AN EVALUATION OF SOUTH AFRICA’S LEGISLATION TO COMBAT ORGANISED CRIME

by

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SUMMARY

Organised crime is a global phenomenon. It is a problem in South Africa as it is a problem in most countries. International and regional organisations, in particular, United Nations, Financial Action Task Force (FATF), and African Union (AU), have developed legislative measures and laid down minimum standards to assist party and non-party states to combat the scourge. Member countries and signatories to those instruments are ever encouraged to bring about national legislative and regulatory frameworks to criminalise predicate crimes, curb money laundering, confiscate instrumentalities and proceeds of such crimes, and to co-operate amongst themselves in their endeavours to fight the scourge.

South Africa is a signatory and state party to the Vienna Convention, the Palermo Convention, African Union conventions, Southern African Development Community protocols, and has embraced Financial Action Task Force Forty Recommendations.

As a signatory and a state party to these instruments, South Africa has passed, in its parliament, a vast array of legislative tools aimed at complimenting the criminalisation of organised crime related conduct (thus extending range of predicate crimes, and has also put in place preventative measures to be taken by financial, non-financial and professional institutions against money laundering practices, in order to deny organised criminals of illicit proceeds and a further use of property as an instrument of crime. The legislative framework is also aimed to foster international co-operation in the form of mutual assistance, extradition and enforcement of foreign judgements and sentences.

There is a public perception, though, that crime pays in South Africa. The general public perception is that crime pays because the laws of the country always lag behind the ingenuity of organised criminals who, it is believed, are always a step or two ahead in better organisation of their nefarious activities and in the use of sophisticated methods of execution to achieve their goals.

The objective of this research is to evaluate existing South African laws intended to deal with organised crime with relevant international instruments in order to establish
whether the laws are adequate and are being implemented effectively to fight the scourge.

The hypothesis of this research project is that South Africa has adequate laws (compliance); however, the problem lies in their implementation (enforcement).

To obtain the necessary information to achieve the said objectives, the views made by various writers on organised crime were considered.

The legislation currently in place to combat organised crime was identified and measured against aforementioned instruments in order to establish whether they do achieve the minimum standards set for the fight against organised crime. The comparison was done following the perspectives contained in these instruments in chapter form. In this regard, over-achievements as well as under-achievements were highlighted. For an example, article 6 of the Palermo convention instructs state parties to include as predicate offences all serious crime, punishable by maximum deprivation of liberty of at least 4 years or more, for money laundering. The Prevention of Organised Crime Act (POCA), on the other hand, contains no list of specific predicate offences, but makes an open-ended reference to the ‘proceeds of unlawful activities’. It is, therefore, all-encompassing. Another example can be found in the South African definition of corruption. The South African statutory definition penalises corruption ‘in the widest sense and in all its forms, whereas that in the Palermo Convention is limited or restricted, as it does not instruct for the criminalisation of corruption involving foreign public officials or international civil servants.

The evaluation of existing South African laws shows that South Africa has adequate laws to fight organised crime. There is, however, a room for improvement in their implementation, particularly in the prosecution of organised crimes. The South African government is urged to make available adequate financial resources to enable prosecutors to carry out their functions effectively in the fight against the scourge.
CHAPTER 1
INTRODUCTION AND PROBLEM STATEMENT

1.1 INTRODUCTION

South Africa identifies with crime-fighting initiatives and efforts by the international community. The reason for South Africa to pledge its support has to do with a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally. The repugnancy of organised crime was aptly acknowledged by the erstwhile Minister of Safety and Security, Steve V. Tshwete, when he said the following:2

‘Organised crime is a problem in South Africa and in its SADC neighbours, just as it is a problem in most countries of the world. The government is well aware of the fact that the consequences could be disastrous for good governance and the economy in the absence of the political will to confront the phenomenon head-on with all the might and ruthlessness that can be summoned. It could lead to the perception, for instance, that government is weak and that its law enforcement agencies and judiciary are incapable of standing up to the security threat posed by organised crime. It could facilitate corruption and create opportunities for government officials to serve their own interests instead of those of the state, thus blurring the distinction between criminal thugs and those officials who are supposed to be fighting them. It could adversely affect stock market activity and consumer interests and contribute to the emergence of various illegitimate businesses which deal in stolen and counterfeit goods. It could discourage foreign investment and create a situation where people begin to question the integrity of genuine business practices, conducted either by government or by respectable private institutions.’

South Africa has ratified international and regional instruments and has committed to implement the measures as well as to follow the initiatives contained in those instruments.3 As a signatory and state party to these instruments, it is of

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1 There are different definitions and views about this phenomenon, highlighted by Hübschle ‘Unholy alliance? Assessing the links between organised criminals and terrorists in Southern Africa’ Paper 93, (October 2004) ISSN 2-3. Also see Standing’s discussion of the concept in ‘Rival Views of Organised Crime’, (2003) ISSN, Chapter 1-4.
fundamental importance for South Africa to ensure that it has laws to fight organised crime within the measures laid therein, and to fully implement the minimum standards set out by Financial Action Task Force\(^4\) on money laundering.

Such compliance and implementation would be achieved, firstly, by criminalising: all serious profit generating crimes predicate to money laundering as well as money laundering activities; participating in organised criminal activity; corruption and obstruction of justice on the basis of the Vienna and Palermo Conventions, and in terms of Recommendation 1 of the Forty Recommendations by FATF.

Secondly, by putting in place legislative measures that would enable competent state authorities to confiscate property that has been laundered, proceeds from money laundering or predicate crimes, instrumentalities used in or intended for use in the commission of these offences.\(^5\)

Thirdly, by putting in place preventative measures to be complied with or to be taken by financial institutions; non-financial businesses; and professions, in order to counter money-laundering.

Finally, by taking steps to become the party to, and to implement international instruments related to international co-operation.

### 1.2 REASONS FOR SELECTION OF THE TOPIC

The public perception is that crime pays in South Africa. The general perception of the public is that crime pays because the laws of the country always lag behind the ingenuity of organised criminals who, it is believed, are always a step or two ahead in better organisation of their nefarious activities and in the use of sophisticated methods of execution to achieve their goals.

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\(^4\) Commonly known as FATF.

\(^5\) This must be done without unduly prejudicing the rights of bona fide parties – R3.
International and regional organisations\(^6\) have developed measures and laid down minimum standards to assist party and non-party states to combat organised crime. It is important to establish whether South African laws to combat organised crime comply with these measures and minimum standards to fight the scourge, or lag behind, as perceived.

1.3 **OBJECTIVES AND HYPOTHESIS**

The objective of this research is to evaluate existing South African laws intended to deal with organised crime with relevant international instruments in order to establish whether the laws are adequate and are being implemented effectively to fight the scourge.

The hypothesis of this research project is that South Africa has adequate laws (compliance), however, the problem lies in their implementation (enforcement).

1.4 **STRUCTURE**

This research project is divided into six chapters: In chapters 2, 3, and 4, compliance of South African legislation with international and regional instruments is examined. In chapter 2, legislation for drug trafficking and the laundering of its proceeds is discussed. In chapter 3, legislation for specified offences and serious crimes perpetrated by structured groups is discussed. In chapter 4, laws governing regulatory and supervisory regimes against money-laundering and related activities are discussed. In chapter 5, implementation of the laws is discussed. Chapter 6 contains conclusion and recommendation.

1.5 **RESEARCH METHODOLOGY**

To obtain the necessary information to achieve the said objectives, the views made by various writers on organised crime were considered. The legislation currently in place to combat organised crime was identified with the greater emphasis being on money-laundering because organised crime is defined as a systematic criminal

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\(^6\) United Nations, FATF and African Union.
activity of a serious nature committed by a structural group of individuals or a corporate body in order to obtain, secure or retain, directly or indirectly, a financial or other material benefit. The identification of the legislation was done with the view to establish compliance with the minimum standards and measures contained in the conventions, and the FATF Forty Recommendations which are aimed at assisting member states to fight organised crime. Once compliance was determined, the enforcement of the laws was considered to establish its effect on fighting organised crime. The research is therefore limited to a comparative literature study.

1.6 IMPORTANCE OF THIS RESEARCH

It is important to establish through this research whether South Africa has enacted laws which measure up to the standards and initiatives set out by the Vienna, Palermo conventions, FATF’s Forty Recommendations, supplemented by AU Plan of Action for Drug Control in Africa, and the AU Convention on the Prevention and Combating of Corruption and Related Offences, in order to protect its state and people from a global threat of organised criminality. State parties and non-state parties are ever encouraged to adopt, embrace and implement the provisions of these instruments in their national legislative and regulatory frameworks, in order to criminalise predicate serious crimes, criminalise and curb money-laundering, confiscate and have instrumentalities and proceeds of such crimes forfeited, and to co-operate amongst themselves in order to fight organised crime in their states.

By 1998, South Africa had 192 identified organised crime syndicates mostly specialising in either drug trafficking (96), vehicle related crimes (93), commercial crime (60) or in combination operating within and across its borders. Recently South Africa has seen and continues to suffer a spate of rhino killings intended to poach horns for international markets. It is important, therefore, to ensure that the

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8 In particular, Vienna and Palermo Conventions.
9 Footnote 3 supra.
10 Dr de Kock ‘Organised Crime in South Africa: Statistical Overview’ in Hough and Du Plessis (EDS), ISS, 36 ad hoc publication 46-47.
laws compatible with global best practices are in place and operational to fight the scourge. Some writers consider common law crimes a good sufficient template from which organised criminality could be fought,\textsuperscript{12} instead of parliament passing a vast array of legislative tools to do so.\textsuperscript{13} It is also important to ensure that while enforcing the laws, values espoused in our Bill of Rights are taken on board. Bassiouni, aptly, pointed out that internationally protected human rights are directly applicable in all national legal systems that have ratified the United Nations Charter.\textsuperscript{14}

In the following chapter, legislation for drug trafficking and the laundering of its proceeds will be discussed.

\textsuperscript{12} Burchell ‘Criminal Justice at the Crossroads’ (2002) \textit{SALJ} 119.

\textsuperscript{13} Prevention of Organised Crime Act (POCA) 121 of 1998, Chapters 2,3,4,5&6; Financial Intelligence Control Act (FICA) 38 of 2001, s29; International Co-operation in Criminal Matters Act 75 of 1996.

\textsuperscript{14} Bassiouni \textit{The protection of human rights in the administration of criminal justice} (1994) XXIV – quoted in the article of Kemp ‘Foreign relations, international co-operation in criminal matters and the position of the individual’ (2003) \textit{SALJ} 370 374.
CHAPTER 2
DRUG TRAFFICKING AND ANTI-MONEY LAUNDERING

2.1 INTRODUCTION

In this chapter drugs and drug trafficking and anti-money laundering legislation will be discussed. The legislative framework will not be discussed in its entirety, but only the main features related to compliance with relevant international instruments will be discussed. How law enforcement is effected will be also discussed.

2.2 LEGISLATION

South Africa became party to the Convention against Illicit Traffic in Narcotic drugs and Psychotropic Substances,\textsuperscript{15} also known as the Vienna Convention, late in 1998. At that time it already had legislation in the form of the Drugs and Drug Trafficking Act,\textsuperscript{16} to combat illicit drug peddling, along the guidelines envisaged in the Convention. This legislation is central to criminalise illicit drugs and drug trafficking, and it also used to create money laundering as an independent statutory crime before the latter provision was incorporated in new legislation.\textsuperscript{17}

2.2.1 DRUG AND DRUG TRAFFICKING OFFENCES

The Drug and Drug Trafficking Act creates for the following offences:

- Manufacture and supply of scheduled substances, knowing or suspecting such is to be used in or for the unlawful manufacture of any drugs.\textsuperscript{18} ‘Drug’ is defined ‘as any dependence-producing substance, any dangerous dependence-producing substance or any undesirable dependence-producing substance’. The substances are listed in Part I-III of Schedule 2 of the Act.

\textsuperscript{15} 1988.
\textsuperscript{16} 140 of 1992.
\textsuperscript{17} Prevention of Organised Crime Act 121 of 1998.
\textsuperscript{18} Ss 3 and 13(b).
Scheduled substances, on the other hand, are listed in Part I and Part II of Schedule 1 of the Act;

- use and possession of drugs, unless prescribed by a practitioner in accordance with Medicines Act or regulations thereto for medicinal purposes or otherwise acquired lawfully;¹⁹ and

- dealing in drugs, unless acquired through a practitioner as stated above or lawfully. ‘Dealing in’ in relation to a drug, includes performing any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.²⁰

### 2.2.2 MONEY LAUNDERING

The statutory crime of money laundering has since 1998 been incorporated in the Prevention of Organised Crime Act which extended laundering activities beyond the scope of drug offences to all predicate crimes.²¹

### 2.2.3 SENTENCES

The Act provides for harsh sentences, especially for possession and dealing in any dangerous or undesirable dependence-producing drugs. The following punishments may be imposed:

- In the case of possession of any dependence-producing substance (section 13(c)), a fine in the discretion of the court or a period of imprisonment not exceeding five years or both;²²

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¹⁹ Ss 4 and 13(c)-(d).
²⁰ Ss 5 and 13(e)-(f).
²¹ Ss 6 and 7 since repeated by s 79(b) of POCA.
²² S 17(b).
• in the case of dealing in any dependence-producing substance (section 13(e)), a fine in the discretion of the court or a period of imprisonment not exceeding ten years or both;\textsuperscript{23}

• in the case of the manufacture and supply of scheduled substances or possession of any dangerous or undesirable dependence-producing substance (section 13(b) or (d)), a fine in the discretion of the court or a period of imprisonment not exceeding fifteen years or both;\textsuperscript{24} and

• in the case of dealing in any dangerous or undesirable dependence-producing substance (section 13(f)), a period of imprisonment not exceeding twenty five years or to both such imprisonment and a fine in the discretion of the court.\textsuperscript{25}

‘Such fine as the court may deem fit to impose’\textsuperscript{26} may legally exceed the jurisdiction of the court.

In the next section, a discussion of international and regional initiatives follows, for purposes of comparison.

2.3 INTERNATIONAL AND REGIONAL INITIATIVES

2.3.1 UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES\textsuperscript{27}

This Convention obliges states parties to criminalise drug trafficking and the laundering of its proceeds.

\textsuperscript{23} S 17(a).
\textsuperscript{24} S 17(d).
\textsuperscript{25} S 17(e).
\textsuperscript{26} S 64.
\textsuperscript{27} Fn 15 supra.
2.3.1.1 DRUG RELATED OFFENCES

Article 3 provides that State parties shall criminalise under their domestic laws certain acts or conduct tantamount to the use, possession or dealing in narcotic drugs or psychotropic substances when committed intentionally.\textsuperscript{28} The prohibited acts or conduct relate, \textit{inter alia}

- to the production, sale, transportation, importation, exportation of any narcotic drug or psychotropic substance;\textsuperscript{29}

- to the cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs;\textsuperscript{30}

- to the possession or purchase of any narcotic drug or psychotropic substance for the purpose of any prohibited activity;\textsuperscript{31}

- to the manufacture, transportation or distribution of equipment, materials or substances listed in Table I and Table II, knowing they would be used in or for illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances.\textsuperscript{32} Mere possession of these instrumentalities is also criminalised;\textsuperscript{33} and

- to the organisation, management or financing of any of the offences mentioned above.\textsuperscript{34}

It also criminalises acquisition, use or possession of proceeds of all predicate crimes mentioned above, if source is known at the time of receipt.\textsuperscript{35} This Convention also provides for inchoate offences.\textsuperscript{36}

\textsuperscript{28} Art 3(1)(a)(i-v).
\textsuperscript{29} Art 3(1)(a)(i).
\textsuperscript{30} Art 3(1)(a)(ii).
\textsuperscript{31} Art 3(1)(a)(iii). Activities are enumerated in article 3(1)(a)(i).
\textsuperscript{32} Art 3(1)(a)(iv).
\textsuperscript{33} Art 3(1)(c)(ii).
\textsuperscript{34} Art 3(1)(a)(v).
2.3.1.2 ANTI-MONEY-LAUNDERING

This convention is the first international legal instrument to embody efforts to curb beneficitation from money-laundering and to have it criminalised. The convention was followed by two further international legal instruments, namely, the UN Convention against Transnational Organised Crime, and the UN Convention against Corruption. However, the distinction between the former and the two instruments lies in the scope of application of the money-laundering offence. In the former, the scope of the money-laundering offence is restricted to the proceeds of illicit drug trafficking. Both latter instruments widen the scope of the offence to cover proceeds of all serious crimes.

