹12 of 2004.

¹⁵⁰⁰94 of 1992.

¹⁵⁰¹Tambulasi *Corruption and Organised Crime* 19.

¹⁵⁰²Madsen *Organized Crime* 21.

¹⁵⁰³Maltz *Organized Crime* 24.

¹⁵⁰⁴Section 3 of the PRECCAA of 2004.

In addition to the general crime of corruption, Sections 4 to 21 provide that the following specific persons can commit the offence of corruption:¹⁵⁰⁵

Table 9.2: Offences and targets of the Prevention of Corrupt Activities Act (**Source:** PRECCAA)

Section	Specific person against whom the crime of corruption is designed
3	General corruption
4	Offences in respect of corrupt activities relating to public officers
5	Offences in respect of corrupt activities relating to foreign public officials
6	Offences in respect of corrupt activities relating to agents
7	Offences in respect of corrupt activities relating to members of legislative authority
8	Offences in respect of corrupt activities relating to judicial officers
9	Offences in respect of corrupt activities relating to members of the prosecuting authority
10	Offences of receiving or offering of unauthorised gratification by or to a party to an employment relationship
11	Offences in respect of corrupt activities relating to witnesses and evidential material during certain proceedings
12	Offences in respect of corrupt activities relating to contracts
13	Offences in respect of corrupt activities relating to procuring and withdrawal of tenders
14	Offences in respect of corrupt activities relating to auctions
15	Offences in respect of corrupt activities relating to sporting events
16	Offences in respect of corrupt activities relating to gambling games or games of chance
17	Offences relating to acquisition of private interest in contract, agreement or investment of public body
18	Offences of unacceptable conduct relating to witnesses
19	Intentional interference with, hindering or obstructing of investigation of offence
20	Accessory to or after an offence
21	Attempt, conspiracy and inducing another person to commit an offence

The crucial element of corruption is gratification. Gratification includes: (a) money, whether in cash or otherwise; (b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage; (c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage; (d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation; (e) any payment, release, discharge or liquidation of any loan, obligation or other liability,

¹⁵⁰⁵See sections 3-21 of the PRECCAA of 2004.

whether in whole or in part; (f) any forbearance to demand any money or money's worth or valuable thing; (g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty; (h) any right or privilege; (i) any real or pretended aid, vote, consent, influence or abstention from voting; or (j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.¹⁵⁰⁶

The writer concludes that corruption is not only insidious and ferocious; it is so corrosive and cancerous that it needs to be diagnosed early and tackled head-on wherever it raises its ugly tentacles, otherwise it institutionalizes itself until good men and women do nothing, which results in justice giving way to injustice.

9.4 RESPONSES TO ORGANISED CRIME IN SOUTH AFRICA

South Africa has responded operationally, legislatively and institutionally to the challenge of organised crime. Buys reflects the number of organised criminal groups or syndicates that were in operation in 1994, 1995 and 1996 as 278, 481 and 192 respectively.¹⁵⁰⁷ De Kock states that, as on 10 August 1999, there were at least 500 crime syndicates operating in South Africa. He concedes that it is difficult to determine the extent of organised crime.¹⁵⁰⁸ This argument is internationally compatible with the view of Harding who states that it is improbable that the dark figure with regard to the number of organised criminality will ever be cleared up. He concludes that all the estimates remain imprecise guesswork and are likely to

¹⁵⁰⁶Section 1 of PRECCAA of 2004.

¹⁵⁰⁷Buys *Hijacking of Trucks* 70.

¹⁵⁰⁸De Kock *Generators of Crime* 10.

remain so.¹⁵⁰⁹ In the same vein, Rhodes states that there are many organised crime ventures that are not detected at all.¹⁵¹⁰ The fact that Marshall was arguing that organised crime in Africa is on the increase whilst Williams was arguing that it is going down, tends to support the guesstimate view.¹⁵¹¹ In the first quarter of 1999, Eksteen reported on the Organised Crime Threat Analysis Committee (OCTAC), that there were 786 active syndicates in South Africa.¹⁵¹²

The SAPS has for the period 2004-2007 set four key strategic priorities that include the combating of organised crime, focusing on drug and firearm trafficking, vehicle theft and hijacking, as well as commercial crime and corruption among public officials.¹⁵¹³ The view of Cockayne is that, while crime has gone global, crime control has remained largely state based and remains true. He quotes Williams who stated that transnational criminal networks could only be defeated by transnational enforcement networks. He further quotes Godson and Williams who state that as long as transnational criminal organizations structure their operations in ways that limit the effectiveness of initiatives by any single state, the response needs to be extensive in scope, multilateral in form and to the extent possible, global in reach. The mere transnationality of contemporary organised crime calls for an international response.¹⁵¹⁴

¹⁵⁰⁹Harding *Criminal Enterprise* 196.

¹⁵¹⁰Rhodes *Organized Crime* 2.

¹⁵¹¹Lahneman and Lewis *Organized Crime* 4 and 11.

¹⁵¹²Eksteen Report 4.

¹⁵¹³See <http://www.saps.org.za/sps-profile/strategic-framework/strategic-plan/2004-2007/direction.htm> last visited on 31 December 2007.

¹⁵¹⁴Cockayne *Response to a Rising Threat* 12. Attuned to this view, Prime Minister Milo Djukanovic states that contemporary challenges are complex and require a united and global response, particularly in the fight against organised crime, see Interpol Media Release number 42/2010 and statement by Mr Milo Djukanovic, Prime Minister of Montenegro during the opening of the 39th European Regional Conference. The statement is also accessible at <http://www.interpol.int/Public/ICPO/speeches/2010/39thERCDjukanovic.PDF> last visited on 06 June 2010.

9.4.1 Legislative responses

According to Woodiwiss, Chamberlin explicitly made a connection between unworkable laws and successful organised crime. He states that organised crime is today a great unmanageable threatening fact in the lives of our communities. It is not good enough, he states, to ask whether the machinery of law enforcement is good, we must go further, call in question the wisdom of the laws themselves and discover whether or not some of our experiments are not as menacing in their effects as criminal activities.¹⁵¹⁵

The promulgation of the South African Police Service Act of 1995,¹⁵¹⁶ has through section 16, brought about the concept of organised crime in the statutes. This section that deals with the Specialised Units and investigations thereof, tried to describe organised crime. Unfortunately, this description is a police baggage as no penal provisions accompanies it. In alignment with the principle of legality, which proscribe that there is no crime without penal provisions, the concept has become a police vernacular with no recognition outside the police circles.

