

CRJ602W Masters in Criminal Justice

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-The Prevention of Organised Crime Act in International Perspective-

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Abstract

The objective of this paper is to locate the debate surrounding organised crime in South Africa within the larger context of international responses to organised crime. It will show that crime policy (in the form of the Prevention of Organised Crime Act) has been developed by the South African State in a global and globalising (these terms will be explained further below) environment and that the legislation produced has much in common with international policy regarding organised crime. This will lead the paper to conclude that there is growing evidence showing a convergence of crime policy globally and a greater harmonisation in approaches to problems that have a global character. By beginning with a conceptualisation of globalisation the paper hopes to explain why crime policy convergence occurs. It follows then that the study of the drafting of the Prevention of Organised Crime Act¹ (POCA) will be located within an analytical framework comprising two main components. The first is globalisation and the globalisation of crime policy, the second is the process of convergence and law enforcement harmonisation that has given rise to the phenomenon of policy convergence. Within this analytical framework, an examination of the form, content and process whereby POCA was drafted and implemented will be attempted. This paper is also concerned with providing the reader with a 'social history' of the formulation of the legislation. It will show that the drafting of the POCA was accomplished in a state that was grappling with transition and regime change and that these forces impacted upon the drafting process. In way of conclusion the input of international bodies will be explored within the context of late 20th century South Africa and a brief digression will be attempted to understand the effect the POCA has had upon local Cape Town communities. One might note then that only the sections of POCA that effect the Western Cape have been undertaken. In addition a critique of externally motivated policy upon local conditions will be attempted in order to understand the disadvantage and advantages of the POCA in regard to domestic concerns surrounding growing and vociferous calls for effective policy to counter organised crime internationally, regionally and sub-regionally. It must be noted that the author holds the view that, while international influences on the criminal justice systems of the world and South Africa have been diverse and have arrived from different quarters, the United States of America (USA) has played a dominant and enduring role in helping many developing states create and forge effective criminal justice institutions. This paper has, as a matter of expediency, focused almost entirely on the USA and the reader will no doubt note the absence of counter examples herein.

¹ Act 121 of 1998 as amended by Prevention of Organised Crime Amendment Act 24 of 1999 & Prevention of Organised Crime Second Amendment Act 38 of 1999.

Chapter 1: Introduction

The greater global interconnectivity that distinguishes the 20th and 21st century from the 19th century has been referred to as globalisation. Within our 'New World' states and individuals operate much closer together than ever before. Agricultural subsidies in the United States of America have a direct impact on South African grain farmers. Political decisions in England effect South East Asian economies. The media has become globalised and the world is connecting through artificial means like the Internet. Information is thus easily accessible and exchanged.

With the rise of globalisation has come a worrying threat to society, which has taken the form of organised crime. It must be kept in mind that this is not a recent occurrence. 'Organised crime' has developed and evolved in a way to take advantage of new favourable global conditions. These conditions are (in no particular order); advances in communications networks, greater freedom of movement and the expansion of transportation infrastructure. The technological advancements that organised crime has benefited from will make combating and policing it so much more difficult.²

Crime groups have grown and are co-operating with one another along borders that are less restricted. The criminal environment, today, has no "historical precedent." Ever since the September 2001 terror attacks against the United States of America global crime and terrorism as concepts have gained new meaning. It showed us that in this 'new world' corruption and denigration of the values of society in general have begun to threaten human security. The ability of states to provide for their own defence and security, according to Boone, no longer applies in a world that is becoming interdependent. It is against this background that Boone argues for global governance and a 'global effort' to combat a 'global challenge.'³

Organised crime also threatens to undermine the state itself by operating in the unregulated 'illicit global economy.' Crime has become globalised and responses to it have had to be swift and

² Redpath, J. 2000. 'The Impact of Technological Advancement on Organised Crime'. Paper delivered at the 'International Conference on Corruption and Organised Crime: Challenges for the New Millennium' Abuja, Nigeria, 7-11 May.

³ Boone, R. 2001. *United Nations Convention Against Transnational Organised Crime: Issues and Challenges*. Address to the 2nd World Conference on the Investigation of Crime in Durban 3-7 December. Boone was the representative for Southern Africa of the UN Office for Drug Control and Crime Prevention.

unilateral. Crime policy, therefore, has joined the process of globalisation through international and regional structures and we have witnessed a greater harmonisation of approaches to crime and crime policy.

Africa has also been effected by the growth of organized crime. This paper will consider arguments advanced by certain commentators that the state in Africa has become criminalised and that organised (cross border) crime is rampant. The African State has, in their view, become the 'felonous state' operating in tandem with syndicates to accumulate wealth and power. South Africa provides a strong counter example to this view, yet organised crime has still had an impact on the South African economy and society in general.

From the early 1990s onwards South Africa has been a state in transition from authoritarian to democratic rule. This transition has presented criminals with an opportunity to take advantage of relaxed border controls and weaker policing structures. Against this transitional background organised crime has become a growing. In response the government has been initiating both legal and administrative reforms to deal with the spectre of organized crime.

Organised crime as defined by the Palermo Convention (see above) is a broad concept that combines elements of society that may or may not be involved in what could be described as 'normal organised criminal activity.' According to the Palermo Convention an organised crime group is defined as follows:

*"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."*⁴

Redpath suggests that even terrorists could fall under the definition offered by Palermo delegates. Indeed, the Scorpions and National Intelligence Agency (the latter having been initially concerned with eradicating organised crime) investigated the bombings in the Cape in the late 1990s. This action in effect blurred the distinction (if they're ever had been one) between terror and organised crime. This blurring occurs worldwide and as this paper will show larger agencies than the Scorpions have made the distinction almost impossible to make.⁵

⁴ The Palermo Convention will be discussed further below.

⁵ Redpath, J. 2004. "The Scorpions: Analysing the Directorate of Special Operations." *ISS Monograph* no.96 March.

What Redpath does successfully is describe in basic terms why governments are threatened by organised crime. Simply put it is money. Illicit economic activity does not bother about tax. This destabilises economies. These monetary flows need to be stopped by adequate legislation. This paper will detail below the two themes in legislation that have become norm worldwide, not only in SA and it is this papers intention to find links between these forms of legislation to show ultimately that POCA is an example of policy convergence.

POCA was enacted in 1998. This Act was based largely on foreign legislation, but legislation that had been adopted by the international community in response to an international phenomenon. South Africa acted swiftly in its decision to adopt a strategy that could deal with gangsters and syndicates, come in line with international best practices and relieve itself of the burden of continued public criticism of crime policy and high crime rates. As this paper will show this new approach was not met with enthusiasm by all roleplayers.

This paper will provide a social history of the drafting of the POCA. An analysis of the context within which the POCA was drafted and enacted will be undertaken and the debates and controversies surrounding, not only the drafting, but also the main aims of the legislation will be attempted. The constitutionality of certain provisions will be discussed while maintaining the discussion within the broader context of crime policy convergence.

Methodology

In the composition of this research paper a wide range of primary and secondary sources were consulted. An extensive analysis of the relevant literature surrounding the main issues within this paper was undertaken and a concerted effort was made to accurately portray the views and opinions of writers referenced. The strictest guidelines regarding plagiarism were adhered to and the author is confident that the work presented is his own.

Primary sources of information included parliamentary documents, newspaper sources, speeches and interviews. The parliamentary documents took the form of minutes of specific portfolio committees (the Justice Portfolio Committee in particular) that dealt with the POCA legislation. An exhaustive search of all relevant minutes was made. This included contacting the Parliamentary Monitoring Group and obtaining a list of portfolio committee minutes pertaining to

the issue under investigation. Documentary analysis was undertaken with a view to accurately portraying and representing the evidence gathered therein.

Newspaper sources were obtained from various online sources, the Social Justice Resource Project⁶ and the National Library in Cape Town. A conscious attempt was made to access articles that reflected the essence of public attitudes towards the POCA and great efforts were made to read through articles from a range of publications printed between 1998 and 2000 concerning organised crime.

In addition to the literature review the author also conducted a small number of interviews. It was the author's desire that the interviews conducted targeted individuals that were intimately involved with the drafting of the POCA. In order to achieve this goal access needed to be negotiated. I was assisted in this regard by my supervisor. After an extensive period of back and forth communication three interviews were arranged with members of the national and local policy elite.

Interviews were tape recorded and transcribed. The main themes addressed in the interviews explored various aspects relating to the drafting of the Prevention of Organised Crime Act (POCA) the reasons underlying its drafting, the actual process of drafting with references to the political, social and economic factors impinging on the process as well as the participants involved. Lastly, the interviewees were also asked to comment on the broader effects of POCA.

Interviews were conducted with Irvin Kinnes⁷, Peter Gastrow⁸ and Willem "Base" Basson⁹ over a 30-day period. Interviews were structured around prepared questions. The questions were of an open-ended nature. However, questioning often became informal as answers and issues developed during the interviews. The interviews were conducted under the strictest ethical guidelines. All persons interviewed were assured of their right to anonymity but declined this offer. The interviews themselves were conducted in locations of the interviewee's choice adding to the relaxed nature of the interviews, which hopefully ensured that answers were concise and accurate reflections of the issue at hand.

⁶ Based at the Institute of Criminology, Faculty of Law, University of Cape Town.

⁷ Cape Town based gang expert and criminologist.

⁸ Head of Cape Town branch of the Institute of Security Studies and chairman of the POCA drafting committee.

The information gathered from the interviewees was sufficient for the purposes of this paper and added a certain amount of credibility to the findings therein. Newspaper sources provide the paper with a valuable source of information with which to contextualise the discussion. The secondary sources (which are largely current and new sources of information) add to the paper as a whole.

⁹ Deputy Director for Crime Prevention at the Department of Community Safety in the Western Cape Province and acted in an advisory capacity during the drafting of the POCA. Also a local gang expert.

Chapter 2: Globalisation and the globalisation of crime

The purpose of this chapter is to discuss the concept of globalisation from a number of perspectives. The primary source will be the criminological interest in the subject and a secondary but no less important contribution from international political theorists. The aim of criminologists, briefly, is to understand why crime occurs, where it occurs and why and what measures are used by states to counter the problem of crime.

The second of the two approaches (typically) explores the concept of globalisation and debates the competing theories dealing with the international system and is concerned, ultimately, with politics and political power play between actors in the international arena.

One may suggest that combining two fields of thought in a single paper is folly. However, together these two approaches help us to understand the concept of globalisation and for the purposes of this paper to explore the effect globalisation has on crime policy aimed at eradicating transnational and national organised crime.

Ultimately the purpose of this chapter is to explore the nature of the international system vis-à-vis globalisation and to explore the substance of the hypothesis that argues that, because of the changing nature of the world and international system we are witnessing a greater harmonisation of crime policy.

The chapter shall begin by describing the effect of organised crime on democratic society. In so doing we might highlight the obvious but sometimes overlooked reality that crime undermines the authority of the democratic state. It is important to remind oneself that at the root of policy designed to eradicate crime is a desire to protect the society at large.¹⁰

2.1 Organised crime as a threat to the democratic state

¹⁰ See Shelley, L. Statement of Dr. Louise I. Shelley before the House of Representatives' Committee on International Relations, October 1, 1997 http://www.american.edu/tracc/Publications/Shelley_testimony1097.html discussing the effect of organised crime on society.

One of the challenges to democracy has been the growth of organised crime. Some figures suggest that the cost of organised crime could be as high as \$600 billion dollars annually.¹¹ Organised criminal syndicates would find it difficult at best to operate without allies within state structures. From corrupt border patrol officials to high-ranking civil servants, corruption has appeared in most states. Yet Allum and Siebert suggest that corruption of officials and the presence of organised crime does not in itself pose a danger to democracy.¹² They argue that in the absence of effective leadership people turn to crime networks for security. These take the forms of protection and economic relief, for example. In return these groups ask for loyalty and obedience. In areas like Sicily this loyalty has been transformed into political power. Politicians are bought or offer loyalty to the Mafia who in turn ensure that their followers vote for the politician they choose.

The symbiosis of crime and democracy¹³ is accepted in some countries like Italy. The gray area of societal acceptance of crime is balanced by the democratic state, which upholds democratic principles. Where organised crime becomes a real problem to *democracy* is when the actions of the criminals impact upon the fundamental bedrock of society, namely civil society. The formation of groups and organisations that support democratic principles and community are essential in maintaining social cohesion and the status quo.¹⁴

Of course some politicians have lambasted organised crime and argued that it threatens their societies when they are in fact talking about terrorism. The link between the two is real but not complete. Organised crime is more likely to impact negatively on the economic side of life while terrorism aims to bring about regime change. It is not in the interests of organised criminal networks to change the state if they are doing well within it and while the modus operandi of terrorist groups and organised criminal networks are similar their desired goals are not.¹⁵

On the other hand the freedoms and liberties people enjoy in democratic states can be threatened by organised crime which looks to influence the political process by buying off politicians, police, judges, administrators, entrepreneurs and civil servants. This weakens the democratic

¹¹ Berdal, N. & M, Serrano (eds.). 2002. *Transnational Organised Crime and International Security*. London: Boulder. p.2.

¹² Allum, F. & R. Siebert (eds.). 2003. *Organized Crime and the Challenge to Democracy*. London: Routledge. pp. 219-224.

¹³ Chapter 3 will consider Bayart and his work on the criminalisation of the state in Africa.

¹⁴ Allum & Siebert, 2003, pp.225-228

process, institutions and principles but can be and is balanced by civil values (although a certain amount of courage and determination is required to meet this danger). Ultimately the threat organised crime poses to democracy is summed up succinctly by Allum & Siebert,

...the challenge organized crime represents for democracy is to confront it with its responsibilities, to force it to measure itself against its own ideals and basic principles and constantly revivify its own resources- in terms of rights, freedoms and legitimacy- in guaranteeing the equality of citizens.¹⁶

2.2 International political theory and globalisation

It is commonly accepted that globalisation is a phenomenon that has progressed steadily since the end of the Middle Ages. Waters sums it up quite eloquently when he says that globalisation "... is the direct consequence of the expansion of European culture across the planet through settlement, colonisation and mimesis. It is also bound up intrinsically with patterns of capitalist development, as it has ramified through political and cultural arenas. However, it does not imply that every corner of the planet must become westernised and capitalist but rather that every set of social arrangement must establish its position in relation to the capitalist West... it must relativise itself."¹⁷

In theory the idea that cultures can maintain a semblance of their previous selves is idealistic. The power being wielded over them by the most powerful states using diplomacy, the media and finance (through aid in particular) makes the choice of 'relativising' an involuntary one at best. We must not assume that this process is occurring without covert coercion. If we do, we assume that the path being followed is being legitimised through simple adherence to the reigning status quo. Yet the fact remains that improving technologies and greater interconnectivity are effecting the world today. The view of Waters is one perspective of the process that is occurring. To understand the differing views on globalisation some reference to political theory is helpful in putting the competing theories in perspective. In short it is helpful to distinguish between three competing approaches: the globalists, realists and the pluralists.

¹⁵ Shelley, L. & Picarelli, J. 2002. "Methods not motives: Implications of the convergence of international organized crime and terrorism." *Police Practice and Research*. Vol.3 no.4 pp. 305-318.

¹⁶ Allum & Siebert, 2003, p.228.

The Globalists' outlook (of Waters and others) is the global context within which states and entities coexist and interact. Their view is dominated by a historical perspective, which analyses how some actors or bodies act as 'mechanisms of domination.' As a product some parties benefit from this relationship. They are, primarily, concerned with money and power. Who has it and how they got it by defining, refining and exporting economic ideas to other countries. One should be warned that this view does not consider in depth the role of the state in protecting its own interests (the realist perspective) or the role of non-state actors in shaping world affairs (the pluralist view).¹⁸

The pluralists hold to the belief that the state is neither a unitary nor a rational actor and consider social issues as more important than military/security issues. Issues such as energy, resources, use of space (developmental issues) and the environment are of outmost concern. By looking at crime policy and the exportation of crime policy ideas or 'knowledge' to other countries we could argue that the USA has a largely realist perspective. When it comes to crime policy and combating terrorism and organised crime the concerns of nature and globalisation do not concern them as much as the basic security of the state. It and its allies have actively and openly exported ideas to protect and advance its own military/security concern in response to terrorism, in particular. In summary realists view the world as constituted by states competing for scarce resources. The state is of central importance and the major player in world affairs. It acts in its own interest when deciding on policy and matters of national concern.¹⁹

The United States of America (USA) has led the way in creating a homogenous and globalised world system in which we all must, as Waters puts it, 'relativise' ourselves. Indeed the presence of the hegemonic power in world affairs (including the affairs of South Africa) has had an enormous effect on the way individual states operate. South Africa has made use of US advisors and funds to establish 'US like structures' in their criminal justice system. Such developments point to the Americanisation of social policy.²⁰

¹⁷ Waters, M. 1995. "Globalisation." London: Routledge. In Findlay, M. 2000. *The Globalisation of Crime: Understanding Transitional Relationships in Context*. Cambridge: Cambridge University Press. p.9.

¹⁸ Viotti, P. & Kauppi, M. 1987. *International Relations Theory: Realism, Pluralism, Globalism*. New York: Macmillan Publishing Company. Ch. 1

¹⁹ Ibid.

²⁰ The paper will discuss the apparent Americanisation of SA institutions in further detail below.

The concern with globalisation is not restricted to non-Americans. Americans are concerned and anxious about the integration of the US with the rest of the world. They believe that integration constrains their ability to create policy that will directly benefit Americans. Other parties are concerned that the globalisation of policy will lead to the formulation of policy that is politically acceptable instead of intrinsically reliable and based on sound knowledge and investigation.²¹

In response some commentators have argued that criminology is suffering from the globalisation of policy in much the same way and argued that political power "has detached itself from its previous need for academic legitimisation."²² Haggerty argues that policy makers no longer need the input of criminologists. He ascribes to the notion set forth by Garland who states that the public's attitudes toward crime is "sustained and reproduced by cultural scripts and not by criminological research or official data."²³

The influence of certain Western states on crime policy worldwide is beyond dispute. There is also growing similarity between policing jurisdictions. The transnationalisation of policing (as Sheptycki argues) is a reality. Sheptycki would argue, however, that this realist perspective should take stronger heed of those organisations that operate outside the realms of the state in the global arena.²⁴ This 'extranational realm' houses the banking systems, business systems and global factories that play such an important role in world affairs.

Crime policy convergence is a feature of contemporary society and is important to any paper looking to understand the effect of globalisation on this process. There are however, arguments that advance the view that the connection between organised crime and globalisation are not as clear as it might seem.

For Berdal and Serrano the issue of whether the external domain is linked in any way to organised crime is an important consideration. They argue for hypotheses that do not "rule out the relevance of changes in the international sphere to the rise of transnational organised crime but

²¹ Drezner, D. 2001. "Globalization and Policy Convergence." In *International Studies Review* 3 (spring 2001) 53-78. At www.danieldrezner.com .p.55 <Accessed on 02 February 2005>

²² Haggerty, K. 2004. "Displaced expertise: Three constraints on the policy relevance of criminological thought." In *Theoretical Criminology*. Vol. 8 No. 2 p.228.

²³ Garland, D. 2000. "The Culture of High Crime Societies: Some Preconditions of Recent 'Law and Order' Policies," *British Journal of Criminology* Vol. 40 No. 2 at p. 368.

²⁴ See Sheptycki, J. 2000. *Issues in Transnational Policing*. London: Routledge. Introduction.

that [does] not take it for granted either.”²⁵ Perspectives then are divided between those viewing globalisation and organised crime as moving in tandem and those that see it as two competing entities.²⁶

It is with this in mind that they advance what they call their *argumentative hypothesis*, that globalisation and market economic reforms have played a major role in the globalisation of crime. This is due to three factors: The first is that the infrastructure and ‘undeniable material aspect of globalisation’ that has supported the ‘internationalisation of economic and social relations’ has also supported the illegal economy. The flow of both illicit and licit goods has been improved by this state of affairs. This requires qualification and the authors provide it. The first is that the liberalisation of trade has been paralleled by the ‘selective criminalisation of trade through prohibition.’ Secondly, the percentage of trade through smuggling is no higher than it was before although the volume has increased. Thirdly the ‘marginal effects on enterprise crime of technological innovation’²⁷ may be no greater than previous generations’ technological innovation, such as the railway.²⁸

The second factor considers ‘institutional comparative advantages.’ Stronger states have been able to develop within the globalising world much easier than weaker states. These weaker states have lacked the power to influence the economic and social changes that have accompanied globalisation. Thus the emergence of organised crime is certain. Poverty creates the resource base for new syndicates to recruit members and the dislocated market is engorging the flow of illegal immigrants, so closely associated with organised crime.²⁹

The third factor considers the privatisation of assets, which can be open to corrupt arrangement. The neo-liberal agenda has encouraged the reform of markets and in fact has unwittingly instigated the movement of criminal assets into the legal economy because of privatisation and the opportunities afforded by financial liberalisation.³⁰

²⁵ Berdal & Serrano, 2002, p.24

²⁶ Ibid.

