ORGANISED CRIME IN SOUTHERN AFRICA

ASSESSING LEGISLATION

Edited by Charles Goredema

ACKNOWLEDGEMENTS

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In the words of Safety and Security Minister, Steve Tshwete:

"The menace of organised crime is not a theoretical phenomenon. It is a reality that governments and peoples across the face of the globe are grappling with on a daily basis. Huge financial resources, which should have been spent on development initiatives for the improvement of the fortunes of people, are directed towards the containment, if not the elimination, of national and transnational syndicates — rogue elements who have squandered all sense of decency to pursue the acquisition of wealth and comfort at the expense of law-abiding nationals."

The Minister's view appears to be shared by many in Southern Africa. The Organised Crime and Corruption Programme of the Institute for Security Studies (ISS) has embarked on an analysis of the nature and extent of the threat posed by organised crime in the region. In addition, the project seeks to explore initiatives to combat organised crime at local and transnational levels. The contributions in this work are the product of an examination of the relevant statutory instruments in force in various member states of the Southern Africa Development Community (SADC). The papers were presented at a seminar held in Pretoria, South Africa, on 26 and 27 February 2001.

The seminar occurred against the background of the signing of the United Nations Convention Against Transnational Organised Crime in Palermo at the end of 2000 by more than 130 countries. Signatories included virtually all SADC member states. It was inevitable that comparisons would be made between the legislative framework of each state and the requirements of the Convention. The Convention is ready for ratification, but before it can proceed to this stage, each state has to harmonise its laws with the Convention. Once it has been ratified by 40 states, the Convention will come into force.

The Convention has two main objectives. The first is to establish standards for domestic laws to enable them to combat organised crime, and the second is to eliminate disparities among legal systems to facilitate transnational mutual assistance. The substance of the Convention’s standards and guidelines is summarised in some of the papers, as is the extent to which respective legislative structures are consistent with the Convention.

The discussions that punctuated the seminar presentations highlighted some of the practical problems that might arise in the process of harmonising and aligning legislation. Some stem from the rather troubled contexts in which changes will be expected to take place. Fragile political and economic systems plague SADC. Differences in background, levels of development and values could also constitute formidable impediments to the reforms suggested. Participants were in agreement that, in the face of the challenges eloquently outlined by Minister Tshwete in his keynote address, pessimism would become part of the problem.

The apparently universal awareness of the enormity of the threat constituted by organised crime was a source of hope that the imperative for legislative reform would be taken seriously. The seminar was indebted to the SADC legal sector for participating. It was also encouraging to
have the head of the Secretariat of the Southern Africa Regional Police Chiefs Co-ordinating Organisation (SARPCCO) in attendance. The ISS also appreciated the contributions of the United Nations Office for Drug Control and Crime Prevention (UNODCCP) and the South African Asset Forfeiture Unit.

It is anticipated that the different contributions will take the project further. The Organised Crime and Corruption Programme is currently surveying the nature and extent to which the public and private sectors in SADC have been penetrated by organised crime. The ISS is grateful to the European Union, the Open Society Initiative for Southern Africa (OSISA) and the Hanns Seidel Foundation for supporting the seminar and this publication.

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EXECUTIVE SUMMARY

The containment of organised crime, especially where it assumes transnational dimensions, is a major issue on the law enforcement agendas of many countries and regional groups. This stems from a universal appreciation of the threat presented by organised criminal activity to the security of socio-economic systems and individuals. International efforts to build on this awareness by constructing new forms of co-operation across national borders started in earnest in the mid-1990s, under the auspices of the United Nations. Complemented by various regional initiatives, these efforts culminated in the United Nations Convention Against Transnational Organised Crime, signed at Palermo, Italy in December 2000.

Most of the countries in Southern Africa share the concern about the problem of organised crime. Consequently, 11 of the 14 member states comprising the Southern African Development Community (SADC) signed the Convention at Palermo. More than six months after its signature, it is clear that not every signatory state is ready to ratify the Convention. Harmonisation of institutional arrangements and the updating of legislation must precede ratification, since these actions signify competence to implement the prescribed obligations. Implementing the Convention can only occur if suitable domestic laws have been introduced, and the necessary administrative mechanisms have been activated. Those measures that have been adopted must then be submitted to the Secretary-General of the UN.

The required reforms are bound to have certain policy and legislative implications across the region. This monograph is an attempt to contribute to the assessment of the prevailing legislative infrastructure in some of the signatory countries. The various contributions provide a
comparative overview of the relevant statutes in Angola, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Tanzania and Zimbabwe. Contributors assembled at a seminar in Pretoria at the end of February 2001 to deliberate on the legal implications of the Palermo Convention for Southern Africa.

The South African Minister for Safety and Security, Mr Steve Tshwete, opened the seminar, cautioning against complacency in the face of the threat of organised crime (see chapter 1). He expressed his government’s readiness to play a role in cementing a regional response to organised crime in all its forms, and outlined what South Africa had already achieved at a local level. Contrary to the misconception that crime syndicates operate outside or parallel to the formal sectors of society, Minister Tshwete advised that organised crime is constantly trying to penetrate them.

Frank Msutu, who straddles Interpol’s subregional bureau and the Southern Africa Regional Police Chiefs Co-operation Organisation (SARPCCO) portrays the nature and magnitude of the threat that organised crime represents to the region (see chapter 2). He also outlines the trends in its growth, and the operational responses that it has provoked.

In chapter 3, Charles Goredema surveys the legislation in South Africa, Swaziland and Zimbabwe from the standpoint of the Palermo Convention. He evaluates the adequacy of the legislation, in terms of substantive content and enforcement mechanisms, and highlights changes needed if these countries are to comply with the Convention. He also argues for a co-ordinated approach towards the issues of corruption, money-laundering and witness protection.

Jai Banda, who practices law in Malawi, considers the legislative responses to organised crime in the country (see chapter 4). Criminal syndicates in Malawi do not conform to the traditional Mafia model, with their reputed hierarchies of governance and enterprise management. Rather, a multiplicity of loose, less formal units, whose membership is often fluid or transient, are active in the country. He examines the laws in place to deal with their activities, and argues that more can be enacted and penalties in the existing statutes should be raised. He also contends that the investigative capacity of law enforcement agencies leaves a lot to be desired.

Of all the SADC countries, Tanzania has the longest enduring laws dedicated to combating organised crime. The flagship Economic and Organised Crime Act dates back to 1984. The Proceeds of Crime Act, which deals with money-laundering, was passed in 1991. Professor Chris Maina Peter undertakes a comprehensive analysis of these laws in chapter 5. He highlights several deficiencies, especially in relation to the monitoring of suspicious transactions often associated with money-laundering. While the text of the law might be sound, the auxiliary infrastructure, some of which should be part of the law itself, is non-existent.