The Prevention of Organised Crime Act of 1998¹⁵¹⁷ came into effect on the 01 February 1999, which is before the adoption of the Palermo Convention of 2000. Organised criminal groups, which were famously called syndicates, were identified, investigated, arrested and prosecuted in terms of the original crimes such as dealing in drugs and possession of abalone. Although a prosecutorial approach did not immediately change in line with the prescripts of the POCA, the civil part that dealt with forfeiture of assets fittingly changed.

¹⁵¹⁵Woodiwiss *The Strange Career* 11.

¹⁵¹⁶68 of 1995.

¹⁵¹⁷121 of 1998.

South Africa enacted a number of laws, which have to a certain extent, dealt with organised crime. While these laws may not speak about organised crime *per se*, they address those activities which are linked to organised crime as predicate offences. These laws include the following:

- The Riotous Assemblies Act 17 of 1956 that criminalises conspiracies.
- The Extradition Act 67 of 1962 that provides for the extradition of persons accused or convicted of certain offences and for other incidental matters.
- The Customs and Excise Act 91 of 1964 that prohibits and controls the importation, export, manufacture or use of certain goods.
- The Criminal Procedure Act 51 of 1977 that provides, amongst others, the compelling of recalcitrant witnesses, use co-perpetrators as witnesses, plea bargains, entrapment and severe penal provisions.
- The Secret Service Act 56 of 1978 that provides for the establishment of an account for secret services that is also used to finance undercover operations.
- The Intimidation Act 72 of 1982 that provides for the prohibition of certain forms of intimidation of individuals or the public in order to do or abstain from doing any act or to abandon a particular standpoint.
- The Diamonds Act 56 of 1986 that provides for the control over the possession, purchase, sale, processing, the local beneficiation and the export of diamonds.
- The Drug Trafficking Act 140 of 1992 that provides for the prohibition of the use, possession, dealing in drugs and certain acts relating to the manufacture, supply of certain substances, acquisition or conversion of the proceeds of certain crimes as well as the obligation to report certain information to the police.
- The International Co-operation in Criminal Matters Act 75 of 1996 that facilitates the provision of evidence, and the execution of sentences in criminal

cases, and the confiscation and transfer of the proceeds of crime between the Republic and foreign States.

- The Marine Living Resources Act 18 of 1998 that provides for the conservation of the marine ecosystem and criminalises some illegal activities regarding certain species.
- The National Prosecuting Authority Act 32 of 1998 that also established the Directorate for Special Operations (DSO) as announced on 29 June 1999 by Mbeki, to deal with all national priority crimes including police corruption and the POCA that focussed on money laundering, criminal gang activities and organised crime.
- The Witness Protection Act 112 of 1998 that provides for the protection of witnesses and related persons. The witnesses include those who are to testify on any offence referred to in the POCA. The POCA was enacted to, amongst others, introduce measures to combat organised crime, money laundering and criminal gang activities; prohibit certain activities relating to racketeering activities; provide for an obligation to report certain information; criminalise activities associated with gangs; provide for the recovery of the proceeds of unlawful activity; and forfeiture of instrumentality to crime.
- The Firearms Control Act 60 of 2000 that provides for the establishment of a comprehensive and an effective system of firearms control.
- The Financial Intelligence Center Act 38 of 2001 that provides for the combating of money laundering activities and the financing of terrorist and related activities as well as the imposition of certain duties on institutions and other persons who might be used for money laundering or the financing of terrorist activities.
- The Regulation of the Interception of Communications and Provision of Communication-related Information Act 70 of 2002 that was enacted to, amongst others, regulate the interception, monitoring and provision of certain

communications as well as the prohibition of telecommunication services, which do not have the capability to be intercepted and the manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment.

- The International Trade Administration Act 71 of 2002 that was enacted to, amongst others, provide for continued control of import and export of goods and matters connected therewith.
- Contravention of the Explosives Act 15 of 2003 that provides for the control of explosives that are at times used on illegal mining and ATM explosion.
- The Prevention and Combating of Corrupt Activities Act 12 of 2004 that provides for the strengthening of measures to prevent and combat corruption and corrupt activities.
- The Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007 that provides for the prevention of trafficking in women and children for the purpose of sexual activities.

9.4.2 Institutionalised responses

The response to organised crime does not only require the putting of laws in place, it also requires the putting together of institutions to enforce such laws. With the promulgation of the South African Police Service Act of 1995,¹⁵¹⁸ the legislature has under section 16, legally established the Organised Crime Units. The SAPS joined the International Criminal Police Organization (ICPO) known as INTERPOL of which National Police Commissioner Jackie Sello Selebi became the Deputy President for the Africa region and ultimately the President. The SAPS also became a member of the SARPPCCO. It furthermore participates in the Heads of National Law Enforcement Agencies (HONLEA) which is an organization geared to deal with drugs

¹⁵¹⁸68 of 1995.

and drug trafficking in the region.

The SAPS has further established a number of various specialised units that were geared to deal with various manifestations of organised crime. These units include a Cross Border Operations Unit (CBOU); an International Vehicle Crime Investigation Unit (IVCIU); a Special Task Force; an Organised Crime Investigation Unit (OCIU), a Selected Organised Crime (SOC); Border Police / Railway Police / Precious Metals and Diamonds Units (PMDU) [formerly known as Diamonds and Gold(D&G)]; Fraud Units; Syndicate Fraud Units (SFU); Office for Serious Economic Offences (OSEO); Commercial Crime Units (CCU); Aliens Units; Serious and Violent Crime (SVU) [formerly Murder and Robbery (M&R)] Units; Family Violence Child Protection and Sexual Offences Units (FCS) [formerly Child Protection Units (CPU)]; Endangered Species Units (ESPU); Gang Units; Trucks Hijacking Units; Transit Theft Units; Firearms Investigations Units (FIU); Anti-Corruption Units (ACU); Motor Vehicle Crime Investigation Units; Special Task Force (STF) Units; Tactical Response Team (TRT) Units; and Tracking Units.¹⁵¹⁹

The Commercial Branch was established in 1947 and was called Johannesburg Company Fraud Staff with jurisdiction to investigate countrywide.¹⁵²⁰ In 1969, the Branch was expanded with offices in Cape Town, Pretoria, Durban, Bloemfontein, Port Elizabeth and Klerksdorp. The Branch was, during the period 1988-1997, reorganised in order to cope with the increasing challenge of commercial crime resulting in the establishment of 12 Commercial Crime Units, 13 Syndicate Fraud Units¹⁵²¹ and 43 Fraud Units. On completion of the first phase of the restructuring

¹⁵¹⁹Standing *Anti-gangs Policy* 5 and Shaw *Organized Crime in South Africa* 109.