Article 3(1)(b)(i-ii) of the Convention provides for the following offences:

- Conversion or laundering of proceeds of all predicate drug offences mentioned above, knowing it is derived from such source; and

- concealment or disguise, inter alia, of the true nature, source, ownership of the proceeds, knowing they were derived from participating in a drug offence mentioned above.

2.3.1.3 SENTENCE

Article 3(4) provides for sentences of imprisonment, a fine and confiscation. In addition, or as an alternative to such conviction or punishment, it provides for treatment, education, rehabilitation or social reintegration of the offender. Sub-article 5 provides examples of aggravating circumstances that have to be considered when sentencing the offenders.

35 Art 3(1)(c)(i).
36 Art 3(1)(c)(iii-iv).
37 Art 3(1)(a)-(v).
38 2005.
39 Art 3(4)(a).
40 Art 3(4)(b-c).
2.3.1.4 ENFORCEMENT

Implementation presupposes the establishment and maintenance of functional co-operation domestically and transnationally against drug trafficking. The Convention provides for measures of confiscation,\(^{41}\) active and passive jurisdiction,\(^{42}\) mutual legal assistance,\(^{43}\) and extradition.\(^{44}\) These provisions will not be discussed in any further detail in view of the limited scope of application and the much broader scope of the Convention against Transnational Organised Crime to be discussed in the next chapter. Enforcement mechanisms discussed therein, should apply \textit{mutatis mutandis} to the Vienna Convention.

2.3.2 REVISED AFRICAN UNION PLAN OF ACTION ON DRUG CONTROL AND CRIME PREVENTION

The Plan complements the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances at regional level. The Plan entails an undertaking or commitment by AU member States to address problems of drug abuse and illicit drug trafficking in the African continent by taking action in seven priority areas. These areas range from policy development, legal development, increased information research, analysis and networking, technical improvement in drug abuse prevention, rehabilitation and law enforcement measures.\(^{45}\)

In Southern Africa, there also exists the 1996 Southern African Development Community\(^{46}\) Regional Protocol on Illicit Drug Trafficking. It also complements the Convention. The symbiosis is discernible in articles 3 and 4. Article 3 calls for Member States to accede to the Convention and its predecessors. Article 4 enjoins Member States to promulgate and adopt domestic legislation which shall satisfy the provisions of the Convention and its predecessors.

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\(^{41}\) Art 5.
\(^{42}\) Art 4.
\(^{43}\) Art 7.
\(^{44}\) Art 6. Principle – \textit{aut dedere aut judicare} applies.
\(^{45}\) See the Declaration on Control of Illicit Drug Trafficking and Abuse in Africa 2002-2006 (http://cc.bingj.com).
\(^{46}\) SADC.
2.4 CONCLUSION

The South African legislative framework on drugs compares favourably with international initiatives mentioned above. However, other serious predicate crimes need similar accord to fight organised crime. In the next chapter, the legal framework to curb other serious and specified crimes predicate to organised crime is discussed.
3.1 INTRODUCTION

It is vital for State Parties, in order to curb organised crime, to criminalise, prosecute and punish specified serious crimes perpetrated by organised groups in pursuit of their nefarious goals. These crimes are contained in the United Nations Convention Against Transnational Organised Crime.

This Convention came into force in September 2003. Its purpose is to promote international co-operation in order to prevent and combat transnational organised crime more effectively. From the statement of purpose, it is evident that the Convention is more concerned with the prevention, investigation, prosecution and punishment of specified offences and serious crimes perpetrated by structured groups domestically and across national borders.

Article 2 defines ‘serious crime’ to mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. In terms of article 3 an offence is transnational if: committed in more than one state; in one state but substantial part of its preparation, planning, direction or control takes place in another state; in one state but involves an organised criminal group that engages in criminal activities in more that one state; or in one state but has substantial effects in another state.

The Convention places an obligation to State Parties to criminalise ‘serious crime’ as well as conduct specified as criminal by the Convention. The specified conduct consists of the following:

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47 Art 1 of the Convention.
48 Specified offences are contained in articles: 5, 6, 8 and 23 of the Convention.
49 Art 3(2)(a)-(d) of the Convention.
- participation in an organised criminal group;\textsuperscript{50}
- laundering of proceeds of crime;\textsuperscript{51}
- corruption;\textsuperscript{52} and
- obstruction of justice.\textsuperscript{53}

In order to foster effective co-operation amongst State Parties and to galvanise enforcement, the Convention provides, \textit{inter alia}, for the extradition of fugitives from justice,\textsuperscript{54} transfer of sentenced persons,\textsuperscript{55} mutual legal assistance,\textsuperscript{56} special investigative techniques,\textsuperscript{57} protection of witnesses,\textsuperscript{58} confiscation and seizure of illicit gains\textsuperscript{59} and jurisdiction.\textsuperscript{60}

There are also measures provided to combat money-laundering which are contained in article 7. They relate to the regulatory and supervisory regimes intended for financial and non-financial institutions as well as professional entities. However, to avoid repetition, these regimes and related measures which are contained in FATF’s Forty Recommendations will be discussed in the next chapter that will be dealing with them in a comprehensive manner.

In the following section specified offences are discussed.

\textsuperscript{50} Art 5(1) of the Convention.
\textsuperscript{51} Art 6(1) of the Convention.
\textsuperscript{52} Art 8(1) of the Convention.
\textsuperscript{53} Art 23 of the Convention.
\textsuperscript{54} Art 16 of the Convention.
\textsuperscript{55} Art 17 of the Convention.
\textsuperscript{56} Art 18 of the Convention.
\textsuperscript{57} Art 20 of the Convention.
\textsuperscript{58} Art 24 of the Convention.
\textsuperscript{59} Art 12 of the Convention.
\textsuperscript{60} Art 15 of the Convention.
3.2 SPECIFIED OFFENCES

3.2.1 CRIMINALISATION OF PARTICIPATION IN AN ORGANISED CRIMINAL GROUP

The Convention defines ‘organised criminal group’ as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.\(^61\) It is pertinent to observe the substantive lower threshold relative to other crimes not specified in the Convention. Those other crimes should be ‘punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’.\(^62\) Reference to ‘a more serious penalty’ is unclear. Does it refer to a fine or a period of deprivation of liberty in excess of four years? However, since the definition lays down the minimum threshold of liberty deprivation, ‘a more serious penalty’ most likely refers to a substantial fine which could be monetary or in kind, depending on domestic laws of the State Party. If not so interpreted, the phrase becomes superfluous. As to what would constitute ‘a more serious penalty’ at any given period, if the aforesaid argument is sustainable, would therefore have to be determined in terms of the laws applicable to the State Party concerned because domestic dimensions come into play.

However, the definition of ‘organised criminal group’ is still unsettled and may be constitutionally questioned on the basis of the legality principle, if not promulgated in strict terms and clear language, as well as on the culpability principle if the intention element is equivocal.\(^63\)

As the definition contained in article 2(a) of the Convention shows, analysts from the northern hemisphere tend to emphasize the hierarchical structure of an organised criminal group, a typical feature of the American Mafia – *La Cosa Nostra*,\(^64\) whereas

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\(^{61}\) Art 2(a) of the Convention.

\(^{62}\) Art 2(2)(b) of the Convention.


such groups in Southern Africa, for instance, bear little resemblance with the Mafia as they tend to function in flexible groupings without a clear pecking order.\textsuperscript{65}

Peter Gastrow distinguishes between ‘indigenous organised criminal groups’,\textsuperscript{66} and ‘transnational organised groups’.\textsuperscript{67} According to him, the definition contained in the Convention was a compromise amongst participants who negotiated the Convention in Palermo.\textsuperscript{68} Andre Standing supports the notion and regards the final broad definition as ‘probably a compromise by weary delegates’.\textsuperscript{69} He argues that the organised criminal group structure should not be seen as ‘homogenous’ or as ‘rational and cohesive’.\textsuperscript{70}

He states that relationships between organised groups and ordinary criminals are often indistinct and may involve a wide variety of people including professionals and those in public office.\textsuperscript{71}

He believes, the broad definition was more likely due to a desire to establish an unproblematic nomenclature for international crime fighting community, organised via intergovernmental agreements and a UN Convention and thus a specific definition would only serve to confuse and act as stumbling block.\textsuperscript{72}

\begin{footnotesize}
\begin{enumerate}
\item ‘Indigenous organised criminal groups’ are those that are made up primarily (but not exclusively) of nationals from your country and that are involved mainly (but not exclusively) in criminal activities within your borders. See fn 68 below 55.
\item Transnational organised criminal groups are ‘those that are made up primarily (but not exclusively) of foreign nationals or of individuals who originate from countries other than the respondent country and who are involved in cross-border crimes’. See fn 68 59.
\item Gastrow ‘Organised crime in the SADC region: police perceptions’ (2001) ISS 29.
\item Standing ‘Rival views of organised crime’ (2003) ISS 37.
\item Standing ‘The social contradiction of organised crime on the Cape Flats’ (June 2003) ISS 74 3.
\item Fn 70 supra.
\item Fn 69 supra 39.
\end{enumerate}
\end{footnotesize}
3.2.2 CRIMINALISATION OF THE LAUNDERING OF PROCEEDS OF CRIME

Laundering means the conversion, transfer, concealment or disguise of property or its source of origin, knowing that such property is the proceeds of predicate crime.\(^{73}\) This is not a ‘concise and exhaustive’ definition.\(^{74}\) Not only the hider or cleaner of proceeds is criminalised, so is the *socius criminis*,\(^{75}\) and possessor or end-user of such property, if the necessary knowledge has been established.\(^{76}\)

It is not only the proceeds of serious predicate crimes that should be proscribed, but also for the offences established in terms of article 5 (participation in organised criminal group), article 8 (corruption) and article 23 (obstruction of justice) of the Convention.\(^{77}\) If predicate offences are specified in the national legislation, the list shall include a ‘comprehensive range of offences associated with organised criminal groups’.\(^{78}\)

3.2.3 CRIMINALISATION OF CORRUPTION

In terms of the Convention, State Parties should criminalise both active and passive corruptive acts involving a State’s own public officials. The promise, giving or offering to a public official, directly or indirectly of an undue advantage with an intention to persuade such official to act or refrain from acting in the exercise of his or her duties should be constituted in a criminal offence.\(^{79}\) The acceptance or solicitation by such public official of an undue advantage, directly or indirectly, in order to act officially or to refrain from acting in the exercise of his or her official duties respectively should likewise constitute a criminal offence.\(^{80}\)

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\(^{73}\) Art 6(1)(a)(i-ii) of the Convention.


\(^{75}\) Art 6(1)(b)(ii) of the Convention.

\(^{76}\) Art 6(1)(b)(i) of the Convention.

\(^{77}\) Art 6(2)(b) of the Convention.

\(^{78}\) Fn 77 *supra*.

\(^{79}\) Arte 8(1)(a) of the Convention.

\(^{80}\) Art 8(1)(b) of the Convention.
Foreign public officials are excluded, but State Parties are exhorted to consider progressive measures, as may be necessary, to establish as criminal offences corruptive acts involving such officials. Kemp submitted that the restriction is problematic from an international criminal law point of view because corruption is typical of organised crime, and he echoed sentiments raised by Van der Wyngaert that ‘in an ever globalising village’, it seems anachronistic for domestic definitions to be given such a leeway to exclude foreign public officials.

The African Union Convention on Preventing and Combating Corruption extends the definition of corruption to private sectors of State Parties. In terms of article 4, the scope of corrupt practices is widened to cover instances beyond offer and acceptance.

Southern African Development Community Protocol against Corruption also defines corruption to include bribery both in public and private sectors. Article 6 proscribes acts of corruption relating to an official of a foreign state.

### 3.2.4 CRIMINALISATION OF OBSTRUCTION OF JUSTICE

The Convention proscribes obstruction of justice by ‘the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage calculated to induce false testimony or to interfere in the giving of testimony or the production of evidence’, and the use of such negative influence calculated ‘to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offence covered by this Convention’. State Parties have discretion to extend such protection to other public officials.

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81 Art 8(4) of the Convention.
82 Art 8(2) of the Convention.
85 For example, art 4(c & d) proscribe abuse of public office for own illicit enrichment or third party.
87 Art 23(a) of the Convention.
88 Art 23(b) of the Convention.
89 Fn 88 supra.
Obstruction of justice in its various manifestations would undermine the rule of law by frustrating organs of the State Party in their application of traditional principles and means of criminal justice, consequently weakening the systems that are in place to deal decisively with organised crime.

The definition is wide enough to cover not only judicial proceedings but also proceedings of an administrative or quasi-judicial nature. Kemp submitted that the ambit of application of this crime should be narrowed to only those ‘official government proceedings’ that are intended or aimed at the establishment of criminal liability id est criminal trial including pre-trial stage.

3.3 ENFORCEMENT

In order to combat transnational organised crimes established in the Convention effectively, national courts must have jurisdiction to try those cases and, in addition, ‘the model of inter-state co-operation’ is essential. Such inter-state co-operation may take the following forms:

- Extradition of persons suspected or convicted of organised crime;
- mutual legal assistance between countries in respect of investigations, prosecutions and judicial proceedings relating to organised crime;
- co-operation between countries to enhance law enforcement action on organised crime, including the exchange of information; and
- an obligation to establish powers to identify, trace, freeze or seize and ultimately confiscate and dispose of assets resulting from the proceeds of

90 Kemp fn 63 supra 160.
91 Kemp fn 63 supra 161.
92 Kemp fn 63 supra 162.
crime derived from (at least) offences covered by this Convention and to offer this assistance to others.

The co-operation called for in the Convention is clearly extensive and is all encompassing of prevention, investigation, prosecution and punishment for transnational organised crime by States Parties. Besides giving a note on the obvious requirement of jurisdiction, the discussion that follows will, however, be restricted to ‘six generally accepted modalities of inter-state co-operation’. These are: extradition; mutual legal assistance in criminal matters; transfer of prisoners; seizure and forfeiture of illicit proceeds of crime; recognition of foreign judgements, and transfer of criminal proceedings. The recognition of foreign judgements would however be implicit in the discussion of mutual legal assistance in criminal matters and would not be discussed as a separate topic.

3.3.1 JURISDICTION

Since the crimes contained in the Convention are not ‘core crimes’ envisaged by the Rome Statute, jurisdiction resides entirely in national courts (indirect enforcement). In those instances where the crime occurred outside State Party’s borders, jurisdiction may be found through international instruments which usually provide for the customary international criminal law principle called aut dedere aut judicare (extradite or prosecute). The application of the principle may, however, be obstructed by the requirement of the double criminality principle, namely that the crime preferred by the requesting state must have been crime in the requested state at the time it was committed. Should the requested state not extradite but prosecute in terms of its laws, criminal culpability is questioned in abstracto and not in concreto as would be the position if prosecution takes place in the state where the crime was committed.

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94 Kemp fn 63 supra 162.
95 In terms of article 5 of the Rome Statute (see fn 96) ‘Core crimes’ are genocide, crimes against humanity, war crimes and aggression.
97 Art 15(3) & (4) of the Convention.
According to the Convention, the States Parties may establish jurisdiction in terms of the following elements:

- Territoriality\(^{98}\) which may be subjective (where the crime commenced) or objective (where the crime completed - the ‘effects doctrine\(^{99}\)’);

- nationality\(^{100}\) which may be passive (where crime committed against its citizen abroad) or active (where its citizen is the perpetrator and is unwilling to extradite);\(^{101}\) and

- universality principle\(^{102}\) where the offender is within its territory and does not effect extradition. According to Kemp this provision is clearly aimed at better international co-operation in the fight against organised crime since effective co-operation often fails for lack of double-criminality which is normally a requirement for extradition.\(^{103}\)

### 3.3.2 EXTRADITION

Extradition is normally, but not exclusively, established through a treaty between the State Parties. State Parties to the Convention are obliged to consider concluding such agreements which may be bilateral or multilateral.