²⁷ Proponents of the ‘globalisation increases crime’ argument would point out that the advancing technological innovation that accompanies globalisation aids the expansion and increase of crime. Skeptics might argue that in real terms technological innovation is simply a tool of the criminal to commit the crime and does not directly encourage others to commit crime. In summary skeptics would argue that in substance there is no link between technological innovation and increasing crime rates.

²⁸ Berdal & Serrano, 2002, p.25

²⁹ Berdal & Serrano, 2002, p.26

³⁰ Berdal & Serrano, 2002, pp.26-27

2.3 The criminological perspective on globalisation, policy transfer and policy convergence

It has been suggested by some criminologists that two inter-related transformations, concerning globalisation, are of interest. The first is the apparent convergence of criminal justice policies amongst the 'western powers' especially the United States and the United Kingdom. Initiatives in human rights, macro-economic social developments and accelerations in policy transfer are symptoms of the harmonisation of criminal justice policies. Governments are compelled to adopt similar economic, social and criminal justice policies if they wish to become members of the new world order and be identified as 'modern states.'³¹

Secondly, the homogenisation is "underpinned by a fundamental shift in state/market relations."

"A loss...of 'the social' is evidenced in the process whereby neo-liberal conceptions of the market and international processes encourage the formulation of policies based less on principles of social inclusion and more on social inequality, deregulation, privatization, penal expansionism and welfare residualism."³²

Muncie contends that three global processes are occurring that explains the homogenisation of the above policies. The first he identifies as the shift in governance from welfare to neo-liberal rule. In his description of this change, he makes it clear that he is describing the change within the youth justice field. Yet the contribution he makes by identifying six inter-related themes within this debate are helpful and reflect changes in all aspects of criminal justice.³³

The first is the diminution of welfare. This occurred in the late 1970s and was preceded by a reaction from civil lawyers, civil libertarians and radical social workers who were becoming critical of welfare based procedure and sentencing. They argued that by providing for the needs of offenders they (the state) were in fact placing restrictions on liberty. Sentencing considered background and offence and undermined the right to natural justice. The impact of this new wave of thinking resulted in policy being adopted that punished the crime and not the person. This had

³¹ Muncie, J. 2005 "The Globalization of crime control-the case of youth and juvenile justice." *Theoretical Criminology*. Vol. 9 No. 1 p. 35-64. pp. 36-37

³² Muncie, 2005, pp.36-37

³³ Muncie, 2005, p.38

wider ramifications for welfarism and signaled a decisive shift towards a more justice-based approach.³⁴

The liberal critique of welfarism fitted neatly into the argument of retributivists that rehabilitation was a soft option. Of course the bases for these similar arguments differed considerably but gave rise to the second theme, 'adulteration.' As the 1980s approached justice and rights were commonly associated with individual responsibility and obligation. Instead of a liberal movement based on the rights of the individual the 1980s witnessed the emergence of modern retributivism.^{35 36}

The third and fourth themes highlighted by Muncie are the growth in risk factor prevention and responsabilisation. The growth of identifying potential criminals and risk management (discussed further by Sheptycki below) encouraged police jurisdictions (typically in the UK, USA, Australia and Canada³⁷) to create risk profiles of those most likely to commit crime. At the same time government activated non-state structures to combat crime. Moving the responsibility for crime control away from the state towards businesses and other organisations. The new crime combating mantra was that crime was everyone's problem and we all had a responsibility to reduce criminal opportunity and increase informal controls.^{38 39}

The justice system has also altered its appearance and output. Managerialism and the fifth theme 'actuarial justice' have replaced philosophies of justice and welfare. Improving internal system coherence, standardised risk assessments and managerial performance targets (highlighted by complaint processing and cost effective application of punishment) have replaced rehabilitation and due process and are concerned more with output than outcome.⁴⁰

The sixth and final theme surrounds penal expansionism. The growth in prisons and prison numbers internationally has coincided with a growth in private industrial interests. A set of policy

³⁴ Muncie, 2005, p.38

³⁵ Muncie, 2005, pp.38-39.

³⁶ See also Hudson, B. 1987. *Justice Through Punishment*. Basingstroke: Macmillan.

³⁷ See Farrington, D. 2000. "Explaining and Preventing Youth Crime: The Globalization of Knowledge." In *Criminology*. Vol. 38(1): 1-24 for discussion on the transatlantic replicability of the 'risk' phenomenon.

³⁸ Muncie, 2005, 38-39

³⁹ For more on responsabilisation see Garland, D. 1996. "The Limits of the Sovereign State," *British Journal of Criminology*. Vol. 36(4). pp.445-471.

⁴⁰ Muncie, 2005, p.40.

networks “has constructed a ‘neo-liberal penal policy complex’ that encourages the dissemination of punitive and exclusionary practices.”⁴¹

Muncie concludes by making a number of sweeping comments about the nature of these changes and the effect they’ve had on policy in particular. He argues that wherever free market principles have spread, rates of incarceration have increased. The welfare state has also disappeared eroding protection of those at risk and subsequently increasing the early diagnoses of at risk population groups. It would seem then, that regimes of “surveillance, inspection, regulation and control” have come to predominate in the world today.⁴²

The second global process he identifies is the area of policy transfer and convergence. Literature on the subject is more often than not located in the USA and UK. Apparent similarities have been remarked upon in criminological spheres around the spread of penal policy from the USA to other liberal democracies. Two approaches to the phenomenon can be led to describe and explain this process. The first is a structuralist argument which links developments in crime control policy and the discourse surrounding the debate to deeper cultural and social changes being experienced in late modern society (typically capitalist society). Agency led arguments focus on the process whereby policy decision making is undertaken (and the arena in which decisions are made) and observe the incidence of policy transfer and imitation.⁴³

Jones and Newburn contend that a greater emphasis should be laid on the role of political actors. By doing so they suggest that a “fuller picture of cultural formation and reproduction is produced”⁴⁴ and a better understanding of the nature of policy convergence will highlight the dissimilarities between different criminal justice jurisdictions and systems.⁴⁵ Their argument is logical and tempting to explore further.

Jones and Newburn⁴⁶ make mention of the fact that writers have concentrated on privatisation within criminal justice, zero-tolerance policing strategies, harsher sentencing policies and

⁴¹ Muncie, 2005, p.40

⁴² Muncie, 2005, p.41

⁴³ Jones, T. & Newburn, T. 2002. “Policy Convergence and Crime control in the USA and UK: Streams of influence and levels of impact” In *Criminal Justice*. Vol. 2 No.2 pp. 173-203.

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Jones, T. & Newburn, T. 2004. “The Convergence of US and UK Crime Control Policy: Exploring substance and Process.” In Jones & Newburn (eds) *Criminal Justice and Political Cultures: National and International Dimensions of Crime Control*. Devon: Willan Publishing.

expanding rates of imprisonment. Writers have tended to explain this phenomenon by arguing that changes in economic and social structure have led political actors to adopt similar responses. However, these arguments do not account for political agency. They have tended to focus instead on the level of policy imitation and policy transfer, which can be highly generalised at times.

They do not focus on the specific particulars as Jones and Newburn attempt to do. However, these authors take the next step and argue that both approaches are useful and worthy of study. They try therefore to achieve a 'more detailed empirical consideration of both substance of policy and the process through which it comes about.'⁴⁷

Their argument begins interestingly enough with Nils Christie a leading academic who has written extensively on the so-called prison industrial complex amongst other issues. Christie's argument follows that the extension of transnational security corporations and the weakened informal social controls inherent in capitalist society have culminated in increased criminal activity and the commodification of crime. Within this context security and private prison companies benefit from increasing crime levels. With a public demand for harsher penalties the circle of offender-incarceration-profit does not heed well for crime control. The end result is more people are committing crime and this is beneficial for transnational corporations who, in a way, 'encourage' policy that increases penalties for criminal acts. Garland expresses a common sentiment and adds that a common 'culture of control' is emerging (in the UK & US). His study, however, is too general and Newburn and Jones dismiss his conclusion arguing that one needs to be more focused in the study of policy convergence.⁴⁸

Jones and Newburn conclude that most convergence is no more than symbolic and that while the rhetoric used by politicians is strikingly similar the substance of the policy is not homogenous. Indeed, differences between the UK and US crime policy are apparent and suited to local problems.⁴⁹

Muncie adds to this view by presenting the case of European implementation of restorative principles (with regard to juvenile justice): He notes that these principles are marked by heterogeneity not convergence. In Belgium, Finland and Norway for example "restoration is an extension of existing welfare"⁵⁰ and not a result of some conscious European decision to

⁴⁷ Ibid.

⁴⁸ Ibid. (Garland in Jones and Newburn)

⁴⁹ Jones & Newburn, pp.123-146

⁵⁰ Muncie, 2005, p.43

harmonise approaches. He cites further examples in countries like Denmark, France and Spain where systems differ in approach. Focus varies between the victim, the offender and in some countries the focus is mixed. It is clear then that "policy transfer is rarely direct and complete but is partial and mediated through national and local cultures."⁵¹

The importance of local context is no where more pronounced than in South Africa. We certainly have adopted strategies that originate in the global arena but local situations have served to mould those strategies into something that is effective in local conditions: Zero-tolerance policing for one was an accepted term in top police positions. However, it is used more as a rhetorical device than a substantive police strategy. What Dixon finds intriguing about the transfer of ideas and policies is "the degree to which they have been 'indigenised'" rather than how they arrived here in the first place.⁵²

The third global process Muncie identifies is that of international conventions. However, this topic will be discussed after a slight detour into the realm of policing and the globalisation and transnationalisation of democratic policing. Due to the impact and involvement of South Africa in international efforts to combat organised crime it would be feasible to entertain this topic before moving onto South African discourses surrounding organised crime and POCA (chapter 3 & 4). For now policing will be explored and used as a benchmark to further understand the globalisation of crime and policing and understand the subculture of transnational policing.

2.4 Global policing

This idea that the state is 'hollowing out' with the greater flow of capital across the world is a common one. Within international relations theory, idealists' hold the view that the market has come to be the major player in world affairs and that the state's role as provider and director of events has come and gone. Yet time and again we see examples of the complete opposite. State's still possess overall legislative control and power in world affairs, especially the stronger G8 countries.

Despite this the market has come to play a prominent but not dominating role in world affairs and that certain (if not all) developing states and Western states have adopted the neo-liberal approach

⁵¹ Muncie, 2005, p.44

⁵² Dixon, B: 2000. *The Globalisation of Democratic Policing: Sector Policing and Zero Tolerance in the New South Africa*. Occasional Paper. Institute of Criminology: University of Cape Town. p.53.

to their economies which in turn creates new links with “sociological concerns about global social relations.”⁵³ Such relations blur lines between countries (especially lesser-developed countries) that once so distinct have become almost homogenous in appearance and output. The main concern then being that if the market controls the New World, whose concern is it to maintain social control?

Beck (in Sheptycki) “...has argued that contemporary society is characterised by a shift from a logic about the distribution of goods (i.e. the logic of capitalist, or modern, society) to a logic about the distribution of bads (i.e. the logic of risk society).”⁵⁴ Holding this view it is supposed that police have changed their approach. They, the police, identify suspect populations or communities and ask *who is at risk? And who poses a risk?*⁵⁵ Therefore, the role of the police has changed in the past 50 years. However, they have maintained their position in society as the “principle franchisees of the liberal democratic states claim to a monopoly on the use of coercive force.”⁵⁶ With the subsequent globalisation of liberal democracy has come the globalisation of democratic policing⁵⁷ to which this paper now turns.

Bayley⁵⁸ (in Dixon, 2000) argues that it is the explicit goal of western states to export ‘democratic policing’ to states in transition (typically he speaks of Eastern Europe, but there is no denying that this ideal has been extended to South Africa as well, see below). The police, he argue, are essential to the functioning of democracy and the regulation of the principles of democracy. Bayley criticises the US government for their reluctance to assist in changing the character of transitional states. This reluctance should be overcome by democratic states making use of eleven guiding principles, one of which is largely counter-intuitive. It states that foreign police should be encouraged to become more reactive in their law enforcement.⁵⁹

Despite Bayley’s warnings regarding the exportation of proactive models of policing to states that lack “the democratic history to sustain them,” as Dixon agrees, “it is precisely those styles of community and problem orientated policing that have been promoted as blueprints for democratic

⁵³ Sheptycki, J. 1997. “Insecurity, risk suppression and segregation: Some reflections on policing in the transnational age.” *Theoretical Criminology* vol. 1 No. 3 pp. 303-315. London: Sage Publications. pp. 304-5

⁵⁴ Sheptycki, 1997, p.305.

⁵⁵ Sheptycki, 1997, p.305.

⁵⁶ Dixon, 2000, p.6

⁵⁷ Dixon, 2000, p.6

⁵⁸ Bayley, D. 1995. “A Foreign Policy for Democratic Policing.” In *Policing and Society*, Vol. 5 pp. 79-93.

⁵⁹ Dixon, 2000, pp.6-7.

policing. [Not] only in South Africa but across the sub-continent south of the Sahara, in Eastern Europe and in the countries of the former Soviet Union.”⁶⁰

Community policing and zero-tolerance policing have found their way into the discourse surrounding policing in many states, including South Africa. Yet again it must be said that such terms are little more than ‘brand names’ and rhetoric used by politically savvy and aware leadership structures. Time and again writers have shown that policies that originate in the West more often than not are similar in name as opposed to substance.

In South Africa community policing has seemingly given way to what some might argue is reactive policing. Bayley might note that the introduction of the Scorpions and tough new anti-organised crime legislation is the right step in curbing crime in a country that lacks democratic history. However, questions are raised in SA over the methods and targets of the Scorpions⁶¹ (see below). An auxiliary question for this paper then is to understand the nature of this new approach being adopted for police in South Africa. Many would be cautious in exploring this as it is possibly too soon to fully appreciate the nature of current SA policy regarding crime as it is still developing and evolving to suit local conditions.

For now it would be pertinent to return to Muncie’s third global process, namely international conventions. In the following section the effect foreign policy initiatives (at the international level and national level) will be tested and an attempt will be made to understand the role foreign actors have on local criminal justice developments.

2.5 Global Players: The USA and the UN

With the end of the Cold War certain states such as the United States of America (USA) and other Western nations redirected a portion of their energies from fighting ‘Communism’ to combating transnational organised crime (in the case of the USA the change in foreign policy was ‘kickstarted’ following the September 11 terrorist attacks in New York). Cross border criminal activity within the domain of the illicit global economy costs billions of dollars every year in lost taxation income and threatens the moral fibre (a subjective opinion) of democratic states. State

⁶⁰ Dixon, 2000, p. 9.

⁶¹ Redpath, J. 2004. “Weathering the Storm”. *ISS Crime Quarterly* No.8 appearing on <http://www.iss.org.za/Pubs/CrimeQ/No.8/Redpath.htm>

concern, therefore, has seen a purposive shift (according to Friman and Andreas) and has moved from the realm of military concern to the now too usual cross border law evasions. Cold War type agencies are being redeveloped in light of this new occurrence to deal with the problem and tensions have begun to rise between states (once again like the United States of America) that condemn the illicit economy in its entirety and those that take a rather more lenient approach to the problem.⁶²

Friman and Andreas' view that the 'concern of states has shifted' must be qualified. They generalise quite extensively about the 'concern of states.' It is true that focus on transnational organised crime has become an important focus of states. However, it would be helpful to point out that many states view transnational crime and terrorism as one and the same and a threat to national security. On the Department of Homeland Security (DHS) website for example there is a section on financial crimes. The DHS state as 'objective 3.3' the need to "protect against financial and electronic crimes." they state that it is an objective and responsibility, if you will, of the DHS to bring an end to drug-smuggling, money laundering and other crimes that effect the economy of the USA. This money in turn is used, they argue, to finance further international criminal syndicates or to finance terrorist activities.⁶³ This amalgamation of terror and crime is subtly achieved throughout the site and we as the readers are led to believe that they are indeed one and the same.⁶⁴

Military concern should, therefore, be included in the debate. Many states it must be said use state military apparatus to fight crime (and terrorism). South Africa makes use of commandos, Colombia is continuing the fight against 'terrorists' who are closely linked to the drug trade, the USA uses its military strength to subdue states that sponsor terror and many states use their military to guard international boundaries. Yet it is true that, led by the stronger states and international bodies like the United Nations (UN), a much greater focus has begun to emerge on the issue of transnational organised crime as a threat to state security. Foreign policy directed at improving developing and emerging democracies is commonplace as are international

⁶² Friman, H. & P. Andreas 1999. "Introduction: International Relations and the Illicit global Economy." Friman, H. & P. Andreas (eds.). *The Illicit Global Economy and State Power*. Rowman & Littlefield Publishers Inc.

⁶³ The Department of Homeland Security. <http://www.dhs.gov/dhspublic/> accessed 05 June 2005.

⁶⁴ Shelley, L. & J. Picarelli 2002. "Methods not motives: Implications of the convergence of international organized crime and terrorism." *Police Practice and Research*. Vol.3 no.4 pp. 305-318 discuss the implications of this convergence.

conventions governing the role of states globally in their response to transnational organised crime.

The input of foreign powers on many developing countries criminal justice systems is a real and documented occurrence. The effect organised crime has on democracy (in terms of public confidence in the states ability to curb crime) and on the security (one could argue that organised crime undermines the authority of the state in the eyes of the public by acting 'outside of the law') of the modern state has elicited this global response. South Africa for one has responded to the threat and has enacted legislation that is similar to international responses to the growing problem of organised crime which has, by all accounts, grown in international importance because of certain larger states (and the UN) grouping terrorism with organised crime.

South Africa's POCA is similar to the Racketeer Influenced Corrupt Organizations (RICO) legislation; the USA's organised crime legislation. This has not gone unnoticed by the local policy elite in South Africa and organised crime experts. Peter Gastrow⁶⁵ chairman of the Cape Town office of the Institute of Security Studies and chairman of the drafting committee established by the South African state to draft organised crime legislation in 1998 makes it clear where he stands. He states plainly that "...the concept of racketeering the concept of charging as a whole [a] criminal group was taken by the RICO legislation." Irvin Kinnes⁶⁶ a local gang expert and criminologist holds a similar but more cautionary view arguing that the South African criminal justice system is becoming increasingly Americanised:

My worry is that we are Americanising our criminal justice system and that goes hand in glove with taking away people's rights, so I don't support this move towards a law and order agenda. We've got an anti-terrorism Bill or Act apart from the legislation we have on books [and] we're going to find ourselves with a Department of Homeland Security. There is already talk of having one ministry for Safety and Security to control everything. That's a bit scary. That's the big brother and that doesn't work. The old government tried that and its not going to work, you know?

Willem 'Base' Basson⁶⁷ a deputy director in the Department of Community Safety in the Western Cape holds a similar view. He argues that South African crime policy is becoming increasingly

⁶⁵ Interview 1: Peter Gastrow

⁶⁶ Interview 2: Irvin Kinnes

⁶⁷ Interview 3: Willém 'Base' Basson

'internationalised.' These commentators have all highlighted significant areas of the criminal justice system that is changing and that the change is not occurring in a vacuum but within a larger global arena where organised crime has become a 'global challenge.'

In whatever way one views the development of organised crime policy it is clear that a new approach is being adopted. This approach is similar (at least) in rhetoric to western practice and we can deduce that there is a definite transfer of policy from the international realm to the national. In sections below the similarities between foreign and local legislation will be discussed, but for the present this paper will explore the nature and origin of the policy transfer occurring between international and national organisations.