¹⁵²⁰<http://www.saps.gov.za/org-profiles/core-components/commercial/history.htm> last visited on 17 November 2011.

¹⁵²¹It needs to be mentioned that Lieutenant General Schutte established this unit in 1986 in response to a worthless cheque that was deposited by Dr Motsepa at Rustenburg Volkskas Bank and funds that were withdrawn from the account.

of the Detective Service in 2000-2002, the Commercial Branch comprised of 17 Commercial Crimes Units and one Serious Economic Offences Unit.¹⁵²² When the SAPS lost all its members who belonged to the original Office for Serious Economic Offences¹⁵²³ who were legislated to become Investigating Directorate Serious Economic Offences (IDSEO),¹⁵²⁴ they started from scratch to build another unit, which is still operating today.

The Organised Crime Intelligence Unit, which is the predecessor of the Organised Crime Investigation Unit was the first unit created to deal directly with organised crime. As the abbreviation of both are the same, it has at times confused researchers who are of the view that the current Organised Crime Investigation Units (OCIU) are synonymous with the then Organised Crime Intelligence Units (OCIU). Amongst some of the activities of the Organised Crime Intelligence Unit, which is a distinguishing factor as compared with the current, was to compile an Organised Crime Threat Analysis (OCTA) in order to have a global insight into the activities of crime syndicates.¹⁵²⁵

¹⁵²²See Historical Perspective of the Commercial Branch at <http://www.saps.gov.za/org-profiles/core-components/commercial/history.htm> last visited on 17 November 2011.

¹⁵²³The Office for Serious Economic Offences (OSEO) was established in 1992 in terms of the Investigation of Serious Economic Offences Act 117 of 1991, which provided that such Office may investigate any offence which in the opinion of the Director: Office of Serious Economic Offences is a serious and complicated, economic offence. The National Prosecuting Authority Act 32 of 1998 repealed this Act and the Directorate was deemed to have been created in terms of this Act and came to be known as Investigating Directorate Serious Economic Offences (IDSEO).

¹⁵²⁴The National Prosecuting Authority Act 32 of 1998 repealed this Act and the Directorate was deemed to have been created in terms of this Act and came to be known as Investigating Directorate Serious Economic Offences (IDSEO). The Act further specifies the categories of offences in the Schedule, in respect of which the Investigating Directorate must exercise its functions. These offences are: (a) Any offence of fraud; theft; forgery and uttering; or corruption in terms of the Corruption Act, 1992 (Act No. 94 of 1992); or (b) any other economic common law offence; or economic offence in contravention of any statutory provision, which involves patrimonial prejudice or potential patrimonial prejudice to the State, anybody corporate, trust, institution or person, which is of a serious and complicated nature.

¹⁵²⁵*Id* n 283 *supra* at 15.

The South African Government appointed a Commission under Police Commissioner, General Hennie de Witt to look into the restructuring of the SAP. As a result, the SAP was restructured into five divisions in 1990-1991. One of these five divisions, which was a merger between Criminal Investigation Department (CID) and the Security Branch (SB) called the Crime Combating and Investigation Division, came into effect on 01 April 1991. As Gastrow puts it, senior members from these divisions wanted to ensure that members from each side did not gain control of the new division.¹⁵²⁶ The timing of restructuring of law enforcement is important. Voronin is of the view that the government of Russia has done too little too late with the result that the fight against crime was no match for the mafia. His pessimistic view is based on the grounds that officials are corrupt, law enforcement organs are deprived of most experienced professionals, continuous restructuring of law enforcement resulted in distractions, demoralisations, demotions and tensions, ineffective laws, control of economy by organised groups and usurpation of functions of state by private institutions like 100 000 private law enforcements.¹⁵²⁷

During April 1991, a Crime Combating and Investigation division of the SAP held a conference at which it was resolved that an Organised Crime Project must be undertaken as one of the support service of crime investigations and combatting. In terms of this instruction, focus was to be specifically directed at 'planners' and 'organisers of crime' that cannot be brought before court through the traditional conventional methods and techniques so that they can be brought to court.¹⁵²⁸ The project was approved on 13 August 1991 by the then Minister of Law and Order, Mr Hermanus Jacobus Kriel. During the approving ceremony, Andriaan Vlok, the predecessor to Kriel, cautioned that the project must not be used in political

¹⁵²⁶Gastrow *Organised Crime* 29.

¹⁵²⁷Voronin *Emerging Criminal State* 58-60.

¹⁵²⁸*Id* n 283 *supra* at 7-8.

activities with the aim of prejudicing or advancing some political parties.¹⁵²⁹ The unit, which was called the Organised Crime Intelligence Unit, came into operation on 01 December 1991 with its Head as Colonel F C Truter.¹⁵³⁰ In describing the unit, it was said that it consisted of the Organised Crime Intelligence Unit and investigators attached to Crime Investigation Service (CIS).¹⁵³¹ The unit was to focus on organised crime syndicates by gathering information, evaluating and providing to the detectives information for the purpose of effecting arrest without usurping the control by the investigator.¹⁵³²

During 1992, the Anti-Corruption Units were established in South Africa in order to police corruption against members of the then SAP. The law used was the Corruption Act of 1992,¹⁵³³ which was later repealed by the Prevention and Combating of Corrupt Activities Act of 2004.¹⁵³⁴ The mandate of the Anti-Corruption Unit (ACU) was to investigate corruption cases against members of the SAP, whereas the rest of corruption cases were investigated by the Commercial Branch. When the Anti-Corruption Units were closed down during the restructuring of the Detective Service in 2000, no final word was pronounced as to who is to investigate corruption cases against members of the SAPS and there were thus no uniform standards in the provinces. The Organised Crime Component took upon itself to investigate these cases in 2004.

The National Crime Investigation Service (NCIS) was established in South Africa in 1994 to operate in the same way as the FBI, Australian Federal Police (AFP) and the Regional Crime Squads (RCS) in America, Australia and England respectively. In

¹⁵²⁹*Id* n 283 *supra* at 10. This information was reflected under police file reference GM28/2/4 dated 1992-03-10 at 11.

¹⁵³⁰Kruger *Organised Crime* 5 and Truter *Organised Crime Intelligence Unit* 2.

¹⁵³¹*Id* n 283 *supra* at 21.

¹⁵³²*Id* n 283 *supra* at 22 and 23.