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98 Art 15(a-b) of the Convention. This would be *terra firma* or on board its vessel or aircraft.

99 Gilbert *Transnational Fugitive Offenders in International Law* (1998) 86-91. For example, the State Parties would have jurisdiction if the crime committed outside its territory involves an original criminal group proscribed in art 5 of the Convention or when the planning of laundering of proceeds of crime proscribed in art 6(1)(b)(ii) occurred outside its territory with a view to carry out inside its territory any of the laundering of proceeds of crimes established in art 6(1)(a)(i)-(b)(i) of the Convention.

100 Art 15(2)(a-b) of the Convention. This is subject to the principle of sovereign equality and territorial integrity of States Parties contained in art 4 of the Convention.

101 Art 15(3) of the Convention.

102 Art 15(4) of the Convention.

103 Erasmus and Kemp ‘The application of international criminal law before domestic courts in the light of recent developments in international and constitutional law’ (2002) *SAYIL* 27 67. Also Kemp fn 63 supra 158.
Article 16 provides extradition for offences covered by the Convention, if they involve organised criminal group activities. Extradition may be subjected to the double criminality principle between the Requesting State and the Requested State.

Where the treaty between the States Parties does not provide for a serious crime not mentioned in the Convention as extraditable, the Requested State may nevertheless deem the crime extraditable in terms of the Convention. If the treaty has left out, wittingly or unwittingly, an offence provided for in the Convention as an extraditable offence, such an offence would also be deemed extraditable.

If there is no extradition treaty between the Requesting State and the Requested State, the Convention itself may be considered to be the legal basis for extradition, provided it is in respect of the offences mentioned in the Convention. By signing the Convention, both parties bind themselves to co-operate with each other when such assistance is required unless the grounds mentioned in article 14 are present. Even in those instances before the request is refused, the Requesting Party shall, where appropriate, be given an ample opportunity to state its case, as it were. Kemp notes that the grounds for such refusal are not mandatory.

If the State Party is unwilling to extradite its national on the base or basis mentioned above, the aut dedere aut judicare principle kicks in – the Requested State should prosecute its national at the request by the Requesting State to so prosecute.

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104 Serious crimes (defined in art 2), participation in an organised criminal group (art 5), laundering of proceeds of crime (art 6), corruption and defeating justice.
105 Art 16(1) of the Convention.
106 Art 16(2) of the Convention.
107 See art 16(3) of the Convention. Even for fiscal matters that were traditionally left out – see art 16(15) of the Convention, and Kemp, fn 63 supra 166.
108 Art 16(4) of the Convention.
109 See the Statement of purpose in art 1. Article 14 provides that no obligation to extradite shall be present where the Requested Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin or political opinions or if compliance would cause prejudice to that person’s position on any of those basis.
110 Art 16(16) of the Convention.
111 Kemp, fn 63 supra 165.
112 Art 16(11) of the Convention.
Article 16(11) also provides for a conditional extradition in terms of which the Parties agree that the trial proceed in the State (Requesting State), but sentence be served in the other State (Requested State). The same goes for a request in order to enforce a sentence – the Requested State shall oblige upon application of the Requesting State to extradite or cause the person sentenced to serve his or her sentence in the Requested State. These obligations, however, are dependent on domestic laws permitting of the same. Kemp submits that the actions provided for in article 16(11) and 16(12) of the Convention should be taken with due regard to the principle of *ne bis in idem* (the double jeopardy principle).

The Convention guarantees fair trial rights to an accused person. Kemp notes that the Convention does not provide for a refusal of extradition request where trial or part thereof commenced and judgment was rendered *in absentia* of the convicted person and there are no prospects of a retrial once brought back to the Requesting State. He states that the conspicuous omission flies in the face of the United Nations Model Treaty on Extradition. To cure the defect, he supports the two-pronged solution, proposed by Dugard and Van den Wyngaert, of conditional extradition whereby a Requested State is allowed to monitor the subsequent treatment of the extradite while at the Requesting State, or a development of a new procedure of *aut dedere aut judicare* whereby the Requested State deals with the fugitive upon refusing extradition on such human rights grounds in order to balance fugitive rights with the interest of suppression of crime.

### 3.3.3 MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The Convention provides for the widest measure of mutual assistance in crimes that are contained in the Convention, transnational in character and are involving an

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113 Art 16(12) of the Convention.
114 Kemp, fn 63 supra 165.
115 Art 16(13) of the Convention.
116 Kemp, fn 63 supra 165.
117 Kemp, fn 63 supra 165.
118 Kemp, fn 63 supra 166.
organised criminal group.\footnote{119} This takes place in the field of investigations, prosecutions and judicial proceedings carried out by States Parties.

Such assistance could take the following form:

- Taking evidence or statements from persons;
- effecting service of judicial documents;
- executing searches and seizures, and freezing of property;
- examining objects and sites;
- providing information, evidentiary items and expert evaluations;
- providing originals or certified copies of relevant documents and records;
- identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- facilitating appearance of persons, voluntarily, in the requesting State Party; and
- any other help that is not contrary to the domestic law of the requested State Party.\footnote{120}

Such assistance usually avails where State Parties have treaties or agreements in place between or amongst themselves.\footnote{121} However, the Convention also provides for instances where no such treaties exist between State Parties involved or where

\footnote{119} Art 18(1) of the Convention.\footnote{120} See art 18(3)(a-i) of the Convention.\footnote{121} See art 18(30) of the Convention.
the State Parties to the treaty agree to apply the provisions of the Convention (paragraph 9 – 29) *in lieu* of the corresponding provisions of their treaty.\(^{122}\)

The Requested State has discretion to decline to render assistance on the grounds of absence of double criminality.\(^ {123}\) The Requested State cannot, however, refuse assistance on the grounds of bank secrecy.\(^ {124}\)

It would appear, the Convention does not oblige State Parties to make provision for ‘direct access’ of individuals to co-operation schemes. International law writers like Bassiouni and Van den Wyngaert are of the opinion that the individual in such schemes is no longer the mere ‘object’ of international co-operation.\(^ {125}\) The reason could be, as Kemp says, ‘States are still quite reluctant to provide individuals with direct access to co-operation schemes’.\(^ {126}\) Van den Wyngaert is of the opinion that in the minimum, an individual involved in international criminal proceedings in the requesting state should have a right to be informed about the exchange of evidence in his case.\(^ {127}\)

### 3.3.4 TRANSFER OF PRISONERS

Article 17 provides that States Parties may within their discretion enter into bilateral or multilateral agreements on the transfer of persons sentenced into imprisonment into their territories to complete their sentences for offences covered by the Convention.

### 3.3.5 TRANSFER OF CRIMINAL PROCEEDINGS

Article 21 obliges State Parties to consider the transfer of proceedings for prosecution of offences covered by the Convention, where such is considered to be

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\(^ {122}\) See art 18(7) of the Convention.

\(^ {123}\) See art 18(9) of the Convention.

\(^ {124}\) See art 18(8) of the Convention.

\(^ {125}\) See Kemp ‘Foreign relations, international co-operation in criminal matters and the position of the individual’ (2003) *SACJ* 16 378.

\(^ {126}\) Kemp ‘Foreign relations’ fn 125 *supra*.

\(^ {127}\) Kemp ‘Foreign relations’ fn 125 *supra* 380.
in the interest of the proper administration of justice, in particular cases where several jurisdictions are involved, with a view to concentrating the prosecution. The Convention, however, does not provide for the legal system that should apply in that situation.

It is submitted that the aspect is left to be determined through bilateral or multilateral agreements that may exist between State Parties and in conjunction with their domestic laws,\textsuperscript{128} otherwise the law and procedure of the forum,\textsuperscript{129} as the domestic position obtains, should apply with the necessary co-operation by the foreign States Parties. As regards rights of the individual involved, Bassiouni points out, aptly, that internationally protected human rights are directly applicable in all national legal systems that have ratified the United Nations Charter.\textsuperscript{130}

### 3.3.6 CONFISCATION AND SEIZURE

Confiscation and seizure is the vital tool in the fight against organised crime. It hits where it hurts the most to the organised criminal group – their pockets, which are the very essence of their existence. Article 12 of the Convention obliges States Parties to incorporate in their domestic legal systems necessary measures to enable appropriate authorities in their jurisdiction:

- to \textit{identify}, \textit{trace}, \textit{freeze} or \textit{seize} proceeds of crime or property of equivalent value, derived from offences covered by the Convention or instrumentalities, property and equipment used or destined to be used in the commission of such offences;\textsuperscript{131}

- to confiscate proceeds of crime or property of equivalent value derived from offences covered by the Convention or instrumentalities, property and equipment used or destined for use in offences covered by the Convention.\textsuperscript{132}

\textsuperscript{128} See art 18(30) of the Convention.
\textsuperscript{129} See art 11(6) of the Convention.
\textsuperscript{130} See Kemp ‘Foreign relations’ fn 125 \textit{supra} 374.
\textsuperscript{131} See art 12(2) of the Convention.
\textsuperscript{132} See art 12(1)(a)-(b) of the Convention.
In instances where the proceeds of crime were already laundered into other property, such property would be liable to be seized and confiscated. If such proceeds had been intermingled with property from legitimate source, such property is liable to confiscation up to the assessed value of the intermingled proceeds.

Income and other benefits derived from the proceeds of crime or converted or intermingled with property from legitimate source shall also be liable to be seized and confiscated in the same manner and to the same extent as proceeds of crime.

The owner of the ‘proceeds of crime’ or ‘offending’ property may be allowed to demonstrate the lawful origin of the alleged proceeds of crime or property. Provision should be made for the rights of bona fide third parties. Where proceeds of crime or property is located outside the State Party’s territory, seizure and confiscation is possible through mutual legal assistance with the State Party where it is located.

The proceeds of crime or property confiscated in terms of article 12 or 13 of the Convention shall be disposed of in accordance with the State Party’s domestic laws and its administrative procedures.

3.4 SOUTH AFRICAN LEGISLATION

South Africa only became party to the Convention on 20 February 2004 despite signing it on 14 December 2000. Even before then, it already had legislation in place to combat serious organised crimes and transnational crimes. What follows is the appraisal of these laws in conjunction with the objectives contained in the Convention.

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133 See art 12(3) of the Convention.
134 See art 12(4) of the Convention.
135 See art 12(5) of the Convention.
136 See art 12(7) of the Convention.
137 Art 13 of the Convention contains procedure to be followed to obtain the assistance.
138 Art 14(1) of the Convention.
3.4.1 CRIMINALISATION OF ORGANISED CRIMINAL GROUP

As early as 1998, South Africa already had legislation in its statute books to curb, *inter alia*, gang-related criminal activities. It is called the Prevention of Organised Crime Act.\(^{139}\)

Section 1 of the POCA defines ‘criminal gang’ as including any formal or *informal* ongoing organisations, *associations*, 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.\(^{140}\) The ‘pattern of criminal gang activity’ includes the commission of two or more criminal offences referred to in Schedule 1,\(^{141}\) provided that at least one of those offences occurred after the date of the commencement of chapter 4 (offences relating to criminal gang activities) and the last of those offences occurred within three years after a prior offence and the offences were committed – on separate occasions or on the same occasion, by two or more persons who are members of or belong to, the same criminal gang.\(^{142}\)

It is pertinent to note that, closely aligned to the definition of ‘criminal gang’ and ‘criminal gang activity’ is the concept of ‘racketeering activity’. Racketeering activity is however not defined in the Act, but what is defined instead is ‘pattern of racketeering activity’. This means the planned, ongoing, continuous, or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1.\(^{143}\)

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\(^{139}\) Fn 17. Effective from 21 January 1999. It is commonly known as POCA.

\(^{140}\) S 1(1)(iv) of POCA.

\(^{141}\) Schedule 1 contains the list of serious crimes including drug offences (s 13 of Drugs and Drug Trafficking Act), corruption and defeating or obstructing the course of justice.

\(^{142}\) S 1(1)(xi) of POCA.

\(^{143}\) S 1(1)(xii) of POCA. Emphasis is on crimes and not offenders.
Section 2 proscribes the receipt or retention of property from a ‘pattern of racketeering’, knowingly or where a person ought to have known it was derived from that source and against use or investment of any part of such property to establish or operate any enterprise.\textsuperscript{144}

Enterprise is defined as including any individual, partnership, corporation, association or other juristic person or legal entity and any union or group of individuals associated in fact, although not a juristic person or legal entity.\textsuperscript{145} Receipt or retention of the property or use and investment of such property on behalf of any enterprise is also criminalised.\textsuperscript{146} The acquisition or maintenance of any interest in or control on any enterprise through ‘pattern of racketeering activity’ is also punishable.\textsuperscript{147} It is also an offence to participate in any enterprise through a ‘pattern of racketeering activity’.\textsuperscript{148}

Section 9(1) of POCA criminalises criminal gang activities by proscribing active participation in, or membership of a criminal gang and

- wilful aid and abetting in any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang;

- use of violence or threat to use violence by or with assistance of criminal gang; or

- threat of retaliation with violence to any specific person or persons in general for an act or alleged act of violence.

Section 9(2) proscribes any act which is aimed at causing or promoting a ‘pattern of criminal gang activity’.\textsuperscript{149} Inchoate crimes intended to promote a ‘pattern of criminal gang activity’ or to solicit a person(s) to join a criminal gang are also outlawed.\textsuperscript{150}

\textsuperscript{144} My emphasis. See s 2(a)(i)-(iii) of POCA.
\textsuperscript{145} See s 1(1)(v) of POCA.
\textsuperscript{146} See s 2(b)-(c) of POCA.
\textsuperscript{147} See s 2(d) of POCA.
\textsuperscript{148} See s 2(e) of POCA.
\textsuperscript{149} See s 9(2)(a) of POCA.
As far as section 9(1) is concerned, Burchell argues that the legislation is less effective than the common purpose principle already embodied in common law which only applies after the proscribed conduct has already occurred.\textsuperscript{151} He argues, further, that the doctrine at least requires ‘active association in a specific enterprise with requisite \textit{mens rea}, not just membership of a gang, some members of which may engage in crime’.\textsuperscript{152} He submits that in section 9(2) the legislature provides for the ‘worst excesses of guilt by association’ where, for an example, an accused person intentionally encourages or advises another to join a criminal gang.\textsuperscript{153} In his view, it is far more realistic to focus on the conduct (in particular the criminal consequences) of gang activity than try to freeze the nature of criminal gangs into a legal definition.\textsuperscript{154}

Standing,\textsuperscript{155} in his criticism of the anti-gang policy looks at the history of the legislation,\textsuperscript{156} and what inspired it,\textsuperscript{157} and says it explain, \textit{inter alia}, the severity of punishments for members of criminal groups and the fact that ‘members of criminal organisations, and especially the senior members, are difficult to prosecute under traditional law’.\textsuperscript{158} He concedes that the Act attempts to overcome this dilemma by criminalising membership of a criminal group as the preamble states.\textsuperscript{159} He views these provisions as a reasonable deterrence for young people who consider joining gangs to be an attractive idea.\textsuperscript{160}

\textsuperscript{150} See s 9(2)(b)-(c) of POCA.
\textsuperscript{151} Burchell \textit{Principles of Criminal Law} (2005) 984.
\textsuperscript{152} Burchell \textit{Principles of Criminal law fn 151 supra.}
\textsuperscript{153} \textit{Ibid.}
\textsuperscript{154} \textit{Ibid.}
\textsuperscript{156} Fears created by the increasingly aggressive vigilante movement – PAGAD, which created a profound crisis of confidence in State Security and a pressing need for drastic measures – see fn 155 supra.
\textsuperscript{157} American RICO statute and Strict Terrorism Enforcement and Prevention Act (STEP) of 1988 – see fn 151 supra.
\textsuperscript{158} See Standing ‘The threat of gangs’ fn 155 supra.
\textsuperscript{159} See Standing ‘The threat of gangs’ fn 155 supra 6. The preamble states: ‘Bearing in mind that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, it is necessary to criminalise the management of and related conduct, in connection with enterprises which are involved in a pattern of racketeering activity.’
\textsuperscript{160} See Standing ‘The threat of gangs’ fn 155 supra.
He does highlight, however, the difficulty of establishing if a person is ‘in the gang’ because gang membership can be vague and contested.\(^{161}\) He also believes there are many criminal acts carried out by gang members that may have very little to do with their gang membership or some sort of planned agenda.\(^{162}\) He submits that the authorities have criminalised a phenomenon based on very little research.\(^{163}\) He suggests a socio-economic approach to the problem of gangs.\(^{164}\)

### 3.4.2 CRIMINALISATION OF THE LAUNDERING OF PROCEEDS

The laundering of the ‘proceeds of unlawful activities’ is proscribed in Chapter 3 of the Act.\(^{165}\) The definition of ‘proceeds of unlawful activities’ contained in section 1 of the Act is wide and is not limited to any specific crime like the Drugs and Drug Trafficking Act did.