Namibia may not have a statute dedicated to combating organised crime in general, or money-laundering by syndicates, but it has a range of legislative instruments that give the authorities the necessary capacity. Ray Goba assesses the laws in Namibia against the background of the incidence of organised crime in the country (see chapter 6). It is evident that much transnational organised crime involving Namibians and nationals from neighbouring countries has occurred in Namibia in recent times. Goba laments the absence of simplified extradition arrangements with neighbouring countries, particularly with South Africa. Ironically, Namibia has the most liberal extradition regime of all SADC countries. In the sphere of money-laundering control, Namibia has put in place an administrative system centred on the Bank of Namibia, in terms of which transactions raising suspicion of illegal activity have to be reported. Goba notes that the system seems to work erratically.
In chapter 7, Sakoane Peter Sakoane undertakes an interesting, thematic analysis of the existing and impending legislation in Lesotho. He identifies various objectives and assumptions that influence this country’s laws. The belief that organised crime has a strong financial motivation underlies virtually all these laws. In consequence, emphasis is placed on the identification, seizure and forfeiture of illicitly acquired assets. Recent legislation against corruption seeks to impose a duty to explain wealth obtained in ‘unorthodox’ ways, in the hope of catching the corrupt. Theft of stock and motor vehicles are two of the most problematic crimes in Lesotho. Both tend to be linked, or to lead to other organised crimes like murder and the smuggling of firearms. Sakoane outlines the strategy adopted in respect of both, which is to put pressure on the receivers of stolen stock or vehicles to verify the authenticity of the transferor’s title, presumably on the understanding that it is easier to locate the receivers than the thieves. Finally Sakoane highlights a challenge that is common to the entire region — the scarcity of resources. On account of it, Lesotho’s Prevention of Corruption and Economic Offences Act (1999) has yet to be implemented. The Anti-Money Laundering Bill, which is under consideration by government, is likely to face a similar predicament.

The assassination of well-known investigative journalist, Carlos Cardoso in Maputo, virtually on the eve of the signing of the Palermo Convention, illustrated the lengths to which crime syndicates in Mozambique were prepared to go to evade the law. For the region, it underscored the urgency of acting against crime syndicates before they grow more powerful. Angelo Matusse outlines Mozambique’s law relating to serious crime (see chapter 8). His contribution shows that there is no lack of applicable legislation to deal with criminal activities, but that the structures for its enforcement are vulnerable to corruption.

Angola does not have laws dedicated to organised crime. Astrigildo Culolo identifies what laws could be passed for this purpose, but argues that the prospects of this happening while the civil war rages in the country are dim (see chapter 9). There can be no doubt that the country needs such laws. Much corruption, associated with the diamond, arms and oil industries, has been reported.

In the concluding chapter, Charles Goredema considers the prospects of harmonising the laws of Southern African countries, in view of the realities that might intervene. The challenges arise from the economic and political context in which reforms have to occur. He derives hope that SADC countries will ratify the Palermo Convention from the fact that so many of them signed in December, as well as the relatively small disparities between their laws and the requirements of the Convention in many areas. In addition, there is likely to be much pressure from financially influential regional groupings, such as the Financial Action Task Force.

Chapter 1
LEGISLATIVE RESPONSES TO ORGANISED CRIME IN THE SADC REGION
Minister Steve V Tshwete

The idea of bringing together people from different countries and backgrounds is highly commendable. The experience even at a regional level is necessary so that the issues that are frequently canvassed at international forums are given a sharper focus for purposes of creative planning and implementation. The menace of organised crime is not a theoretical phenomenon. It is a reality that governments and peoples across the face of the globe are grappling with on a daily basis. Huge financial resources, which should have been spent on development initiatives for the improvement of the fortunes of people, are directed towards the containment, if not the elimination, of national and transnational syndicates — rogue elements who have surrendered
all sense of decency to pursue the acquisition of wealth and comfort at the expense of law-abiding nationals.

For organised crime groups, the dawn of the new era of globalisation means the globalisation of their nefarious activities. The significant advances in the area of information technology are equally exploited to undermine good governance and subvert the objectives of conventional economies throughout the world. In the circumstances, no government, no matter how strong its technology, can fight and hope to win the war against organised crime syndicates without co-operating with other governments, both regionally and worldwide. The response to organised crime must also be an organised initiative within and outside the country’s borders.

Organised crime is a problem in South Africa and in its SADC neighbours, just as it is a problem in most countries of the world. The government is well aware of the fact that the consequences could be disastrous for good governance and the economy in the absence of the political will to confront the phenomenon head-on with all the might and ruthlessness that can be summoned. It could lead to the perception, for instance, that government is weak and that its law enforcement agencies and the judiciary are incapable of standing up to the security threat posed by organised crime. It could facilitate corruption and create opportunities for government officials to serve their own interests instead of those of the state, thus blurring the distinction between criminal thugs and those officials who are supposed to be fighting them. It could adversely affect stock market activity and consumer interests and contribute to the emergence of various illegitimate businesses, which deal in stolen and counterfeit goods. It could discourage foreign investment and create a situation where people begin to question the integrity of genuine business practices conducted either by the government or by respectable private institutions. It could even influence the value of real estate, the currency and the price of goods and services such as motor vehicle parts, clothing and insurance, to name but a few. It could also result in aggressive and unjustified criticism by some members of the community who have no or limited information, or who conveniently ignore government’s initiatives and successes in the fight against crime.

The organised manner in which such syndicates and groups extend their tentacles into society and corrupt officials from the lowest to the highest echelons in the public service and civil society, in general, could threaten internal and external confidence and accordingly a country’s economic well-being. Given the resources available to organised crime syndicates, and their capacity to undermine governments and their economies, the luxury of under-estimating their potential or real threat to peace and stability cannot be afforded. The point must be made again that the phenomenon of organised crime is not limited to a specific country or region. It is, on the contrary, a global onslaught aimed at creating and, in certain instances, consolidating alternative economies.

South Africa is no exception and, since its return to the global arena, has felt the effects of transnational organised crime syndicates attempting to extend their tentacles to ‘new markets’. Given South Africa’s relatively well-developed infrastructure, modern telecommunication systems, technology and business practices, it would appear that the scope of organised crime has evolved from generally small-scale local operations to international syndicates. The majority of known syndicates operating in South Africa specialise in motor vehicle theft, drug-dealing, fraud, armed robbery and dealing in firearms. The effects of these crimes are increased violence, a booming private security industry, rising insurance premiums, higher banking costs and a general sense of insecurity among law-abiding citizens.

It might be that many people have not been robbed, have not had their vehicle stolen, or have
not been defrauded, but this does not mean that anyone has escaped the consequences of the activities of organised crime syndicates. Every citizen is eventually a victim who has to contend with rising insurance premiums, potential job losses and a host of other negative consequences.

What makes the threat of organised crime so profound is the fact that corruption occurs of state officials and other functionaries in the private sector. The ability of crime syndicates to buy into government and corrupt officials, especially the police, enables organised crime operations to run more smoothly. As long as there are corrupt officials who act in collusion with criminals, crime syndicates will show a readiness to compensate for ‘services rendered’.

The relationship between corrupt officials and crime syndicates is symbiotic. Corruption is the antithesis of good governance and, if left unchecked, will undermine the structure of good governance. In a sense, the fight against organised crime is a fight against corruption, and the fight against corruption is a fight against crime — both scourges should be fought simultaneously. In the absence of a determined bid to do so, the fight should be abandoned for more pleasant pastimes.

In South Africa, the large-scale onslaught by organised crime has been effectively countered and, as such, the country has been spared the full brunt of the consequences alluded to above. The government cannot be accused by anybody of sound mind of turning a blind eye to the menace of organised crime. Apart from a vast array of legislative tools that are in place, a variety of new and innovative strategies have been adopted and implemented to address crime in general. Law enforcement agencies have been rid of the low levels of legitimacy that haunted them during the apartheid era. These strategies range from the implementation of an organised crime threat analysis, a new three-year crime combating strategy in line with government’s policy of an integrated approach to the fight against crime and an improved capacity to deal with organised crime by restructuring the specialised units in the SAPS. Successes include the elimination of 366 organised crime groups, the prosecution of 233 organised crime syndicate leaders and 2 334 ordinary syndicate members. During 2000 alone, a total of 4 775 kilograms of gold-bearing material and various instruments used in the processing of gold-bearing material were confiscated from syndicates involved in the illegal trade in precious metals.