2.5.1 The United States of America

American foreign policy has been robust in challenging new democracies to reform and implement 'techniques and training programs' that will renew their 'lagging' criminal justice systems. The goals of protecting US citizens and simultaneously enshrining democracy are key to US criminal justice departments. Under the US Department of State, agencies are organised and interdepartmental actions coordinated to deal with foreign threats to the US. Through the US Department of Justice nine organisations export expertise to countries from afar afield as Brazil and Khazakstan. They are, in no specific order,⁶⁸

- The Federal Bureau of Investigations (FBI)
- Drug Enforcement Administration
- Criminal Division: International Criminal Investigative Training Assistance Program
- Criminal Division: Office of Professional Development and Training
- Criminal Division: Office of International Affairs
- Executive Office for US Attorneys
- Immigration and Naturalization Service
- Antitrust Division
- National Institute of Justice.

⁶⁸ McGillis, D. 1995. "US government International Justice Assistance: Overview of Major Activities." Accessed through the Institute of Criminology. University of Cape Town

Another American organisation designed to assist foreign states in their pursuit of democratic policing measures is the US Agency for International Development (USAID). It was created in the 1980s and serves to expand its 'rule-of-law program's' worldwide. From the mid-1980s to 1995 USAID spent approximately \$220 million on criminal and civil justice reform throughout the world.⁶⁹ In a report by Daniel McGillis mention is made of the role of USAID programs. They "are typically multifaceted [and include] fundamental reform of the legislation underlying the justice system, including substantive and procedural criminal codes and statutes underpinning the courts, prosecution and police." Such programs also include training of criminal justice staff.⁷⁰

What is clear is that the US interest is in securing democracy that is similar to that which appears in the US. One method of securing democracy is to secure the state. The US has been particularly successful in the 'law enforcement' arena in exporting its ideals and techniques (as mentioned above). Indeed some writers have noted that this process has led to the Americanisation of global law enforcement.

In Nadelmann's piece⁷¹ on this very subject he provides a short history of how the US has increased its presence on the world stage. The figures he provides are colourful representations of the scope of the US law enforcement's reach.

Between 1967 and 1995, the number of US drug enforcement agents stationed abroad rose from about one dozen in eight foreign cities to more than 300 in 73 foreign locations. Between 1979 and 1994, the number of attorneys in the Criminal Divisions Office of International Affairs rose from 4 to 39. From 1979 to 1995, the US national central bureau of Interpol, based in the Justice Department, increased its staffing from 6 to 81, its budget from \$125,000 to almost \$6.5 million, and the number of US law enforcement agencies represented from one to eighteen.

He adds the burgeoning number of cases at the US Interpol office but warns that his statistics reflect both growing incidence of organised crime and a greater US government capacity to counter the threat.⁷² This disclaimer of sorts should in no way discount the increasing presence of the US worldwide and in SA.

⁶⁹ McGillis, D. 1995. "US government International Justice Assistance: Overview of Major Activities." Accessed through the Institute of Criminology. University of Cape Town.

⁷⁰ Ibid

⁷¹ Nadelmann, E. 1997. "The Americanization of Global Law Enforcement." McDonald, W. F. (ed.) *Crime and Law Enforcement in the Global Village*. Cincinnati: Anderson Publishing Co.

⁷² Nadelmann, 1997, p.125

2.5.1.1 Importing Ideas and strategies: Multiple Interventions and support to SA

In the context of political liberalization the South African Government (specifically the criminal justice sector, police and the directorate for Special Operations) have benefited greatly from foreign aid and expertise. Donor assistance has been increasing. Between 1995 and 2001 donor support for the criminal justice system increased by over 400%.⁷³ In the area of specialist law enforcement technical assistance from USAID, the Secret Service and the FBI has been particularly critical. This is not to deny that the South African government could also draw on specialist training from other quarters. So for example, training was also given by the London Metropolitan Police at Bramshill Centre, Customs UK, Border Police, US INS, NCIS London and the French Surete.

This paper is interested primarily in the involvement of US led structures in advancing law enforcement expertise of South African specialist units. This paper does acknowledge however that other donors and countries assisted SA in improving the criminal justice sector. The perceived dominance of the US may well be a function of more advanced packages on offer and/or willingness on the part of US agencies to assist SA.

The USAID/South Africa Democracy and Governance Program has been in existence since 1994 helping to restructure the South African criminal justice system. Coincidentally the marginalization of the development ideas embedded in the crime prevention policy of the National Crime Prevention Strategy (NCPS)⁷⁴ coincided with the emergence of a tougher stance on crime by the Scorpions in particular who have benefited from USAID and US secret Service training and funding. It is unclear whether the state felt obliged to change its crime policy or whether this was simply a coincidence or a compromise with international best practice.

USAID uses its particular influence to assist governments in consolidating democracies. In South Africa it has identified that the "chief threat" to this aim is the "limited capacity of the state to

⁷³ Rauch, J. & E. Pelsner 2001. "South Africa's Criminal Justice System: Policies and Priorities." Paper presented at the South African Sociological Association (SASA) Annual Congress, *Globalisation, Inequality and Identity*, 1-4 July 2001. <http://www.csvr.org.za/papers/papepjr.htm>

⁷⁴ The NCPS was designed to provide a comprehensive macro-strategy to crime policy. While strong on policy and optimistic in its goals it was rather weak in implementation and failed to produce any lasting changes. See Van Der Spuy, E. 2000. "Crime and its Discontent: Recent South African Responses and Policies." In Seminar Report *Crime and Policing in Transitional Societies*. Konrad-Adenauer-Shifting.

govern” or to “cement a social contract with society.” They argue that high crime and non-compliance of some citizens to help government protect the democratic order threaten the social fabric, so to speak, of a society that is coming to terms with its new democracy.⁷⁵

In a report by Barkan et al analysis was made of the effectiveness of USAID activities in SA up until 1997. The main areas of concern for USAID up until 2005 related around the ‘strategic objective’ of USAID, which was ensuring democracy and governance. What the report highlighted were two key areas of concern that related directly to this goal. These priority areas concerned greater links between the people and the government and the “strengthening of institutions of countervailing power to central government.”⁷⁶ Only through effective voicing of the people’s needs and an effective balance (to government power) in the democratic realm can stability and advancement occur.⁷⁷

The report was particularly vociferous on the case that South Africa had an infrastructure second to none in Africa and a strong civil society in the urban centres. The main problem, however, was the massive discrepancy between rural and urban and rich and poor. The gulf that exists is large and needs to be addressed. USAID has tended to focus on specific NGO’s when more emphasis (they say) should focus on the ‘accountability of state institutions to civil society.’⁷⁸

Specific cases of US involvement in the South African criminal justice arena are fairly easy to pinpoint. The US embassy in Pretoria⁷⁹ regularly releases press statements regarding aid and training programs being run in South Africa. Government officials regularly hint at outside involvement in policy matters. A few examples of late indicate to us that the techniques and expertise of American agencies have been greatly beneficial. In 1998 Paul Coffey visited South Africa at the request of the then National Director of Public Prosecutions, Bulelani Ngcuka. Coffey at the time was a US crime expert and chief of the US Justice Departments Organised Crime and Racketeering section in Washington. His visit was noted in local papers and he was brought to SA to provide help and advice to local crime fighting personnel.⁸⁰ Experts from other states such as Sir Paul Condon and Sir John Stevens of London Metropolitan Police also visited

⁷⁵ Barkan, J., Friedman, S., Kabemba, C., Landsberg, C. & Shubane, K. 1998. *Sector Assessment: USAID/South Africa Democracy and Governance Programme*. Prepared for Macro International and USAID/SA by a team directed by the Centre for Policy Studies Johannesburg, South Africa.

⁷⁶ Barkan et al, 1998, p.3

⁷⁷ Barkan et al, 1998, p.3.

⁷⁸ Barkan et al, 1998, pp.13-14

⁷⁹ pretoria.usembassy.gov/

the country to implement UK training initiatives for the Scorpions, Asset Forfeiture Unit and National Prosecuting Authority.

Some examples might suffice of US funding to the SA criminal justice machinery. The US Secret Service has of late donated expensive equipment to the South African Police Service and the Scorpions. On June 08, 2004, \$400,000 was donated and training in interviewing and report writing was offered.⁸¹ Earlier on in the year (12 January, 2004) 22 forensic computers to the value of \$204,000 were provided and training of 22 members of the South African Police Service Computer Crimes Unit; Scorpions Cyber Crime Unit and Cyber Crimes Officers from other African countries on Computer Forensic Investigations was undertaken.⁸²

It would seem that there is a clear policy being followed by the US under the banner of international justice reform. Aid money and the added expertise are beneficial from a purely financial point of view. Also the operational side of the criminal justice sector benefit from US support and substantive changes are occurring at the point of policy and legislation that seem consistent with international (particularly Western/US) developments. The Scorpions look much like the FBI, are trained by the Secret Service (US) amongst others (there was and is assistance from numerous Western European nations), have been funded since 1993 by the USAID/SA organisation and have procedures that are based in some way upon Secret Service/FBI methods. Indeed, our POCA legislation is based in part on RICO legislation.

In summary, global advancements in crime fighting have found their way to South Africa. State sponsored agencies such as USAID and the US Department of State actively pursue policies that help to identify and improve the criminal justice practices of states like SA. Specific examples of this provide evidence of this state of affairs. However, the role of the US while important in showing how policy is transferred does not fully explain policy developments in SA. The international stage involves numerous players many of which are important in understanding how policy is transferred and how policy convergence comes about.

⁸⁰ www.dispatch.co.za/1998/10/07/southafrica/SA.HTM accessed 01 December 2004. Sapa.

⁸¹ Embassy of the United States of America, media advisory, pretoria.usembassy.gov/wwwhpr7g.html. June 08, 2004.

⁸² Embassy of the United States of America, media release, pretoria.usembassy.gov/wwwhpr7g.html. January 12, 2004.

2.5.2 UN: Global Cooperation

International standards and rules governing responses to threats from organised criminal groupings converged in a way with the ratification of the United Nations Convention Against Transnational Organised Crime in Palermo, Italy. Also known as the Palermo Convention the agreement was signed with uncanny haste by the members of the various states.

The convention agreed to improve cooperation in regards to extradition, mutual legal assistance, transfer of proceedings and joint investigations. It also considers the rights of the victim in providing witness protection and 'shielding legal markets from infiltration by organised criminal groups.' Extending the policy of some Western nations (in regards to assisting developing democracies) the convention also makes provision for technical assistance to developing countries.⁸³

Leading the way in international cooperation in this regard, the USA, led at the convention by Under Secretary of State Frank Loy said that the signing was an "accomplishment of some magnitude, perhaps unprecedented."⁸⁴ Boone, a member of the United Nations Office for Drug Control and Crime Prevention (UNODCP), shared the sentiments of many of the dignitaries in describing the convention as a success against fighting aspects of the 'uncivil society.' He stated, however, that Palermo was only one of the many global strategies required to combat major global organized crime.⁸⁵ His words highlighted, to all members of the world, the expectation that governments be dedicated to eradicating crime that has become increasingly globalised in contemporary times. The sentiments of Loy (and Boone later at the 2nd World Conference in Durban) were echoed by a number of dignitaries at the event and highlighted the presence of a political will to combat organized crime:

Kofi Anan, UN Secretary-General:

One of the starkest contrasts in our world today is the gulf that exists between the civil and the uncivil. By civil I mean civilisation: the accumulated centuries of learning that form our foundation for progress...Arrayed against these constructive forces, however, in ever greater

⁸³ A detailing of the Convention on the UNODC website www.unodc.org/palermo/convmain.html.
<Accessed 13 December 2004>

⁸⁴ Appendix 2, Speeches: Frank Loy at Palermo (www.unodc.org/palermo/convmain.html) "United Nations Convention Against Organised Crime High Level Political Signing Conference."

numbers and with even stronger weapons, are the forces of what I call 'uncivil society.' They are terrorists, criminals, drug dealers, traffickers in people, and others who undo the good works of civil society.

And,

"Criminal groups have wasted no time in embracing today's globalised economy..."

In addition the Palermo Convention...

"...gives us a new tool to address the scourge of crime as a global problem."⁸⁶

These sentiments were expressed by a number of other representatives who also saw the need for a unified approach to combating international crime and increased cooperation between states. It is against this background that the Palermo convention is interpreted as a step in the right direction.

Pino Arlacchi, UN Under-Secretary General and Executive Director of the UN Office for Drug Control and Crime Prevention put it that

...never before had an international convention attracted so many signatures barely four weeks following its adoption by the Assembly." And added that, "...the international community was now well ahead in the construction of an international legal framework of legal instruments aimed specifically at confronting the most serious threats to human security."⁸⁷

Piero Fassino, Italian Minister of Justice and President of the Convention, mentioned that

"...the meetings had demonstrated a firm and formal international commitment to take action against organized crime."⁸⁸

⁸⁵ Boone, 2001, p.2.

⁸⁶ Appendix 2, Speeches: Kofi Anan at Palermo. (www.unodc.org/palermo/convmain.html) UN Secretary-General Calls Signing of Palermo convention 'A Watershed Event' in Fight Against Organized Crime".

⁸⁷ www.globalpolicy.org/globaliz/law/1219.htm UN Press Release (L/T/4359) December 15, 2000.

<Accessed 13 December 2004> "Over 120 Nations Sign UN Convention Against Organized Crime."

⁸⁸ www.globalpolicy.org/globaliz/law/1219.htm UN Press Release (L/T/4359) December 15, 2000.

<Accessed 13 December 2004> "Over 120 Nations Sign UN Convention Against Organized Crime."

The scope of the Convention must not be underestimated as states representing all continents expressed their need for international cooperation.

Batty Weerakoon, Minister of Justice of Sri Lanka, remained upbeat that the convention would advance the fight against money laundering and trafficking in human beings that helped to finance terrorism and organised crime. Sudan's Ali Mohamed Osman Yassin said it was important to lay the groundwork for the youth to create a moral and stable society.⁸⁹

South Africa's Minister of Justice, Penuell Maduna, acted as Rapporteur of the Conference.⁹⁰ He expressed the South African state's approval and support of international efforts to harmonise the approach of law enforcement in regards to combating international syndicates.⁹¹ Incidentally when POCA was passed it met the requirements of Security Council Resolution (SCR) 1373, which instructed all states to prevent and suppress all aspects of terrorism and its close ally, organised crime. Thus, SA did not simply adhere to the requirements of SCR 1373 but drafted POCA "to measure up to the international measures against" organised crime that were taking place before SCR 1373.⁹² However, it wasn't until 2003, that the convention was ratified on recommendations by the Select Committee on Security and Constitutional Affairs (in line with s. 231 (2) of the constitution of South Africa Act 108 of 1996) and report of the state law advisor and international state law advisor, that the convention was in line with SA domestic law and international law respectively.⁹³

The Palermo Convention has come to represent a massive step forward in the harmonisation of crime policy. There was a need by many states to create a system whereby organised crime that existed in the international realm could be countered. The generalized nature of the convention and its largely non-political objectives made it far easier to accept and ratify. There were sticking points over information sharing particularly by France, the USA and Britain. All parties, however, saw the need for a global information source that could better track criminal syndicates.

⁸⁹ www.globalpolicy.org/globaliz/law/1219.htm UN Press Release (L/T/4359) December 15, 2000. <Accessed 13 December 2004> "Over 120 Nations Sign UN Convention Against Organized Crime."

⁹⁰ www.globalpolicy.org/globaliz/law/1219.htm UN Press Release (L/T/4359) December 15, 2000. <Accessed 13 December 2004> "Over 120 Nations Sign UN Convention Against Organized Crime."

⁹¹ Report of the Select Committee on Security and Constitutional Affairs on the UN convention against Transnational Organised Crime 19 November 2003. (minutes from www.pmg.org)

⁹² Powell, C.H. 2002. "South Africa's Legislation Against Terrorism and Organised Crime." *Singapore Journal of Legal Studies* pp. 104-121.

⁹³ Report of the Select Committee on Security and Constitutional Affairs on the UN convention against Transnational Organised Crime 19 November 2003. (minutes from www.pmg.org)

Led primarily by the USA and other developed nations, countries worldwide are reshaping their criminal justice systems to come into line with this UN convention.

There has also been a remarkable similarity in the political rhetoric that is used at arenas like the UN. Whether all countries adopt a single substantive approach is unclear though. However, there is enough evidence to suggest that many if not most of the 124 signatories have benefited from American financial and technical aid and structured their criminal justice systems accordingly. In addition, the approach adopted by the UN members is a clear indicator that organised crime and its bedfellow terrorism are perceived as significant threats to democracy. This point in particular must be seen in the light of post 9/11 moves by the USA. The USA has blurred the line between organised crime and terrorism in a strategy to tackle groups it sees as threatening US interests. It's ratification of the treaty should also be seen in this light.

2.6 SADC: Regional and local responses to international efforts aimed at curbing organised crime

The SADC region has begun to develop legislation that is based broadly on the Palermo Declaration. South Africa has been a leading partner in the SADC region having signed the Palermo Convention in 2000. Under the auspices of the national Department of Safety and Security (DSS) initiatives to counter organised crime have been developed. The DSS has helped to create the Southern African Regional Police Chiefs Co-ordinating Organisation (SARPCCO). SARPCCO has signed a multilateral cooperation agreement that has as its main goal greater SADC police cooperation. By creating SARPCCO and concluding bilateral cooperation agreements with Asian, European, American and African countries South Africa has reinforced its ability to gather, manage and coordinate organised crime projects with particular emphasis on drugs, vehicle theft and trafficking of all kinds.⁹⁴

The challenge to SADC countries is a unique one. All are developing countries. Porous borders and weak state institutions allow organised criminal syndicates to take advantage of the states in the region. This state of affairs is not aided by the corruption of local officials.⁹⁵

⁹⁴ Minister of Safety and Security Steve V Tshwete. "Legislative Responses to Organised Crime in the SADC Region." In Goredema, C. (ed.) 2001. *Organised Crime in Southern Africa: assessing Legislation* ISS Monograph Series, No 56, June.

⁹⁵ Shelley, L. 2001. *Transitional States and Organised Crime*. 2nd World Conference on Modern Criminal Investigation, Organised Crime & Human Rights. ICC, Durban, 3-7 December.

Whilst SADC states have, in large, ratified Palermo, there are specific challenges that need to be addressed before states in the region can effectively contend with organised crime. Firstly, the financial services sectors in many SADC countries are extremely weak. The ability of banks in Lesotho, for example, to take the extra costs involved in coordinating and implementing an Anti-Money Laundering Bill is beyond their means. In South Africa, the Financial Intelligence Centre Bill (now Act) widens the range of institutions that are required to file reports. If these new procedures can not be undertaken properly, confidence in the economic sector might be undermined and states will face growth in the illegal economy. The 'official system' requires adequate resources to effectively deal with these new standard operating procedures. Secondly, some SADC states face challenges from other state institutions. Mistrust and fear of domination result in constant friction, which undermines the democratic order and prevents some relevant role players a voice in legislation dealing with organised crime.⁹⁶

Goredema outlines content related challenges that need to be met by SADC states. He highlights the need to develop legislation on corruption that will criminalise all forms of corruption, i.e. corruption in the non-state sector as well as corruption by public officials. He also mentions that in terms of protecting witnesses much work still needs to be done to protect them during criminal proceedings and not only at the adjudicative stages.⁹⁷

The Palermo Convention makes certain demands on states to cooperate. In order for such cooperation to occur the legal systems of states need to be flexible enough to cater for such cooperation. The challenge for SADC states is to create a relationship where extradition, criminal forfeiture activities and mutual assistance in criminal matters are possible in order to counter organised criminal groups.⁹⁸

Under the Palermo Convention provision is made for extradition in the absence of extradition agreements. In the SADC region only South Africa and Namibia have concluded extradition with most other SADC states. Constitutional issues remain in regards to the death penalty and extradition. Issues over whether extradition from a state that doesn't have the death penalty to

⁹⁶ Goredema, C. (ed.). 2001. "Harmonising Legislation Against Organised Crime in SADC Countries" *Organised Crime in Southern Africa: Assessing Legislation*. ISS Monograph Series. No 56. pp. 187-191

⁹⁷ Goredema, 2001, pp. 191-194.