Section 4 criminalises any process, undertaken by any person who knows, or ought to have known that property is, or forms part of the proceeds of unlawful activity, by which it becomes hidden that such property comes from illegal activity.\(^{166}\)

Section 5 proscribes assistance of another to benefit from proceeds of unlawful activities when done so intentionally or through negligence.

Section 6 punishes the acquisition, possession or use of proceeds of unlawful activities where one knowingly or through negligence ought to have known that it is, or forms part of the proceeds of unlawful activities of another person.\(^{167}\) Section 7 punishes failure to report suspicion regarding proceeds of unlawful activities.\(^{168}\)


\(^{162}\) See Standing ‘The threat of gangs’ fn 155 supra 15-17.

\(^{163}\) See Standing ‘The threat of gangs’ fn 155 supra 19.


\(^{165}\) ‘Proceeds of unlawful activities’ means any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.

\(^{166}\) See s 4(a)-(b)(ii) of POCA.

\(^{167}\) See s 6(a)-(c) of POCA.

\(^{168}\) See s 7(1) of POCA.
Burchell submits that the process of disguising the criminal origin of money or property could constitute one of a variety of common-law or statutory offences like fraud.\textsuperscript{169} He further argues that the doctrine of common purpose could also serve to criminalise as perpetrators, those who associate in a joint criminal enterprise to commit a consequence crime such as fraud.\textsuperscript{170} The money laundering offence in terms of this legislation, unlike the Convention provides, extends liability beyond a person who \textit{knows} the property constitutes the proceeds of crime.\textsuperscript{171}

### 3.4.3 CRIMINALISATION OF CORRUPTION

Kemp submits that corruption is one of the crimes typical of organised crime.\textsuperscript{172} The problem with many definitions is that they restrict corruption to ‘bribery’ of their own public officials, thus excluding ‘bribery’ in general or bribery of foreign public officials or those of international organisations such as the United Nations.\textsuperscript{173}

Corruption in terms of South African law is proscribed in the Prevention and Combating of Corrupt Activities Act.\textsuperscript{174} This Act succeeded the Corruption Act of 1992, which had repealed the common law crime of bribery.

Chapter 2, Part 1 contains a general offence of corruption.\textsuperscript{175} Both active and passive corruption is criminalised. It applies to any person who directly or indirectly accepts or offers to accept or gives or offers to give any gratification in order to act personally or to induce another to act or to influence another to act in a dishonest, unauthorised or improper manner. Such gratification may be a benefit which is material or immaterial.\textsuperscript{176}

\textsuperscript{169} Burchell \textit{Principles of Criminal Law} 986.
\textsuperscript{170} Burchell \textit{Principles of Criminal Law} 987.
\textsuperscript{171} See s 4-7 of POCA. Negligence is equally punished.
\textsuperscript{172} Kemp fn 63 \textit{supra} 158. Also see preamble to Prevention and Combating of Corrupt Activities Act 12 of 2004.
\textsuperscript{173} See fn 172 \textit{supra}.
\textsuperscript{174} Act 12 of 2004.
\textsuperscript{175} S 3.
\textsuperscript{176} See the definition of ‘gratification’ in s 1 of the Act.
Part 2 contains offences in respect of corrupt activities relating to specific persons. These specific persons are:

- Public officers;\(^{177}\)
- foreign public officials;\(^{178}\)
- agents;\(^{179}\)
- members of legislative authority;\(^{180}\)
- judicial officers;\(^{181}\) and
- members of prosecuting authority.\(^{182}\)

Part 3 contains offences in respect of corrupt activities relating to receiving or offering of unauthorised gratification by or to party to an employment relationship.\(^{183}\)

Part 4 pertains to offences in respect of corrupt activities relating to specific matters. These are:

- Witnesses and evidential material during certain proceedings;\(^{184}\)
- contracts;\(^{185}\)
- procuring and withdrawal of tenders.\(^{186}\)

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\(^{177}\) S 4. Public officer is any person who is a member, an official, an employee or a servant of a public body and includes – persons contemplated in s 8(1) of the Public Service Act, 1994; persons receiving any remuneration from public funds; or persons incorporated in a corporation which is a public body.

\(^{178}\) S 5. These include any person holding a legislative, administrative, or judicial office of a foreign state; any person performing public functions for a foreign state including board, commission, corporation or other body or authority that performs a function on behalf of the foreign state.

\(^{179}\) S 6. Defined as any authorised representative who acts on behalf of his or her principal and includes a director, officer, employee or other person authorised to act on behalf of his or her principal.


\(^{181}\) S 8. Any member of the judiciary – judges, magistrates, including commissioners of Small Claims, arbitrators and mediators, adjudicators appointed in terms of Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991, assessors or presiding officers in statutory tribunals with judicial capacity or any person with an acting or temporary appointment.

\(^{182}\) S 9.

\(^{183}\) S 10. This includes any person who in any manner assists in carrying on or conducting the business of an employer.

\(^{184}\) S 11.

\(^{185}\) S 12.

\(^{186}\) S 13.
• auctions;\textsuperscript{187}
• sporting events;\textsuperscript{188} and
• gambling games or games of chance.\textsuperscript{189}

Part 5 contains offences which relate to: acquisition of private interest in contract, agreement or investment body;\textsuperscript{190} unacceptable conduct relating to witnesses;\textsuperscript{191} and interference with, hindering or obstruction of investigation of offence.\textsuperscript{192}

Part 6 contains inchoate offences which relate to corrupt activities.\textsuperscript{193}

A cursory look at the main features shows that corruption in terms of the legislation has a wider scope of application than found in the Palermo Convention. Penalties for the offences contained in the Act are very stiff. They range between three years and life imprisonment.

3.4.4 CRIMINALISATION OF OBSTRUCTION OF JUSTICE

In South Africa, defeating or obstructing the course of justice is a common law crime. It consists in unlawfully doing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice.\textsuperscript{194}

Unlike in the Convention, the ‘administration of justice’ only means the ‘justice in civil or criminal proceedings’.\textsuperscript{195} Such process, Burchell argues, begins when an established legal process is initiated, for example when an individual makes a

\textsuperscript{187} S 14.
\textsuperscript{188} S 15 – includes any sport in which individual or teams or animals compete and usually attended by public and governed by rules or code of conduct.
\textsuperscript{189} S 16 – includes a lottery, lotto, numbers game, scratch game, sweepstakes or sports pool.
\textsuperscript{190} S 17.
\textsuperscript{191} S 18.
\textsuperscript{192} S 19.
\textsuperscript{193} S 20-21.
\textsuperscript{194} Burchell Principles of Criminal Law 939.
\textsuperscript{195} Burchell Principles of Criminal Law 943.
complaint to the police.\textsuperscript{196} Proceedings of an administrative or quasi-judicial nature which are not crime related (pre-trial) are excluded.

3.5 ENFORCEMENT

3.5.1 JURISDICTION

The Prevention of Organised Crime Act and Prevention and Combating of Corrupt Activities Act both provide for extra-territorial jurisdiction for South African courts. The former provides for such jurisdiction only in racketeering offences.\textsuperscript{197} The Prevention and Combating of Corrupt Activities Act provides for extra-territorial jurisdiction on the basis of nationality;\textsuperscript{198} universal jurisdiction;\textsuperscript{199} and active as well as passive territoriality.\textsuperscript{200} The double criminality principle is expressly excluded.\textsuperscript{201}

3.5.2 EXTRADITION

An extradition means ‘the delivery of an accused or a convicted individual to the State where he or she is accused or has been convicted of a crime by the State on whose territory he or she happens for the time to be’.\textsuperscript{202}

In South Africa extradition is governed by various treaties which the South African state has concluded with other States Parties, the Conventions it is party to (including protocols) as well as its domestic legislation, namely the Extradition Act.\textsuperscript{203} Such treaties are known as extradition agreements and are provided for in the Act.\textsuperscript{204}

\textsuperscript{196} Burchell \textit{Principles of Criminal Law} 943-944.
\textsuperscript{197} See s 2(1) ‘… in the Republic or elsewhere’.
\textsuperscript{198} Ss 35(1)(a)-(e),35(2)(a) and 35(3)(a)-(b).
\textsuperscript{199} S 35(2)(b)-(c).
\textsuperscript{200} S 35(4).
\textsuperscript{201} Ss 35(1) and (2).
\textsuperscript{202} Kemp – source unknown, given during his coursework lecture in international criminal law in NMMU in August 2007.
\textsuperscript{203} Act 67 of 1962.
\textsuperscript{204} See s 2 in fn 203 \textit{supra}. 
An extradition agreement means an agreement in force or deemed to be in force under section 2 including a multilateral convention to which the Republic is a signatory or to which it has acceded and which has the same effect as such agreement.\(^\text{205}\)

An individual may be extradited for an ‘extraditable offence’.\(^\text{206}\) The definition of ‘extraditable offence’ evinces the double criminality requirement for extradition process at the time request was received.

The provisions of the Act and agreement, if any, apply with retrospective effect and notwithstanding whether domestic courts have jurisdiction to try such person for such offence or not.\(^\text{207}\) Where the foreign state is not a party to an extradition agreement, the President of the Republic may exercise his discretion and consent or not consent to such surrender in writing.\(^\text{208}\) Extradition requests should comply with an extradition agreement and or the legislation.\(^\text{209}\)

The Act provides for judicial oversight in the manner warrants of arrest should be issued or endorsed,\(^\text{210}\) further detention of persons under warrants,\(^\text{211}\) and for surrender enquiries to be held.\(^\text{212}\)

Surrender may be refused on the basis of an existing agreement or the Act, where there is pending criminal prosecution, pending sentence, temporal element has

\(^{205}\) S 1 – fn 203 supra. An example of such a multilateral convention can be found in the European Convention on Extradition which South Africa acceded by ratification on 12 February 2003, and came in force on 13 May 2003. Article 11 (on human rights) has the impact of superseding bilateral treaties. As a result South African Extradition Act, 1962 was amended to bar extradition in cases where there is a possibility of gender discrimination (see s 11(b)(iv) – old s 11 was substituted by s 9 of Act 77 of 1996.

\(^{206}\) S 1 – fn 203 supra. An ‘extraditable offence’ means an offence which in terms of the law of the Republic and of the foreign state concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign state.

\(^{207}\) See s 3(1), fn 203 supra.

\(^{208}\) See s 3(2), fn 203 supra.

\(^{209}\) See s 4, fn 203 supra.

\(^{210}\) See ss 5 – 6, fn 203 supra.

\(^{211}\) See ss 7 – 8, fn 203 supra.

\(^{212}\) See ss 9 – 10, fn 203 supra.
expired or for human rights imperatives.\textsuperscript{213} It would appear that pure political reason should not obstruct extradition unless agreed \textit{inter partes} or there is some connotation of threat to human rights.

### 3.5.3 MUTUAL LEGAL ASSISTANCE

This relates to an international state to state relationship created to engender co-operation in criminal matters (judicial and police) for the purpose of obtaining evidentiary material necessary for criminal trial, execution of sentences and confiscation and transfer of proceeds of crime. Such a relationship may be created through bilateral or multi-lateral instruments, and supported by domestic legislation.

In South Africa this relationship is governed by the International Co-operation in Criminal Matters Act (the Act)\textsuperscript{214} which also provides for ‘agreements’ between the state and foreign state(s).\textsuperscript{215} An ‘agreement’ includes a multilateral convention to which the Republic is a signatory or to which it has acceded and which has the same effect as an agreement referred to in section 27.\textsuperscript{216}

The mutual provisioning of evidence is initiated through the issuing of letter of request by a court to a foreign state which states therein evidence so requested.\textsuperscript{217} Such a letter may be issued by a judge or magistrate in chambers if satisfied:\textsuperscript{218} that there are reasonable grounds for believing that an offence has been committed in the Republic or that it is necessary to determine whether an offence has been committed;\textsuperscript{219} that an investigation in respect thereof is being conducted;\textsuperscript{220} and that for purposes of the investigation it is necessary in the interest of justice that information be obtained, from a person or authority in a foreign state.\textsuperscript{221}

\begin{itemize}
\item \textsuperscript{213} See s 11(b), fn 203 \textit{supra}.
\item \textsuperscript{214} Act 75 of 1996 (the Act).
\item \textsuperscript{215} See s 27(1) of the Act.
\item \textsuperscript{216} S 1(i) of the Act.
\item \textsuperscript{217} See s 2(1) of the Act.
\item \textsuperscript{218} See s 2(2) of the Act.
\item \textsuperscript{219} S 2(2)(a) of the Act.
\item \textsuperscript{220} S 2(2)(b) of the Act.
\item \textsuperscript{221} S 2(2)(c) of the Act.
\end{itemize}
Where South Africa is the requested State, the Director-General of the Department of Justice and Constitutional Development must upon receipt of the request satisfy himself or herself that: proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting state; or there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine whether an offence has been committed and that an investigation is being conducted in the foreign state.\(^{222}\)

The mutual execution of sentences and compensatory orders is also initiated through the issuing of letter of request by a court to a foreign state, if it appears to such court that a person sentenced to payment of a fine or ordered to pay compensation to another does not have sufficient property in the Republic to satisfy the same, but does have it in a foreign state.\(^{223}\)

Where South Africa is the requested State, the Director-General of the Department of Justice and Constitutional Development shall, if satisfied: that the sentence or order is final and not subject to review or appeal; that the court which imposed the sentence or made the order had jurisdiction; that the person on whom the sentence was imposed or against whom the order was made, had the opportunity of defending himself or herself; that the sentence or order cannot be satisfied in full in the country in which it was imposed; and that the person concerned holds property in the republic, submit the request to Minister of Justice and Constitutional Development for approval and cause the sentence or order to be registered by clerk of a magistrate’s court, if so approved.\(^{224}\) The effect of the registration of sentence or order is that it shall have the effect of a civil judgement of the court at which it has been registered in favour of the Republic as represented by the Minister of Justice and Constitutional Development.\(^{225}\)

The mutual request for confiscation and transfer of proceeds of crime is also initiated through a letter of request by a court, if it appears to that court that a sufficient

\(^{222}\) S 7(2) of the Act.  
\(^{223}\) S 13 of the Act.  
\(^{224}\) S 15(1) – (3) of the Act.  
\(^{225}\) S 17(1) of the Act.
amount to satisfy the confiscation order cannot be realised in the Republic and that the person against whom the order has been made owns property in the foreign state concerned.  

Where South Africa is the requested State, the Director-General of the Department of Justice and Constitutional Development shall, if satisfied: that the order is final and not subject to review or appeal; that the court which made the order had jurisdiction; that the person against whom the order was made had the opportunity of defending himself or herself; that the order cannot be satisfied in full in the country in which it was imposed; that the order is enforceable in the requesting state; and that the person holds property in the Republic, submit such request to Minister of Justice and Constitutional Development for approval and cause such foreign confiscation order to be registered by clerk of a magistrate’s court in the Republic, if so approved.