The government has been equally active in the international arena. In December 2000 in Palermo, Italy, South Africa, together with more than 118 other countries, signed the United Nations Convention Against Transnational Organised Crime. The Convention and its protocols were signed by the government out of a clear understanding that the fight against organised crime syndicates is a proper and fitting response. In addition, and since 1994, the Department of Safety and Security has been involved in the negotiation and conclusion of a number of police co-operation agreements, including the establishment of the Southern African Regional Police Chiefs Co-ordinating Organisation (SARPCCO). A multilateral co-operation agreement, effectively paving the way for increased police co-operation in the region, has been signed by 11 countries and is now in force. From this agreement and the initiatives of SARPCCO, a number of joint crossborder operations have been successfully concluded and the might of a region united in action against crime has been felt.

Further afield, bilateral co-operation agreements have already been sealed with countries in Africa, Latin America, Europe and Asia. Crime liaison officers have been posted in the United Kingdom, Brazil, Swaziland, Mozambique, Ghana and Namibia for the purpose of gathering, managing and co-ordinating information related to drugs and organised crime.

Consisting of developing countries and emerging markets, the Southern African region is
attractive to international crime syndicates. As long as any one of the SADC members remains weak, the region will experience destabilising influences. This seminar once more transmitted a loud and clear message to those rogues out there who will be dealt with wherever and whenever they are found. As a region and even as individual states, neither strength nor courage will be spared.

As mentioned above, the South African scenario is one of success and will surely serve as an inspiration to all in the region. The government must build on these gains and continue to sharpen the tools of preventing, investigating and prosecuting all forms of crime syndicate activities at home and across the borders. In order to do so successfully, the anti-corruption drive must be stepped up as never before, particularly within the police, Correctional Services and the prosecutorial environment. As the corrupt elements are removed from within the ranks, an equally tough campaign must be launched against those elements in civil society who have taken it upon themselves to corrupt members and officers of the entire criminal justice system.

Chapter 2
RESPONSES TO ORGANISED CRIME IN SADC: INTERPOL AND SARPCCO
Frank Msutu

Introduction

The term ‘organised crime’ is derived from the ability of criminals to organise themselves and their activities along the lines of a properly organised and well-managed business entity. These groups sometimes organise their criminal activities in such a way that they are disguised under legitimate business activities. To this end, an organisational structure may be in place with each division of the structure carrying a specific responsibility. The organisation may consist of a number of loosely connected substructures with complementary expertise. The organised group may be involved in one or in several types of crime, depending on their speciality. In the Southern African region, there are several organised groups specialising in a variety of crimes, including armed robberies, motor vehicle thefts, drug-trafficking, stock theft, firearms-smuggling, illegal immigrants and trafficking in people, diamond-smuggling and others. The groups may work together in certain situations when there is a need to link their activities or exchange commodities.

In discussing trends and patterns of organised crime, this chapter will be restricted to practical issues from a regional policing point of view. It will look at what the Southern Africa’s police forces and services are trying to do to combat crime in its organised form.

Interpol in Southern Africa

The Interpol Subregional Bureau for Southern Africa started operating on 3 February 1997. This was made possible by Resolution AGN/63/P.Res/24 of the 63rd General Assembly of Interpol in Rome. Prior to this resolution, all Interpol activities were centralised at the Interpol headquarters in Lyons, France.

Upon commencing operations, the Subregional Bureau put in place a strategic plan with, over and above the general objectives of Interpol, the following objectives:

- to study and evaluate regional and international crime trends, perceived by the chiefs of police of the region as priority crimes in order to advise the police organisations of the region on crime trends and their effects, thus enabling them to take the necessary steps to
counter the incidence of crime either as individual countries or jointly as a region, through the exchange of criminal intelligence, joint operations or joint training exercises;

- to promote and co-ordinate the objectives and initiatives of Interpol in the region in a bid to facilitate regional and international police co-operation in the investigation of criminal matters;

- to encourage and maintain mutual trust between and among the police organisations of the region in order to maximise co-operation against crime;

- to co-ordinate regional training activities in order to assist in raising the general performance of specialised police units to acceptable standards according to the requirements of the police chiefs of the region, and to prepare and facilitate any training initiatives that may be required by the General Secretariat of Interpol from time to time;

- to facilitate co-operation and meetings to resolve legal issues which may inhibit police co-operation and other joint activities in the region;

- to act as the Secretariat of the Southern African Regional Police Chiefs Co-operation Organisation (SARPCCO), to ensure and enhance proper communication links and co-operation between SARPCCO and the General Secretariat of Interpol, and to ensure a free flow of crime-related information and intelligence between national co-ordinating structures and the General Secretariat;

- to co-ordinate and facilitate sport and cultural exchanges by police forces or services in the region; and

- to evaluate all regional projects, to provide feedback to the Secretary-General of Interpol, and to advise the contracting states of results.

In studying regional and international trends of the priority crimes within the context of these objectives, it was imperative to look at the possibility of linkages between these crimes. Questionnaires were sent to the countries in the region, and officers at the Bureau also studied crime reports that came through formal and informal channels.

At the time, there was very little focus by the General Secretariat on the development of criminal activities in Africa, especially in Africa south of the Sahara. The criminal world, however, was aware that countermeasures were concentrated in other parts of the world, leaving Africa wide open for criminal exploitation, the cultivation of new trafficking routes, the recruiting of contacts and the creation of new cells. For instance, Interpol’s drug-trafficking analysis indicated mostly that heroin, hashish and other hard drugs were going into Europe from Asia through the ‘Golden Triangle’, a route linking Asia with Western Europe through Eastern Europe and North Africa. International policing attention and efforts were therefore naturally concentrated on countering international drug traffic on this route.

It was only later that it was realised that other trafficking routes had been created through South Africa, Nigeria, Angola and Tanzania. New routes are continuously being discovered in Africa that were not known before. It is a fact that the trafficking transit points normally establish themselves as the epicentre of local and regional abuse of the trafficked contraband as residual particles will find their way to local communities. In this case, a new consumer base is created and this means a new market for the commodity. The proceeds are then laundered and
transferred to offshore banks and the country where the market is situated obviously loses hard currency in the process.

The above is only a scenario meant to explain why Interpol saw the need for regionalising its activities, hence six subregional bureaux have been established throughout the world.

The Southern African Subregional Bureau covers 12 countries, all of them members of SADC: Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The only two SADC countries not directly linked to the Subregional Bureau are the Democratic Republic of Congo (DRC) and the Seychelles.

**SARPCCO**

The twelve countries mentioned above came together at the end of August 1995 and formed SARPCCO. The Interpol Subregional Bureau acts as the Secretariat for SARPCCO. The objectives of SARPCCO, according to its constitution, are subject to the provisions of domestic laws and include the following:

- to promote, strengthen and perpetuate co-operation and foster joint strategies for the management of all forms of crossborder and related crimes with regional implications;
- to prepare and disseminate relevant information on criminal activities as may be necessary to benefit members in their attempts to contain crime in the region;
- to carry out regular reviews of joint crime management strategies in the light of changing national and regional needs and priorities;
- to ensure the efficient operation and management of criminal records and the efficient joint monitoring of crossborder crime, taking full advantage of the relevant facilities available through Interpol;
- to make relevant recommendations to governments of member countries in relation to matters affecting effective policing in the Southern Africa region;
- to formulate systematic regional police training policies and strategies, taking into account the needs and performance requirements of the regional police services or forces; and
- to carry out any relevant and appropriate acts and strategies for purposes of promoting regional police co-operation and collaboration as dictated by regional circumstances.