⁹⁸ Goredema, 2001, p. 194.

states that do provide significant stumbling blocks. By and large though, extradition as an enforcement concern is covered adequately.⁹⁹

Criminal forfeiture is covered by article 12-14 of the Convention. Most SADC states also have legislation dealing with this area and mutual assistance law in this regard. South Africa differs from the others in that civil forfeiture "is precipitated by an investigation into organised crime."¹⁰⁰

Goredema's survey of SADC countries found that only one state hadn't the necessary legal framework that facilitated mutual assistance, despite it being a prerequisite in the Palermo Convention article 18. He also highlighted two shortcomings. The first being a lack of uniformity with some states not including investigations with assistance and secondly, the tendency of states to be selective in who they would cooperate with.¹⁰¹

The harmonisation of crime policy worldwide has manifested in a greater similarity in approaches by the SADC region, in particular to the issue of organised crime. Suffering from chronic lack of resources and manpower to counter the threat of crime, states in Southern Africa have had to adopt legislation that is capable of combating crime in the region. Through agencies like SARPCCO (with the assistance of Interpol) police have given voice to policy that aims to eradicate criminal syndicates that are perceived to threaten the fragile economies and societies of Africa.

⁹⁹ Goredema, 2001, pp. 194-195.

¹⁰⁰ Goredema, 2001, pp. 197-198.

¹⁰¹ Goredema, 2001, p. 195.

CHAPTER 3: Case Study: South African Developments in the field of Organised Crime

The emergence of organised crime in Africa is not a recent phenomenon, as the conventional view seems to suggest. It is held by many writers that organised crime as a serious or dangerous threat to society or parts thereof only emerged in the early 1990s as the Apartheid State slowly declined, resulting in a vacuum that was filled by international syndicates keen on taking advantage of poor border controls and weak state regulation.

Writings on organised crime dealing with the gangs in the 1950s and 1960s are few and far between, but we do know that gangs were operating outside the realm of the legal market at this time. The late 1970s and 1980s saw the emergence of gangs in the Western Cape heavily influenced by the trade in drugs, specifically mandrax. However, because of the relative isolation of South Africa and the strong military and police structures, international syndicates (which are seen to be more advanced technologically and organisationally) could not extend their criminal networks to local groups.

Organised criminal activity certainly wasn't (and isn't) restricted to the entrepreneurial efforts of gangs alone, as the works of Ellis clearly portray.¹⁰² The Apartheid State and more specifically the agents attached to certain 'security agencies' were involved in the illicit trade in ivory.¹⁰³ Such activities raise questions over the role of the state in the organised crime debate.

The involvement of the state in Africa in organised crime is interesting. The role of state actors and state structures in smuggling, for example, raises serious questions over the ability of states and sub-regional groupings to combat organised crime. As an African and international phenomenon it would be pertinent to digress for a moment and explore how criminal activities and state authority are connected and dependent upon one another in the political economy of organised crime.

¹⁰² One method of destabilisation was poaching, elephant in particular, which though hard to prove at the time was widely held to be occurring. Indeed concerted efforts to raise awareness of the actions of the South Africans was blocked as there was a strong and powerful South African interest in major conservation groups like the World Wildlife Fund (WWF).¹⁰²

¹⁰³ See Ellis, S. "Of Elephants and Men: Politics and Nature Conservation in South Africa." *Journal of Southern African Studies*. Volume 20. Number 1. March 1994.

3.1 The political economy of organised crime in Africa

The involvement of non-state actors in the affairs of state and vice versa is not a recent phenomenon as Ellis argues. The colonialists were not averse to 'benefiting' from their colonies rich abundance of raw materials. This phenomenon has seemingly manifested itself in post-colonial Africa and has been described by Bayart¹⁰⁴ as a movement from kleptocracy to the felonious state, which he describes in "The Criminalization of the State in Africa."¹⁰⁵ This book explores the connection between the state, the agents in control of the state and the methods they used to accumulate wealth and subsequently power through what might be referred to as 'illicit means.'

Bayart's analysis seems to group all African states together without distinguishing between them adequately enough. His generalisations about African states are not without problems. While many states certainly can be grouped together as 'felonous states' it would be difficult to distinguish between countries which all have sovereign governments and independent leaderships. Language difference and culture differences are massive and clearly distinguish between states that might even neighbour one another. However, he does make valid points concerning the development of the African State, but these points highlight similarities from which he generalises to make sweeping comments concerning the state of affairs in Africa.

We notice that his analysis of the movement of states from one type to another are grouped in five categories. They suffer from issues of validity in Africa's present context, but as we know all too well hindsight is a valuable ally. His first point considers the relegation of Sub-Saharan Africa in diplomacy, economics and finance. With the end of the Cold War old relationships, that saw African states either on the side of the Communist or Capitalist nations, have ended. For the major players in world affairs the focus has shifted away from Africa to the detriment of the three spheres of interaction mentioned above. There has also been a real change in the aid agreements between Africa and the 'West.' Aid is now largely conditional upon structural adjustment programs. Africa's share in world trade has also declined since the 1980s with a growing dependence upon imports of a non-capital nature characterising Africa's interaction in the global

¹⁰⁴ And Ellis and Hibou in Bayart, J., Ellis, S. & Hibou, B. 1999. *The Criminalization of the State in Africa*. Oxford: James Currey.

¹⁰⁵ Bayart, J., Ellis, S. & Hibou, B. 1999. *The Criminalization of the State in Africa*. Oxford: James Currey.

market. In addition the crop or raw material specialisation of many African states has led to problems over pricing regulations with many states seeing their main export material or good decline in price due to international market fluctuations. With no capital imports to reverse this trend, African State's dependence on aid is deepening and their ability to escape the cycle of debt becomes even more remote.¹⁰⁶

Bayart et al's second point notes the failure of democratic transition promised by the liberalisation of single party governments at the end of the 1970s and the mass political mobilisation of 1989-1992. Authoritarian regimes are common amongst states that show signs of weak political order and follow largely undemocratic processes.¹⁰⁷

His third point considers the rise in armed conflicts and spread of current conflict in areas like the Democratic Republic of the Congo. Conflicts are characteristically intrastate and are difficult to mitigate especially with the withdrawal of the United States of America and European peacekeeping missions from African conflicts after disastrous stints in Rwanda and Somalia. As a result of this new state of affairs African states have moved their diplomatic attention eastwards with the withdrawal of the 'West' from African affairs revealing a new axes of power which forms Bayart et al's fourth point.¹⁰⁸

The fifth and final point is rather vague and focuses on the growing implication of African political and economic entrepreneurs in activities, which may be considered illegal or criminal according to Western criteria, that have tended to be adopted by the international system. The world today offers criminals many lucrative smuggling opportunities. By operating within states that harbour corrupt officials criminals use the state mechanism to operate their illicit smuggling operations. The state therefore, becomes the power base from which the criminal operates. The pay off for the state (usually authoritarian in nature) is the consolidation of power (here we see the power of the elite directly proportionate to the accumulation of wealth).¹⁰⁹

In light of present political and economic conditions many of the points Bayart et al refer to fail as explanatory devices. Debt servicing and debt cancellation are issues that seem to be receiving renewed interest globally with a new wave of intellectuals and politicians understanding the value

¹⁰⁶ Bayart et al, 1999, pp. 1-4

¹⁰⁷ Bayart et al, 1999, p. 5

¹⁰⁸ Bayart et al, 1999, pp. 6-7

¹⁰⁹ Bayart et al, 1999, pp. 7-8

of an economically strong and independent Africa. Afro-pessimism is giving way to more positive approaches to the 'Dark Continent.' The democratic process is also being given a push with states like Namibia and South Africa showing real and purposive democratic intent. With agreements like the New Partnerships for Africa's Development (NEPAD) and African Peer Review Mechanism (ARPM) African states are taking the initiative when it comes to securing democracy. Standards of good governance are being sought throughout the region in order to create conditions favourable to economic growth and development and making the continent more attractive to foreign investment.

Even states in West Africa are working together under the strong leadership of Nigeria to prevent anti-democratic practices in offending states (Togo is a case in point). The recent resolution of the conflict that engulfed the Great Lakes region is one example that African States are serious about peace and dedicated to democracy and accountability.

However, within the new conditions referred to by Bayart et al there is a ring of truth about the nature of the international system and the corruption that accompanies it especially in regards to smuggling. The state in Africa has to a certain degree become criminalised allowing rulers to accumulate wealth and power through illegal means. Of course what is meant by 'criminal' is never clear and relative in a sense that not all people view certain acts as deserving of punishment.¹¹⁰ Bayart et al mention the drug trade in Nigeria were it is covered up only because of international pressure. Indeed the social context of many African states makes smuggling an offence hardly worth noting. Boundaries are poorly guarded and people trade and migrate across them with impunity. However, when it comes to states in the SADC region for example such practices are most certainly frowned upon.

South African state structures and agents in modern day can not be said to be involved in any large-scale accumulation of wealth and power through trade in illicit goods. Bayart would possibly testify to this. However, the South African state still suffers from high organised crime rates (although we are told by the government that these numbers are decreasing) involving corrupt officials. The Home Affairs Department is a case in point. It is widely known that the sale of identity documents and document fraud are common and widespread occurrences. The question for this paper then, is to understand why this state of affairs exists and in order to do so the work of Gastrow and Shaw in particular will attempt to throw some light on the matter.

3.2 South African organised crime in the 1990s

At a conference in the early 1990s members of the South African Police (SAP) force met to discuss the rise of organised crime in the region during the dying days of Apartheid. The conference focused on the increasing activity of syndicates and the ineffective response from the police. The first investigation following the conference involved members of the old security branch and SAP's members (pre-1994), combining for the first time investigation and intelligence gathering structures. What this investigation (and others following it) found was that crime syndicates were operating with impunity in many areas of the country and that members of the SAP were involved in smuggling. In summary two areas of concern were highlighted, the corruption of state officials and the cross border nature of organised crime.¹¹¹

Since the early 1990s the range of organised criminal activity has increased from relatively small operations to nation wide syndicates. The threat this poses to the country has not been overlooked by the police but an effective response mechanism has been difficult to maintain as policies and leaderships have changed with political change.¹¹²

The problem faced by the under resourced SAP can best be understood by looking at the extent of the problem. In 2002 there were approximately 800 criminal groups, comprising 12000 suspects, which have been identified by the police. It is also believed that the top 30 syndicates are in direct contact and liaise and coordinate criminal activity with one another. These syndicates also make use of skilled individuals, who offer their services, often, to more than one syndicate.¹¹³

Organised crime in SA has benefited from the development of links between local syndicates (which developed in the late 1980s) and the extension of foreign criminal groups in the state. Local groupings and international groups have also combined operations with legitimate business creating a complex interrelationship that serves the criminal goal.¹¹⁴

¹¹⁰ Bayart et al, 1999, pp. 10-20

¹¹¹ Shaw, M. 2002. *Crime and Policing in Post-Apartheid South Africa*. Cape Town: David Philip Publishers.

¹¹² Shaw, 2002, pp. 63-65

¹¹³ Shaw, 2002, p. 65

¹¹⁴ Shaw, 2002, p. 66

Smuggling of ivory and diamonds in the 1980s by corrupt officials of the South African government has resulted in the forging of close relationships in present times. This has facilitated the easier smuggling of illicit goods across borders through established lines of transport and communication.¹¹⁵

In summary, organised crime in SA is characterised by a number of factors. As Shaw puts it they are; a “complex and changing network structure which is often built around past allegiances and relationships; a connection between areas which have experienced violent conflict and the origins of the criminal group; a clear regional dimension...and a crossover between licit and illicit activities.”¹¹⁶

3.3 The extent of organised crime in SA

Organised crime in South Africa takes many forms and involves diverse groups of people. The range of criminal enterprise differ as do modus operandi making the police's job difficult at best in defining what organised crime is and deciding on methods to apprehend syndicate members.

In a recent report the Central Intelligence Agency and the Federal Bureau for Investigation estimated that there were 32 transnational crime groups operating in South Africa at a cost of 130 billion Rand each year. The nationalities of these groups are diverse and include Russians, Chinese, and Nigerian interests. These groups typically work as networks and can continue operating even after members have been apprehended by police.¹¹⁷

One of the largest markets of illicit goods includes the smuggling of stolen cars. As early as 1980 the SAP recognised the problem, which is estimated to be so large that South Africa accounts for 96-99% of vehicles stolen in the region. The usual operation of syndicates is to steal vehicles, smuggle them out of the country and then re-register them for resale or exchange them for other illegal goods. The footmen in this trade are normally South Africans who work for the international syndicates. Figures of stolen vehicles are impressive by their sheer quantity. In 1996

¹¹⁵ Shaw, 2002, p. 67

¹¹⁶ Shaw, 2002, p. 74

¹¹⁷ Irish, J. & Qhobosheane, K. 2003. “South Africa.” In Gastrow, P. (Ed.). *Penetrating State and Business: Organised Crime in Southern Africa*. Vol. 2 No. 89, November. p.71-73

12860 car hijackings were reported while in 2000 this figure has increased to 14999. In 2003/2004 the figure has stabilised somewhat to 13793.¹¹⁸

Other commodities stolen and used in the criminal economy to purchase other illegal goods are cell phones. Pakistani and Nigerian groups are the main players and regularly exchange drugs for cellular phones. A discovery of 7000 cell phones was recently (2003) made on a truck heading to Zimbabwe and indicates the extent of this particular problem.¹¹⁹

South Africa has also been identified by international groups as being a nerve centre for the shipment of drugs into the USA and Europe. In 1995 South Africa accounted for 73% of all cocaine seized in Africa. Mandrax has also come to be associated with SA. As early as the 1980s Police were cracking down on the Mandrax producing industry, shutting down a factory capable of making 20 million tablets a day in 1987. Since 1990 transnational groups have greatly expanded the drug market in South Africa extending the trade in drugs to heroine and hashish.¹²⁰

While there are many Western Cape interests in the drug trade international syndicates dominate the industry, which is estimated to be worth 50-75 billion Dollars annually. Police can vouch for the growing problem having seized 19 million Mandrax tablets, 500 kilograms of cocaine and 11 tonnes of hashish at a value of 1.43 billion Rand in 2000 alone.¹²¹

Another major source of revenue in the South African organised crime circles is in gold and diamond smuggling. The South African Chamber of Mines estimates that it loses 7% of its gold stock a year through theft and in 1996 the government estimated that it lost 300 million Rand a year through gold theft. Like vehicle smuggling the theft and smuggling of gold out of the country is directed by international syndicates but the footmen generally tend to be South African's and in this case miners.¹²²

One can go on listing the various crimes and the figures for each. Indeed, the extent of the problem does not stop at vehicle hijacking, drugs and gold smuggling (although these are the bigger operations). Human trafficking, trade in endangered species, fraud and the arms trade are

¹¹⁸ Irish et al, 2003, p. 75.

¹¹⁹ Irish et al, 2003, p. 76.

¹²⁰ Irish et al, 2003, p. 77.

¹²¹ Irish et al, 2003, p. 78.

¹²² Irish et al, 2003, p. 78.

also lucrative markets. Irish and Qhobosheane mention 7 reasons why organised crime is able to flourish in SA. They are in no specific order porous borders, South Africa's position as a major transport route, modern infrastructure that facilitates crime, corruption, well organised local crime groups poverty and local markets willing to sell and buy illicit goods.¹²³

3.4 Transitional dynamics 1994 -1998

The end of Apartheid in SA and the transition to constitutional democracy created an environment in which local and international syndicates could operate with relative ease. The characteristics of states in transition are such that the ability of the government to curtail criminals was impeded by lack of resources and the lack of clear policy and effective personnel to combat criminal activity.

In 1998 Mark Shaw produced an article entitled 'Organised Crime in Post-Apartheid South Africa (SA)'.¹²⁴ This piece was designed to focus the public's attention on a vital area of concern. Shaw painted a picture of close to complete ignorance on the part of the police in regards to the organised crime issue. He argues that they were caught unprepared to deal with the problem of organised crime and cross border smuggling and while in transition from authoritarian to democratic forms of policing, unable to cope with burgeoning crime rates.

His argument follows that in a society in transition (as South Africa was and still is, to a certain degree), organised crime is likely to flourish as controls on criminal activities come second to the reconstruction of the state. This is the case in SA were despite arguments to the contrary, organised criminal networks have long existed especially in the Western Cape. However, the gangs here were not as sophisticated as some international syndicates and when the state was reformed in the early 90s (with the unfortunate weakening of border controls) Nigerian, East European and Asian criminal influences saw an opportunity to extend their criminal enterprise into SA and forge links with local groupings.¹²⁵

¹²³ Irish et al, 2003, pp. 82-84

¹²⁴ Shaw, M. 1998. "Organised Crime in Post Apartheid South Africa". Institute for Security Studies: *ISS Papers* No. 28, January.

¹²⁵ Ibid

The problem of organised crime in SA was exacerbated by four important factors, which Shaw asks his readers to account for. First there is the degree to which various organised crime groups have consolidated either through merger or structured cooperation. Second there is the role that the former members of the apartheid security forces play in relation to organised crime. A third factor of importance is the degree to which organised criminal groups have been successful in penetrating the state and corrupting officials and lastly the degree to which foreign organised crime groups operate within the country and have forged links with local crime syndicates.¹²⁶

Measuring these four occurrences is difficult. An easier task is to ask what worsened the current state of affairs.

Shaw points out the problems confronting state control vis-à-vis organised crime in SA during the mid-1990s. They are:

- Poor border controls
- Inefficient customs and revenue services
- Under resourced police force
- Government corruption
- Low public service moral¹²⁷

These problems still exist but to a lesser degree today as government invests significant time and resources into containing the problem. Schonteich concurs with Mark Shaw's argument that South Africa (was and) is an easy target within which criminal networks could operate because of, low resources, inadequate border controls, good transport infrastructure and a, good banking system. He mentions again the problem faced by the state and provides insights into the legislation that has been enacted in SA, namely, the POCA.¹²⁸

Since Shaw's now outdated analysis much effort has gone into modernizing systems and boosting capacity of. However, these developments have occurred largely post-2000. What this sub-section hoped to achieve was to provide a picture of the then current state of affairs so that we may later infer back to these arguments and describe why and how the POCA was enacted.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

3.5 Conceptualising organised crime in the Western Cape

Standing is not convinced that South Africa is following the right approach concerning organised crime. He grapples with how best to conceptualise a term that by its very nature is subjective. He raises the debate to consider 'crime economies' instead of the usual approach based largely on 'groups.'^{129 130}

The 'usual' approach to studying or conceptualising organised crime is by using the group based approach. Usually the study of the criminal group will focus on the internal characteristics of the group and contain a descriptive account. This will usually include a hierarchy, code of secrecy, division of roles, restricted membership, initiation rituals and the use of violence to obtain their desired ends.¹³¹ For reasons that will be made clearer below the group based approach can not help us to understand conditions in the Western Cape.

The Cape Flats are characterised by a symbiotic relationship between gangs and communities. Major crime figures in the Western Cape receive massive community support in their criminal ventures. This in itself provides those fighting organised crime a interesting and challenging contradiction.¹³²

The gangs on the Cape Flats do not prescribe to any formula or practice we might notice when compared to gangs internationally. They are unique in structure and operation with the bigger gangs usually comprising thousands of members who serve as the 'consumers' in the drug trade and are therefore the income generators for the crime bosses. Gangs are usually seen as anti-social groupings that undermine communities' social fabric and contribute to increased crime and deviance. However, South Africa's unique history has had a significant effect on the role of gangs in certain Cape Flats communities. Andre Standing in particular has detailed the relevant role gangs play in providing community structure and a criminal economy that is outside of the mainstream.¹³³

¹²⁹ Standing, A. 2003. "Re-conceptualising Organised Crime." *African Studies Review* Vol 12 No.3.

¹³⁰ See also Standing, 2003. A. *Rival Views of Organised Crime*. ISS Monograph Series. No. 77, February.

¹³¹ Ibid. p.103.

¹³² Standing, A. 2003. "The Social Contradictions of Organised Crime on the Cape Flats." Institute of Security Studies. *ISS Paper* 74. June.

¹³³ Ibid.