The effect of registration of such order is that such order shall have the effect of a civil judgement of the court at which it has been registered in favour of the Republic as represented by the Minister of Justice and Constitutional Development.

Restraint order or preservation of property order made in the Republic under the Prevention of Organised Crime Act may also be enforced by the issue of a letter of request by a court of the Republic or judge, if it appears to such court or judge that the person against whom the order has been made owns property in the foreign state concerned. Similar requests by foreign states are lodged with and registered by the Registrar of a division of the Supreme Court where the person against whom such order may be enforced resides, carries on business, employed or holds any movable or immovable property at the instance of Director-General of the Department of Justice and Constitutional Development who receives such requests.

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226 S 19(1) of the Act.
227 S 20(1)-(3) of the Act.
228 S 21(1) of the Act.
229 S 23(1) of the Act.
230 S 24(1)-(2) of the Act. Further see s 1, where order is to be enforced against 'corporate body', partnership' or particular property.
The effect of such registration is that such order shall have the effect of a restraint order made by the division of the Supreme Court at which it has been registered.\textsuperscript{231}

The assistance which may be solicited in terms of this Act is not \textit{numerus clausus}.\textsuperscript{232} This indicates that South Africa has aligned itself with the international injunction to afford other jurisdictions ‘the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences’.\textsuperscript{233}

\section*{3.6 Conclusion}

South African legal framework satisfies the requirements contained in the Convention. However, criminalising the specified activities does not suffice if proceeds from predicate and money laundering crimes and instrumentalities are left in the hands of offending groups and individuals. Confiscation and forfeiture of illicit proceeds and instrumentalities should form part of the package for criminalisation to be effective. It hurts criminals where it hurts the most – in their pockets. It is also important for state parties to be equally proactive in fighting organised crime by putting in place preventive and regulatory measures for financial institutions and designated non-financial business and professions who perform diverse core functions to comply with. Such preventative and regulatory measures are discussed in the next chapter.

\textsuperscript{231} S 25 of the Act.
\textsuperscript{232} See s 31 of the Act.
CHAPTER 4
REGULATORY AND CONFISCATION REGIMES

4.1 INTRODUCTION

This chapter deals with a multidisciplinary approach to the fight against organised crime with particular emphasis on legislative measures which state parties should have in place in order to prevent the laundering of ill-gotten gains by criminals and to have such gains and instrumentalities of crime confiscated. The Financial Action Task Force recommended minimum standards which national legal systems must comply with in order to prevent money-laundering.

4.2 FINANCIAL ACTION TASK FORCE STANDARDS\textsuperscript{234}

In April 1990, the FATF on Money-Laundering provided a set of 40 Recommendations for improving national legal systems, enhancing role played by the financial sector and intensifying cooperation in the fight against money-laundering. After the 2003 update, these Recommendations were updated to add detail, in particular with regard to administrative, regulatory and supervisory regimes that were directed at institutions that deal with financial, non-financial and professional customer-driven transactions in which customer identification, due diligence, suspicious transactions, seizing, freezing and confiscation mechanisms were emphasised. These Recommendations provide a comprehensive set of measures for an effective legal, regulatory and institutional framework against money-laundering.

As early as 1996, the South African Law Commission acknowledged that the criminalisation of money-laundering alone will not provide an effective measure to fight organised crime. A money-laundering scheme needs to involve the financial system to accomplish its objectives, and therefore, in order to prevent, identify and investigate such activities for ultimate prosecution, certain administrative measures that will apply to the institutions of business community must be introduced. To

\textsuperscript{234} Fn 4 supra.
accomplish this, a legislative framework comprising regulatory measures must be introduced.\textsuperscript{235}

An appraisal of measures related to regulatory and supervisory, as well as institutional regimes contained in the Recommendations will now follow. Lastly, confiscation measures will be discussed.

4.2.1 REGULATORY AND SUPERVISORY REGIMES

In terms of the Recommendations, financial institutions and designated non-financial businesses and professions who perform diverse core functions with and on behalf of their customers, should in their countries be obliged to comply with specified recommendations by their respective states in order to help prevent, identify, investigate and prosecute money-laundering and related activities.\textsuperscript{236} These are

\textsuperscript{235} See SALC Issue Paper 1 Project 104 par 3.3 p5. Also see par 3.6 p6 and Stassens \textit{Money laundering: A new international law enforcement model} (2000) p 92-93.

\textsuperscript{236} In terms of the Glossary to Recommendations: ‘Financial institutions’ means any person or entity who conducts as a business one or more of the following activities or operations for or on behalf of a customer:

1. Acceptance of deposits and other repayable funds from the public (private banking included).
2. Lending.
3. Financial leasing.
4. The transfer of money or value.
5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller’s cheques, money orders and bankers’ drafts, electronic money).
6. Financial guarantees and commitments.
7. Trading in:
   (a) money market instruments (cheques, bills, CDs, derivatives etc.);
   (b) foreign exchange;
   (c) exchange, interest rate and index instruments;
   (d) transferable securities;
   (e) commodity futures trading.
8. Participation in securities issues and the provision of financial services related to such issues.
10. Safekeeping and administration of cash or liquid securities on behalf of other persons.
11. Otherwise investing, administering or managing funds or money on behalf of other persons.
12. Underwriting and placement of life insurance and other investment related insurance.

‘Designated non-financial business and professions’ means:
   a) Casinos (which also includes internet casinos).
businesses most likely to be abused by money-launderers to conceal or invest proceeds of their illicit activities. They should be obliged to maintain customer due diligence, record-keeping and report suspicious transactions.

### 4.2.1.1 CUSTOMER DUE DILIGENCE AND RECORD-KEEPING

Recommendation 5 provides that in undertaking customer due diligence, financial institutions should not keep anonymous accounts or accounts in obviously fictitious names. In this regard financial institutions should identify and verify the identity of their customers when: establishing business relations; carrying out occasional transactions above the applicable designated threshold or that are wire transfers from cross-border correspondent banking and similar relationships; there is a suspicion of money-laundering; or the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

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b) Real estate agents.
c) Dealers in precious metals.
d) Dealers in precious stones.
e) Lawyers, notaries, other independent legal professionals and accountants – this refers to sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to ‘internal’ professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to measures that would combat money laundering.
f) Trust and Company Service Providers refers to all persons or businesses that are not covered elsewhere under these Recommendations, and which as a business, provide any of the following services to third parties:

* acting as a formation agent of legal persons;
* acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or similar position in relation to other legal persons;
* providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;
* acting as (or arranging for another person to act as) a trustee of an express trust;
* acting as (or arranging for another person to act as) a nominee shareholder for another person.

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237 Also Shell banks are disapproved – see R 18.
238 ‘Designated thresholds’ for transactions under Recommendation 5 are as follows:

- Financial institutions (for occasional customers under Recommendation 5) USD/EUR 15,000.
In order to identify or verify a customer’s identity, financial institutions should use ‘identification data’. Reasonable measures should also be taken to identify or verify the beneficial owner. If it is legal persons and arrangements, reasonable measures should be taken to understand the ownership and control structure of the customer. This should entail: verifying authority and identity of a person purporting to act on behalf of the customer; verify and identify the customer’s legal status, customer’s name, trustees’ names, legal form, address, directors and provisions regulating the power to bind the legal person or arrangement; and identify beneficial owners (natural persons with a controlling interest or who comprise the mind and management of the legal person or arrangement) except where the customer or person with controlling interest is a public company that is subject to regulatory disclosure requirements.

In addition, financial institutions should obtain information on the purpose and intended nature of the business relationship and throughout the course of that relationship, conduct ongoing due diligence and scrutiny of transactions undertaken to ensure that such transactions are consistent with the institution’s knowledge of the customer, their business, risk profile and, where necessary, the source of funds.

In applying customer due diligence measures, financial institutions may be given leeway to determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction.

Recommendation 10 obliges financial institutions to maintain all necessary records on transactions (domestic and international) for at least five years to enable them to

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239 In the form of reliable, independent source documents, data or information obtainable from public register, customer or other reliable sources.

240 ‘Beneficial owner’ refers to the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.

241 ‘Legal persons’ refers to bodies corporate, foundations, anstalt, partnerships, or associations, or any similar bodies that can establish a permanent customer relationship with a financial institution or otherwise own property. ‘Legal arrangements’ refers to express trusts or other similar legal arrangements.

242 See interpretative notes on Recommendation 5.

243 Higher risk categories should equal enhanced due diligence, low risk reduced or simplified measures. See interpretative notes par 9-13 for examples of customers.
comply swiftly with information requests from the competent authorities.\textsuperscript{244} In this respect, the banking secrecy is considered one of the most intractable impediments to combating money-laundering. However, Recommendation 4 obliges countries to ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations. Access to these records should be available to domestic competent authority upon appropriate authority. The necessary records on transactions should include identification data obtained through the customer due diligence process.\textsuperscript{245}

Recommendation 12 provides that the customer due diligence and record keeping requirements apply to designated non-financial businesses and professions in the following situations:

- Casinos – when customers engage in financial transactions equal to or above the applicable designated threshold.\textsuperscript{246}

- Real estate agents – when they are involved in transactions for their client concerning the buying and selling of real estate.

- Dealers in precious metals and dealers in precious stones – when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.\textsuperscript{247}

- Lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their clients concerning the following activities:
  - buying and selling of real estate;

\textsuperscript{244} For investigations and prosecutions of money laundering offences.
\textsuperscript{245} For examples, copies or records of official identification documents (like passports, identity cards, driving licences or similar documents), account files and business correspondence for at least five years after the business relationship is ended. In relation to insurance business it includes insurance product, premiums and benefits.
\textsuperscript{246} For casinos, including internet casinos the designated threshold is USD/EUR 3000.
\textsuperscript{247} For dealers in precious metals and dealers in precious stones when engaged in cash transaction, the designated threshold is USD/EUR 15,000.
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- organisation of contributions for the creation, operation or management of companies;
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

- Trust and company service providers when they prepare for or carry out transactions for a client concerning the activities listed in the definition in the Glossary.²⁴⁸

### 4.2.1.2 REPORTING OF SUSPICIOUS TRANSACTIONS AND COMPLIANCE

Recommendation 13 prescribes that, if a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, it should by law or regulation, be required to report promptly its suspicions to the Financial Intelligence Unit.²⁴⁹ Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal and civil liability for breach of any restriction on disclosure of information imposed by contractual, legislative, regulatory or administrative provision, if the reporting was done in good faith to the financial intelligence unit regardless of whether they knew or did not know what the underlying criminal activity was and regardless of whether illegal activity actually occurred.²⁵⁰ They should also be prohibited by law from disclosing that such a report is being made to the unit.²⁵¹

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²⁴⁸ This includes—acting as a formation agent of legal persons; acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons; providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement; acting as (or arranging for another person to act as) a trustee of an express trust; acting as (or arranging for another person to act as) a nominee shareholder for another person.

²⁴⁹ FIU.

²⁵⁰ Recommendation 14. This is regardless of the amount of the transaction.

²⁵¹ See fn 250 supra. This is to avoid a risk of unintentional tipping off to customer which could compromise future efforts to investigate the suspected money laundering. Legal professional and accountants seeking to dissuade clients from engaging in illegal activity would not tantamount tipping off though.
Financial institutions should also develop programmes against money-laundering which should include:

- the development of internal policies, procedures and controls, including appropriate compliance management arrangements, and adequate screening procedures to ensure high standards when hiring employees;

- an ongoing employee training programme; and

- an audit function to test the system.\(^{252}\)

It is not only the financial institutions that have to comply with the above-mentioned reporting requirements. All designated non-financial business and professions should also be forced by law to comply subject to the following qualifications: \(^{253}\)

- Legal professionals (including lawyers and notaries) and accountants should be required to report suspicious transactions when they engage in a financial transaction in relation to: \(^{254}\)

  - buying and selling of real estate;
  - managing of client money, securities or other assets;
  - management of bank, savings or securities accounts;
  - organisation of contributions for the creation, operation or management of companies;
  - creation, operation or management of legal persons or arrangements, and buying and selling of business entities; and
  - auditing, on behalf of or for a client;

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\(^{252}\) Recommendation 15. The extent of measures which are regarded as appropriate should be guided by the risk of money laundering and the size of the business – see Interpretative notes. For financial institutions a manager should be appointed to oversee compliance should be appointed.

\(^{253}\) Recommendation 16. Designated non-financial business and professions may also send report to their appropriate self regulatory organisations provided there is appropriate co-operation with FIU – See notes.

\(^{254}\) Fn 253 supra.
- Dealers in precious metal and dealers in precious stones when they engage with a customer in any cash transaction equal to or above the applicable designated threshold,\textsuperscript{255} and

- Trust and company service providers when they engage on behalf of or for the client in the following services: \textsuperscript{256}

  - acting as a formation agent of legal persons;
  - acting as a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
  - providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any legal person or arrangement;
  - acting as a trustee of an express trust; and
  - acting as a nominee shareholder for another person.

However, the designated non-financial businesses and professionals are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal privilege.\textsuperscript{257}

### 4.2.1.3 REGULATION AND SUPERVISION

Recommendation 23 compels countries to ensure that financial institutions are subject to adequate regulation and supervision and that they are effectively implementing the FATF Recommendations.

Those financial institutions subject to the Core Principles,\textsuperscript{258} should also apply in a similar manner the regulatory and supervisory measures that apply for prudential purposes to money-laundering if relevant to it.

\textsuperscript{255} Fn 248 supra.
\textsuperscript{256} Fn 250 supra.
\textsuperscript{257} Each country or jurisdiction should determine matters that would fall under legal professional privilege or professional secrecy. Normally it is information obtained from clients: (a) in the course of ascertaining the legal position of their client (pre-trial or hearing interviews) or (b) in performing their task of defending or representing that client in or concerning judicial, administrative, arbitration or mediation proceedings (trial or hearing proceedings).
Other financial institutions, at a minimum, businesses providing a service of money or value transfer, or of money or currency changing should be licensed or registered, and subject to effective systems for monitoring and ensuring compliance with national requirements to combat money-laundering.\textsuperscript{259}

It is not only financial institutions that should be regulated and supervised as prescribed above, but also designated non-financial businesses and professions should be subject to regulatory and supervisory measures as follows:\textsuperscript{260}

- Casinos should be subject to a comprehensive regulatory and supervisory regime that ensures that they have effectively implemented the necessary anti-money laundering measures. At a minimum:
  - Casinos should be licensed;
  - Competent authorities should take the necessary anti-money measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest, holding a management function in, or being an operator of a casino; and
  - Competent authorities should ensure that casinos are effectively supervised for compliance with requirements to combat money laundering; and

- Countries should ensure that the other categories of designated non-financial businesses and professions are subject to effective systems for monitoring and ensuring their compliance with requirements to combat money laundering by a government authority or an appropriate self-regulatory organisation on a risk-sensitive basis.\textsuperscript{261}

\textsuperscript{258} ‘Core principles’ refers to the Core Principles for Effective Banking Supervision issued by the Basel Committees on Banking Supervision, the Objectives and Principles for Securities Regulation issued by the International Organisation of Securities Commissions, and the Insurance supervisory Principles issued by the International Association of Insurance Supervisors.

\textsuperscript{259} See Recommendation 23.

\textsuperscript{260} See Recommendation 24.

\textsuperscript{261} See Recommendation 24.
4.2.2 INSTITUTIONAL REGIME

Recommendation 26 obliges countries to establish Financial Intelligence Units that would serve as a national centre for receiving, analysing and disseminating information on suspected money laundering transactions from intermediary service providers (designated non-financial business and professions) and financial institutions.