**SARPCCO co-operation agreement**

An Agreement in respect of Co-operation and Mutual Assistance in the Field of Crime Combating was signed by SARPCCO members in Harare on 1 October 1997. The Agreement allows police officers of the region to enter countries of other parties with the authority to do so, for the purpose of police investigations, seizure of exhibits, tracing and questioning of witnesses. The actual seizures, tracing, questioning of witnesses and arrest of criminals, however, are to be carried out by police officers of the host country.

This agreement has opened a new chapter to policing in Southern Africa as it removes all suspicions about whether one police force or service could act on information from another. The
agreement also allows for the exchange of criminal intelligence as the police in the region recognised the fact that criminals are not controlled by political boundaries.

Police forces have traditionally been taught to be guardians of information. Because of legislation guarding official secrets, there was previously no scope for providing information to a foreign police organisation. As a result, criminal intelligence was jealously guarded and would never be disclosed. The SARPCCO constitution and agreement have assisted in breaking barriers in the Southern African region, and information is being exchanged more freely for the purposes of combating criminal activities in the region.

Through the regionalisation of Interpol and the SARPCCO grouping, it has become possible to conduct joint police operations that are intelligence-driven. The intelligence that is supplied is stored on the Interpol database for use by SARPCCO.

*Crime statistics*

The trends and patterns of organised crime outlined in this chapter emerged as a result of information gathered from questionnaires or from intelligence gathered during joint operations in Southern African countries. The gathering of the information was basically intended to support one of the objectives of the SARPCCO constitution to promote, strengthen and perpetuate co-operation and foster joint strategies for the management of all forms of crossborder and related crimes with regional implications.

*Joint operations*

The Southern African region has conducted nine joint operations since 1997, directly as a result of having identified definite crime trends emerging through criminal intelligence, questionnaires and other sources.

The joint operations targeted motor vehicle thefts, drug cultivation and trafficking, firearms-trafficking, wanted criminals, diamond-smuggling, illegal immigrants and other crimes. As a deliberate strategy, the crime of motor vehicle theft was focused upon especially during joint Operation V4, which was conducted between February and March 1997, and involved Mozambique, South Africa, Zambia and Zimbabwe. During these operations, 1 576 stolen vehicles were recovered over a period of 12 days. Of these, 1 464 were South African vehicles recovered from all the countries.

Other regional operations that followed this strategy included:

- Operation Midas, June 1998, covering Lesotho, Mauritius, South Africa and Swaziland.
- Operation Stone, April 1998, covering Angola, Botswana and Namibia.
- Operation Sesani, April 1999, covering Botswana, Tanzania, Malawi, South Africa and Zimbabwe.
- Operation Makhulu, July to August 2000, covering Botswana, Lesotho, Mozambique, Namibia, South Africa, Swaziland and Zimbabwe.
Although these joint operations were also designed to control and seek further intelligence on drugs, firearms, diamonds and illegal immigration, the planning sessions had noted that motor vehicles were the common denominator in all the targeted crimes. Effective control of the transborder movement of stolen vehicles would therefore go a long way in controlling the other crimes.

The regional joint crossborder operations were very successful, albeit temporarily, with the impact manifesting itself in a reduction in motor vehicle theft to zero in certain countries. A few weeks after the operations, one evaluation of a joint operation indicated that, two weeks after Operation V4, motor vehicle thefts had been reduced as follows:

- Zimbabwe — 47.8%
- Mozambique — 60%
- South Africa — 22.8%
- Zambia — 75%

But this was only a temporary setback to criminal activities, as this crime gradually increased to the original levels once criminals realised that the operations were of a temporary nature.

In a region of 12 countries with a population of approximately 140 million people, South Africa has the largest population accounting for no less that 26% of the region’s total figure. Being the great economy it is, South Africa naturally presents itself as a great market base for all good entrepreneurs, including criminal syndicates. It is also a great source of stolen goods and other contraband.

It is not surprising that South Africa has a greater number of motor vehicles stolen per year than any other country in the region. Statistics presented to Interpol show that the rest of Southern Africa together loses between 1.3% and 4% of the total number of vehicles lost to theft per year by South Africa alone.

Much work has been done in trying to identify crime syndicates operating in the region. All countries in the region have supplied intelligence that has been analysed by Interpol and by the countries themselves. There are very clear relationships and interlinking factors between crime syndicates operating in Southern Africa. It is not a secret to law enforcement agencies in the region that the criminals in the region have better co-operation links than the police officers.

They seem to know who to contact at all times and budgetary constraints, foreign currency shortages, visa problems or governmental authority to travel do not control their movements.

For instance, during the V4 operation, the operatives of the four countries dealt with two very clearly structured syndicates. Both syndicates had ascertainable links in Zimbabwe, Mozambique, Zambia, South Africa and Botswana. Many of the leading figures were arrested during and after the operation, but there is nothing to suggest that their operations were effectively curtailed. Many of the operations are run as family businesses. Thus, when one top operative is arrested, the remaining members continue with the business until they have been arrested as well. In many instances, the different syndicates help one another or share business, although there may be conflict at times. Inter or intrasyndicate conflicts greatly benefit the police in as far as they enable the use of one group against the other to gain information and/or convictions.

**Motor vehicle theft syndicates**
Crime syndicate connections have caused problems for the police in the region in many ways. Those operating from South Africa seem to be the busiest. South Africa loses an average of 100 000 vehicles to theft per year. Many of the vehicles, especially those with a low mileage, are driven across borders to the north. Trends have shown that, while some of the vehicles will remain to be registered in the more tranquil SARPCCO countries, many have found their way to Angola, the DRC and further afield. Fewer vehicles, especially 4x4s, are stolen from countries north of the Limpopo and taken further north. There are instances, however, where vehicles are stolen from countries north of the Limpopo that are driven to South Africa. Vehicles from Tanzania, Zambia and Zimbabwe have been recovered from Bloemfontein in South Africa.

The syndicates use forged registration books and travel documents, false number plates and clearance certificates, as well as corruption and anything else in their power to pass through the borders. On 1 January 2000, SARPCCO introduced a SARPCCO Motor Vehicle Clearance Certificate to counter crossborder motor vehicle theft.

This took criminals aback for a while. However, during January 2001, it emerged that criminals had developed a new strategy to get around the SARPCCO clearance certificate. During 2000, they tried to forge the certificate, but due to the security features on the certificate and training given to the police, the forgeries were easily discovered. The latest trick was to have a reproduction of a registration book and licence plate from a foreign country for the kind of vehicle they intend to steal. A suitable vehicle is then stolen and its particulars are substituted with those on the registration book. This means that, for example, a stolen South African vehicle will bear a Zambian registration plate, complete with a Zambian registration book. No South African police officers will bother to stop a foreign registered car unless their suspicions are raised by something else. Vehicles have been exported in this fashion recently. There is no need to produce a SARPCCO clearance certificate at the border as the vehicle is passed off as that of a returning resident.