¹⁵³³94 of 1992.

doing this, twenty (20) operational offices were established primarily with the South African Narcotics Bureau (SANAB) detectives. The detectives from Vehicle Theft Units and Crime Intelligence and Commercial Branch were later added.¹⁵³⁵ According to Colonel Ramotshehi Ernest Madzhie who was then an Inspector at SANAB, these units were called National SANAB.¹⁵³⁶ According to Eksteen, the operational problems with this setup was that organised crime offices and some specialised units such as SANAB and Vehicle Theft Units worked as rivals, and in some instances against each other. The organised crime units focussed primarily on narcotics and to a lesser extent on stolen vehicles.¹⁵³⁷

On 11 August 1999, Eksteen raised a concern that the SAPS was not making enough progress in the fight against organised crime which is probably a reason for the establishment of a Directorate for Special Operations (DSO)¹⁵³⁸ on the Federal Bureau of Investigations (FBI) model in the Department of Justice.¹⁵³⁹ What came out strongly from Eksteen was the questioning of organised crime working in a fragmented fashion to arrest, as he puts it, “crime lords” as his concern. He was worried that the Organised Crime Unit was only capable of investigating cases, which were being investigated by specialised units such as SANAB, Vehicle Theft, Commercial Branch and even general detectives. He enumerated the dysfunctions which he believed existed as including flawed process of identification of projects,

¹⁵³⁴12 of 2004.

¹⁵³⁵Eksteen Report 2.

¹⁵³⁶This is information obtained on verbal interview conducted with Colonel Madzhie on 03 January 2008.

¹⁵³⁷*Id* n 1535 *supra* at 3.

¹⁵³⁸The cited name of Special Investigation Directorate is incorrect. Nicaso and Lamothe have erroneously reported that the Scorpions is an Elite Unit of the SAPS whereas it was a Unit of National Prosecuting Authority, see Nicaso and Lamothe *Criminal Empires* 241. Kelly has observed that Organized Crime Units in the police departments tend to be elite units where a disproportionately large percentage of high-ranking personnel are placed which suggests opportunities for career advancement; Kelly *Organized Crime* 216.

¹⁵³⁹The information regarding this proposal is recorded under work-study report 26/3/4 dated 11-08-1999, which is referred to hereafter as Eksteen Report, *Id* n 1535 *supra* at 3.

distrust, keeping information close to their chest, and the lack of qualitative and quantitative information from Crime Intelligence.¹⁵⁴⁰

Assistant Commissioner Timothy Charles Williams, as he then was, wanted an agreement between the SAPS and the DSO. He further observed that the Crime Threat Analysis (CTA)/Organised Crime Threat Analysis (OCTA) process offers a perfect vehicle for such a common approach. He emphasised the need to strengthen the efficiency of the desks.¹⁵⁴¹ Divisional Commissioner Louis Eloff, as he then was, stated in his strong recommendation as follows: “we cannot allow ignorance and ‘power play’ to further delay the fight against organised crime. Our past approach has led to the establishment of the Scorpions”.¹⁵⁴² The establishment of Selected Organised Crime (SOC) was then approved on 29-09-1999 by the National Commissioner John George Fivaz, which resulted in National Instruction 5/1999.

The restructuring of the Detective Service started in earnest on 21 January 2000 with an instruction 3/1/8 dated 21-01-2000. This restructuring resulted in the closure of some specialised units and the opening or enhancement of Organised Crime Investigation Units. Unfortunately, some sector in the business community influenced some of the decisions, which saw the organised crime having three types of structures, to wit, Organised Crime Investigation Units, Assets Investigation Section (AIS) and Precious Metals and Diamonds. It is during this period where the Diamond and Gold’s existence were really influenced by the mining sector, which resulted in only the change of name and the closure of the units in Eastern Cape, Western Cape and KwaZulu-Natal Provinces.

¹⁵⁴⁰*Id* n 1534 *supra* at 4-7.

¹⁵⁴¹*Id* n 1535 *supra* at 16.

¹⁵⁴²*Id* n 1535 *supra* at 17.

An Investigating Directorate: Organised Crime and Public Safety (IDOC),¹⁵⁴³ which operated separately from the SAPS, was established in respect of the offences and categories of offences specified in the Schedule. These offences included extortion; kidnapping; the Intimidation Act of 1982;¹⁵⁴⁴ the Diamonds Act of 1986;¹⁵⁴⁵ some crimes that are committed in an organised fashion or which may endanger the safety or security of the public, or any conspiracy, incitement or attempt to commit any of the above-mentioned offences.¹⁵⁴⁶

South Africa established the National Anti-Corruption Forum (NACF) on 15 June 2001 at Langa, Cape Town. While the intention was to have the forum led by civilians, the Minister of Public Service later assumed the Chairpersonship and Administration on 21-11-2002 as the appointed chair could not take the Forum off the ground. This body ensures that everybody in civil society, business and the public sector play a role in fighting corruption.¹⁵⁴⁷

An Investigating Directorate Corruption (IDCOR)¹⁵⁴⁸ that was established to deal with offences relating to corruption did not become operational until the formal legal creation of the Directorate of Special Operations (DSO), which became operational on 01 September 1999. As acknowledged by the NPA, it was, in essence, built on the successes of the existing Investigating Directorates. It became a legal entity on 12

¹⁵⁴³Proclamation no. R. 102 of 16 October 1998: establishing of Special Investigating Directorate: Organised Crime and Public Safety: Regulations in terms of the National Prosecuting Authority Act 32 of 1998.

¹⁵⁴⁴72 of 1982.

¹⁵⁴⁵56 of 1986.

¹⁵⁴⁶See Proclamation no. R. 102 of 16 October 1998.

¹⁵⁴⁷See case study on the South African National Anticorruption Forum by Odette Ramsingh, Director General of Public Service Commission and Kris Dobie, Centre for Business and Professional Ethics, University of Pretoria at <http://www.unglobalcompact.org/NewsAndEvents/event-archives/ghana-2006/NACF.pdf> last visited on 07 June 2008.

¹⁵⁴⁸See Proclamation R14/2000 published in the Government Gazette No 20997 on 24 March 2000.