Goredema views the unit as having been conceived of as a means of maximising the collaboration between the public and private sectors that is demanded by the imposition of information dissemination responsibilities on private entities.262

He identifies at least four models of financial intelligence units that have taken shape within FATF membership. They are263

- the intermediary or administrative model which is centred around a specifically designated administrative authority to which reports are submitted for analysis and processing before being passed on for investigation and prosecution;264

- the police model, the disclosure-receiving agency specially created or designated within the police force;265

- the judicial model in which reports are addressed directly to the public prosecutor's office which then performs a filtering before referring the case for police investigation if warranted; and

- the hybrid police/judicial model which combines the analysis, investigation and prosecution functions in the same unit.

263 Goredema and Botha ‘African Commitments’ fn 262 supra p 34.
264 The typical Financial Intelligence Centre (FIC) of South Africa.
265 Like the Commercial Crimes Unit of SAPS did before the advent of FIC in South Africa.
Recommendation 27 prescribes that countries should ensure that designated law enforcement authorities have responsibilities for money laundering investigations and exhorts countries to develop and support special investigative techniques suitable for such investigations. They are also encouraged to establish and use specialised groups, permanent or temporary, in asset investigations. Such competent authorities should be provided with adequate financial, human and technical resources.\textsuperscript{266}

\section*{4.2.3 CONFISCATION MEASURES}

Recommendation 3 provides that countries should adopt measures similar to those set forth in the Vienna and Palermo Conventions, including legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of \textit{bona fide} third parties.

In terms of the Recommendation such measures should include authority to:

\begin{itemize}
\item identify, trace and evaluate property which is subject to confiscation;
\item carry out provisional measures, such as freezing and seizing to prevent dealing, transfer or disposal of such property;
\item take steps that will prevent or void actions that prejudice the state’s ability to recover property that is subject to confiscation; and
\item take any appropriate investigative measures.
\end{itemize}

Such proceeds or instrumentalities should be capable of being confiscated without requiring a criminal conviction or an offender be required to demonstrate the lawful origin of the property alleged to be liable to confiscation.

\textsuperscript{266} Recommendation 30.
4.3 FINANCIAL ACTION TASK FORCE REGIONAL BODIES

The FATF Secretariat reports that for more than 10 years, FATF has worked to support the development of FATF-style regional bodies as an important means of ensuring a truly global effort is in place to combat money laundering and to ensure effective implementation of FATF standards in all regions of the world. FATF view these bodies as playing important leadership roles in their respective regions and to provide important regional expertise and input into the FATF policy-making function.

For the purpose of this research project, the Eastern and Southern African Anti-Money Laundering Group of which South Africa is member bears relevance. It conducts mutual evaluations amongst its members and helps FATF in shaping the policy on anti-money laundering on an ongoing basis. This role has recently been acknowledged in FATF Presidential speech of 21 August 2009 in Maseru, Lesotho.

4.4 SOUTH AFRICAN ANTI-MONEY LAUNDERING LEGISLATION

South Africa has passed various statutes to combat money laundering. For the current discussion, the measures introduced by the statutes dealt with hereunder, were largely intended to provide for anti-money laundering regulatory regime which enforces compliance and self-regulation by institutions that may be used or exploited for money laundering activities.

4.4.1 FINANCIAL INTELLIGENCE CENTRE ACT

The Act created the Financial Intelligence Centre, the Money Laundering Advisory Council, imposed certain duties on ‘accountable institutions’, ‘reporting

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269 Fn 13 supra. Also known as FICA.
270 Established by s 2 of FICA. The Centre collects reports from accountable institutions and makes them available to law enforcement authorities for investigations.
271 Established by s 17 of FICA. Council administrator of Finance on policies and best practices to combat money laundering; and advises Centre on its performance of functions assigned to it in
institutions and ‘supervisory bodies’ in order to combat money laundering activities.

The duties established are the following:

- the duty to identify clients,
- the duty to keep records,
- the duty to report and access to information,
- the duty to implement internal rules to promote compliance, and
- supervision of accountable and reporting institutions.

### 4.4.1.1 DUTY TO IDENTIFY CLIENTS

An accountable institution may not establish a business relationship or conclude a transaction with a client unless: it has established and verified the identity of the client; if client acting on behalf of another person – establish and verify the identity of the principal or beneficial owner, client’s authority to establish the business relationship on behalf of that other person; and if another person is acting on behalf of the client – to establish and verify the identity of that person and authority to act on client’s behalf. This duty also inures to business relationships which existed before the Act took effect.

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s 18 of FICA. It will soon be known as Counter-Money Laundering Advisory Council per s5 of the Financial Intelligence Centre Amendment Act 11 of 2008 – date of coming into operation yet undetermined.

Listed in Schedule 1. May be amended i.t.o s 73 and may be extended i.t.o s 74 of FICA.

Listed in Schedule 3. May be amended i.t.o s 76 of FICA.

Listed in Schedule 2. May be amended i.t.o s 75 of FICA.

Part 1 of FICA.

Part 2 of FICA.

Part 3 of FICA.

Part 4 of FICA.

Part 5 of FICA.

S 21(1)(a)-(c) of FICA.

S 21(2) of FICA.
4.4.1.2 DUTY TO KEEP RECORD

When an accountable institution establishes a business relationship or concludes a transaction with a client, the accountable institution must keep record of: 282

- the identity of the client;
- if client is acting on behalf of another person – identity of the principal or beneficial owner and client’s authority to act on behalf of that other person;
- if another person is acting on behalf of the client – identity of that other person and his authority;
- the manner in which identity of persons was established;
- the nature of that business relationship or transaction;
- the amount and parties involved to that transaction;
- all accounts involved in the transaction(s) concluded;
- the name of the person who obtained the information used in identifying or in verification of the client or other persons on behalf of the accountable institution; and
- any document or copy thereof obtained by the accountable institution in order to verify person’s identity.

The records referred to above must be kept for at least five years from the date the business relationship was terminated or a transaction (if single transaction) was concluded. 283

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282 S 22(1)(a)-(i) of FICA.
283 S 23 of FICA.
4.4.1.3 REPORTING DUTIES AND ACCESS TO INFORMATION

The accountable institution must, upon request by an authorised representative of the Centre, inform the Centre whether: S284 a specified person is acting or has acted on behalf of any client of the accountable institution; or a client of such accountable institution is or has acted on behalf of the person specified.

An accountable institution and a reporting institution must report to the Centre particulars of a transaction concluded with a client if an amount of cash deposited in terms of the transaction exceeds the prescribed amount or if some amount is paid by the institution to its client, person acting on behalf of the client or to a person on whose behalf the client or to a person on whose behalf the client is acting. S285

A person who carries on a business or is in charge of or manages a business or is employed by a business and who knows or ought reasonably to have known or suspected that: S286 the business has received or is about to receive proceeds of unlawful activities; the transaction or series of transactions to which the business is a party: facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities; has no apparent business or lawful purpose; is conducted to avoid a reporting duty under the Act; or may be relevant to tax evasion or attempted tax evasion investigation by the Commissioner for South African Revenue Service; or the business has been or is about to be used in any way for money laundering purposes must after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for such knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

Even if the transaction or series of transactions had not been concluded, if such a person knows or suspects those transactions would have: resulted in the business receiving proceeds of unlawful activities; facilitated transfer of such proceeds or resulted in the business being used in any way for money laundering had such

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284 S 27 of FICA.
285 S 28 of FICA.
286 S 29(1) of FICA.
transaction or series of transactions been concluded, the person must still report
grounds for his knowledge or suspicion to the Centre. The said person is
proscribed to disclose such report or to tip-off the person in respect of whom the
report is or must be made unless it falls within the scope of his powers and duties to
do so or for the purposes of carrying out the provisions of the Act or for the purpose
of legal proceedings or has been so ordered by the court. So is any other person,
and to the same extent, who knows or suspects that a report has been or is to be
made, including the person in respect of whom the report is or is to be made.

The reporting duty and obligations to provide information is not affected by
confidential rules, unless between an attorney and his or her client or third party
made in confidence for the purposes of legal advice or litigation which is pending,
contemplated or has commenced.

4.4.1.4 THE DUTY TO IMPLEMENT INTERNAL RULES TO PROMOTE
COMPLIANCE

An accountable institution must formulate and implement internal rules concerning:

- the establishment and verification of the identity of persons in terms of Part 1,
  namely, the clients, persons on whose behalf the client is acting, persons
  acting on behalf of the client and authority to so act;

- information records kept in terms of Part 2, which relate to the identification of
  clients or persons acting for or on whose behalf the client is acting, nature of
  the business relationship or transaction, accounts involved in the transaction
  or course of business, person who obtained information and the documents
  received during verification;

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287 S 29(2) of FICA. Supervisory bodies are also expected to report similar transactions by
accountable institutions over whom they have authority – see s 36 of FICA.
288 S 29(3) of FICA.
289 S 29(4) of FICA.
290 S 37(1) of FICA.
291 S 37(2) of FICA.
292 S 42(1)(a)-(e) of FICA.
the manner such records are kept and the place;

steps to be taken to determine if transaction is reportable; and

other relevant matters as may be prescribed.

These rules must comply with prescribed requirements and must be available to the Centre and supervisory body of the accountable institution.293

In order to promote compliance, an accountable institution must appoint a person with the responsibility to ensure compliance with the internal rules by employees of the institution and that the institution honours its obligations in terms of the Financial Intelligence Centre Act.294

4.4.1.5 SUPERVISION OF ACCOUNTABLE INSTITUTIONS

Each supervisory body is responsible for supervising compliance with the duties to identify clients, keep records, report suspicious transactions, promote compliance by each accountable institution regulated or supervised by it.295

When the Centre refers the matters to the supervising body on the basis of a suspicion, based on reasonable grounds, that the accountable institution has contravened any rule or failed to comply with any provision of the Act or guideline applicable to such accountable institution, such supervisory body must investigate the matter and take steps using powers at its disposal to remedy the matter after consultation with the Centre.296

Failure to comply with any of the duties established by the Act would constitute an offence.297

293 S 42(2) & (4) of FICA.
294 S 43(b) of FICA.
295 S 45(1) of FICA.
296 S 45(2) of FICA.
297 See Chapter 4 for the various offences punishable by maximum penalties ranging from one to ten million rand or a period of imprisonment of five to fifteen years.
4.4.2 PENDLEX TO THE FINANCIAL INTELLIGENCE CENTRE ACT

The amendment to the Act, brought about by the promulgation of the Financial Intelligence Centre Act Amendment Act,\(^{298}\) contains important provisions which are critical to compliance and ameliorate enforcement.

Section 43A provides for issue of a written directive to all institutions to whom the provisions of the Act apply by the Centre or a supervisory body regarding the application of the Act. Over and above the issue of a written directive, the Centre or supervisory body is given powers to ask in writing from any accountable or reporting institution to be furnished with specified information within a period specified or may direct the said institution to cease or refrain from engaging in any act, omission or conduct in contravention of the Act or may direct the institution to perform certain acts necessary to remedy an alleged non-compliance or to meet any obligation imposed by the Act.\(^{299}\)

Section 43B provides for the registration of every accountable institution referred to in Schedule 1 and also every reporting institution referred to in Schedule 3 with the Centre within the prescribed period. All information regarding such registration must be maintained by the Centre and any changes to the particulars furnished to the Centre upon registration must be made in writing to the Centre within 90 days.\(^{300}\)

Section 45A provides for the appointment of inspectors by the director of the Centre or head of supervisory body from persons in the service of the Centre or supervisory body to undertake inspection in terms of the Act.\(^{301}\)

Section 45B provides that an inspector may for the purposes of determining compliance with the Act, at any reasonable time and on reasonable notice (where appropriate) enter and inspect any premises at which the Centre or the supervisory

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\(^{298}\) Act 11 of 2008.
\(^{299}\) Inserted by s 14 of Act 11 of 2008.
\(^{300}\) Inserted by s 14 of Act 11 of 2008.
\(^{301}\) Inserted by s 16 of Act 11 of 2008.
body reasonably believes that the business of an accountable institution or reporting institution or other person to whom the provisions of the Act apply, is conducted.\textsuperscript{302} In the exercise of his or her functions, the inspector has powers to summon a person for questioning, order production of any document, search and seize any document, computer or equipment upon issue of receipt or examine or make extracts from or copy any document.\textsuperscript{303}

Section 45C provides for administrative sanctions and give guidelines to the Centre or supervising body when such sanctions may be visited upon the non-complying institution.\textsuperscript{304}

\subsection*{4.4.3 PREVENTION OF ORGANISED CRIME ACT\textsuperscript{305}}

The central goal of the Act is to ensure crime does not pay, literally and financially speaking. Chapter 5 of the Act provides for the criminal confiscation of the proceeds of unlawful activities and Chapter 6 for the civil forfeiture of the instrumentalities and proceeds of unlawful activities. Both procedural devices are made by way of civil application – the former to the court that had tried and convicted the defendant (or to a High Court for restraint order if prosecution is pending) and the latter to a High Court, first for the preservation of property order which is followed by the forfeiture of property order. The difference between the two procedures lies in the fact that criminal forfeiture follows upon the criminal prosecution and conviction of the defendant (specific person) whereas in civil forfeiture no criminal conviction or impending prosecution against the offender is precedent. The latter targets the property: that has been used to commit an offence (instrumentalities of crime); which constitutes the proceeds of crime; or which is derived from the proceeds of crime. It is therefore described (archaically) as \textit{in rem}.\textsuperscript{306}

\textsuperscript{302} Inserted by s 16 of Act 11 of 2008.
\textsuperscript{303} S 45B(2) of FICA as amended. Failure to comply constitutes an offence – see s 62A.
\textsuperscript{304} Inserted by s 16 of Act 11 of 2008.
\textsuperscript{305} Act 121 of 1998. Effective from 21 January 1999, commonly known as POCA.
\textsuperscript{306} The notion originates from a common law practice where an ‘offending’ object was confiscated not to compensate victim but to ‘appease God’s wrath’ – BEN CLARKE ‘Confiscation of Unexplained Wealth: Western Australia’s Response to Organised Crime Gangs’ (2002) 15 SALJ note 3. Cf the views of Van Der Walt ‘Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause’ (2000) 16 SAJHR 1 34.
As far as criminal confiscation is concerned, the Act provides, in section 18, that the court may on the application of the public prosecutor enquire into any benefit which the defendant may have derived from the offences of which he has been convicted or any criminal activity which the court finds to be sufficiently related to those offences. If the court finds that the defendant has so benefited, may in addition to any punishment which it may impose in respect of the offence(s), make an order against the defendant for the payment to the State of any amount it considers appropriate.\textsuperscript{307} The court may, in addition, make further orders as it may deem fit, to ensure effectiveness and fairness of that order.\textsuperscript{308}

The amount of such order shall not exceed the value of the defendant's proceeds of the offence or the amount which in the opinion of the court might be realised in terms of section 20.\textsuperscript{309}

Where prosecution is still pending, a High Court may grant a restraint order, in instances where a prosecution for an offence has been instituted against the defendant or the court is satisfied he or she will be charged with an offence and there are reasonable grounds for believing that a confiscation order may be made against such person, to prohibit such person from dealing in any manner with any property to which the order relates.\textsuperscript{310} Applications for such orders are brought before court by way of an \textit{ex parte} application by the National Director of Prosecutions.\textsuperscript{311}

The effect of such an order is that any police official may seize any such property to which the order relates, if he or she has reasonable grounds to believe that such property will be disposed or removed contrary to the restraint order.\textsuperscript{312}

As far as civil forfeiture is concerned, the Act provides, in section 38, for the preservation of property orders which precede the final forfeiture order. The

\begin{itemize}
\item \textsuperscript{307} See s 18(1) of POCA.
\item \textsuperscript{308} Fn 307 supra.
\item \textsuperscript{309} See s 18(2) of POCA.
\item \textsuperscript{310} See s 25 of POCA. Except i.t.o conditions & exceptions as specified in the order.
\item \textsuperscript{311} See s 26 of POCA.
\item \textsuperscript{312} See s 27 of POCA.
\end{itemize}
applications for such orders are brought by way of an *ex parte* application to a High Court. The order is intended to prohibit any person from dealing in any manner with any property, subject to such conditions and exceptions as may be specified in the order.\(^{313}\) The High Court shall make an order if there are reasonable grounds to believe that the property concerned is: \(^{314}\) an instrumentality of an offence referred to in Schedule 1; \(^{315}\) or the proceeds of unlawful activities.