It would also seem that the vehicles stolen from the north going to South Africa are intended for the market in Angola and the DRC, as some of these vehicles, after being registered in South Africa, have been intercepted while going north through Namibia and Kazungula in Botswana.

Drugs

There is a clear route for hard drugs that come from South America and Asia into Southern Africa. There is no doubt that the hard drugs destined for Europe from these regions come through South Africa for re-routing to the European region and sometimes to Canada. Some of the drugs are routed to South Africa through Luanda and Dar es Salaam. This is an indication of a strong base of organised crime in the region as money-laundering is undoubtedly a factor in drug-trafficking. Heroin, hashish and mandrax from the east and cocaine from the west are seen to be converging in South Africa before moving north to Europe.

An Interpol World Cocaine Report, produced by the Drug Sub-Directorate, states:

"The Southern cone of Africa has become one of the hottest spots of cocaine trafficking in the world. Its part in the trafficking equation has developed into a serious issue both in consumption and transit. West African traffickers increased their influence and distribution networks in the region and developed a consumer market that is seen by national authorities as a serious problem. Transit points for cocaine heading to Europe continue to surface throughout the year. The source of the drugs
from South America is principally Brazil. Hundreds of couriers on board commercial flights brought cocaine into South Africa either directly or through Angola, Namibia, Swaziland and other neighbouring state."

Between 1996 and 1997, the main cocaine-trafficking groups in Africa were identified as Ghanaians, Moroccans, Nigerians, South Africans and Liberians. The interest in this survey is mainly in the involvement of Nigerians, South Africans and other nationals from the region. In 1995, 130 Nigerians were caught smuggling more than 296 kg of cocaine. In 1996, 144 Nigerians were caught smuggling nearly 310 kg and in 1997, 125 Nigerians were caught smuggling nearly 206 kg of cocaine. The number of individuals involved is clearly decreasing.

On the other hand, in 1995, 15 South Africans were found smuggling close to 72 kg of cocaine. In 1996, 36 South Africans were found smuggling about 55 kg and in 1997, 75 South African were found smuggling nearly 90 kg. In this case, the number of individuals involved is increasing.

| Table: Seizures of cocaine in Southern African countries, 1995-1997 |
|-----------------|---------|-------|
| Country         | 1995    | 1996  |
| Angola          | 8.902   | –     |
| Botswana        | 0.350   | 3     |
| Lesotho         | –       | –     |
| Namibia         | –       | 5     |
| South Africa    | 187.615 | 123.102 |
| Swaziland       | 2.766   | 5.048 + 100 slabs |
| Tanzania        | –       | –     |
| Zambia          | 0.088   | –     |
| Zimbabwe        | 0.088   | –     |

The presence of Nigerian syndicates in the region also means the expansion of activities. They seem to be taking a management role as more people in the region are being used as couriers. In the majority of seizures, there is a Nigerian connection. As this is seen more and more as a lucrative business, more nationals in the region will eventually be enticed to create their own syndicates and start their own operations.

The expansion of syndicate activities in respect of drug matters has been made clearer through the dismantling of drug-manufacturing laboratories by law enforcement agencies in South Africa, Tanzania and Zambia in recent years.

Cannabis

The cultivation and trafficking of cannabis continue in Southern region countries. The main trafficking direction is towards South Africa. The main suppliers of cannabis have been Lesotho, Swaziland, Malawi, Mozambique, Zambia and Zimbabwe. The cultivation in Lesotho, Malawi and Swaziland occurs on a commercial scale. Very little surveying has been done in Mozambique as no major regional drug operation has been undertaken in the country.

Most of the cannabis is intended for the European market. Drugs have been packed, sealed and shipped to London, the Netherlands and other European destinations. A number of operations
have been dismantled in Southern Africa. Recently, the preoccupation of SARPCCO has been
to locate and destroy all cannabis crops under cultivation. A regional joint operation, codenamed
Motokwane, has been conducted in Malawi, Lesotho, Swaziland and South Africa. More than
6 000 tons of cannabis were destroyed during the joint operations. The region believes if this
operation is repeated regularly, there could be a general reduction in cannabis trafficking.

The strength of cannabis syndicates was tested during some of these operations when gunfire
was exchanged with criminals.

**Diamond-smuggling**

This is an area that has caused much concern due to its link to some of the armed conflicts in
the region.

The United Nations Security Council Committee on Sanctions Against Unita produced a report
that was circulated on 10 March 2000. Part of its investigations were conducted in Southern
African and the investigations indicate, to an extent, the links of the syndicates in the region.

Intelligence indicates that some of the stolen vehicles that go into the conflict areas are
exchanged either for US dollars or for diamonds. The diamonds are smuggled back and are
introduced into the diamond market. Organised syndicate structures have been identified and
some of the leaders’ names have been circulated for monitoring and further action by the
countries involved. Some of the syndicates involved with diamond trade are suspected to be
involved with firearms-smuggling as well.

**Nigerian letter scams**

Syndicates specialising in sending fraudulent letters that seemingly introduce opportunities to
make money quickly are now also based in Southern Africa. Many people have already lost
money to these syndicates. Hundreds of thousands of letters have been sent to business
people and ordinary citizens in the region, some of whom responded and lost money. While the
origins of this scam can be traced to Nigeria, many of the letters are being posted locally with
local phone numbers and addresses. This type of crime is highly organised in that operators are
interlinked with other groups or individuals in other countries who will talk to the targets and
convince them to part with their money. They are also involved in kidnapping, extortion and
even murder.

**Links between crime and conflict**

It is quite clear that conflict presents the perfect opportunity for crime. For example, the end of
the war in Mozambique found the subregion flooded with firearms. Substantial trafficking moved
through Malawi, Zambia, Zimbabwe and into South Africa. The weapons that remained in these
countries have been used to commit crimes involving firearms.

Of late, the smuggling of stolen motor vehicles into Angola and the DRC has increased because
the conflicts there give the opportunity to criminals to move in and out without detection. The
authorities in these countries are concentrating on conflict-related issues and pay little attention
to crime being perpetrated. By the end of the hostilities, the criminals will have entrenched
themselves to such an extent that the organised crime structure will be difficult to dismantle.

There is growing apprehension that, as they become economically stronger, criminal syndicates
will start sponsoring political parties to influence the direction of politics in countries. Some of them may sponsor conflict in order to create or expand opportunities to make money.

The subregion is still monitoring crime trends to allow future operations to be focused regionally and internationally.

SARPCCO’s structure offers significant capacity for the region to respond effectively to organised crime, if sufficiently funded and enabled through enhanced crime research:

- Within SARPCCO, the Council of Police Chiefs is the main policymaking body.

- The Permanent Co-ordinating Committee is the operational wing of SARPCCO, tasked with the planning, strategy development and execution of operations throughout the region after studying criminal intelligence and trends.

- The Training Subcommittee is tasked with identifying training needs and putting together relevant curricula for the training of police officers throughout the region.

- The Legal Subcommittee continuously studies legislation and its applicability to the intended objectives and operations of SARPCCO. The committee makes recommendations to governments for changes or the introduction of new laws where necessary.

These structures have a potential to assist the region substantially in combating all forms of crime.