January 2001 in terms of Proclamation R3 of 2001 published in the Government Gazette No 21976 of 12 January 2001.¹⁵⁴⁹

As the purpose of organised criminals is primarily financial benefit, the financial investigation capacity that was established included the Special Investigation Unit (SIU); the Investigative Directorate on Organised Crime (IDOC); the Special Commercial Crime Units (SCCU)(1999), and Organised Crime Section (OCS).¹⁵⁵⁰

On 14 March 1997, President (Dr) Nelson Holihlahla Mandela, as he then was, established the Heath Special Investigating Unit in terms of Special Investigating Units and Special Tribunals Act of 1996.¹⁵⁵¹ Judge Willem Heath, who was succeeded by Hofmeyr, headed the Heath Commission. The name of the unit was changed to the Special Investigating Unit (SIU).¹⁵⁵² It does not deal with criminal matters, but focuses on the civil part of activities which are approved by the State President.¹⁵⁵³

The AFU was established in 1999 in terms of the POCA. It resorts under the National Prosecuting Authority.¹⁵⁵⁴ Before its establishment, the Organised Crime Investigation Units of the SAPS had established the Assets Investigation Section to deal with cases identified by the SAPS. These investigators were assigned to work with the AFU upon its establishment. They formed the core investigators in the AFU and have investigated both cases referred to it by the SAPS and the DSO.¹⁵⁵⁵

On 01 April 2005, President Mbeki appointed Justice Sisi Khampepe to head a

¹⁵⁴⁹See also <http://www.npa.gov.za/ReadContent424.aspx> last visited on 06 June 2008.

¹⁵⁵⁰Standing *Anti-gangs Policy* 5.

¹⁵⁵¹74 of 1996.

¹⁵⁵²See also <http://www.info.gov.za/aboutgovt/justice/npa.htm> last visited on 08 June 2008.

¹⁵⁵³Judge Heath, now Adv Heath submitted this information in 1999.

¹⁵⁵⁴Kruger *Organised Crime* 9 and Keightley *Asset Forfeiture* 94.

Commission of Inquiry to enquire into, make findings, report on and make recommendations regarding, amongst others, the rationale behind the establishment of the DSO and its location; the mandate of the DSO and the accountability, the mandate of the SAPS and intelligence agencies with reference to their roles in respect of organised and high level priority crimes; the co-ordination and co-operation between the SAPS and Intelligence agencies on the one hand and the DSO on the other; and the need to review the legislative framework and make recommendations.¹⁵⁵⁶ The final report was submitted in February 2006 and released in April 2008.

In the report, the Commission uncovered the following findings:

1. The DSO was established to supplement the law enforcement agencies because of the SAPS's constraints with capacity and credibility.
2. The Ministerial Co-ordinating Committee (MCC) failed to properly discharge its responsibilities.
3. The DSO and the SAPS share a legal mandate in respect of the investigation of serious organised crime with potential conflict.
4. The DSO is not subjected to security scrutiny by Inspector General of Intelligence.
5. The DSO has been leaking information that caused prejudice or embarrassment to those who are the subject matter of the investigations.
6. No systems of co-ordination existed between the DSO and the SAPS, which resulted in an irretrievable breakdown of relationships.¹⁵⁵⁷

The South African Police Service Amendment Act of 2008 established the Directorate for Priority Crime Investigation (DPCI), which is nicknamed Hawks.

In order to coordinate its activities, the SAPS established a forum called the Organised Crime Secretariat that has been designed to operate at regional,

¹⁵⁵⁵See also <http://www.info.gov.za/aboutgovt/justice/npa.htm> last visited on 08 June 2008.

¹⁵⁵⁶See Proclamation R317 in the Government Gazette dated 01 April 2005.

¹⁵⁵⁷The report can also be accessed at <http://www.info.gov.za/view/DownloadFileAction?id=80441> last visited on 06 June 2008.

provincial and national level. Projects are identified, registered, investigated, evaluated and monitored by the Secretariats. Since July 2006, the Organised Crime component, the AFU and the National Prosecution Service (NPS) have jointly undertaken an Organised Crime Initiative (OCI) where they jointly address organised crime from the moment of identification to conclusion of criminal prosecution. This initiative has empowered the investigators and prosecutors to have a better understanding of 'organised crime'. Since then, 136 prosecutions have been instituted in terms of POCA.¹⁵⁵⁸

9.5 CONCLUSION

Various organised criminal groups have been identified and dealt with in South Africa. These groups are involved in a variety of crimes including murder, theft of motor vehicles, drugs trafficking, robberies, house breaking and theft, endangered and protected species crimes, precious metals and diamonds, fraud, trafficking in firearms, stock theft, trafficking in persons, theft from ATM's, illegal gambling and corruption.

Organised crime is manifested in various ways. While it may be easy to identify a criminal act, it is a mammoth task to identify organised crime. As an example, when a group of criminals attack a bank and robs it, the crime is robbery and not organised crime. Even if the same group commits another bank robbery, such second robbery is still not organised crime, but bank robbery. However, these two counts of bank robbery by the same group generate the third crime, which is organised crime. The law enforcers and prosecutors have mightily struggled to search and comprehend this third crime called 'organised crime'.

¹⁵⁵⁸SAPS 2009/2010 Annual Report 103.

If the purpose of organised crime is financial benefit, it is important to target such profit incentives. Scotty Smith, who acquired an irrigation plot at Uppington on which he erected a cottage where he resided until his death in 1919, would have, in today's legal system, attracted the attention of the AFU.¹⁵⁵⁹ The attack on the assets derived from crime is an area where the implementation of the POCA was done effectively. It did not come lightly, because its predecessor, which is the Proceeds of Crime Act of 1996¹⁵⁶⁰ was not so successful. It can be said that this is a lesson from previous mistakes.

¹⁵⁵⁹Metrowich *Scotty Smith* 190.

CHAPTER TEN

SUMMARY, RECOMMENDATIONS AND FINAL CONCLUSION

10.1 INTRODUCTION

‘Organised crime’ is a highly abused term. It is often personified, dressed with an octopus mask, fitted with long cancerous tentacles and paraded publicly to corrupt a public perception that ensures a reputedly inflated budget. Some crimes that appear to be unacceptable, are at times, tagged with a label “organised crime”. When everybody calls it ‘organised crime’, even those who do not agree, concede that point. The obsession of labelling every serious crime as organised crime is not helpful, for when all is said and done, the public prosecutor will not be able to draft a charge sheet for violations of organised crime law. This research has assessed and analysed the history, theories, definitions, manifestations of organised crime and experiences from other jurisdictions in order to arrive at this conclusion.

As observed from the argument of Von Lampe, there are a few conclusions that can be drawn from the analysis of the conceptual history of organised crime. Amongst others, the concept of ‘organised crime’ as foreign Mafias, dominates the public perception of organised crime as contrasted by a very broad conception of organised crime in criminal statutes and law-enforcement guidelines. Opportunities for a flexible use of the concept of ‘organised crime’ to accommodate different political and institutional interests are also provided.¹⁵⁶¹

¹⁵⁶⁰76 of 1996.