After the order has been made, the National Director of Public Prosecutions must give notice of the order to all persons known to have an interest in the property and publish such notice of order in the Gazette. Upon being served with the notice, any person who has an interest in the property may enter an intention to oppose the making of a forfeiture order or for an order excluding his or her interest in the property from the operation thereof.\(^{316}\)

Section 48 provides for the National Director of Public Prosecutions to apply to a High Court, by way of notice, for an order forfeiting to the State all or any property that is subject to the preservation of property order. If a High Court finds, on a balance of probabilities, that the property concerned: is an instrumentality of an offence referred to in Schedule 1; or is the proceeds of unlawful activities, the High Court shall make the forfeiture order.\(^{317}\) The High Court may, when making a forfeiture order, make an order excluding certain interests in property.\(^{318}\)

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\(^{313}\) See s 38(1) of POCA.

\(^{314}\) See s 38(2) of POCA.

\(^{315}\) Contains crimes: involving violence like murder, robbery, assault; involving sexual violation like rape, sexual assault; involving dishonesty like extortion, fraud, theft; involving drugs and drug trafficking; firearms and munitions; exchange control; obstruction of justice; perjury and many more.

\(^{316}\) See s 39(1)-(3) of POCA. Section 47 also provides an affected party with an opportunity to approach a High court in order to apply for variation or rescission of the order.

\(^{317}\) See s 50(1) of POCA.

\(^{318}\) See s 52(1) of POCA. Such an exclusion would be made by court on the basis that it finds, on balance of probabilities, that the applicant had acquired the interest in the property legally (for a proportional value not significantly less than the interest) and (if acquired after the commencement of the Act) he or she neither knew nor had reasonable ground to suspect the property is the proceeds of unlawful activities. The prosecution also obtains in relation to forfeiture of an instrumentality of an offence referred to in Schedule 1 if the court finds on the balance of probabilities that interest in such property was acquired legally and the applicant has since the commencement of the Act (if it happened before commencement) taken all reasonable steps to prevent the use of the property as an instrumentality of an offence referred to in Schedule 1. However, it should be noted that the provisions do not avail a ‘uniform innocent defence’ as can be discerned in s 52(2A)(b) of POCA.
submits, however, that these orders affect rights of the defendant and third parties before facts which justify final confiscation or forfeiture have been tested and proved. A real possibility exists that the defendant will not be convicted or that reasonable grounds required by section 52 will not be proven on a balance of probabilities.

4.5 CONCLUSION

It is clear from the above exposé that South Africa’s legislation satisfies the minimum requirements contained in FATF’s Forty Recommendations. However, all structures provided, need to be in place for effective implementation. In the next chapter, implementation of legislative framework is considered, in order to assess its impact to the fight against organised crime.

320 Fn 319 p 105 & 106.
CHAPTER 5
IMPLEMENTATION

5.1 INTRODUCTION

In this chapter, implementation of the legislative provisions to fight organised crime is discussed. Implementation would entail: receipt and analysis of information reported to the Financial Intelligence Centre and passing or supply of that information by the Centre to the authorised police agencies for investigations of cases involving money laundering; investigations of serious organised predicate crimes by specialised units in the police services, prosecution of those cases justiciable in courts of law followed by the passing of judgements and sentences by the courts in deserving instances including confiscation or forfeiture of offending property in appropriate and justified circumstances.

5.2 FINANCIAL INTELLIGENCE CENTRE AND INVESTIGATIVE DUTIES

In compliance with the Financial Intelligence Centre Act, the Financial Intelligence Centre has since been created to receive reports from financial and other reporting institutions. Information given to the Centre is being made available to the investigating authorities after it has been vetted and analysed, and investigating authorities are able to request supply of any such information at the disposal of the Centre. The Centre has also been placed in a position to share or exchange information at its disposal with foreign Financial Intelligence Units, and to supply it to the prosecuting authorities when requested to do so. The effectiveness of the Centre operations can only be assessed in the future. However, The Centre’s Annual Report for 2007/2008 shows progress in its operations.

321 Fn 13 supra.
322 W.e.f February 2002. It is constituted as a juristic person located outside the public service but within the public administration i.t.o s 195 of the Constitution. It started receiving reports on suspicious transactions on 3 February 2003. It liaise closely with SAPS, DPCI, AFU, SARS, NIA, SARB, Reporting institutions, Supervisory bodies & government departments. According to the 2007/2008 annual report the Centre received 24 580 suspicious transaction reports and made 999 referrals to law enforcement authorities.
323 FICA is already a member of the Egmont group since June 2003 where such information is shared by FIUs.
The South African Police Service has detective structures in place to conduct investigations of organised crimes and money laundering activities. Such investigations are carried out primarily by:

- Organised crime units established in every province of the Republic;\(^{324}\)
- Special investigations units;\(^{325}\)
- Serious and violent crimes units;\(^{326}\)
- Commercial crimes units.\(^{327}\)

Multi-dimensional, as opposed to single-dimensional investigations, are allocated to organised crime units. These investigations involve a variety of criminal activities by an identified organised criminal group with a view to obtain profit or power.\(^{328}\) The investigations are long-term operations undertaken with interactions with institutions like the Department of Home Affairs, South African Revenue Service, intelligence agencies and prosecuting authorities.\(^{329}\)

With the recent launch of the Directorate for Priority Crime Investigations\(^{330}\) to take over all the functions of the erstwhile Directorate for Special Operations,\(^{331}\) it is envisaged that multi-dimensional investigations relating to organised crime viewed as national priority would be undertaken by this Directorate, dubbed ‘the Hawks’. It has been tasked to prevent, combat and investigate national priority offences as well as

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\(^{324}\) National Organised Crime Secretariat undertakes the prioritisation and the allocation of projects at national level on the basis of national organised crime threat analyses carried out by SAPS at that level. This is ‘mirrored’ at provincial level by the Provincial Organised Crime Secretariat on the basis of the provincial crime threat analyses carried out by SAPS at that level. At the Secretariat all component heads of the detective service are represented to ensure joint and correct priority and allocation of projects to the most appropriate investigating unit – see Smit ‘Clean money, suspect source’ (January 2001) ISS Monograph No 51 p 75 & 76.

\(^{325}\) These units deal with single dimensional investigation concerning organised groups i.e. where only one type of criminal activity is involved eg. sexual offences, diamonds & gold, drugs & drug trafficking, Illegal aliens – see Smit ‘Clean money, suspect source’ at fn 324 supra p 73 & 76.

\(^{326}\) These units deal with murder and robbery, hijackings, firearms, taxi-related crimes and crimes against the state – Smit at fn 324 supra p 73.

\(^{327}\) These units deal with commercial crime, syndicates, fraud, - Smit at fn 317 supra p 73.

\(^{328}\) See Smit at fn 324 supra p 76.

\(^{329}\) See Smit at fn 324 supra p 76. For a recent example of such joint venture – see media release of 14 June 2009 (www.fic.gov.za).

\(^{330}\) DPCI, also known as ‘Hawks’.

\(^{331}\) DSO, commonly known as ‘Scorpions’.

any other offence or category offences referred to the Directorate by the National Commissioner.\textsuperscript{332} It promises to make a significant impact on organised crime syndicates, serious and violent crimes as well as white collar crimes and corruption. Unlike its predecessor which was based in the National Prosecution Authority, this Directorate is based in the South African Police Service under the direct control of the National Commissioner of Police, with the Minister of Police as its sole political head. However, the Directorate will be assisted by a ‘dedicated component of prosecutors’, which gives hope it would still be prosecution guided in order to make a significant impact to organised crime.\textsuperscript{333} Other institutions like Home Affairs, South African Revenue Service, and various intelligence agencies should still play pivotal roles during the investigations.

The Directorate’s organisational structure is still in the process of being finalised. It is envisaged that the functions of the Organised crime units, Commercial crime units (including Investigating Directorate for Serious Economic Offences), and the High Technology Project Centre will also be transferred to the Directorate.\textsuperscript{334}

Since August 1995, the South African Police Service is the founder member of the Southern African Police Chiefs Co-operation Organisation whose aim is to foster cooperation and joint strategies for the management of all forms of cross-border and related crimes with regional implications.\textsuperscript{335} It is also a member of Interpol effective on 3 February 1997 per Resolution AGN/63/P. Res/24 of the 63\textsuperscript{rd} General Assembly of Interpol in Rome.\textsuperscript{336}

\section*{5.3 PROSECUTING AUTHORITIES}

The National Prosecuting Authority is headed by the National Director of Public Prosecutions. In this office is located the Asset Forfeiture Unit which is responsible

\begin{itemize}
\item \textsuperscript{332} See SAPS statement issued to Online Innovations dated 6 July 2009 (accessed through \url{www.bac.co.za/news} on 2009/11/10).
\item \textsuperscript{333} Fn 332 supra.
\item \textsuperscript{334} Fn 332 supra.
\item \textsuperscript{335} Schönsteich ‘How organised is the state’s response to Organised crime?’ (1999) \textit{African Security Review} 8(2) p 8.
\item \textsuperscript{336} See Msuthu \textit{Responses to Organised Crime in SADC: Interpol and SARPCCO}’ at Fn 7 Chapter 2 p 13-20.
\end{itemize}
for the institution of confiscation and forfeiture of criminal assets procedures and to ensure such assets are used effectively to fight organised crime. The unit is headed by a special director (one of the three Deputy National Directors of Public Prosecutions) who has a mandate to develop policy guidelines in detail for forfeiture proceedings. The unit supports and lends assistance with financial investigations, confiscation or forfeiture proceedings. Investigating Directorates which used to reside in the Office of the National Director of Public Prosecutions have since the advent of the Directorate for Priority Crimes Investigations been relocate to the South African Police Services. Special investigations would, however, still be prosecution-guided and not prosecution driven like before.\textsuperscript{337} In each province the National Prosecuting Authority is represented by Directors of Public Prosecutions as heads of the provinces. They institute and conduct prosecutions of organised crime and other crimes at provincial level. Of concern though is the general inexperience and weakened capacity of the staff component at that level.

5.4 COURTS

Since the passing of the interim and final Constitution, our courts have on many occasions had to pronounce on the constitutionality and had broached several substantive requirements of a number of provisions or measures aimed to implement and prevent crimes, identified mostly to be predicate to organised criminal activities and to proceeds thereof. In each category a few cases will be highlighted to demonstrate how our courts have dealt with such laws in order to ensure that constitutional imperatives and interest of justice are not compromised in the haste of curbing organised crime and money laundering.

5.4.1 DRUG TRAFFICKING

The Drugs and Drug Trafficking Act incorporated basic fact presumptions, which sought to relieve the prosecution of the burden of proving that an accused person

\textsuperscript{337}Wannenburg however, does not believe the DPCI will command the same reputation of being the ‘untouchables’ units previously enjoyed by the DSO – see fn 10 supra p 17. Although the DPCI would still be prosecution-guided, the proximity between the investigators and prosecutors and independence in their functioning might be critical. In its mandate the DPCI will not be able to do proactive investigations like the DSO did - at p 20 & 21. For dangers posed by prosecution-led investigations, see Redpath Scorpions fn 10 p 63-65.
was dealing in a specified drug, once it had proved the accused person possessed a
certain quantity of the drug. In *S v Bhulwana; S v Gwadiso*, the High Court
found the presumption contained in section 21(1)(a)(i) of Act 140 of 1992 which
determines that, if accused possesses more than 115g of dagga he or she is
presumed to be dealing, to be in conflict with presumption of innocence entrenched
in section 25(3)(c) of Act 200 of 1993. The court found the presumption not
necessary or justifiable as contemplated by section 33 of the interim Constitution.

### 5.4.2 PARTICIPATION IN ORGANISED CRIMINAL GROUP

In *S v Eysen*, the Supreme Court of Appeal interpreted and gave meaning to the
terms ‘manage’, enterprise, pattern of racketeering activity and ‘planned’ as
contained in section 2(1)(e) and (f) of POCA. The appellant was convicted in the
High Court on two counts relating to racketeering activities, namely, contraventions of
section 2(1)(e) and (f) of the POCA, a contravention of section 9 of the same Act and
two counts of house breaking with intent to rob and robbery, and one count of
robbery with aggravating circumstances. He was sentenced to a 20-year sentence
on the racketeering count. Sentences in the other counts were ordered to run
concurrently with the 20-year sentence.

On appeal, the court distinguished between the provisions of section 2(1)(e) and
2(1)(f) of POCA and held that the former required actual participation of the accused
in the conduct or the affairs of an enterprise while the latter in managing an
enterprise required that the accused must have known or ought reasonably to have
known that another person, whilst associated with the enterprise, was engaged in
racketeering activity (knowledge rather than participation was required). The court
gave ‘manage’ its ordinary meaning and found that ‘enterprise’ was widely defined. It
found that where a group of individuals associated in fact was concerned, the
association would have to be conscious and there would have to be a common factor
or purpose identifiable in the association and further the association will have to be

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338 Fn 16 *supra* s 21(1)(a)(i).
339 1995 2 SACR 748 C.
340 2009 1 SACR 406 SCA.
341 Fn 340 *supra*, 406 – headnote.
ongoing and the members would have to function as a continuing unit. The court broached the definition of ‘pattern of racketeering activity’ and found that the word ‘planned’ qualified words – ‘ongoing’, ‘continuous’, or ‘repeated’ which followed it and that unrelated or coincidental instances of proscribed behaviour would not constitute a pattern.  

In *S v Dos Santos and Others,* the High Court interpreted the word ‘offence’ in the definition of ‘a pattern of racketeering’. The court followed a literal dictionary meaning as referring to ‘such a transgression of the law as will make the transgressor liable to trial and punishment’. The court also paid due regard to the relevant portions of the Preamble to the POCA and concluded that the word ‘offence’ was intended by the Legislature to carry its ordinary meaning and not a conviction.

### 5.4.3 CORRUPTION

Except for the famous but yet unreported case of *S v Selebi,* which was against the erstwhile National Commissioner of Police, no cases on the new Act could be found to have been reported.