Chapter 3

LEGISLATION IN SOUTH AFRICA, SWAZILAND AND ZIMBABWE TO COMBAT ORGANISED CRIME

Charles Goredema

Introduction

Organised crime is defined in this chapter as systematic criminal activity of a serious nature committed by a structured group of individuals or a corporate body in order to obtain, secure or retain, directly or indirectly, a financial or other material benefit. The definition is broad enough to embrace participation in organised crime groups, serious economic crime, violent crime, corruption, money-laundering, the possession of and trafficking in narcotics, trafficking in humans, poaching, smuggling and obstructing the course of justice. At the core of organised crime, there is usually an economic imperative.

South Africa, Zimbabwe and Swaziland, the three neighbouring countries considered in this chapter, are all plagued by organised crime of one kind or another. The kinds of organised crime itemised above can all be encountered in each of them. A study of these countries reveals two further facts: first, transnational crime certainly occurs across their borders and, second, all have made some legislative attempts to curb some or all of the activities that fall under the definition of organised crime.

This chapter presents a comparative overview of the laws in South Africa, Zimbabwe and Swaziland, which may be used to confront organised crime. It also attempts to evaluate the functional strengths and weaknesses of these laws. The countries of which laws are under
review have all pledged to ratify the United Nations Convention Against Transnational Organised Crime, which makes it appropriate to assess the extent to which the legislative regime in each country measures up to what is envisaged by the Convention.

This overview also examines the substance of the restrictions imposed by law, as well as the process of enforcement that obtains in the three countries.

**Criminalisation**

All three countries follow a common law of which the general principles are rooted in Roman Dutch law. The criminal law relating to conspiracy to commit crime and to degrees of participation in crime are therefore identical. Economic crimes such as fraud, theft by false pretences, forgery and uttering are also identically defined. The purpose of this chapter is not to dwell further on the substance of the common criminal law, but rather to focus on the complementary statutory laws. In both Zimbabwe and Swaziland, the statutory law regulating criminal procedure renders any person who conspires with any other person to aid or procure the commission of, or to commit a crime, guilty of conspiracy as a distinct offence. A person who instigates, commands or hires any other person to commit an offence is also guilty of an offence. South Africa has gone further to enact legislation specifically dealing with participation in criminal gangs.

**General participation in criminal gangs**

The formulation of an appropriate and adequate response to the much publicised activities of gangs operating primarily, but not solely, in the Western Cape, has preoccupied the South African government in the late 1990s. Against a background of the proliferation, on the one hand, of criminal acts by gangs and, on the other, retaliatory responses by vigilante outfits, and the accompanying public criticism of perceived government passivity, parliament passed the Prevention of Organised Crime Act in 1998. The Act comprises a package of measures designed to:

"combat organised crime, money laundering and criminal gang activities relating to racketeering activities … [and] 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."

The Act criminalises the command of, active participation in or membership of a criminal gang. It also seeks to criminalise the recruitment or advice to another person to join a criminal gang, while giving a broad definition to the concept ‘criminal gang’. A recurrent theme in gang activity is the practice of extortion or protection rackets. The Act creates offences relating to racketeering activities, making it an offence, among others, to receive property derived from a pattern of racketeering activity. It is not necessary to prove that the accused was directly involved in committing a specific criminal act. Nor is it essential to show that the accused knew the precise origins of the tainted proceeds or property. The state only needs to prove that they "ought reasonably to have known" that the property is derived from illegal activity. It is partly on account of these innovations that the Act is expected to ease the task of securing convictions against gang bosses who keep their distance from the dirty criminal work, but reap the benefits afterwards. Harsh penalties are prescribed for involvement in racketeering activity, with a conviction exposing the accused to a billion rand fine or life imprisonment.
Corruption

Corruption is endemic in Southern Africa. Among the forms which it assumes, the most recurrent are bribery, insider dealing, bid-rigging and collusion to distort procurement processes. In recent times, instances of forgery of qualifications and other official documents have also been reported.

South Africa

The legal system in South Africa is replete with anti-corruption legislation, indicating an awareness of the danger that corruption, in any form, poses to the national socio-economic fabric. The statute that appears to be dedicated to the scourge is the Corruption Act (1992), although it really deals with bribery and to a certain extent, extortion. The Act extends the concept of bribery to the private sector.

Zimbabwe

Zimbabwe has both pre-emptive and reactive legislation relating to corruption. The former type generally regulates the context in which corruption tends to occur. It deals with, for instance, the disclosure of conflicting interests that may have a bearing on tenders and procurement decisions. Apart from the numerous statutes regulating the public sector and public corporations, the Procurement Act epitomises this kind of legislation. The pre-emptive laws will not be examined in this chapter.

The most significant reactive statute is the Prevention of Corruption Act, which is generally intended to respond to corruption in both the public and private sectors. Curiously, this is an Act to which the highest placed public official, the country’s president, is not subject.

Corrupt practices are defined in Part II of the Act, specifically in section 3 and rather obliquely in sections 4 and 14. In spite of appearances, the Act targets a relatively limited range of corrupt actions, the equivalent of what the common law would term bribery, fraud and extortion. Section 4 is a rather amorphous provision that could be interpreted widely to embrace disregard for appropriate procedures or dereliction of duty. It renders criminal action that is contrary to or inconsistent with a public official’s duty as such, or the omission by a public official to perform anything which falls within his or her scope of work, if done to favour or prejudice any person.

There are many transgressions by public officials at various levels of government that could fall foul of this prohibition. These would include the manipulation of tender processes in respect of the provision of cellular telephone services by government ministers, which resulted in a lawsuit by one of the tenderers, the side-stepping of similar processes in the transaction involving the Malaysian company YTL and the Zimbabwe Electricity Supply Authority, or the similar flouting of tender procedures in the contract for the construction of a new airport terminal in Harare. It is a matter of record that none of these highly publicised violations of section 4 yielded a prosecution, which has been attributed to the compromised position of the state’s prosecuting arm. The Attorney-General in Zimbabwe is a key member of government, vested with the discretion to decide whether or not to prosecute. It is a discretion that has generally exercised in favour of political colleagues or in the interests of the ruling establishment.

In any event, considering the stakes that may be involved, the penalties provided for
transgressions of section 4 are paltry.

**Swaziland**

The Prevention of Corruption Order\[13\] repealed and replaced the Prevention of Corruption Act of 1986. The various kinds of corruption that it proscribes are listed in Part III. Section 20 codifies the common law of bribery, while section 21 extends this to tender processes. Bribery in the private sector is also criminalised, as is similar conduct in judicial work. Potentially controversial is section 26, which creates a residual offence on the sole basis of unexplained lifestyle or assets. Its main subsection reads:

- "Any person who being or having been a public officer maintains a standard of living above that which is commensurate with his present or past official emoluments; or

- is in control of pecuniary resources or property disproportionate to his present or past official emoluments;

- shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such standard of living or how such pecuniary resources or property came under his control, be presumed to have maintained such standard of living or acquired such pecuniary resources or property as the result of the commission of an offence under section 20, 21, 22 or 25 of this Part, and shall be guilty of that offence and liable on conviction to the penalty prescribed in relation to that offence."

Subsection 2 extends this ‘presumptive’ offence to "any person who has no known source of income or who is not known to be engaged in any gainful employment."\[14\]

In fairness, it must be conceded that Swaziland is not unique in giving legislative expression to popular prejudice and turning the tables on public officers in this manner.\[15\] Similar offences are to be found in the cognate statutes of Hong Kong,\[16\] Botswana, Tanzania and Zambia. As Coldham has observed, presumptions of corruption are fairly common in anti-corruption legislation in Commonwealth Africa.\[17\] All of them do not adopt the same form, but they invariably provoke the argument that they are not a justifiable departure from the normal principle governing the incidence of proof in criminal cases. For this reason, these presumptions often coexist uneasily with the constitutional rights of suspects. In the absence of such a constitutional dispensation, the Swaziland version seems to be in no danger of a legal challenge. It is noteworthy that the Draft SADC Protocol Against Corruption has eschewed the inclusion of this kind of presumption.