¹⁵⁶¹Von Lampe *Concept of Organized Crime* paragraph 5 at <http://www.organized-crime.de/organizedcrimetheory.htm> last visited on 22 December 2007.

Organised crime is a “criminal contract” in terms of which criminals agree to generate profit by repeatedly committing certain types of crimes. Admitting that there are as many models and theories of ‘organised crime’ as there are authors, there is neither a perfectly accurate nor a totally fallacious model. It is submitted that a composite model fusing enterprise, activity and commodity will better suit the South African situation.

While definitional debates on organised crime are tedious, they remain critically essential in order to have a common understanding of the phenomenon. The existences of these definitions illustrate the distorted understanding of the organised crime, which ultimately renders the task of policing it well nearly impossible. In order to overcome this, countries are increasingly brought together and encouraged to narrow the gaps and advance uniformity worldwide in terms of legislation, policies, sanctions and strategies for control.¹⁵⁶² Indeed, defining the term ‘organised crime’ has stumped politicians, police, academics and governments for decades. The definitional dilemma, in part, can be ascribed to the pervasive nature of organised crime, which manifests itself in different forms of criminality with different labels.¹⁵⁶³ As correctly put by Lord Edmund Davies, the law in action compiles its dictionary, as in time, what was originally the common coinage of speech, acquires a different value in the pocket of the lawyer than when in the layman’s purse.¹⁵⁶⁴

Organised crime remains undefined in the South African laws. To allow the country to continue to operate in an undefined setting with regard to the phenomenon, will tantamount to maintain the confused state of affairs. Just as the Portfolio Committee on Safety and Security on the South African Police Service Amendment Bill saw fit to pronounce a need to define the term ‘organised crime’ more

¹⁵⁶²Beare *Purposeful Misconceptions* 157-159.

¹⁵⁶³Dean, Fahsing and Gottschalk *Organized crime* 169.

¹⁵⁶⁴Allen *Criminal Law* 52.

specifically, this commitment should be followed with action.¹⁵⁶⁵

The inopportune diversion to focus on a national priority offence by Parliament left the long awaited organised crime phenomena undefined.¹⁵⁶⁶ Instead of defining the phenomena that would have paved the way for legal certainty, the Legislature has unwittingly engorged the confusion into the already contaminated South African Police Service Act of 1995 by inserting the term ‘serious organised crime’ without defining it.¹⁵⁶⁷ As argued by Rhodes, every definition needs a purpose, and the purpose of distinguishing what is serious from what is not serious about organised crime is relevant.¹⁵⁶⁸ Although Massari endorses a view that there is no legal system presently capable of fully controlling the growth of transnational organised crime, the least that the law can do is to define the phenomenon that it seeks to address.¹⁵⁶⁹ The POCA of 1998, which was influenced by the RICO of 1970 (USA), remains a disappointing piece of legislation that needs to be reviewed to ensure that the term ‘organised crime’ is properly defined.¹⁵⁷⁰

The court has repeatedly pronounced that the POCA is not solely designed to deal with organised crime but other crimes too. It is therefore understood that not all offences in the POCA can be called ‘organised crime’. To cite but one example, is money laundering which an individual can perpetrate. As indicated in *Seevnarayan*,¹⁵⁷¹ with which this writer agrees, a lone individual cannot commit

¹⁵⁶⁵See point 5.5 page 1928 of the Announcements, Tablings and Committee Reports no 135-2008 dated 20-10-2008 for the Parliament of the Republic of South Africa. The report is also accessible at <http://www.pmg.org.za/docs/2008/comreports/081020pcsafetyreport.htm> last visited on 14 April 2009.

¹⁵⁶⁶The definition of national priority offence is reflected under section 1 of the South African Police Service Act 68 of 1995 as brought about in terms of section 17 D(1)(b) of the South African Police Service Amendment Act of 2008.

¹⁵⁶⁷Section 1 of the South African Police Service Act 68 of 1995.

¹⁵⁶⁸Rhodes *Organized Crime* 2.

¹⁵⁶⁹Massari *Transnational Organized Crime* 59.

¹⁵⁷⁰*Ibid* n 275 *supra*.

¹⁵⁷¹*Ibid* n 77 *supra*.

organised crime. This serves as an authority, to settle a flawed view by Van der Merwe and Du Plessis who argue that an individual can commit organised crime.¹⁵⁷²

As pointed out, there are twenty-eight offences created by the POCA. The argument that the POCA has created three offences is unfounded and must be abandoned. Having analysed all the offences created in terms of the POCA, it is apparent, as this writer has come to conclude, that the legislature intended to refer to the offences which are generally known as racketeering activities as reflected in Section 2 (Chapter 2) of the POCA, as organised crime. When reference is being made to the term 'organised crime', it has to be understood to refer to the contravention of anyone of the provisions in Section 2 of the POCA. Any offence that the NDPP pronounces its willingness to prosecute in terms of Section 2(4) of the POCA is organised crime.

The various definitions reflected in this research illustrate the rich literature with regard to the definition of 'organised crime'.¹⁵⁷³ While agreeing that a single precise definition of organised crime does not exist, Liddick has correctly concluded that a survey of the literature reveals that the plethora of definitions are often ambiguous and sometimes diametrically oppose. His argument that many official accounts of organised crime are merely descriptions of criminal activities, and lacking the level of generalisation necessary to constitute a definition, remains correct.¹⁵⁷⁴

The elements of organised crime can only be determined if there is a definition. By creating a definition, South Africa will also be able to draw an organised crime threat assessment. This shall not only assist in identifying the elements with certainty but will also assist the investigators, who are assigned the responsibility to address

¹⁵⁷²Van der Merwe and Du Plessis *Law of South Africa* 490.

¹⁵⁷³Van Duyne and Van Dijck *Assessing Organised Crime* 105.

¹⁵⁷⁴Liddick *Overview of Organized Crime* 31.

organised crime.