The history and geography of Cape Town is unique. An affluent Central Business District and surrounding (previously white only) suburbs are encircled by dire poverty. This affluent area is flanked on the one side by the Atlantic Ocean and the other the Cape Flats. The Cape Flats are made up of a number of neighbourhoods (Mitchell's Plain, Elsies River, Kuils River and the numerous black townships). In order to survive in this 'other world' people have had to adapt to survive. Gangs have taken advantage of this need and provided an alternative government so to speak, in the absence of legitimate state structures. In an area where unemployment is rampant criminal domains deal in their illicit goods, be they drugs, prostitution and stolen property. Crime bosses of whom there are between 10 - 20 control this economy with the help of their base of followers, the typical street gangster. A strict hierarchy is maintained between the elite and street gang member with professional personnel such as lawyers and accountants operating outside these areas in a support capacity.¹³⁴

As mentioned above street gangsters number in the tens of thousands¹³⁵ and serve as consumers in the criminal economy. The normal citizens living in the affected communities also have a role to play. Some people support the gangsters by hiding weapons and drugs. Gangsters in turn provide food, sporting events and money to the community. This 'social bribe' has its payoff in the community remaining silent on crimes committed in their neighbourhoods. Support of this nature could also be based on simple fear. What is clear is that significant portions of the community see nothing wrong with the 'gang problem.' This is the contradiction that characterises the Cape Flats.

With gangsters that have replaced the state as providers and a state that is under resourced in the Cape it is easy to understand why there would be support for gangsters. It is also important to remember the context in which these people live. Squalor, hunger and fear are a lethal combination that gangsters have manipulated to garner support. To overcome these problems the state has introduced POCA, but whether removing the community 'philanthropists' or leaders (the crime bosses) is a good thing will only be known after they have been removed. Standing for one doesn't believe that the problem will be solved by this approach.

As mentioned above the conceptualisation of organised crime is important and necessary to tackle the problem at hand. Standing reveals to us that the government's response to organised crime in

¹³⁴ Ibid.

¹³⁵ Based on estimates. No detailed survey has been conducted as yet.

the Western Cape in particular suffers from a lack of clarity on what an organised gang group is. Using definitions that are based on the group based approach, they aim to remove offending individuals that fit the description of the organised crime boss or street gangster. However, new evidence presented by Standing in his paper (*Reconceptualising Organised Crime*) shows that the much of the crime is not perpetrated by the career criminal or any distinct group. Rather what he terms the criminal entrepreneur is the main culprit who acts within a loose association consisting of corrupt officials and businessman (not gangsters). The network that maintains this association is not held together by trust or loyalty like the gangs are. Rather paranoia and fear predominate and the idea of a *criminal economy* seems a more pertinent label.

Within this *crime economy* removing individual offenders might not have the desired effect of preventing further illegal activities but rather provide an opportunity for a new criminal to emerge. Standing suggests then that what is required is a "...criminal economy perspective [that] should encourage a more strategic response based on harm reduction." In other words investigation into drug crimes for example would not focus only on the offender but on the problem. The harmful effects of drug dependency, the prison system and income generating activities that raise drug money might also be considered. This would require a more holistic approach requiring the police to work in concert with individuals with a large range of expertise and knowledge.¹³⁶

Organised crime in the Western Cape does not exist primarily in the realm of the 'gang' and the trade of 'drugs.' Other syndicates operate in the province and have proven to be rather lucrative 'ventures.' An excursion into the actual activities of organised crime can best be served by looking at Jean Redpath's analysis of organised criminal activity in the Western Cape in the realm of perlemoen poaching and drug smuggling. In some communities along the Cape coast the local communities and organised crime networks no longer respect the rule of law as illegal activities provide income for families who would otherwise be unemployed.¹³⁷

In these towns and villages where the rule of law does not seem to exist the trade in perlemoen has attracted international syndicates and Cape Flats gangs. The involvement of communities is widespread and even children as young as 12 are used as runners in the 'industry.' Clashes with

¹³⁶ Standing, 2003 (*African Studies Review* 12(2)), p.104

¹³⁷ Redpath. 2004

local law enforcement and Scorpions in the early 2000s simply added weight to the claim that these communities were 'lawless.'¹³⁸

With demand from China¹³⁹ communities in the Overberg (or elements within these communities) plunder local resources in an estimated R400 million a year enterprise. With, a then estimated, conviction rate of approximately 5% the extent of the organised criminal network is easy to gauge. This example is one of many. In Jean Redpath's 2001 study of Western Cape crime trends (information of which was recovered from a survey of 150 Western Cape police stations) a number of organised criminal activities were uncovered.¹⁴⁰

Redpath's analysis differs from Standing considerably and provides us with a much more descriptive account of the state of affairs of organised crime in the Western Cape. Definitions also seem to be important to her. One example being the distinction between syndicates (which involve themselves in single income activity) and gangs (who are adept at a range of activities which are concerned with maintaining and growing their 'territory' or turf). Township gangs can be further distinguished from the latter two. These conceptualisations are important in understanding the Western Cape gang phenomenon and help us distinguish between different groups of criminals.

The syndicates in operation differ in ethnicity (see below) and target market. Some of the many are: ATM fraud, computer theft, residential housebreaking, motor vehicle theft and drug syndicates.¹⁴¹ They can also operate in cells, which together make up a much larger network.

Gangs in the Cape on the other hand are in continuous states of flux, due to assassination, imprisonment and influxes of foreign syndicates, says Redpath. Gangs are also not the preserve of coloureds. Black township gangs are also common. This paper will not go into a discussion of the specific gangs it must be born in mind that gangs operate and strive for territory (generally speaking). When the leadership is targeted and removed a phenomenon described by Redpath as the Hydra phenomenon involving the emergence of a number of minor leaders and a

¹³⁸ Redpath, J. 2002. "Poached close to extinction." *Focus*, March.

¹³⁹ Triads usually dominate this trade. Gastrow, P. 2001. "Triad Societies and Chinese Organised Crime in South Africa." *ISS Occasional Paper* No. 48.

¹⁴⁰ Redpath, J. 2001. *The Hydra phenomenon, rural sitting ducks, and other recent trends around organised crime in the Western Cape: Including a brief comparison with trends in Gauteng*. Paper presented at 2nd World Conference: Modern Criminal Investigation, Organised Crime & Human Rights, International Convention Centre, Durban, South Africa, 3-7 December 2001.

fragmentation of gangs and gang territory occurs.¹⁴² Thus one would conclude from these findings that removing gang bosses is not the answer to the crime problem and might very well exacerbate the problem of gangsterism. This will be discussed further below.

3.6 Ethnicity, migration and organised crime

H.F. (Rika) Snyman's simply titled piece "Organized Crime"¹⁴³ provides the theoretical framework of the study of the issue at hand. Snyman touches upon biological and strain theories of crime causation and uses these devices to come to understand why gangs form, under the banner of the rational choice approach. The second explanation is similar to Standing as she looks at the community origins and support of criminal networks. Organised crime is seen as a product of the "production-distribution-consumption factor of the community in which these activities are found."¹⁴⁴

She also summarises the characteristics of different syndicates (group based approach). She focuses on Colombian, Asian, Cuban, European, Russian, African, the Triads and Yakuza organised crime groups. In so doing one can appreciate the enormity of the problem for international police agencies when structure and method differ in criminal practice across the world. She contends that in dealing with these syndicates a more 'sophisticated approach' is required (not only reactive). What we require is a change in the minds of the consumers to resist the purchase and or support of illicit goods and legislation that can deal effectively with criminals.¹⁴⁵

Of the major 'groups' discussed in the literature is the rise in social and academic debate surrounding West African criminal networks. In 2001 two articles in particular appeared detailing the activities of these groups. Mark Shaw's *Crime as Business, Business as Crime*¹⁴⁶ is an informative text that details the rise of the West African criminal networks using mainly structural arguments to explain their emergence in Nigeria and South Africa.¹⁴⁷ We learn that

¹⁴¹ Redpath, 2001 (Hydra Phenomenon)

¹⁴² Redpath, 2001 (Hydra Phenomenon)

¹⁴³ Snyman, H. 1999. "Organized Crime" In the *Encyclopaedia of Violence, Peace and Conflict*, Volume 2. Academic Press.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Shaw, M. 2001. *Crime as Business, Business as Crime: West African criminal networks in Southern Africa*. South African Institute of International Affairs.

¹⁴⁷ Ibid.

these groups are usually of Nigerian origin and are ethnically homogenous making it difficult for police to infiltrate them. The Nigerians aren't the only players. Ghanaian, Senegalese and Congolese smugglers operate in South Africa. They make use of their highly flexible cultural resources and well established merchant traditions, which have a reputation for commercial expertise.¹⁴⁸

Their growing presence in the South African State is another problem that the police face in combating crime and adds to the pressure on those in authority to deal with what has become an important social, political and economic issue. Mark Shaw contends that academic analysis of the nature and future activities of West African syndicates is crucial in curtailing their operations.

Snyman presents the other paper on the Nigerian question¹⁴⁹ and reiterates what she mentioned in her previous article above, in particular the need to mobilise all members of society to combat organised crime. She favours prevention and control techniques over more punitive, reactive responses to the problem. What is required is a holistic approach to the problem (much like the National Crime Prevention Strategy) that can uplift communities and combat crime. Despite Standing's criticism of writers like Snyman (who use the group-based approach) it is clear that she is quite aware of the need for further development of the legislation and responses to organised crime. However, what Standing does is focus on a particular aspect of the organised crime debate, Western Cape street gangs. This is a rather specific focus on a much greater problem and his critique of the group-based approach is situated within a particular context (Western Cape). Writers like Snyman and Shaw tend to focus on a different level of analysis (and the international syndicate in particular).

3.7 Regional responses

Organised crime is a problem for the Southern African Development Community (SADC) region. The capacity of states to fight organised crime is largely improved when states act in concert. Important developments in this regard involve the formation of regional policing networks such as SARPCCO (Southern African Police Chiefs Co-operation Agreement) and the ratification of the Palermo Convention.

¹⁴⁸ Bayart et al, 1999, 11-12

¹⁴⁹ Snyman, H. 2001. "Nigerian Organised Crime in South Africa." *Security Journal* Vol. 14, no. 3.

SARPCCO began operating at the Interpol Sub-Regional Bureau situated in Harare in February 1997. SARPCCO is officially part of Interpol but maintains its sovereignty. SARPCCO is not an independent law enforcement agency but rather a mechanism through which police agencies in the SADC region can cooperate. The mission and objectives of the organisation are: to promote and strengthen cooperation; foster joint strategies for management of crime with regional implications; prepare and disseminate information; carry out reviews of regional measures to combat crime in light with changing priorities and needs and to maintain the system and structure that facilitates the aforementioned process. In addition SARPCCO is responsible for; making recommendations to government concerning the harmonisation of legislation, accession and ratification of international treaties, promoting mutual assistance, facilitating the movement of witnesses and formulating systematic regional police training policies and strategies.¹⁵⁰

Member countries are all represented in the Harare office by staff seconded from SARPCCO member countries. This arrangement has allowed SARPCCO to launch successful regional operations including Operation Sesani and Operation Atlantic resulting in the confiscation of vehicles, drugs and arms and the arrest of 240 suspects in the first few years after its inception.¹⁵¹

In the 1990s there was an awareness that harmonising legislative responses and coordinating policing activities was necessary to counter organised criminal networks that dealt in cross border crime. A few examples might suffice to highlight the need for the response. Counterfeit US dollar notes are increasingly being produced in SA. In response the Secret Service (US) has set up an office to deal with the problem. In 1998 alone US\$ 16.7 million was seized representing a quarter of the world total of seized dollars. The smuggling of firearms, armed robbery, vehicle theft and hijacking are prevalent in most if not all SADC states. The Malawian government claims that the state has become an outpost for car robbery rackets. In 2000, 100 647 cars and motorcycles were reported stolen in SA. The list is seemingly endless and in 7 of the 9 countries surveyed in 2000 by Gastrow, poaching was still occurring despite the public perception that the trade in ivory had been stopped.^{152 153}

¹⁵⁰ "Combating cross-border crime- The Southern African Experience- from Government. Speech by Juan Kotze, Interpol National Crime Bureau Pretoria, South Africa, on 23rd March 2000 at the Microsoft 'Combating Cross Border Crime 2000' Conference, Cape Town, South Africa. Appearing on www.microsoft.com/europe/industry/government/features/2174.htm 24/10/2000.

¹⁵¹ Ibid.

¹⁵² See Gastrow, P. 2001. *Organised Crime in the SADC Region: Police Perceptions*. ISS Monograph Series, no. 60 August 2001. Ch.6.

Through a substantive review of legislative development Charles Goredema contributes significantly to the understanding of responses to organised crime in South Africa and in the wider Southern African region. 'Organised Crime in Southern Africa'¹⁵⁴ also adds to the debate by focusing on the role of regional structures such as SARPCCO and Interpol in Southern Africa. Legislation concerning organised crime is similar across SADC borders. This improves efficiency in relation to mutual assistance and cooperation across the region and the world.

How this harmonised approach came to be is at first not clear. What is clear is that there was a desire amongst states in the SADC region to adopt practices that would partner international efforts. By signing the Palermo Convention in 2000 and with the formation of SARPCCO in 1997 the platform for homogenised policy was created. It must be stated though that while legislation in the SADC region concerning organised crime exhibits some common features, there remain country specific differences.

3.8 In conclusion

A review of the South African literature on organised crime exhibits a range of thematic concerns. This chapter has hopefully provided a concise introduction to a number of issues one of them being the conceptualisation of organised crime. Two approaches have been identified. The first is the group-based approach, which tends to focus on national groups and operates largely at the macro level. The second is the harm reduction approach (favoured by this paper), which argues that law enforcement that does not incorporate all role players fails to curb the problem of gangsterism in the Western Cape. It is thus focused on the micro level and argues that removing 'criminal entrepreneurs' from the criminal economy does not undermine the criminal trade but rather creates conditions for rival 'entrepreneurs' to benefit. This is described by Redpath as the Hydra phenomenon. As an addendum definitions that have become policy and legislation have been adopted by the state. The POCA for example relies heavily on identifying gang members and punishing membership. It ignores the effect of this extirpation on the community and the offender.

¹⁵³ See also Gastrow, P. (ed.). 2003. *Penetrating State and Business-Organised Crime in Southern Africa*. ISS Monograph Series no.89. and Gastrow, P. 1998. *Organised Crime in South Africa: An Assessment of its nature and origins*. Institute for Security Studies. Pretoria.

¹⁵⁴ Goredema, C. 2001. *Organised Crime in Southern Africa*. ISS Monograph Series, No. 56.

In a changing and diverse world generalisation (which broad definitions tend to become) while pertinent in the broader study do prove problematic and cumbersome when applied to local issues. In the Western Cape the study of gangs has revealed that the structure and operation of gangs are unique and applying legislation, which is loosely based on foreign interpretations and responses to organised crime, to combat these organisations runs the risk of being ineffectual.

Studies of the groups that comprise the organised crime syndicates have also found a niche in academic writing. The influence of foreign interest (Triad, Mafia and Russian Mafia) is of particular concern to South Africans. Yet the effects of these ethnically homogenous groups are hard to gauge as they are usually closed to outside scrutiny.

The combination of crime and politics is a dangerous one. Writings by Ellis in the mid 90s pointed to structures within the state conducting illegal activities and these activities continuing after the change over of power in 1994. While writings on crime and politics have slowed in recent times, there is room for extending research into this field especially in light of the Arms Deal scandal, which has implicated numerous high ranking government ministers. While this might not point to a government 'conspiracy' it certainly raises the issue of corruption, sadly a common practice in most states and an unfortunate bedmate of organised criminal syndicates.

Efforts to combat organised crime have taken many guises in the SADC region. Legislation and police cooperation in particular have become harmonised and developed to fall into line with international efforts to combat the scourge. Regionalisation is an important component of the war on syndicates who have taken advantage of the improvement in communications, transport and free trade zones to operate on a wider and more global scale. The importance of forging relationships with ones neighbours (especially in SADC regions where resources are few) is vital to prevent the movement of criminals and their illicit goods.

The challenges confronting a deeper analysis of organised crime and the themes mentioned above are multiple. With SA in a state of transition and the world changing technologically every year opportunities for criminals are presenting themselves regularly. Thus developing policy that is flexible and efficient is important. Time is also of central concern. If responses are slow, criminal groups will stay one step ahead of law enforcement.

The challenge for the government is a peculiar one. Crime is an issue that has gained popular attention and needs to be addressed as a matter of urgency. On the other hand regional and international responsibilities need to be catered for. In an increasingly globalised world the actions of one state usually impacts on others (depending of course on their economic size or political influence). The SA government needs to balance the contending domestic and international needs and produce policy that will best tackle organised crime in whatever forms it takes locally and abroad. For as we know organised crime is not practiced by one group. Groups differ ethnically, linguistically, structurally and target numerous industries. Responses therefore need to be flexible.

Chapter 4: Towards a Social History of the Drafting and Implementation of the Prevention of Organised Crime Act

4.1 Introduction

Fighting crime in the post-democratic era has been a particularly important challenge to the newly established constitutional state. The ANC feared a white backlash led by the well-resourced, trained and organised military forces of the old SA State.¹⁵⁵ The character of the police was also paramilitary in nature and any transition would be difficult while they remained in a position to *potentially* disrupt the state.¹⁵⁶ In addition, the incoming leadership of the ANC had learnt their trade in the military and intelligence spheres of the liberation struggle and there was, at transition and integration, a serious shortage of capable leaders to take over the reigns of the police service. The same problem did not apply to the military forces as large number of MK combatants were integrated into the South African Defence Force.¹⁵⁷ However, the ANC would have to make do, with the personnel of the old order, for the meantime at any rate.

The first police minister Sydney Mufamadi had the dubious honour of balancing the old order, highlighted by the appointment of an 'old guard' police commissioner Johann van der Merwe with the new (incoming black leadership and general will of the nation).¹⁵⁸ Up until 1999 then, there was an uneasy truce between the old and new. However, the second general elections brought about a radical shift in SA crime policy.

Crime policy in SA during the 1990s saw shifts that were quite dramatic in their own right. In 1996 the government adopted what might be referred to as a nation building approach to crime policy in the National Crime Prevention Strategy (NCPS). This document attempted to create a 'comprehensive macro-strategy.' It became synonymous with the four-pillar approach to crime prevention. The approach identified the need for a radical overhaul of the criminal justice system,

¹⁵⁵ Laufer, S. 2001. "The politics of fighting crime in South Africa since 1994." Steinberg, J. (ed.). *Crime Wave*. Johannesburg: Witwatersrand University Press.

¹⁵⁶ The fears of the ANC did not come to fruition.

¹⁵⁷ Laufer, 2001, p. 16.

¹⁵⁸ Laufer, 2001, p. 19.

the utilization of the principal of environmental design, the extension of public education and attending to the problem of transnational crime.¹⁵⁹

The aims, however good in intention were too far reaching. The resources simply weren't available to the government at the time to implement this policy. In addition the civil service were in no position to adopt a strategy that required interdepartmental cooperation at a level required for the NCPS to succeed. In 1999 a review of the NCPS was undertaken and renamed the National Crime Prevention Centre. This renaming came in the light of the 1998 White Paper on Safety and Security, which argued for partnerships to be developed between law enforcement and crime prevention. It also moved the country towards a position where crime prevention could become a priority for all tiers of government. However, 1998 in particular saw a shift in policy that one could say was motivated by high crime rates, public perceptions of crime, public organisations like the People Against Gangsterism And Drugs (PAGAD)¹⁶⁰ and highlighted by new law enforcement legislation like the POCA and stronger political rhetoric speaking for the 'war on crime.'¹⁶¹

While 1994-1998 was characterised by a strong nation-building ethos, 1998-present has seen what some commentators refer to as state building or the militarisation of crime policy.¹⁶² This decisive shift was preceded by legislation drafted the previous year, as mentioned above. The POCA became a rallying point for new crime fighting groups like the Directorate for Special Operations (or Scorpions) which could 'take the fight' to the criminals. The Scorpions have not had it all their way, however. They have been accused of 'cherry picking' their cases and taking over cases that have been well investigated already and are likely to have a successful conclusion. For more on the Scorpions and constitutional questions over their actions and existence see Jean Redpath's work in the ISS Crime Quarterly no. 8 of 2004, "Weathering the Storm."¹⁶³

¹⁵⁹ Van der Spuy, E. 2002. "Crime and its Discontent: Recent South African Responses and Policies." SAIIA, *Crime and Policing in Transitional Societies*. Johannesburg: Konrad Adenauer Stiftung. pp.167-175

¹⁶⁰ PAGAD is a community based organisation dedicated to the eradication of gangsterism and drug dealing in the Western Cape. They have been identified by the government as vigilantes and numerous court proceedings have been launched against their members for their violent action against suspected criminals and gangsters.