**Remarks**

It would appear that the statutes of all three countries dedicated to combat corruption have adopted a very narrow definition of corruption. There can be no doubt that, in a region that is struggling to come to terms with the demands and pressures of transformation (economic empowerment of previously marginalised groups, privatisation of an erstwhile huge public sector), corruption is bound to extend beyond bribery and extortion. The environment where these demands and pressures are being exerted are characterised by economic systems that are weak (in some cases, the pillars on which these economies rest are disintegrating) and political systems that are fragile and/or undemocratic. It is an environment that tends to encourage the circumvention of appropriate systems and the concealment of misconduct.
The Prevention of Corruption Act in Zimbabwe does not cover electoral corruption. It would also not apply to the growing trade in falsified educational, security and travel documents. More significantly, corruption is not extended to the practices of patronage and nepotism, which usually pave the way for insider-dealing and bid-rigging in public procurement. The latter malpractices are also omitted from the ambit of the Act. At the time of writing, a new statute to replace the Prevention of Corruption Act was under consideration. A preliminary draft purported to expand the scope of the Act, and merge it with the Serious Offences (Confiscation of Profits) Act. The new Act is expected to create an Anti-Corruption Commission with various vested powers. The success of the proposed venture will largely depend on the extent to which the Commission is freed from inappropriate influences. The attitude recently displayed by the Zimbabwe government to the judiciary suggests that the Commission will not be allowed any autonomy.

*Money-laundering*

Opening a conference on money-laundering in South Africa, the former Minister of Justice, Dullah Omar, attempted to summarise the nature and magnitude of the problem presented by money-laundering. He observed:

"Cash lends an anonymity to the proceeds of many forms of criminal activity and it is known that most money-laundering is done by organised criminal groups. In fact, it is a vital necessity to organised crime as it prevents the detection, and consequently, the prosecution of those responsible for the management and financing of criminal syndicates. It also insulates those at the top of a criminal organisation from the sordid reality of their crimes. Money-laundering breaks the paper trail, thus creating obstacles to any investigators as the money trail often represents the only link between the leaders of the criminal organisation and the crime itself. This makes it very difficult to investigate, let alone prosecute, the criminal leaders.

Criminals can thus, by laundering their ill-gotten gains, enjoy the fruits of their illegal activities. A further concern is that the laundering can facilitate the penetration of legitimate business by organised crime with the subsequent corruption of the business. This problem is compounded by the fact that this penetration leads to unfair competition within the particular industry as criminals are not likely to follow ethical business practices usually applied by legitimate business, thus rendering an advantage to the criminals and encouraging others to follow suit.

In addition, the criminal’s access to large sums of money, which he/she wishes to launder, allows him/her to invest without the usual concern for credit and fiscal constraints which operate in any economy. The money launderer’s ability to finance a business operation with illegally earned cash and thereby avoid the cost of finance, as well as his propensity to avoid taxation, also enables him/her to undercut more law-abiding competitors."

Money-laundering is now universally understood to be the processing of the proceeds of criminal acts in order to disguise their illegal origin. Legislation which seeks to combat money-laundering effectively should strive to achieve two goals:

- to protect the legitimate economy (formal and informal) and the financial system from being penetrated by illegally obtained funds; and
• to increase the risk of apprehension of those presenting such funds, and facilitate the
detection, seizure and ultimate confiscation of their illegally acquired funds and assets.

South Africa

With the enactment of the Prevention of Organised Crime Act, South Africa took a major step
forward in combating money-laundering. Although the Act was not the first attempt at
criminalising this activity as such, it has been credited with having created a comprehensive set
of regulatory measures and mechanisms by which to confront the problem. Section 4 codifies
the offence thus:

"4. Any person who knows or ought reasonably to have known that property is or
forms part of the proceeds of unlawful activities and-

(a) enters into any agreement or engages in any arrangement or transaction with
anyone in connection with that property, whether such agreement, arrangement or
transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed
independently or in concert with any other person,

which has or is likely to have the effect-

(i) of concealing or disguising the nature, source, location, disposition or movement
of the said property or the ownership thereof or any interest which anyone may have
in respect thereof;

(ii) of enabling or assisting any person who has committed or commits an offence,
whether in the Republic or elsewhere-

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of
the commission of an offence,

shall be guilty of an offence."

Section 5 follows similar lines and provides that:

"5. Any person who knows or ought reasonably to have known that another person
has obtained the proceeds of unlawful activities, and who enters into any agreement
with anyone or engages in any arrangement or transaction whereby-

a. the retention or the control by or on behalf of the said other person of the
proceeds of unlawful activities is facilitated; or

b. the said proceeds of unlawful activities are used to make funds available to the
said other person or to acquire property on his or her behalf or to benefit him or her
in any other way,

shall be guilty of an offence."
The Act then sets out reporting obligations for those who might come into contact with the proceeds of crime.

**Zimbabwe**

The offence of money-laundering was created by section 63 of the Serious Offences (Confiscation of Profits) Act of 1990. The adequacy of the provisions and measures stipulated in the Act fails to be evaluated against the goals postulated above.

All jurisdictions that act against money-laundering have to conceptualise the practice in a way which is broad enough to capture the iniquities to be proscribed. The Serious Offences (Confiscation of Profits) Act lays down two ways in which the offence may be committed.

Money-laundering is committed by engaging, directly or indirectly, in a transaction involving the transfer to (rather inelegantly described as ‘removal into’) or from Zimbabwe, of the proceeds of crime of whatever form or nature. Alternatively, the offence can be committed by receiving, taking possession of, concealing, disposing of, bringing into or removing from Zimbabwe, the proceeds of crime. In both instances, intention on the part of the suspect must be established, but this does not have to be in the form of actual knowledge that the assets laundered were the proceeds of crime. A person who commits either of the proscribed acts is also guilty if he or she acted negligently in not establishing the origins of the proceeds.  

The first mode of activity does not fit into the conventional definition of money-laundering at all. It seems to target conduct that may or may not constitute the transformation of illegally obtained assets. Section 63(1)(a) of the Act is worded in such a broad manner as to include non-monetary assets, such as a motor vehicle or a firearm. If a motor vehicle is stolen in Zimbabwe and driven across the border into Botswana, the section would describe this conduct as money-laundering.

Section 63(1)(b) is drafted in similarly wide terms, so wide as to render a person who receives a motor vehicle stolen from a foreign country knowing the manner of its acquisition, guilty of money-laundering. As the court pointed out in *S v Mambo (1995)*, a pickpocket could be charged under the section for holding onto the proceeds of his theft.

While blurring the distinction between predicate offences and money-laundering, section 63 does not appear to capture the essence of the concept of money-laundering. Section 63 seems to apportion guilt for money-laundering merely on the basis that there is monetary value attached to an asset that is unlawfully acquired. Any transaction that involves its possession, concealment, disposal, or removal from the country should therefore amount to money-laundering. In so doing, the provision obscures or rather ignores the distinction between the predicate offence and the disposal of its yield. This is an unsatisfactory and illogical distortion of the universal definition of money-laundering. The offence is complex enough to detect and investigate without being encumbered by a multiplicity of other acts of misconduct that are already within the purview of the criminal law.