Indeed, the position of South Africa is not different from the observation of Foglesong and Solomon, who conclude that it is unclear how the definitional void hampers the fight against organised crime.¹⁵⁷⁵ While many may argue that the definition will not impede the operations, they regrettably want to assess the successes with deficiently certifiable tools. Unfortunately, if it cannot be defined, it cannot be measured, and if it cannot be measured, assessing the effectiveness of anti-organised crime control efforts will be a fallacy.¹⁵⁷⁶ The argument by Allen that organised crime is a political failure in a much greater sense than it is a police failure makes sense, as the latter is subservient to the former.¹⁵⁷⁷ The need for a definition of organised crime became all the more urgent with the formation of the Directorate for Priority Crime Investigation and in particular the Organised Crime Component in South Africa.¹⁵⁷⁸ One of the difficulties in designing effective countermeasures has been a lack of information of what organised crime actually is, and what measures have proven effective elsewhere.¹⁵⁷⁹

In describing the term ‘organised crime’, it should be understood to mean the commission of two similar serious crimes within a specified period by a criminal group of at least two persons. This writer is offering the following definition for South Africa’s consideration:

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 at least two persons, in pursuit of an undue financial or other material benefit.¹⁵⁸⁰

¹⁵⁷⁵Foglesong and Solomon *Ukraine* at <http://www.ncjrs.gov/txtfiles1/nij/186166.txt> last visited on 03 May 2009.

¹⁵⁷⁶<http://law.jrank.org/pages/18880/organized-crime.html> last visited on 25 July 2010.

¹⁵⁷⁷Allen *Merchants of Menace* 261.

¹⁵⁷⁸Von Lampe as referred to in n 38 *supra*, quotes these arguments.

¹⁵⁷⁹Fijnaut and Paoli *Organised Crime Concepts* iii.

¹⁵⁸⁰I have adjusted my original definition as appearing at n 295 *supra* in line with persuasive

By using this definition, it can be concluded that the elements of organised crime are: an organised criminal group; financial or other material benefit; conduct by the accused; a pattern of racketeering activity; a serious crime; an unlawful act; culpability and a penal provision.¹⁵⁸¹

Using the above elements as a measuring stick to test the statutory definitions of the countries or states forming the focus of the research, the picture is as follows:

Table 10.1: The elements of organised crime from the definitions of the countries researched
(Source: Own source)

Country or State	Ohio	California	Oklahoma	Hawaii	Tennessee	Washington	Pennsylvania	Tanzania	Italy
Organised criminal group	X	X	X	X	X	X	X	X	X
Financial or other material benefit	X	X	X	X	X	X	X	X	X
An act	X	X	X	X	X	X	X	X	X
Pattern of racketeering activity	X	-	-	-	-	-	-	-	-
Serious crime	X	X	X	X	X	X	X	X	X
Unlawfulness	X	X	X	X	X	X	X	X	X
Culpability	X	X	X	X	X	X	X	X	X
Penal provision	X	X	X	X	X	X	X	X	X

Organised crime has unquestionably originated in Italy as argued by most academics, authors and scholars. Some authors are convinced that there is only one Mafia, Cosa Nostra, the most perfect and ferocious criminal organization that survived the ravages of time and the onslaught of crime fighters on the face of the

arguments that informed the merging of 'organised criminal group' and 'enterprise'. The definition is also accessible in the dissertation at <http://etd.unisa.ac.za/ETD-db/theses/available/etd-06172008-094504/unrestricted/dissertation.pdf> last visited on 21 June 2008 as well as <http://www.organized-crime.de/OCDEF1.htm> last visited on 08 August 2009. The SAPS has also used this definition, as recommended by the author, in the SAPS Annual Report 2007/2008 at 119 and 2008/2009 at 111. See also Servamus of February 2009 page 28.

¹⁵⁸¹Some of these elements may change if the authority in South Africa designs an official definition.

earth.¹⁵⁸² Today, it is perceived as synonymous with organised crime, hence the insubordination of other organised criminal groups as “something Mafia”. In Italy, no less than 114 laws were dedicated to fighting organised crime. Similarly, various specialised investigating and prosecuting units as well as Commissions were created in response to the challenge posed by organised crime. Blok concludes that the paradigm that Italian American criminals are organised crime while others are affiliates or something else, prevails.¹⁵⁸³

Tanzania has identified the need to address organised crime more than a decade before South Africa. To its credit, there is no confusion regarding the meaning and definition as the law has defined and described it. Accordingly, organised crime is 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.¹⁵⁸⁴ This decisiveness has to serve as an inspiration for other jurisdictions such as South Africa. Although its effectiveness cannot be questioned, the discernment by Bagenda that there is little risk of arrest and successful prosecution and that whatever risk may be there, is further mitigated by attempts to corrupt the system is an indictment to the Tanzanian police.

Organised crime is an iridescent crime that is not easily identifiable. It is a crime that facades between serial incidences and groups of criminals. To be able to identify organised crime, a definition needs to be designed and applied. Regrettably, the UN has not defined organised crime. The definition as submitted by Ki-moon that organised crime is any serious offence committed by a group of three or more people

¹⁵⁸²Sterling *Thieves' World* 44 and Balsimo and Carpozi *Under the Clock* xiv.

¹⁵⁸³Blok *Bad Business* 217.

¹⁵⁸⁴Section 2(1) of the Economic and Organised Crime Control Act of 1984: Chapter 200 of the Penal Code.

with the aim of making money, and the definition of transnational organised crime as any national offence undertaken by three or more people with the aim of material gain, are very close to the target and can be used as a point of departure in searching and finding a suitable definition.¹⁵⁸⁵

10.2 RECOMMENDATIONS

Having observed the extent of the lack of understanding of the concept 'organised crime', this writer recommends the following:

1. The legislature should amend the POCA of 1998 with regards to the following aspects:

- Define 'organised crime'. The recommended definition is the following:

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 at least two persons, in pursuit of an undue financial or other material benefit.¹⁵⁸⁶

- Define 'racketeering activity'. In order to be in line with the definition of a pattern of racketeering activity, the recommended definition is the following:

Racketeering is the planned, ongoing or continuous participation or involvement in any predicate or serious offence.¹⁵⁸⁷

- Define 'organised criminal group'. In order to be consistent, the definition of organised criminal group should be in line with that of

¹⁵⁸⁵UNODC: *TOCTA* 19.

¹⁵⁸⁶*Ibid* n 275 *supra*. This definition may have to be adjusted by changing the number of persons from two to three should the definition of organised criminal group be accepted as consisting of three persons in the same vein as criminal gang and Palermo Convention.

¹⁵⁸⁷The prerequisite of this definition is the definition of predicate and/or serious offence.

criminal gang.¹⁵⁸⁸ The recommended definition is therefore as follows:

Organised criminal group includes any formal or informal ongoing organisation, association, or group of at least two persons, which has as one of its activities the commission of one or more serious offences, and whose members individually or collectively engage in or have engaged in a pattern of racketeering activity.