¹⁶¹ Van der Spuy, 2002, pp.170-175.

¹⁶² Ibid.

¹⁶³ Redpath, 2004, paper appearing on <http://www.iss.org.za/Pubs/CrimeQ/No.8/Redpath.htm> (footnoted above)

1998 then, signaled a real and purposive shift in crime policy direction. Where before the government had tried to maintain and retain its foothold on power it now had a clear mandate and confidence to take on the crime problem. So began in 1998 the drafting of POCA and later the ratification of the Palermo Convention which would establish SA firmly in the world challenge to organised crime.

However, even before 1998 the crime issue (including organised crime) had been addressed and legislation enacted to counter the threat posed by criminals to the young democracy.¹⁶⁴ The Proceeds of Crime Act 76 of 1996 provided for the prohibition of money laundering and placed an obligation on citizens to report information to this regard. The Extradition Amendment Act 77 of 1996 catered for extradition in the absence of formal agreements with states (similar to Palermo) and the International Co-operation in Criminal Matters Act 75 of 1996 provided for mutual cooperation with other states in terms of evidence, confiscation and transfer of proceeds of crime.¹⁶⁵

Legislation was one important part in the fight against crime. However, the in-fighting between the 'old guard' and the 'new' and typical inter-agency rivalry stifled effective police action against well organised criminal syndicates. Typically we note that the rivalry between Scorpions and SAPS exemplified the friction between new agencies and traditional security organs. For example, accusations leveled against the Scorpions of 'cherry picking' by elements within the government were frequent.¹⁶⁶ In response to the problem the government created an institution that would centralise all intelligence relating to gangs and organised crime. In 1997 the National Intelligence Agency was officially opened by President Mandela, in Pretoria. This new agency and the 'newly' (1997) created SARPCCO (which envisioned joint police operations with all SADC members) in conjunction with Interpol and the Southern African Development Community Organ on Politics and Security¹⁶⁷ encouraged and adopted an ethos of cooperation.

By 2000 it seemed that the ANC government was well on track in devising a policy that could effectively counter organised crime. They had taken heed of the warnings from the international community and academics that their transitional state was ideally suited to criminal syndicates

¹⁶⁴ Yet the confidence in these acts was shown to be limited by the introduction of the POCA.

¹⁶⁵ Camerer, L. & Shaw, M. 1998/1999. "Countering Organised Crime." *SA Yearbook of International Affairs* no.19. pp. 245-246.

¹⁶⁶ Redpath, 2004.

¹⁶⁷ Camerer & Shaw, 1998, p. 248.

that could and would take advantage of their porous borders and weakened police service. Structures were in place as were the laws needed to strengthen the police's reach and effectiveness. Yet the one question that remained unanswered was, why did we need the Prevention of Organised Crime Act?

4.1.1 *Political context within which the POCA was enacted*

From 1996 onwards SA was facing a *crime crisis*. With crime seemingly burgeoning and parliamentary opposition calling for a tougher stance on gangs the government was under pressure to deal with a problem which some thought threatened 'public order.'¹⁶⁸ After leveling off slightly in 1995/6 crime was again on the increase and vigilantism by groups such as PAGAD was on the increase, their targets usually the gangs or drug merchants operating in the Western Cape. However, we must be cautious when dealing with this idea of a crime crisis. The view that we, as readers of media articles and contributors to editorials, have sometimes skews what we say and believe. Without looking at what is actually occurring we generalize and argue using facts that have not been scientifically tested.

So what do the statistics say? The murder rate is often quoted by analysts to describe the state of crime in SA. Under reporting can not effect this figure, that is obvious. What follows is a list of murder numbers and the years they occurred (1994-2000); 1994/95-25965, 1995/96-28877, 1996/97-25470, 1997/98 24486, 1998/99-25127 and 1999/00-22604. The total number of crimes reported between the same period per capita; 5381, 5359, 5162, 5213, 5387, 5650.¹⁶⁹ One will note that there was a slight increase after 1995/96.

It should go without saying that crime was increasing. The statistics (used unfortunately as indicators of government performance) showed that. Powerful groups (opposition parties and the media) within the country were calling for a tougher stance on crime by the government. The government must surely have been aware of this. It is the position of this paper that the swiftness of the drafting and implementation of the POCA was done precisely because of this backlash. The government, it would seem, began to 'feel the heat.' Nothing else can explain (to the authors mind) why the SA government went ahead in such a manner as they did without having felt some

¹⁶⁸ "Demand for anti-gang laws grows." *Argus*. January 16 1998. Paul Olmer.

¹⁶⁹ Statistics courtesy of <http://www.iss.co.za/CJM/statgraphs/totals.htm>

sort of pressure to do so. POCA was as much a piece of legislation to come into line with international best practices as it was a political quick fix.

International pressure to create policy, to come in line with international norms must also have played a crucial role in the governments decision to begin drafting a piece of legislation that would be accepted worldwide. Peter Gastrow though is not entirely convinced of the pressure from the PAGAD sphere. However, he does see the crime issue at the time as important:

I don't think that PAGAD had much to do with it. The initiative from the state I think was driven by a nation wide outcry against high crime rates. The elections were approaching and to the public it appeared that the government was impotent, not able to take effective steps and I think that as a result of the political pressure and its own feeling that it wasn't coping well with crime... this was one of the initiatives it came forward with to try and tighten up legislation. Make it more effective re: organised crime, because organised crime was mushrooming at the time and the public was aware of it. It was a big national issue.¹⁷⁰

Whether or not the approach was tailored or a simple coincidence the government pulled off a master-class in political spin. With the 1999 elections around the corner, first POCA (based on Californian and Florida anti-gang law)¹⁷¹ was enacted and then the colourfully named Scorpions were introduced as well as the Asset Forfeiture Unit some time later. Combined with a change in political rhetoric that suited the typically reactionary and fickle public the government had escaped virtually unscathed from the quagmire of the crime debate. They had adopted a perfect strategy. Shift the focus, from the governments' failures to the government's successes.

This period also introduced to South Africans a new approach to crime policy. While The NCPS still played a part in directing the efforts of SAPS in regard to community policing and crime prevention, legislation being drafted and the message that government was sending the people of SA was one of crime control. The development ideas embedded in the NCPS were being marginalised and a tougher stance on crime was emerging. The legislation designed to give voice to this new approach can be said to have international roots and proscribe to two main themes:

The first aims at a group that are regularly involved in criminal activities. It criminalises gang membership and gang activity. The second aims at the fact that these groups make a profit and

¹⁷⁰ Interview 1: Peter Gastrow

¹⁷¹ "Gangs to be illegal under new law" *Argus* February 21/22 1998 Jean Le May.

aims to follow the money trail and remove their profits gained from illicit means. Internationally conventions, such as the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* of 1988, the Council of Europe's *Convention on Laundering, Search Seizure and Confiscation of the Proceeds of Crime*, and the *United Nations Convention against Transnational Organised Crime* (the Palermo Convention) all embody these two 'themes.' National bodies including Malawi, Nigeria, USA and South Africa have similar themes.¹⁷² This convergence of ideas and ideals shows that the fight against organised crime is global in character (see Boone above).

4.2 Prevention of Organised Crime Act

Introduction to the Act no 121 of 1998

To introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal assets that have been used to commit an offence or assets that are the proceeds of unlawful activity; to provide for the establishment of a Criminal Assets Recovery Account; to amend the Drugs and Drug Trafficking Act, 1992; to amend the International Co-operation in Criminal Matters Act, 1996; to repeal the Proceeds of Crime Act, 1996; to incorporate the provisions contained in the Proceeds of Crime Act, 1996; and to provide for matters concerned therewith.

It was clear to some (the government in particular) at the beginning of 1998 that a new approach was required. The police were ineffective against the gangs, vigilantism was on the increase, the media were pushing for a tougher stance on crime in general and the influence of international changes and harmonisation of crime policy must've been putting pressure on the government to review and change crime policy. This needed to be achieved in order to come into concert with international efforts against organised crime.

¹⁷² Redpath, J. "Papering over the cracks: The law and organised crime." 2nd World Conference: Modern Criminal Investigation, Organised crime and human rights. ICC Durban December 2001.

The government was keen to address an issue that was becoming the primary national problem. Of course the blame for the growth of organised crime was put firmly at the feet of the previous regime and the weakness of the new democratic state was overlooked. To be fair, though, the previous government had done little to combat the organised crime problem. There have also been allegations that top members of the Apartheid regime colluded with gangsters.¹⁷³

It was concluded by the Justice Ministry and Parliamentary Justice Committees that SA's new Organised Crime Bill would have to look a lot like the RICO (Racketeering Influenced and Corrupt Organizations) Act in the USA. They claim to have based their findings on "careful consideration and research."¹⁷⁴ However, what this research amounted to is unclear. However, it is true that the RICO Act does provide a benchmark for legal action against organised crime worldwide. It must be said, however, that while RICO formed an important reference point for the POCA it was not the only legislation that was considered during the drafting process. As Peter Gastrow made clear similar examples of organised crime policy were studied from European experiences.¹⁷⁵

The team was to be set up under the chairmanship of Peter Gastrow, Cape Town Director of the Institute of Security Studies (ISS). According to the Minister of Justice, Dullah Omar the ISS was chosen because of its "leading role in conducting policy studies on the criminal justice system in South Africa."¹⁷⁶ The team was to be made up of a wide variety of experts, including overseas experts (a list of those who contributed to the process are mentioned below). They were also responsible for drawing up a draft Bill that would be in line with international best standards and could be effective in combating organised crime.

The mandate¹⁷⁷ of the drafting team was simple. Scan international legislation and complete the draft in 3 months. It was to be fast tracked. The objectives of the new law were to criminalise the activities of those at the top of organised crime syndicates i.e. the crime bosses; make participation in a gang illegal; introduce the civil forfeiture of assets, and criminalise activities and membership of street gangs. In order to create a comprehensive Bill the task team was broken

¹⁷³ "Nats were in bed with Mafia boss." *Mail & Guardian* February 5-11 1999. Page 8 NEWS

¹⁷⁴ Press Statement 7 May 1998: "Task team set up to draft new measure against organised crime" Issued by Mr. Dullah Omar, Minister of Justice. Appendix 3

¹⁷⁵ Interview 1: Peter Gastrow discussing the analysis of other states' anti-gang legislation.

¹⁷⁶ Omar, press statement.

¹⁷⁷ See Appendix 3 Fax to Mr. Peter Gastrow from Dullah Omar regarding the Organised Crime Bill Drafting Project.

up into 6 groups of experts who were later to report back to the group as a whole. The six groups concentrated on,

1. Civil and criminal forfeiture of assets
2. New criminal offences such as the ones under RICO or criminal offences relating to gangs
3. To look at resource issues such as would a new Act be implementable in the criminal justice system. Would the Criminal Justice System be able to implement this.
4. The regional and international implications
5. Money laundering implications
6. Information sharing and Revenue issues.¹⁷⁸

The 'team' consisted of a policy team, which would direct the process, a co-ordinating team and the six project teams each assigned a section of the Bill to discuss, analyse and report back on.

The Policy Team consisted of:

1. Peter Gastrow (Chair ISS)
2. Willie Hofmeyer (Portfolio Committee)
3. Adv. Berrington Mkize (State Law Advisor)
4. Dr. Bernie Fanaroff (SAPS/NCPS)
5. Prof. Lovell Fernandez (Dept. of Justice)
6. Adv. Willie Viljoen (Attorney Generals Office)

The co-ordinating team would consist of four 'independent' members and 6 of the convenors of the various project teams. The four 'independents' were-

1. Peter Gastrow
2. Willie Hofmeyer
3. Adv. Gerhard Nel (Legal Draftsman)
4. Adv. Louis Kok (SAPS)

The six project teams were-

1. Project Team on Forfeiture

- Prof. Hennie Strydom (convenor)
- Adv. Louis Kok
- Adv. Pieter Smit (SA Law Commission)
- Prof. Nico Steytler (Community Law Centre)
- Prof. Loot Pretorius
- Prof. Angela Itzikowitz (Faculty of Law Witwatersrand University)

2. Project Team on Criminal Offences

- Adv. Esther Steyn (Convenor, Dept. of Criminal and Procedural Law, UCT)
- Prof. Mike Cowling (School of Law, University of Natal)
- Dr. Flip Jacobs (SAPS Detective Service)
- Mr. Willem 'Base' Basson (Secretariat for Safety and Security)
- Prof. Wilfried Schärf (Institute of Criminology)
- Adv. Gert Joubert
- Adv. Andre van Dyk (SAPS Legal Service, Western Cape)

3. Project Team on International Implications

- Mrs. Anel du Toit (Convenor, Public Law, Stellenbosch)
- Prof. Hennie Strydom (University of Orange Free State)
- Adv. Louis Kok
- Adv. John Welch
- Jack Roux (Detective Service)

4. Project Team on Information Sharing and Revenue Issues

- Adv. Willie Viljoen (Convenor)
- Adv. Catinka Smit (SA Revenue Service)
- Prof. Angela Itzikowitz

- Mr. Charles van Staden
- Adv. Louis Kok

5. Project Team on Resource Issues

- Dr. Flip Jacobs (Convenor)
- Mr. Karel Paxton (Dept. of Correctional Services)
- Mr. Effort Kgamede (Dept. of Justice)
- Adv. Amichand Soman (National Secretariat for Safety and Security)
- Ms. Cecile van Riet (Justice Training)

6. Project Team on Money Laundering

- Prof. Louis de Koker
- Adv. Pieter Smit (SA Law Commission)
- Mr. Charles van Staden
- Dr. Flip Jacobs
- Adv. Louis Kok
- Prof. Wilfried Scharf
- Ms. Anel du Toit¹⁷⁹

Just by browsing through the names above it is clear that the legal and practical expertise regarding organised crime legislation and gangs was extensive. Members of the police, justice ministry, corrections, safety and security, South African Revenue Service and academia were involved. The representivity is impressive and there was according to one interviewee a conscious "...attempt to have the task team as representative as possible of key role players."¹⁸⁰ The composition of the groups can be questioned though. There does seem to be relatively limited input from non-governmental organisations. The participation of civil society is crucial whenever legislation that effects a large body of the community is being drafted (as it does here). It seems that the process was largely driven by the government's desire to create a piece of legislation as efficiently and quickly as possible.

¹⁷⁹ Institute for Security studies: Prevention of Organised Crime Bill Project: Report on the Second Workshop held on 12 June 1998.

¹⁸⁰ Interview 1: Gastrow:

The amount of effort that went into providing up to date information is encouraging. The first workshop was held on the 8th of May 1998 at which certain members were requested to provide research documents on specific areas of the Bill that required further explanation. At the second meeting (12 June 1998) some of the important areas for discussion related to the effect such an Act would have on street gangs and the viability of current legislation and ability criminal justice agents and structures to act against organised crime. Civil forfeiture and the regional and international implications of the Bill were also discussed.¹⁸¹

Prof. Wilfried Schärf of the Institute of Criminology gave a clear account of the problems facing SA lawmakers and the shortcomings of current legislation. He highlighted the main areas of concern; namely that the financiers of illegal activities were not targeted and that syndicates could not operate without the help of agents within state structures. In addition, laws as they stood in 1998 were ineffective to deal with the issue at hand. For example Schärf relates how the Monitoring and Interception Act while helpful was not conducive to the (then) current state of affairs. When crimes were videotaped only the crime for which the warrant was issued could be prosecuted. Searching for evidence relating to banking details was also problematic under this Act, as police required a separate warrant for each account and each financial institution. The issuing of warrants for surveillance was another sticking point as only one judge in Gauteng had the authority to do so.¹⁸² This obviously delayed matters considerably.

Interagency co-operation was another problem area that needed amendment. In 1998 the Receiver of Revenue were loathe to reveal information regarding sources of income, especially from drug dealers, and were generally uncooperative with the police in their investigations. The Drugs Act and Proceeds of Crime Act were also hindering progress as assets could only be seized once a conviction had resulted. In most cases assets vanished before the outcome of a court case.¹⁸³

Discussing the regional and international implications of the Bill, Ms. Anel du Toit argued that SA had to catch up with international developments or risk lagging behind in the international effort against organised crime. What was required was national legislation that could cooperate

¹⁸¹ Institute for Security studies: Prevention of Organised Crime Bill Project: Report on the Second Workshop held on 12 June 1998.

¹⁸² Ibid.

¹⁸³ Ibid.

with foreign legislation and contribute to bilateral and multilateral agreements regarding the policing of the threat.¹⁸⁴

Other papers dealt with the need to review the Income Tax Act in particular. Civil forfeiture was seen as a major area of attention during the proceedings with most if not all commentators lobbying for greater enforcement and clearer guidelines. We know now that the Financial Intelligence Centre Act has provided investigators with the tools to identify sources of income and track ill-gotten gains and combine the intelligence of financial institutions under one banner allowing swifter and more efficient monitoring. However, at the time there was a clash between the Receiver and police. The Receiver argued that Section 4 of the Income Tax Act (a secrecy clause) disallowed them from revealing information to the police or attorney general. However, the Drug Trafficking Act No. 140 of 1992 required the Receiver to reveal information regarding taxpayers.¹⁸⁵ Such points of contention seriously hindered the ability of investigators to track those most responsible for the organised crime gangs, the crime bosses.

4.2.1 The involvement of civil society or lack thereof

The swiftness of the drafting process was a problem for a number of interest groups in SA. The National Association of Democratic Lawyers (NADEL) an organisation dedicated to upholding democratic principles in SA, argued that the new Bill was no more than a reactionary response to a political problem. The problem was organised crime and the response from government was the POCA. They argue that in the light of upsurges in crime (in the mid to late 1990s) the government needed a 'quick out' and the proposed organised crime Bill was just what they needed. They added that government needed to rely more on the National Crime Prevention Strategy (NCPS), as the root of all crime was essentially structural. In an article published by *Rights Now* in 1999¹⁸⁶ they pointed out that no mention is made of the NCPS (the national crime policy) and no definition of organised crime exists. They added that civil society organisations and the community were not given enough time to respond to the Bill. Gastrow would agree with NADEL¹⁸⁷ that the Bill was a reactionary response, however, they would disagree I believe on the

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Newsletter of Nadel's HR Research and Advocacy Project. "Nadel's submission on the Organised Crime Bill," appearing in *Rights Now* in March 1999. See Also Justice Portfolio Committee and Security & Justice Select Committee: Joint Meeting 30 September 1998

¹⁸⁷ Interview 1: Gastrow mentions that governments response to the public outcry over high crime rates was to provide strong policy to target the top criminals. He refers to this as a reactive stance but qualifies his

effectiveness of the Bill (now Act), however, it is clear that their objection regarding 'time to respond' is a poignant one.

4.2.2 Lack of consultation by government with civil society, NADEL's submission

As mentioned above the process was viewed in certain quarters as being one-sided and consultation with the groups representing the people was viewed as not having been undertaken in a responsible manner. However, some commentators rejected the Bill on principle. They questioned the role of the Americans¹⁸⁸ and the increasing role of a police force that now had extra powers, which they said, would be used for greater intimidation of blacks, young people and minorities. Leading the attack in a parliamentary committee meeting in 1998, NADEL queried what impact the Act would have on the youth that in some cases had no choice but to join gangs. The Human Rights Commission shared a similar sentiment arguing that the police's new powers (which included arresting members of gangs) would result in the criminalisation of the entire community.¹⁸⁹ One must note that the language NADEL were using to describe their opposition to POCA seemed to be highly emotive. It is unlikely that entire communities would become 'criminalised.' If one were to hazard an estimation of the effect of POCA on communities one might venture that groups of people within communities would become criminalized. On the other hand of course the POCA legislation did at the time envision harsh penalties for 'gang membership.' See below for further discussion.