### 5.4.4 INTERNATIONAL CO-OPERATION

South African courts have demonstrated a wide approach to extradition procedure like the European Court of Human Rights did in the case of *Soering v UK,* when dealing with human rights-based limitations. The question is not only asked whether deportation or extradition complies with relevant empowering statute or treaty, but goes beyond to establish if it is constitutionally permissible in instances where fundamental human rights are likely to be infringed. In the *Soering* case, the European Court of Human Rights held, that surrender of fugitives where there will be

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344 *S v Dos Santos and Others* case no.32/2005 delivered on 8 June 2006 in High Court of Good Hope, p 20-21.
345 1989 11 ECHR 439.
a danger of being subjected to torture, however heinous crime committed, to be incompatible with the European Convention on Extradition.\textsuperscript{346}

In \textit{Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the death penalty in South Africa and Another intervening)}\textsuperscript{347} the human rights to dignity,\textsuperscript{348} life,\textsuperscript{349} and against cruel or inhumane or degrading punishment were at issue.\textsuperscript{350} The Constitutional Court acknowledged the distinction between deportation and extradition procedures, which arise from different empowering statutes, but held that an obligation to secure an assurance against death penalty does not depend on whether it is deportation or extradition but depends on facts of particular case and the provisions of the Constitution and not on empowering legislation or extradition treaty under which deportation or extradition is carried.\textsuperscript{351} On the facts it further held, that Immigration Authority failed to give value to Mohamed’s life, his right to have dignity respected and right not to be subjected to inhumane, cruel and degrading punishment.\textsuperscript{352} This was found to be contrary to the underlying values of the constitution and it failed or ignored the commitment, implicit in the Constitution, not to be party to inhuman, cruel and degrading punishment.\textsuperscript{353}

In Director of Public Prosecutions, \textit{Cape of Good Hope v Robinson},\textsuperscript{354} the fair-trial rights were in consideration. The respondent was tried and convicted in Canadian Court in 1996 of sexually molesting a 14-year old girl. He subsequently fled to South Africa after conviction and was sentenced in his absence to 3 years imprisonment. The court held that the Minister of Justice and Constitutional Development and not the extradition magistrate has the power, in terms of section 11 of the Extradition Act to consider whether the constitutional rights of the person sought may be infringed.

\begin{footnotes}
\item[346] Fn 345 par 889.
\item[347] 2001 3 SA 893 CC.
\item[351] Fn 339 \textit{supra}, par 40-43 at 911B – 912F.
\item[352] Fn 339 \textit{supra}, par 48 at 913G – 914B.
\item[353] Fn 339 \textit{supra}, par 58 at 916H – 917B-C.
\item[354] 2005 (1) SACR CC.
\end{footnotes}
upon extradition and that the correctness or otherwise of the decision is subject to judicial control.\footnote{355} In the case of \textit{Kolbatschenko v King NO},\footnote{356} which involved letter of request to Liechtenstein for seizure of certain books, documents and records, the High Court reinforced the right of the individual in mutual legal assistance proceedings to have access to courts and to be heard.\footnote{357} The court held that persons affected by a letter of request issued under section 2(2) have equal rights to persons afforded procedural rights in term of section 3(1) to approach a court to have the letter of request set aside on the ground that it is irregular or was unlawfully issued.\footnote{358} Despite the doctrine of separation of powers, the court found that owing to constitutional imperatives which demand government to be accountable, responsive and transparent in exercising its discretion or in making or taking an executive or an administrative decision, that directly affects rights and interests of such an applicant, a right to approach a court to seek remedy will only be denied in highly exceptional cases.\footnote{359}

\subsection*{5.4.5 CRIMINAL AND CIVIL FORFEITURE}

Criminal forfeiture is conviction based. It is usually, but not necessarily, preceded by a restraint order, granted by High Court, upon application by the State prosecutorial services to preserve the property liable to be confiscated after conviction.\footnote{360} It was held in \textit{State v Shaik and Others},\footnote{361} that the key or primary purpose of the procedure contained in Chapter 5 of the Prevention of Organised Crime Act is to ensure that no person can benefit from his or her wrong doing.\footnote{362} It was also said that the secondary purpose was general deterrence of criminals and prevention of

\begin{footnotesize}
\begin{itemize}
\item \footnote{355}{Fn 354 \textit{supra}, par 71.}
\item \footnote{356}{2001 4 All SA 107 C.}
\item \footnote{357}{Fn 356 \textit{supra}, p 125a-b.}
\item \footnote{358}{Fn 356 \textit{supra}, p 119g-h.}
\item \footnote{359}{See fn 356 \textit{supra}, p 123e-f. Only to be found in highly executive actions which affect State as a State.}
\item \footnote{360}{See s 25 of POCA.}
\item \footnote{361}{2008 2 SACR 165 CC.}
\item \footnote{362}{Fn 361 \textit{supra}.}
\end{itemize}
\end{footnotesize}
crime which was legitimate in constitutional order. The court found that although confiscation might at times have the effect of punishment of offenders, the primary purpose of the measures was not to provide for an additional punishment over and above the sentence imposed. The court also found that confiscation of ‘proceeds of unlawful activities’ should not be limited to net proceeds of crime but should include any property, advantage or reward derived, received or retained directly or indirectly in connection with or as result of any unlawful activity.

Interests of innocent third parties to the property subject to a restraint order or confiscation order are, however, discounted in terms of the provisions contained in the Prevention of Organised Crime Act. Firstly, notice is to be given to persons affected by the order. Secondly, that property may not be realised in order to effect a confiscation order unless all persons known to have any interests in the property concerned have been afforded an opportunity to make representations to the court in connection with the realisation of such property. Thirdly, where the court is satisfied that a person is likely to be directly affected by a confiscation order, or has suffered damage to or loss of property or injury as a result of an offence or related criminal activity which was committed by the defendant, the court may allow that person to make representations in connection with realisation of that property. Finally, if the court is satisfied that a victim has instituted civil proceedings, or intends to do so against the criminal for damage suffered as a result of the offence, the court may order that the realisation of any confiscated property be suspended for the period that the court deems fit in order to satisfy such a claim and related legal expenses.

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363 Fn 361 supra.
364 Ibid.
365 Ibid.
366 S 26(4) of POCA.
367 S 30(3) of POCA. Also see NDPP v Pillay and Others 2009 2 SACR 607 D where the right of an innocent former spouse was protected on the basis of ‘free co-ownership’ principle.
368 S 30(4) of POCA.
369 S 30(5) of POCA. This was confirmed by the decision in NDPP v Rebuzzi 2000 JOL 6562 W. It was subsequently overturned on appeal in NDPP v Rebuzzi 2002 2 SA 1 on the basis that the making of a confiscation order need not deprive the victim of the means of recovering his loss, bearing in mind that s 31(1) expressly provides that the state does not have a preferential claim. The court seized with the matter may make appropriate directions in the manner the proceeds are to be distributed.
Nel submits that, despite these safeguards, a child who is entitled to financial support remains in a vulnerable position, and questions how and by whom such a child’s needs and predicament be brought to the attention of the court where the defendant is uncooperative and has no desire to protect his or her own ability to support the child.\textsuperscript{370}

She believes, that the decision in \textit{Director of Public Prosecutions, Cape of Good Hope versus Bathgate}\textsuperscript{371} cannot be used to justify, morally and legally, the provisions that impose severe limitation of fundamental rights of children by the Prevention of Organised Crime Act.\textsuperscript{372} She suggests that a more viable solution would be to seek a solution in existing legislation protecting children’s rights in other areas of the law in South Africa.\textsuperscript{373}

Civil forfeiture, on the other hand, is not conviction based. It exists at the disposal of our law enforcement agencies in order to accomplish the forfeiture of the proceeds of unlawful activities and instrumentalities of an offence. There is a general view, amongst jurists, that the legislature carefully crafted the provision with the chief aim of placing such proceedings ‘beyond the reach and [purview] of the section 35 protection of the Bill of Rights’.\textsuperscript{374} In practice, however, the courts are alive and sensitive to such constitutional imperatives during forfeiture proceedings, and if the forfeiture would be disproportionate to the purpose of the act and would result, for example, to an arbitrary deprivation of property;\textsuperscript{375} or excessive punishment;\textsuperscript{376} loss of human dignity,\textsuperscript{377} the forfeiture would be pronounced constitutionally impermissible.\textsuperscript{378}

\begin{itemize}
\item \textsuperscript{371} 2000 (1) SACR 105C.
\item \textsuperscript{372} Fn 341 \textit{supra}, p 109.
\item \textsuperscript{373} Fn 341 \textit{supra}, p 115-117.
\item \textsuperscript{374} See \textit{NDPP v Mcasa} 2000 1 SACR 263 TE 269b-c; Van Der Walt ‘Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause’ (2000) 16 \textit{SAJHR} 1 34.
\item \textsuperscript{375} Mazibuko \textit{v NDPP} Case no 113/08 [2009] ZACSA 52, 26 May 2009 par 55.
\item \textsuperscript{376} Fn 374 \textit{supra}, s 35(3)(n); s 12(1)(e).
\item \textsuperscript{377} Fn 374 \textit{supra}, s 10.
\item \textsuperscript{378} See for example the minority judgment of Moseneke DCJ & Sachs J, \textit{Mohanram NO v NDPP} 2007 2 SACR 145 CC pars 107-155. Also see \textit{NDPP v RO Cook Properties (Pty) Ltd, NDPP v 37 Gillespie Street Durban (Pty) and another, NDPP v Seenarayan} 2004 2 SACR 208 SCA;
\end{itemize}
Section 34 fair-hearing rights are also jealously guarded, as demonstrated in *National Director of Public Prosecutions v Mohamed NO.* The court found that section 38 of the Prevention of Organised Crime Act does not expressly provide for *rule nisi,* and this was incompatible with section 44(1) of the same Act. The court held that the same rule should find application in the preservation of property orders.

### 5.5 CONCLUSION

The implementation of preventative measures against organised crime and money laundering is well underway through the application of FICA. The South African Police appears to be well dedicated to combating money laundering, but there is still a low number of money laundering investigations and prosecutions. South African authorities have effective mechanisms in place to co-operate with other states on operational matters to combat money laundering, and have adopted, in the legal framework, a flexible approach in dealing with mutual legal assistance requests. South Africa’s extradition framework is comprehensive and flexible. A more comprehensive evaluation and conclusion is made in the next chapter.

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379 2003 4 SA 1 CC par 33-52.

380 Fn 379 *supra.*
CHAPTER 6
EVALUATION AND CONCLUSION

6.1 EVALUATION

The comparison of pertinent measures between international instruments and South African legislative frameworks pertaining to organised crime clearly demonstrates that, comparatively, South Africa should be more than ready to fight organised crime perpetrated within and beyond its borders. In some areas of its legislation it has over-achieved.\textsuperscript{381}

All crimes predicate to money laundering, money laundering and organised crime in general have been criminalised as envisaged in the Vienna, Palermo and FATF’s Forty Recommendations, largely in terms of common law, Drugs and Drug Trafficking Act, POCA and FICA.

The Mutual Evaluation Report of 2009 on South Africa by the Financial Action Task Force and Eastern and Southern Africa Anti-Money Laundering Group shows the following:

\begin{itemize}
  \item Legal Systems and Related Institutional Measures are in place. However, amendment of section 6 of the Prevention of Organised Crimes Act would be necessary to make acquisition, possession or use of the proceeds of unlawful activities applicable to the person who committed the predicate offence;\textsuperscript{382}
  
  \item confiscation and forfeiture regime is being effectively implemented. The AFU, in the NPA, administers and implements the freezing and forfeiture provisions contained in POCA which apply to a broad range of proceeds, both direct and indirect, and property of corresponding value;\textsuperscript{383}
\end{itemize}

\textsuperscript{381}For an example, individual wrongdoing unrelated to organised crime may be dealt with under item 33 of schedule 1 of POCA. In \textit{NDPP v Engels} 2005 1 SACR 99 C the court referred to the item as ‘catch all’ provision. Furthermore for money laundering offences not only is knowledge (intention) punished, but also negligence (ought to have known) – see ss 4 to 6 of POCA.

\textsuperscript{382}Released on 26 February 2009 (accessed through \url{http://www.esaamlg.org} – 2009/10/27).

\textsuperscript{383}Fn 382 \textit{supra}, p 7 (executive summary).
• the Financial Intelligence Unit which is the Financial Intelligence Centre under the Ministry of Finance is well-structured, funded and staffed and functions effectively. It is also a member of the Egmont Group of Financial Intelligence Units;\(^{384}\)

• the SAPS appears to be adequately resourced and dedicated to combating money laundering. Law enforcement authorities have a broad range of investigative powers, including special investigative techniques. However, despite the necessary legal tools and funding to combat money laundering, there is a low number of money laundering investigations and prosecutions;\(^{385}\)

• preventative measures by financial and non-financial institutions have been implemented through the application of Financial Intelligence Centre Act which has been amended by the Financial Intelligence Centre Amendment Act of 2008 to enhance role to be played by the Supervisory Bodies in ensuring the provisions of the Act are complied with by institutions under their supervision;\(^{386}\)

• South African authorities have established effective mechanisms to co-operate on operational matters to combat money laundering. The Centre has mechanisms in place to exchange information and coordinate with the various stakeholders, regulators and law enforcement agencies effectively and to co-operate effectively amongst themselves;\(^{387}\)

• South Africa adopts a flexible approach in dealing with mutual legal assistance requests, and is able to render a wide range of mutual legal assistance under International Co-operation in Criminal Matters Act. It is able to render assistance without the need for a treaty or agreement and there is also no

\(^{384}\) Fn 382 supra, p 7.
\(^{385}\) Fn 382 supra, p 8.
\(^{386}\) Fn 382 supra, p 8-12.
\(^{387}\) Fn 382 supra, p 12.
requirement for dual criminality or instituted judicial proceedings to obtain evidence;\textsuperscript{388} and

- South Africa’s extradition framework is comprehensive and flexible. There is no requirement for a treaty and can also extradite its own nationals.\textsuperscript{389}

6.2 CONCLUSION

In conclusion the report recommends, in the order of priority:\textsuperscript{390}

- The amendment of section 6 of the Prevention of Organised Crimes Act in order to extend its application to predicate crime offenders; the amendment of the same Act in order to regularise and standardise sections 4 to 6 with sections 2 to 9 and keep more comprehensive statistics on reported, investigated and prosecuted cases on money laundering and subsequent convictions;

- the Centre should publish information concerning anti-money laundering cases, typologies and trend analysis. It should also consider tailoring suspicious transaction report form to meet the needs of non-bank reporting parties and issue sector-specific guidance concerning the reporting obligation;

- the South African Police service should consider developing its own expertise in forensic analysis, accounting and auditing;

- the South African authority should also appoint more prosecutors and provide them with a more skills based training;

- South Africa should establish more effective measures to monitor all incoming and outgoing cross-border transportations of currency and bearer negotiable instruments; and

\textsuperscript{388} Fn 382 supra, p 13.
\textsuperscript{389} Fn 382 supra, p 13.
\textsuperscript{390} Fn 382 supra, p 225-230.
• institute a primary obligation to identify beneficial owners.

There are many more recommended actions which relate to operational issues and which would not be dealt with in any further detail in this research. However, despite those specified operational issues that still need attention, it is submitted that the legislative framework is without a doubt, sufficiently comprehensive to enable law enforcement agencies to deal with the scourge of organised crime decisively, both nationally and transnationally. It is in the implementation area where polish is needed.

Prosecution of organised crime lags behind in the area of implementation:

AFU has registered more successes in their sphere of operation than other prosecution units have achieved in prosecution and conviction rates. There is evidence of a high success rate in applications for forfeiture orders and a high forfeiture order value by AFU. The AFU survived the relocation and disbandment which the DSO suffered. The report on prosecution and conviction rates, specifically on organised crimes since the DPCI took over from the DSO is not available but the Draft Performance Overview Report for NPA does not demonstrate a better performance yet, since the DSO was disbanded. The report states that in some regions the DSO was disbanded. The report states that in some regions the DPCI has not yet managed to settle personnel capacity.

The Department of Justice and Constitutional Development and NPA in particular are still under pressure to provide adequately experienced personnel to guide police investigations and conduct high level prosecution of crimes generally and organised crime in particular, in order to achieve better conviction rates. NPA still has problem of less than adequate remuneration scheme for all levels of prosecutors, in addition to inadequate office accommodation, which contribute to less than ideal working.

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391 Success rate=target rate of 86% set – actual rate achieved 92.4%gives surplus of 7.4% obtained. (See NPA Annual Report for 2009/2010 accessed through www.npa.gov.za on 29/1/11). Also see, Draft Performance Overview Report for NPA of April 2010 – October 2010 accessed through the same webpage.

392 Fn 391 supra.
conditions. All these challenges make it hard for NPA to retain skilled staff. Beside the above-mentioned challenges faced by NPA, more facilities, including in high courts, are needed for a proper dispensation of justice.\textsuperscript{393}

In concluding this research project, the recommendations follow in the next section.

6.3 RECOMMENDATIONS

In view of the scarce skills problem currently experienced by NPA, more financial resources need to be provided by the government to enable NPA to overcome this hurdle. Such provision would enable NPA to draw experienced professionals from private sector, pay competitive salaries and also give the required training of its personnel for this highly technical environment. Such financial assistance would also enable NPA to provide adequate office accommodation for its staff and provide, generally, the necessary wherewithal which is critical for an improved service delivery.

\textsuperscript{393} The shortage of facilities was acknowledged by the Minister of Justice and Constitutional Development in his Budget Speech of 24 June 2009 in the National Assembly (accessed through \url{www.dojcd.gov.za/} Reports on 29/7/2009.
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