- The definition of ‘enterprise’ should be repealed in favour of organised criminal group.
- Distinguish specific serious offences and define them as such for the purpose of the POCA as they are precursors to a pattern of racketeering activity. These serious offences may also be referred to as ‘predicate offences’. The term predicate offence that found its way into the South African legal vocabulary in *De Vries*¹⁵⁸⁹ and *Dos Santos*¹⁵⁹⁰ should be defined. Predicate offence is simply the crime that generates some proceeds. In terms of the Palermo Convention, predicate offence is defined as any offence as a result of which proceeds have been generated that may become the subject of an offence as defined.¹⁵⁹¹ Examples of these crimes could be bank robberies and illegal dealing in diamonds. The legislature must therefore define serious crime for the purpose of POCA.
- The Legislature should amend the South African Police Service Act of 1995 so that it may not attempt to define terminologies that must be defined in terms of the relevant legislation, specifically, the POCA.¹⁵⁹²

¹⁵⁸⁸See section 1(1)(iv) of the POCA of 1998.

¹⁵⁸⁹2009 (1) SACR 613 (C).

¹⁵⁹⁰2010 (2) SACR 382 (SCA).

¹⁵⁹¹*Ibid* n 1586 *supra*.

¹⁵⁹²These terms are serious organised crime, serious commercial crime and serious corruption, which should be repealed. The absence of a definition has already surfaced in the SAPS where a DPCI officer defined serious corruption cases as those cases in which large

2. After amending the South African Police Service Act of 1995, the Regulations of Interception of Communications and Provision of Communication-Related Information Act (RICCA) of 2002, should be amended to refer to serious crime as defined in the South African Police Service Act of 1995.

10.3 FINAL CONCLUSION

Organised crime is a statutory crime and not a common law crime. A statutory crime can only be understood if its establishing law defines it. The law that remains unclear and seriously malformed in the judicial eye, needs a jurisprudential overhaul. To ensure an eloquent understanding of the phenomenon, organised crime must be defined in the Prevention of Organised Crime Act of 1998.

amounts of money or high value goods are involved, or where several SAPS employees or employees from more than one station, provincial division or national division are involved. See *Lebakeng Investigating Police Corruption* 8, which is also accessible at <http://www.issafrica.org/pgcontent.php?UID=30731> and <http://www.iss.co.za/uploads/IPIDWorkshopReport.pdf> last visited on 07 May 2011.

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ABBREVIATIONS

ACU	Anti-Corruption Unit.
AD	Appellate Division.
AFP	Australian Federal Police.
AFU	Asset Forfeiture Unit.
AIC	Australian Institute of Criminology.
AJ	Acting Judge.
BAC	Business Against Crime.
C	Cape High Court.
CC	Constitutional Court.
CIAC	Crime Information Analysis Center.
CID	Criminal Investigation Department.
CIS	Crime Investigation Service.
CJ	Chief Justice.
CPA	Criminal Procedure Act.
CPA	Crime Pattern Analysis.
CPD	Cape Provincial Division.
CPF	Community Policing Forum.
CTA	Crime Threat Analysis.
DCJ	Deputy Chief Justice.
DHA	Department of Home Affairs.
DME	Department of Mineral and Energy.
Dr	Doctor.
DRC	Democratic Republic of Congo.
EAPCCO	East Africa Police Chiefs Cooperation Organisation.
ECPR	European Consortium for Political Research.
EJCPR	European Journal on Crime and Policy Research.

EOCCA	The Economic and Organised Crime Control Act.
EU	European Union.
EUROPOL	European Police Organisation.
FBI	Federal Bureau of Investigations.
HC	High Court.
HSRC	Human Sciences Research Council.
ICPO	International Criminal Police Organisation.
IDOC	Investigative Directorate for Organised Crime.
IDSEO	Investigative Directorate for Serious Economic Offences.
IMPA	Interception and Monitoring of Prohibition Act.
Interpol	International Criminal Police Organisation.
IPID	Independent Police Investigative Directorate.
ISS	Institute for Security Studies.
J	Judge.
JA	Judge of Appeal.
JP	Judge President.
LCN	La Cosa Nostra.
LRP	Law Review Project.
LSHC	Lesotho High Court.
MCM	Marine and Coastal Management.
N	Natal.
NCIS	National Criminal Intelligence Service (Canada).
NCIS	National Crime Investigation Service (RSA).
NCJRS	National Criminal Justice Reference Service.
NDPP	National Director of Public Prosecutions.
NPA	National Prosecuting Authority.
NSCR	Netherlands Institute for the Study of Crime and Law Enforcement.
OCI	Organised Crime Initiative.

OCIU	Organised Crime Investigation Unit.
OCPI	Organised Crime Project Investigation.
OCTA	Organised Crime Threat Analysis.
OCRS	Organised Crime and Racketeering Section.
OCS	Organised Crime Section.
POCA	Prevention of Organised Crime Act.
PRECCAA	Prevention of Corrupt Activities Act.
R	Rand.
RCMP	Royal Canadian Mounted Police.
RCS	Regional Crime Squad.
Reg	Regulation.
RICO	The Racketeer Influenced and Corrupt Organisations Act.
RSA	Republic of South Africa.
s	Section.
SA	South African Law Reports.
SABRIC	South African Banking Risk Information Centre.
SACJ	South African Journal on Criminal Justice.
SACR	South African Criminal Law Reports.
SADC	Southern African Development Community.
SAFLII	Southern African Legal Information Institute.
SALRC	South African Law Reform Commission.
SANAB	South African Narcotics Bureau.
SAP	South African Police.
SAPS	South African Police Service.
SARPCCO	Southern African Regional Police Chiefs Co-operation Organisation.
SCA	Supreme Court of Appeal.
SOC	Selected Organised Crime.
ss	Sections.

SSA	Statistics South Africa.
SZHC	Swaziland High Court.
T	Transvaal.
TOCTA	Transnational Organised Crime Threat Analysis.
TPD	Transvaal Provincial Division.
TCO	Transnational Criminal Organisation.
UKZN	University of Kwa Zulu Natal.
UN	United Nations.
UNAFEI	United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders.
UNICRI	United Nations Interregional Crime and Justice Research Institute.
UNISA	University of South Africa.
UNODC	United Nations Office on Drugs and Crime.
UNODCCP	United Nations Office for Drugs Control and Crime Prevention.
US	United States.
USA	United States of America.
Vol	Volume.
WLD	Witwatersrand Local Division.
ZH	Zimbabwe High Court.

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