Despite NADEL's outspoken opposition they failed to convince committee members at the meeting. In the meeting NADEL represented by Mr. Michael Blake provided the committee with six broad points for consideration. He argued that the time for responses was too short and that the timing of the Bill was 'unacceptable' as it was an obvious ploy designed to garner support ahead of the 1999 elections. They also discussed the wider implications of the Bill for black youth that had (in certain instances) no choice but to join gangs. The Act also did not distinguish between types of group acts and this could infringe the constitutional rights of freedom, privacy and right to association by criminalising group representation that was not criminally motivated. The role of the USA in giving 'advice' was also inadequate for SA because of the 'special role of

statement by stating that it was based on international best practices. Therefore, the assumption we must draw is that the step to introduce POCA was a positive one based on solid investigation.

¹⁸⁸ As does Irvin Kinnes in Interview 2: Kinnes

¹⁸⁹ Justice Portfolio Committee and Security & Justice Select Committee: Joint Meeting 30 September 1998.

the police.’ The party representatives attacked NADEL’s submission saying it lacked analytical thought and seemed to be motivated by panic.¹⁹⁰

In response Mr. Blake of NADEL, in an article appearing on their website, said the treatment they received from the committee was “intimidating and rude.” In the article Blake again outlined NADEL’s opposition to the POCA arguing that a quick fix in the form of POCA was not what the country required (he must be understood to have meant that our democracy was not well advanced and implementing complicated legislation that was open to wide abuse of state power was not the best path to take). The POCA was based on a foreign law (RICO) where, according to them, organised crime had not decreased. What was required was a more holistic approach to the issue of crime and to implement legislation that already existed to combat crime.¹⁹¹

Indeed, NADEL did not present any concrete examples of constitutional matter. J. De Lange argued in defence of the Act, saying that it did not criminalise all gang activity, and that the question of getting the Act signed before the 1999 elections was moot as all parties supported its drafting. One could assume, therefore, that there were no political undercurrents that could point to the Act as a political tool designed to garner electoral support. With regard to the police, Johnny de Lange stated bluntly that the police were involved in drawing up an implementation plan.¹⁹²

What is evident is that NADEL presented a view that challenged the main thrust of the Bill and generalised considerably when attacking the Bill on its function and potential output. It would seem that NADEL wished to pull government into a philosophical debate over the pros and cons of the Bill. Yet the forum in which they presented their arguments did not and could not facilitate their need. The Committee was established and designed to raise issue with the Bill, not with the implementation of the Bill. NADEL, while arguing for the removal of the Bill, were clearly at a disadvantage in a forum, which had the power to shut down any dissent. Indeed, the committee were well within their powers to do so. Yet this points exactly to the criticism of the process, that discussion was not allowed initially and that the speed of the process overlooked the oversight role of civil society, so that when opposition did arrive it was too late. NADEL’s suggestions (see

¹⁹⁰ Justice Portfolio Committee and Security & Justice Select Committee: Joint Meeting 30 September 1998.

¹⁹¹ Blake, M. *Submission on Organised Crime*. Appearing on sunsite.wits.ac.za/nadelproject/rcentre accessed 03 February 2005.

above) and criticisms (see above) seem to have been justified. Technically, however, they fell on deaf ears as government had unanimously decided to proceed with the Bill and at the time of the meeting had already decided its future. NADEL in the end simply hadn't had enough time to present an adequate response to the act which would be pushed through parliament in 1999.

During late 1998 and early 1999 the Bill was discussed and errors corrected in the Justice Select Committee meetings.¹⁹³ Most points were minor points of language and structure. Indeed the draft handed to the minister in 1998 was similar to the final Act in substance. The submissions of NADEL, it is safe to say, were considered but did not influence the final drafting.

4.2.3 'Forfeiture,' unpacking the concept and understanding its effects

The whole issue of civil forfeiture is a contentious issue [and] remains a contentious issue. There were many different views on that. The issue of creating new crimes relating to gangs was a contentious issue. There the legislation was largely based on American legislation.¹⁹⁴

Civil forfeiture is a big issue in this country. It is also a popular one amongst people who argue that criminals must pay (literally) for their misdeeds. Who then, could argue that civil forfeiture is unconstitutional or undemocratic when the gains of criminals are due in large to criminal acts.

The Asset Forfeiture Unit (AFU) was established in May 1999 in the Office of the National Director to implement provisions regarding seizure and civil forfeiture in the POCA. Willie Hofmeyer, who was instrumental in the drafting of the Act was to head up the AFU. His official rank was Special Director of Public Prosecutions. In 2001 the AFU became a full division of the National Prosecuting Authority (NPA) and Hofmeyer became Deputy National Director and Ouma Rabaji became Special Director and Head of Operations of the AFU.¹⁹⁵

The main objective of the AFU is to take the 'profit out of crime.' To date they have been successful in attaching/seizing goods and cash from some criminals. However, major court challenges have been launched against the unit but as yet they have successfully dodged any court rulings that could hinder their work. In 2004 the AFU litigated (and in 2005 is still litigating)

¹⁹² Justice Portfolio Committee and Security & Justice Select Committee: Joint Meeting 30 September 1998.

¹⁹³ See www.pmg.org Justice Select Committee: 30 September 1998- 23 February 1999.

¹⁹⁴ Interview 1: Gastrow

approximately 30 procedural and legal issues. This is helpful in that a good jurisprudence may be adopted and the constitutional issues surrounding the Act may be sorted out.¹⁹⁶

The number of successes in court have improved markedly. In 2003, the AFU succeeded in 21 of 48 judgements and in 2004 the AFU won 19 of 23 cases.¹⁹⁷ This points to a system that is slowly working through the legal and procedural loopholes or errors and indicates that the process is well on its way to becoming more effective and efficient.

According to official figures released in May 2004 the AFU has frozen assets worth R700 million Rand (the amount may now be higher) involving 500 orders and 243 forfeiture orders, which have been granted applications (involving R116 million Rand). In 2000/2001 39 seizures involving R149 million were undertaken. In 2003/2004 this number had increased to 204 and R181 million. For the same period complete forfeitures increased from 15 to 116 cases and the value from R7.2 million to R44 million. Thus we can deduce that the AFU has begun to overcome the teething problems associated with the new legal framework and its targets for 2004/2005 show the new confidence in the system. For 2005 the AFU was expecting 260 seizures and 160 complete forfeitures at a value of R250 million and R75 million respectively. The AFU is also likely to receive additional funding for 12 new staff that will bolster the capacity of the division even more.¹⁹⁸

However, not everyone agrees on the principle of AF. Many alleged gangsters and accused have lodged proceedings against the seizures of their assets but have, for the most, fared poorly. Yet what about the cases involving the lower level gang members? NADEL for one were most vociferous in their opposition to POCA, arguing that the small time criminals would be unfairly targeted by the new legislation. Willem 'Base' Basson Deputy Director General Community Safety in the Western Cape notes that

The question was raised that if a young chap is using the house [of his innocent parents for example] to store stolen goods, to store weapons or drugs will it be fair to confiscate and seize that particular property?¹⁹⁹

¹⁹⁵ Annual Report: Asset Forfeiture Unit, National Prosecuting Authority Draft 1: 10 May 2004.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

Basson made it clear where he stood on the matter that despite an individual using a premise that did not belong to him the onus was most definitely on the owners of the property to report the goods to the police. He added that AF was necessary to make a statement to criminals.

So taking into consideration that...gangs provide [an] alternative economy to communities... (the criminal economy) it's important that the properties and the assets are seized to make [firstly] a statement that government is serious [and] secondly also to take the message back to the people that crime does not pay.²⁰⁰

Civil²⁰¹ and asset²⁰² forfeiture are and were contentious issues during drafting.²⁰³ It continues to be contentious to this day.²⁰⁴ The reasons for the adoption of forfeiture are clear. Organised Crime has taken a heavy toll in SA. If figures are any measure, then the R41 billion turnover from organised crime in 1996 is a stark reminder of the extent of the problem. The introduction of POCA was aimed to make the benefactors of this illegal turnover 'pay.' Mention has been made above of the successes of the AFU so far. However, the concept of Asset Forfeiture in the sense that we know it today is different to past legislation regarding 'repossession' of the proceeds of crime. While POCA has created specific crimes of money laundering, racketeering and participation in a criminal gang it does not add much to the substantive criminal law.²⁰⁵

For example the elements of 'continuity' and 'relationship' are new but the core crime of racketeering is not new. Money laundering could've been covered under fraud (common law crime). Conspiracy, incitement, common purpose and defeating the administration of justice (again all common law) provide for broad accomplice liability which is similar to the goal of Section 9 of POCA, which criminalises 'participation in a gang' and 'gang related activities.'

Two aspects of the POCA are wholly new in substantive terms. The first is that it "lowers the threshold of criminal liability by extending the fault component of the crimes to negligence,

¹⁹⁹ Interview 3: Basson.

²⁰⁰ Interview 3: Basson.

²⁰¹ Civil forfeiture requires no criminal proceedings to take place. All that is required is that a link between the asset and a crime must be shown to exist.

²⁰² Asset forfeiture takes place prior to or after criminal proceedings. See below for further explanation.

²⁰³ Interview 1: Gastrow.

²⁰⁴ For an interesting discussion on asset Forfeiture that appeared post-drafting see Redpath, J. 2000.

"Forfeiting Rights? Assessing South Africa's asset forfeiture laws." *African Security Review* vol. 9 no 5/6.

²⁰⁵ See Burchell, J. "Criminal Justice at the Crossroads." (2002) 118 *SALJ*. In Powell, 2002, p. 106.

rather than intent²⁰⁶ and enacts rather severe punishments including a R100 million fine or 30 years imprisonment for Money laundering and a R1000 million or life imprisonment punishment for Racketeering.

Secondly, asset forfeiture of the proceeds of unlawful activities have been introduced to replace the old law. South African law pre-POCA did cater for the confiscation of property but only once a conviction had been achieved. The new law reiterates this position (Chapter 5) and includes the confiscation of property following criminal conviction. It also allows for civil forfeiture of property connected to a crime (Chapter 6). In order to prevent the sale of properties or flight of goods/cash the prosecution can obtain restraint orders (issued by the High Court) under chapter 5 and are based on *ex parte* applications by the National Director of Public Prosecutions (NDPP).²⁰⁷

Chapter 6 of the POCA allows for the forfeiture of property irrespective of whether criminal proceedings are being brought to bear. Once a preservation of property order is placed (mandatory condition) the forfeiture order can be granted if there are reasonable grounds to believe that the property in question was used to commit a crime or is the proceeds of a crime listed in the Act under schedule one. Once all parties have been notified and the preservation of property order granted the NDPP must apply for a forfeiture order within 90 days failing which the preservation order lapses and the property is returned.²⁰⁸

Under Chapter 5 forfeiture can occur only when criminal proceedings are instituted against an individual. In the case of civil forfeiture the nature of any legal proceedings is such that no criminal proceedings need take place and assets may be subject to forfeiture without any connection to an individual's criminal liability. All that one needs to show is that the goods in question are related in some way to criminal activities. Once the properties or goods have been attached the monetary amount is deposited into the Criminal Assets Recovery Account and the money distributed to criminal justice projects and the victims.²⁰⁹

Powell mentions that chapter 5 and 6 can be (and have been) challenged on constitutional grounds for infringing upon certain rights. The right to silence, the presumption of innocence, the right not to be deprived of one's presumption of innocence (all s. 35 South African Constitution

²⁰⁶ Burchell (in Powell), 2002, p. 107.

²⁰⁷ Burchell (in Powell), 2002, p. 109.

²⁰⁸ Burchell (in Powell), 2002, p. 109.

²⁰⁹ Powell, 2002, p. 110.

Act 108 of 1996) and the right not to be deprived of one's property (s.25), right to privacy (s.14) and dignity (s.10).²¹⁰ Certainly the direction the new forfeiture rules and laws have taken South African is one that comes close to crossing the constitutional line in regards to the above constitutional provisions. However, if one's goods or assets pose a threat of flight then it is reasonable for the state to seize those goods. Bail operates much in the same way. If the accused poses a threat to society or the crime is of such a nature that release is not allowed then the accused will be remanded in custody until the conclusion of the court proceedings. It seems logical that this be extended to the proceeds of crime.

A second point raised by NADEL in regards to the constitutionality of the new law argues that the POCA might not stand up to the rigours of constitutional inquiry. In the September 30 parliamentary committee meeting Johnny de Lange, chair of the meeting, argued that POCA (based as it was on Australian and American organised crime law) had passed constitutional investigation in US and Australian courts. NADEL however, argued that the rights of the individual were far more protected in the SA constitution than their Australian and American counterparts. The Australians, they argued, didn't even have a Bill of Rights. In addition the punishments for certain crimes are disproportionate to the crimes and should be reviewed. They ask if it is "truly just that a youth who plays a minor role in two thefts (e.g., as a lookout) should face both an aggravating factor in his sentencing for the theft, pursuant to paragraph 44, and a separate charge (with a potential 3 year sentence) for promoting criminal gang activities pursuant to paragraphs 42-43?" In addition they argued that "current criminal statutes and the common law are sufficient to vindicate fully the rights of organised crime victims, if properly enforced"²¹¹

The drafting of the POCA raises interesting questions around international precedent and local realities. International precedent would have us believe that aggressive crime policy is required such as POCA to deal with an enemy of society. Local realities show us that the enemy, crime, is not lurking within the society but is a product of societal dysfunction and by aggressively suppressing these criminal elements we are in a way shooting ourselves in the foot. For example gangs are not products of an extra-societal entity. They exist within Western Cape society. Laws deal with their crimes. The POCA in the authors view (and NADEL's) takes an extra unnecessary step in criminalising these deviant elements.

²¹⁰ Powell, 2002, p. 110.

When approaching the POCA it must also be remembered that the drafting of legislation should consider international standards of policy regarding organised crime. However, it is important to acknowledge the shortcomings of international experience and balance foreign policy with domestic constitutional requirements and ultimately, what is in the best interest of society. It remains a moot point as to whether the South African government has successfully balanced the global local tensions in the process of drafting the POCA.

4.2.4 Gang Membership

Another controversial area that has been receiving a lot of attention is the issue of gang membership. The POCA criminalises the association of individuals who under section 11 of the Act can be identified as 'gangsters.' Gangsterism has been identified by government as a centre of criminal activity. In the Western Cape the situation has been identified as being particularly problematic especially on the Cape Flats.

While POCA can technically be used to prosecute gang members countrywide it has as yet only been utilised in the Western Cape in what amounts to a test run of the Act. So far three convictions have been achieved against members of the 26s, Corner Boys and Mongrels. A further 47 cases are under way in Cape courts. In December of 2004 Shahied Julies²¹² was the first person to be convicted under the Act, which adds an additional punishment to individuals who continue gang membership in prison or who are caught recruiting or carrying out gang activity near schools.²¹³

Western Cape Community Safety Minister, Leonard Ramatlakane, confirmed in the Weekend Argus (05 February 2005) that the pilot project (the test cases revealed above) had reached a point where his counterparts throughout the state had been briefed and been provided with an impact analysis and enforcement guidelines.²¹⁴

²¹¹ Blake, M. *Submission on Organised Crime*. Appearing on sunsite.wits.ac.za/nadelproject/rcentre accessed 03 February 2005.

²¹² Shahied Julies is a member of the corner Boys and 26s. Later in December 2004 convictions were achieved against Mustafa Booyesen and Gregory Vlotman members of the 26s and Mongrels. They were accused of recruiting members for gangs, recruiting members or carrying out gang activity close to schools and for gang membership.

²¹³ "Courts poised to wipe out gangs." *Weekend Argus*, Saturday, 05 February 2005. Ashley Smith.

²¹⁴ *Ibid.*

Possible constitutional infringements, namely of the freedom of association²¹⁵ may arise. But it would seem that the recent court proceedings and decisions have ruled that the association of individuals can be criminalised if the courts deem that gang activity was the nature of the association. This raises serious ethical problems regarding the direction law enforcement is taking in SA and specifically the impact POCA has on the constitutionally guaranteed right to freedom of association. Certainly we all understand that the gang problem on the Cape Flats, in particular, is of serious concern. By criminalising the association of individuals one does seem to be attacking the symptoms of gangsterism instead of the root causes of the problem. However, as a short term solution s.9 of the POCA does have the potential to deliver results. Time will tell what effect this law has on crime levels and what effect or reaction this legislation will elicit from the gangs themselves and whether or not they will take their activities underground in the face of greater police and judicial scrutiny.

4.3 South African Organised Crime Law and US law: POCA as an example of global crime policy convergence

Is their substance in the argument that SA has adopted (as some experts believe²¹⁶) a more *law and order* approach, pointing to a greater harmonisation of crime policy worldwide? As mentioned above the substantive law did not change much with the introduction of the POCA. It extended the threshold of criminal liability from intent to negligence and introduced the concept of asset forfeiture, but for the most part simply extended existing substantive law on the matter.

However, from the evidence presented above the foundation of anti-gang laws (RICO in the broad sense) of Florida and California, were pivotal in the creation of the POCA. Indeed if one were to compare the law, the similarities in terms of definition of gangs and criminal activity and the criminal acts are striking. While concluding that the harmonisation of crime policy is a reality it would be helpful to look at practical legal examples of this convergence and harmonisation.

The legislation on gang activity is one example.

California 186.22(b)(4)

²¹⁵ The Constitution of the Republic of South Africa, Act 108 of 1996. Section 18.

²¹⁶ One being Irvin Kinnes, Interview 2: Kinnes

(4) Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

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California 186.22 Participation in a criminal street gang; punishment; felony conviction; sentence enhancement; commission on or near school grounds; pattern of criminal gang activity

(b) (1) Except as provided in paragraph (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of two, three, or four years at the court's discretion, except that if the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

POCA Chapter 4 (9)(2)

(2) Any person who-

(e) performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity;

(e) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about, perform or participate in a pattern of criminal gang activity; or

(e) intentionally causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang.

shall be guilty of an offence.

&

POCA Chapter 4 (10)(2&3)

(2) If the offence contemplated in section 9 is committed on the premises or grounds of, or within 500 metres of a public or private school, or any other educational institution, during hours in which the facility is open for classes or school related programmes or when minors are using the facility, such fact shall be regarded as an aggravating circumstance.

[Sub-s. (2) substituted by s. 12 of Act 24 of 1999.]

(3) If a court, after having convicted an accused of any offence, other than an offence contemplated in this Chapter, finds that the accused was a member of a criminal gang at the time of the commission of the offence, such finding shall be regarded as an aggravating circumstance for sentencing purposes.

Florida 874.03. Definitions

- (e) "Criminal street gang" means a formal or informal ongoing organization, association, or group that has as one of its primary activities the commission of criminal or delinquent acts, and that consists of three or more persons who have a common name or common identifying signs, colors, or symbols and have two or more members who, individually or collectively, engage in or have engaged in a pattern of criminal street gang activity.
- (2) "Criminal street gang member" is a person who is a member of a criminal street gang as defined in subsection (1) and who meets two or more of the following criteria:
- (a) Admits to criminal street gang membership.
 - (b) Is identified as a criminal street gang member by a parent or guardian.
 - (c) Is identified as a criminal street gang member by a documented reliable informant.
 - (d) Resides in or frequents a particular criminal street gang's area and adopts their style of dress, their use of hand signs, or their tattoos, and associates with known criminal street gang members.
 - (e) Is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information.
 - (f) Has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity.
 - (g) Is identified as a criminal street gang member by physical evidence such as photographs or other documentation.
 - (h) Has been stopped in the company of known criminal street gang members four or more times.
- (3) "Pattern of criminal street gang activity" means the commission or attempted commission of, or solicitation or conspiracy to commit, two or more felony or three or more misdemeanor offenses, or one felony and two misdemeanor offenses, or the comparable number of delinquent acts or violations of law which would be felonies or misdemeanors if committed by an adult, on separate occasions within a 3-year period.

POCA Chapter 4 (11)

Interpretation of member of criminal gang

In considering whether a person is a member of a criminal gang for purposes of this Chapter the court may, have regard to the following factors, namely that such person-

- (e) admits to criminal gang membership;
- (e) is identified as a member of a criminal gang by a parent or guardian;
- (e) resides in or frequents a particular criminal gang's area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known members of a criminal gang;
- (e) has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with usual criminal gang activities;

[Para. (d) amended by s. 13 (b) of Act 24 of 1999.]

- (e) is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.

The similarities are undeniable and uncontested by those who implemented the process, the drafters of the Act and commentators on the process. In addition SA has adopted the hard-hitting rhetoric that is often associated with American crime policy. Terms like "zero-tolerance" have been adopted by local politicians to describe their efforts at eradicating the problem. Yet what are the effects of this program for South Africans? Are we so different from the Americans that we need to create legislation that is specific to our context? Has this paper missed a beat by leaning towards viewing American influence as negative? The view seems to be split. Some members of the SA government view aid from the Americas and others as favourable. And in a country where crime is so high and resources lacking it may well be argued that any aid is good aid. On the other hand we have constituencies who are concerned about the shift towards a more law and order approach. NADEL for one would have preferred if the government had stuck with the NCPS and focused their energy on social development. However, it would seem that the international

pressures and lure of international best practice have won over our leaders, yet the effect on the grass roots has still to be investigated.

If the POCA is to be taken seriously as the best policy South Africa has to combat organised crime it must fulfill certain constitutional criteria. This paper has already made mention of the possible constitutional infringements the POCA may have on ones rights to freedom of association and movement, for example. Another side issue is that of discrimination which has the potential to become a real problem if the police make use of their new powers under the POCA (such as targeting groups of people and charging them under the POCA for gang membership). It is widely known that the American experience has been problematic in this regard. Specifically race problems concerning 'gangsters' and the police.

The question in South Africa concerns the criminalisation of street gangs and as this paper has shown that street gangs and the community (coloured community on the Cape Flats in particular) are intertwined in a complex network of relationships. Any police action that is directed against the gangster or gang is likely to have further implications for the community. The following chapter will expand on this line of argument.

Chapter 5: Gangs in the Western Cape

The conceptualisation of organised crime differs depending on the standpoint of the 'definer' and the structure within which the term is being used. In the Palermo convention organised crime definitions would differ from local police definitions. In South Africa the lines between organised crime and street gangsterism have become blurred. However, this debate is an aside to the reality. POCA deals in gangs. They target gangs and 'organised criminal networks.' They have been grouped together in the legislation. While in South Africa the unique social phenomenon of gangs makes them part of the make up of communities what remains clear is that the POCA targets gangs and gang membership under the umbrella of organised crime and the fight against organised crime.

The Western Cape gang issue has dominated debate amongst policy makers keen to address the problem of crime on the Cape Flats and surrounding areas. Gang numbers are estimated to be in the tens of thousands with an even larger number of people involved in the merchandising and consumption of illicit materials. Of late the debate has moved towards trying to understand the connection between local gangs and global organised crime groups. Thus the paper again turns to the globalisation not only of policy but also of crime.

In Chapter 2 the globalisation of crime was alluded to. Due to the process of globalisation transnational organised crime has come to expand. The world has allowed a greater interconnectivity between crime groups and allowed them to operate with impunity in 'states in transition.'

Debate surrounding the globalisation of crime has often fallen into two categories. The first view transnational organised crime as having flourished in modern times. The other sees it as a continuation of a historical phenomenon, in other words transnational organised crime has always existed using technology prevalent at the time (like the railway) to smuggle goods illegally and further their criminal enterprise. For this second group the growth of organised crime is relative to the growth in the population of the planet and the opportunities for criminal entrepreneurship. In real terms they argue that transnational and organised crime has not increased. Yet for all the back and forth flow of argument there are a few clear developments that ought to be highlighted.

Technological development, the opening up of borders and the domination of the free market have given organised criminal groupings greater leeway in foreign states. The ability of such groups to operate in transitional states for example has improved greatly. South Africa is one such example. The operation of the Chinese Triads and Nigerian crime groups are well documented as are the associations between these international groups and local gangs.

The local situation has also changed significantly. Mention was made above of how gangs have changed in character over the past decade. Street gangs, which used to dominate in the Cape, are more complex than we believed before. Writers like Standing (2003) and Steinberg (2004) have revealed a world of diffuse arenas of criminal activity. Drug merchants acting as 'independents' sell their merchandise to local street gangs who in turn are divided between the old numbers gangs and the new generation of gangs heavily influenced by American gangsterism.

The central question though is defining or finding common ground between the gangs in order to combat their influence and eradicate their presence in communities that are economically vulnerable. No doubt, this was the task of the drafting team of the POCA who were commissioned by the government to draft an organised crime Act that would be effective in curbing crime (and provide political mileage to the government who were coming under attack for their poor track record with dealing with crime). Yet throughout the process no mention was made of the social context within which gangs operated. Gangs and the community live in a world that is defined by its poverty. Although this is changing the interconnectivity of gangs and the people is visible, as Standing (2003) and Kinnes (interview) have alluded to.

The POCA as it stands today has been shown to be similar to RICO in many respects. It criminalises gang activity and concentrates attack on the gang leadership. Yet using tactics designed elsewhere are problematic. As Irvin Kinnes points out:

The problem with the gangs in Cape Town is that its been centralised for a long time between the different gangs. They can draw people on to the streets much quicker than the LA gangs. The gangs in the US are decentralised so it makes smaller units whereas our basic unit is massed based. They can draw up to a hundred people at any one time very, very quickly. It's not the same in the US.²¹⁷

²¹⁷ Interview 2: Kinnes

And when questioned about the uniqueness of the Western Cape gang problem he said,

It's probably related to our history. The physical geography in relation to space and time, population density is much higher than in the US. People there have their own properties. People here live in council flats. So that makes it much more difficult to police but easier to recruit and easier to mobilise.²¹⁸

This view understands the gang problem from one standpoint that questions the effectiveness of foreign legislation being used to counter a domestic issue that is significantly different in scope and composition. Yet policy experts in government are keen to highlight the 'Americanisation' of gangs. Willem 'Base' Basson mentions that:

...gangs on the Cape Flats are based on the philosophies and ideologies of gangs in LA, the Bloods and the Crypts, the Black Disciples, whatever.

...I suspect that because the US is such a forceful media country and the fact that communications [are] that good I suspect that a lot of gangs (including ours) are focusing on the US gangs. Taking into consideration that there was a time when the rap music played a key role in the spreading of gang ideology, Tupac Shakur from the Westside in the US and the Notorious B.I.G. from the Eastside were the guys who rap about coke, crack and cocaine, they rap about sodomy, kidnapping all these things that gangs do. So even if you look today at today's music videos they also have gang signs ... so the US plays a key role.

...the US gang culture [is] being spread all over the world. And I'm not only referring to gang culture in the sense of the negative sense of gang culture. I won't say [there is a] positive part of gang culture, but the neutral part of gang culture, the way that you dress, the way that you walk, the way that you talk. You are [not] necessarily a vicious gang member, but it is ... sometimes for the young people ... an attractive culture and people get attracted all over the world.²¹⁹

Basson identifies the new trend prevalent in gang formation and gang ideology and motivation. The influence of the media no doubt does play a role in gang formation as Basson alludes to.²²⁰ Yet this view does not take into account the history of gangs on the

²¹⁸ Interview 2: Kinnes.

²¹⁹ Interview 3: Basson.

²²⁰ Interview 3: Basson.

Cape Flats and the role the older generation of gangsters have on the new. However, in order to adopt strategy that is relevant to all sides a number of things need to be done.

Firstly, there needs to be an acceptance on the part of government that the issue of gangsterism is not one-dimensional and the involvement of the community and civil society is crucial in creating a strategy to deal with the problem. The one-dimensional approach of the POCA does not and can not eradicate the scourge of gangsterism. Some high profile gang bosses might be removed but they will be replaced by their competitor. The criminal economy needs to be understood and I'm sure Standing would agree that the first step to tackling the issue is a clearer conceptualisation of the gang, particularly street gang, issue on the Cape Flats.

Crime prevention and crime control have always been two contentious and opposing points of view. Yet both are necessary to combat the real problem of gangs and placate a public that is impatient with government's lack of success with reducing crime levels. To eradicate gangsterism at its sources the motivation behind gang membership needs to be explored.

Poverty on the one hand and the influence of older generations of gangsters on the youth need to be addressed and corrected as a matter of urgency. Social renewal projects must also be considered in the heaviest hit areas and crime bosses need to be arrested in order to provide examples to the youth that crime does not pay. The aura surrounding prison also needs to change. Alternatives to prison and a life of crime need to be provided to the youth who do not fear jail for reasons including the prison lifestyle that is central to the numbers gang and the glorification of imprisonment that arrives from American musicians for example. As Basson says of the American 'rap' culture,

It is a glorification of violence. A glorification... [and] a romanticisation of going to prison, of doing time in the penitentiary and all that. They rap all these things. And for that reason it softens a person's guard not to enter into a gang. It becomes cool to be a gangster.²²¹

For all the back and forth arguing between government, academics and NADEL there is a desire to overcome the problem of organised crime and street gangs. What is required though is an integrated approach that considers all viewpoints. Finding the middle ground is

²²¹ Interview 3: Basson.

essential in providing a framework in which to approach the issue. The drafting of POCA has failed to do this. Considerations of international best practices was considered ahead of what the situation on the ground was at the time. The effect of the legislation on gangs and society was also not adequately dealt with. There was not even any consideration of the detractors in the international arena who openly oppose the POCA/RICO/law and order approach. The process of drafting legislation to deal with organised crime was too swift and the connection between street gangs and international syndicates assumed too easily. This pointed to a process that was driven not out of consideration for societal improvement but perhaps for political mileage. Despite the argument that POCA was a necessity and required to meet a pressing issue perhaps more time should have been taken to fully test the effect of the new law.

Chapter 6: Conclusion

With the growth of globalisation and spread of transnational crime, governments have harmonised approaches to combating the problem of organised crime syndicates. For states in transition, such as SA, adopting measures ideally suited to foreign conditions can be problematic.

The POCA adopted in SA, as a response to organised crime and gangs, is a piece of legislation that makes it possible for police structures to combat gangsterism and organised crime. Despite possible constitutional challenges to certain aspects of the new law, government has not considered changing the content of the legislation and has as of February 2005 begun to implement the POCA nationally.

The POCA is similar in content to American State and Federal legislation (RICO). Questions have been raised over the viability of this approach in light of uniquely South African experiences especially in areas like the Cape Flats in the Western Cape. Despite criticism, the POCA seems to be here to stay.

Issues remain over the drafting of the Bill, however. Some commentators argue that the drafting process lacked legitimacy as input from civil society groups was sorely missing. In response government has argued that expediency was required to counter a growing threat from international syndicates keen to profit from the South African criminal economy and local gangs.

Gangsterism and the resultant vigilantism from groups such as PAGAD dominated headlines in the late 1990s in the Western Cape. Public opinion was squarely of the view that government was failing to deliver an effective crime policy that would deal with growing violence and drug dealing on the Cape Flats. A response was required from government, which they duly produced.

In early 1998 Dullah Omar directed the Institute of Security Studies to draft a Bill that would combat organised crime and gangsterism. Gastrow as we have seen gathered a team that consisted of mainly government personnel, the civil service and academia. The drafting process took less than six months with government, by all accounts ready to present the Bill to the public before the 1999 elections.

Today the POCA is presented as a success yet some believe that it does not represent policy that fits SA's needs. They argue that it is too heavily influenced by American policy and should be reviewed as a matter of urgency. It should, they say, be replaced by a more holistic policy that targets not only the criminals but also the root cause of crime, namely poverty. In addition partnerships need to be created with communities.

However, only time will tell if the POCA succeeds or not. Crime policy is still very much in the realm of public debate. If the change in crime policy from nation building to state building in 1998 is any indication, the Prevention of Organised Crime Act might still be reviewed and changes made that would appease not only members of civil society but also elements within the public.

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Appendix 1

Interview Schedule

Interview 1: Peter Gastrow

Interview of Peter Gastrow

08:48-09:31 8

November 2004

Interviewer: Andre Colling

Venue: Interview took place at the Institute for Security Studies in Cape Town

Interview 2: Irvinne Kinnes

Irvine Kinnes

09:55-10:31

29 November 2004

Interviewer: Andre Colling

Venue: Exclusive Books, Canal Walk.

Interview 3: Willem 'Base' Basson

Interview: Willem 'Base' Basson (BB)

14:00-15:00

14 December 2004

Interviewer: Andre Colling (AC)

Venue: 11th floor Department of Community Safety, 4 Dorp St. Cape Town.

Appendix 2

Speeches: Frank Loy at Palermo (www.unodc.org/palermo/convmain.html) "United Nations Convention Against Organised Crime High Level Political Signing Conference."

Speeches: Kofi Anan at Palermo. (www.unodc.org/palermo/convmain.html) UN secretary-general Calls Signing of Palermo convention 'A Watershed Event' in Fight Against Organized Crime."

Appendix 3

Press Statement issued by Dullah Omar (Minister of Justice, 1998).

&

Fax to Peter Gastrow from Dullah Omar (Minister of Justice, 1998).

[Attached]

EMBARGO: 10h45 7 May 1998

7 May 1998

Press statement

Task team set up to draft drastic new measures against organised crime

During the apartheid years, the previous government failed to keep the legal system up to date and failed to keep pace with sophisticated international measures aimed at dealing effectively with organised crime. These measures have been enacted in a world which has had to find sometimes drastic solutions to the rapid growth of organised crime on a global scale.

The new South African government has already introduced a number of measures to remedy this situation – such as the Proceeds of Crime Act, the Extradition Act, and the new bail and minimum sentence laws.

In addition, the Justice Ministry and the Parliamentary Justice Committees have been in close touch with justice systems elsewhere and have studied the methods other governments use in the war against organised crime. After careful consideration and research, the model that has been selected as a basis for South African legislation is the so-called RICO Act (Racketeering Influenced Corrupt Organisations) used in the United States to deal with their very serious problems in this area.

I have now decided to proceed with the drafting of an Organised Crime Bill which will include several drastic measures aimed at strengthening the hands of the police and prosecutors in dealing with organised crime.

Since this is an extremely urgent matter, I have decided to set up a special Task Team to draft the Bill and to investigate the feasibility of some of the measures I propose.

I have therefore approached Mr Peter Gastrow, Cape Town director of the Institute of Security Studies (ISS), to help us with this project. ISS has played a leading role in conducting policy studies on the criminal justice system in South Africa. ISS will engage in a joint project with the Ministry in order to fast-track the drafting of this bill and has undertaken to raise the money to fund the research and drafting process. We also envisage that the project will invite several experts from overseas to share their expertise with the Task Team.

I have requested the Task Team to have a draft ready as soon as possible. Ideally, I would like it to be ready for consideration by Cabinet in early August so that Parliament can deal with it before the end of the year.

Part of the mandate of the Task Team will be to consider proposals for the speedy implementation of this legislation.

What the Organised Crime Bill will contain

One of the biggest problems in dealing with organised crime is that it is usually very difficult to prove the direct involvement of the gang bosses in particular crimes. They do not do the actual criminal work themselves and orders are conveyed through other persons and often in code. At present, our common law of conspiracy and common purpose is quite inadequate to the task of dealing with the sophistication of modern crime syndicates.

The measures I have asked the Task Team to include in the Bill are:

1. Mere participation in criminal organisation to become a crime

The Bill will make it an offence to participate in any organisation that has committed serious offences. This is similar to the offence of racketeering created by the RICO legislation which has been used with great success in prosecutions of the Mafia.

To secure a conviction against crime bosses, it will thus be sufficient to prove that they participated in the activities of the organisation, and that others in the organisation committed serious crimes. It will not be necessary to prove that they are directly linked to a specific offence. Obviously it must be proved that an organisation exists; this is usually not difficult as the definition of a criminal organisation is very wide.

2. Civil forfeiture of criminal assets

The second drastic measure I propose is the civil forfeiture of criminal assets. This method has been introduced in both the USA and Australia. It allows the state to seize assets through a civil action directly against the asset (rather than against the person as is usual in our law). The measure can be used either against assets that have been used to commit a crime or assets that are the proceeds of crime.

For instance, if a house is used for drug dealing, it can be seized if it can be proved on a balance of probabilities that crimes were committed there, even if there is not sufficient evidence to prove that the owner is guilty of the offence. In Cape Town we have examples of many such houses owned by well-known drug lords. Such legislation will enable the state to act against them.

This gives the state the power to seize the 'profits' of the crime bosses even where there are no direct links (as is usually the case) with the offence committed. This measure also makes it more difficult for gangs to operate by seizing the property they need for their operations.

3. Criminalising activities and membership of street gangs

The Minister of Safety and Security has agreed that legislation proposed by his Ministry which aims to control the activities of street gangs should be included in the Organised Crime Bill. These measures were initially proposed by members of the Western Cape police after a study tour in Florida and California.

The motivation for including these measures in the current Bill is to ensure that they become law as speedily as possible, and that they complement the RICO-type measures described above.

The measures criminalise certain of the activities associated with such gangs, including mere membership in certain cases.

The measures differ from the RICO-type legislation in that they are aimed at combating the activities of street gangs which are normally involved in less serious forms of crime.

They will be used against gangs with a public profile – usually characterised by well-known names and certain codes of dress or behaviour. (RICO, on the other hand, tends to be used against more serious syndicates which deliberately maintain a low profile.)

The inclusion of these measures in the Bill is of the utmost importance in view of the extremely serious gang violence which is presently devastating areas of Cape Town.

First meeting of Task Team

Finally, I am pleased to announce that the first meeting of role players will be held at the ISS offices in Cape Town tomorrow (Friday), and the Task Team is expected to commence its work immediately.

Why such drastic measures are necessary

It is clear that these are very drastic measures - representing probably the toughest legislation yet proposed by this government.

Earlier this year the President pledged that the government will 'fight fire with overwhelming fire' in the war against crime in South Africa. I am confident that this new legislation will add significantly to the firepower of police and prosecutors in the war against organised crime.

Issued by Mr Dullah Omar, Minister of Justice

For more information, contact Paul Setsetse 021 45 7506 or 082 252 4770.



**Ministry of Justice
Ministerie van Justisie
Umntyango Wezobulungisa
Tša Tona ya Toka
ISebe lezoBulungisa**

8 April 1998

Mr Peter Gastrow
Director
Institute for Security Studies
Drury Lane
67 Roeland Square
Cape Town
8001

Fax: 461 7213

Dear Sir

ORGANISED CRIME BILL DRAFTING PROJECT

The Ministry of Justice, as well as the Chairperson of the Portfolio Committee on Justice, is keen to have a Bill drafted that would enable government to deal more effectively with organised crime. The Bill would incorporate some of the more sophisticated measures that have been adopted overseas to deal with this problem.

The Bill would address the following aspects:

- * Broadening the definition of criminal conspiracy to deal more effectively with those in control of crime syndicates. The measures would be based on the Racketeering Influenced Corrupt Organisation Act in the USA.
- * Allowing the state to forfeit assets used to commit crime or which are the proceeds of crime through a civil action without the necessity for a criminal conviction as is required by the present Proceeds of Crime Act passed in 1996. Such measures are in place in the USA and in Australia.
- * Considering measures that, under certain circumstances, would criminalise the mere membership of street gangs involved in criminal activities.

It is proposed to deal with the drafting of the Bill by way of a special project because of the very urgent nature of the Bill which it is hoped can be adopted by Parliament during the current year. Furthermore, some of the proposed measures require a great deal of investigation, research and consultation with experts as they derive from legal systems quite different from our own.

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The drafting project should have three major components:

- * Commissioning South African researchers to do policy research on how best the measures can be adapted to local conditions and to investigate possible Constitutional implications;
- * Contracting a highly skilled South African drafter to adapt international legislation to local requirements;
- * Facilitate ongoing co-operation with international experts, particularly from the USA, including a visit by one or two experts for a period of one or two months.

A working group of relevant role players should be established, including representatives from the Departments of Justice, Safety and Security and Parliament, to meet regularly to supervise the drafting process and give any political input that may be required to ensure consensus on the Bill.

A further aspect of the project should be to ensure that expert advice is available to Parliament when it considers the Bill, and to make proposals regarding its effective and speedy implementation and related matters.

The proposed deadline means that a draft Bill should be ready for consideration by Cabinet in early August at the latest.

As discussed, your assistance will be appreciated in drafting a proposal for the project and securing funding for it. It is also suggested that the project be run from your Cape Town office.

In view of the urgency of the matter, it is proposed that the project should start as soon as possible on an interim basis when some funding has been secured. It can then be expanded as further funding is secured.

Thank you for your kind assistance and I look forward to hearing from you at your earliest convenience.

Yours faithfully



DRA M OMAR MP
MINISTER OF JUSTICE