The Serious Offences (Confiscation of Profits) Act also created the offence of acquiring, holding or dealing in tainted property. Proof of the offence depends on proof of a serious predicate offence. Tainted property is defined as:

- any property used in, or in connection with the commission of a serious offence;
any proceeds of a serious offence; or

any property in Zimbabwe which is the proceeds of a foreign specified offence for which an order in terms of the Criminal Matters (Mutual Assistance) Act may be registered.

The last category of offences comprises serious narcotics offences.

Swaziland

At the time of writing, Swaziland did not have legislation to address the problem of money-laundering. The government was expected to introduce a bill to criminalise money-laundering during the second quarter of 2001. The bill is expected to require ‘accounting institutions’ to be vigilant against suspicious transactions, and to report them to the governor of the Central Bank of Swaziland. A conviction for money-laundering will result in mandatory forfeiture of the proceeds.

Drug-trafficking

Each of the countries under review has extensive legislation to criminalise the possession, use, trade and trafficking in drugs of abuse. They have all committed themselves to the SADC Protocol on Combating Illegal Drug Trafficking. At the time of writing, a Drugs of Abuse Bill was expected to be presented to the parliament of Swaziland during in 2001.

This chapter makes a few points about the legislation of South Africa and Zimbabwe.

South Africa

The Drugs and Drug Trafficking Act is at the centre of anti-narcotics law in South Africa. It pioneered the proscription of money-laundering as a strategy for dealing with drug-trafficking. It also incorporated basic fact presumptions which sought to relieve the prosecution of the burden of proving that a suspect was dealing in a specified drug once it had proven possession of a certain quantity of the drug. Some of these presumptions have since been found to be in conflict with the presumption of innocence, and therefore unconstitutional.

There is an overlap between the provisions relating to money-laundering in the Act and those in the Prevention of Organised Crime Act. Section 10 of the Drugs and Drug Trafficking Act establishes a foundation for a system of reporting suspicious transactions, to the extent that it requires bankers, stockbrokers and dealers in financial instruments to be vigilant, and to report contact with property which they have reason to suspect to be the proceeds of crime. The same section also specifically overrides the duty of confidentiality between these institutions and their clients.

Zimbabwe

Two principal statutes are intended to control drug abuse in Zimbabwe, the Dangerous Drugs Act and the Medicines and Allied Substances Control Act. These two Acts, together with the subsidiary legislation created on their authority, perpetuate an artificial and somewhat anachronistic distinction between dangerous drugs and prohibited drugs. Narcotics that are alkaloids of opium or the coca leaf are proscribed by the Dangerous Drugs Act, while the Medicines and Allied Substances Control Act deals with the rest. For the purposes of law enforcement, there is no practical difference between the two classes.
Inspectors are appointed in terms of each Act and given extensive powers of search, seizure and confiscation. These powers are also extended to officials in the Department of Customs and Excise and the police. Both statutes need revision and updating to take account of the realities and international developments.34

It has been specifically suggested that the statutes should be merged into a single Act targeting all narcotic drugs specified by the Vienna Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances of 1988 (the Vienna Convention). It has also been suggested that presumptions in favour of law enforcement authorities should be introduced to shift the burden of excluding certain inferences to suspects. It has been argued that this would be in line with article 3:3 of the Vienna Convention. Finally, it has been said that consideration should be given to measures to contain the demand for narcotics, by creating sentencing alternatives to promote the rehabilitation of offenders.35

Preventing the obstruction of justice

It is often not an easy matter to detect organised crime. It can also be a formidable challenge to prove such crime. Detection depends on information, and proof is highly contingent upon the availability of reliable, credible witnesses. Witnesses play an important role in both tasks. The pivotal role of witnesses as a source of basic information in investigation, and later in criminal trials places them at risk of victimisation by those against whom their testimony might count. This is the case irrespective of whether or not they are victim or non-victim witnesses. Sometimes their relationship with the perpetrator(s) increases their vulnerability. Apart from interference with witnesses, justice could also be obstructed by the intimidation or elimination of law enforcement or judicial officials. These dangers are particularly manifest in organised crime investigations and prosecution.36

The Convention requires state parties to criminalise both forms of obstruction of justice. The common law prevailing in all countries under review recognises the offence of obstructing (or attempting to obstruct) the course of justice. A growing number of criminal justice systems, however, have realised the inadequacy of simple criminalisation. Article 24 of the Convention enjoins each state party to take appropriate measures, within its means, to provide effective protection from potential retaliation or intimidation of witnesses and, where required, of their relatives and others who are close to them.

As part of these protective measures, states should consider alternative ways of giving testimony, for instance, "through the use of communications technology such as video links or other adequate means." Contemporary trends are in favour of comprehensive, effective protection. A recurrent theme in discussions about the control of serious economic crime and corruption is the need to protect witnesses from victimisation on account of ‘blowing the whistle’ on misconduct.

South Africa

An initiative has been taken to protect those who expose or provide information on criminal and other ‘irregular’ conduct. The Protected Disclosures Act came into force in February 2001.37 The Act is confined, however, to conduct that comes to light in the context of a work environment. It enacts procedures to facilitate the reporting of perceived or suspected unlawful activities of employers or fellow employees. The concerned activities may be criminal, but they could also be non-criminal statutory infractions or possible delictual violations. Employees who make the envisaged disclosures are ‘protected’ from ‘occupational detriment’, which would entail
victimisation of any description. 38

Outside the sphere of employer-employee relationships, individuals who have assisted in the investigation or prosecution of an offence may seek state protection for themselves and/or their relatives, if they perceive a risk to their personal security. The Witness Protection Act (1998) has introduced an administrative framework for the protection of vulnerable witnesses. 39 The Act established an Office for the Protection of Witnesses, headed by a director. Witnesses at risk may be given protection at the place where they reside or be relocated to a place of safety for as long as necessary. 40 The Act also envisages, without making detailed provision, the alteration of the identity of a vulnerable witness. 41 To minimise the distress that is experienced by witnesses at court, the Minister of Justice is empowered to provide for the assistance of witnesses, counselling and the establishment of reception centres at courts. This ministerial power had not yet been used at the time of writing.

Witnesses can also be protected by the use of bail law. As a general principle, bail can be denied as a way of pre-empting interference with the course of justice. It must be conceded, however, that this only works where the direct source of interference is the accused person himself. It cannot prevent the use of agents and accomplices to intimidate or eliminate witnesses.

Zimbabwe

Zimbabwe does not have a structured system for the protection of witnesses or prospective witnesses. Section 14(2) of the Prevention of Corruption Act has the potential to lay down a foundation for such a system. It reads:

"Any person who, without lawful excuse-

(a) prevents any other person from giving any information, whether in terms of this Act or otherwise, concerning any corrupt practice; or

(b) threatens or does any other thing calculated or likely to deter any other person from giving any information, whether in terms of this Act or otherwise, concerning any corrupt practice; or

(c) does anything calculated or likely to prejudice any other person because that other person has given any information, whether in terms of this Act or otherwise, concerning any corrupt practice;

shall be guilty of an offence and liable to a fine not exceeding one thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment" (author’s emphasis)

While applauding the provision, a word or two of caution must be added. It is immersed in an environment bristling with closed enclaves. Secrecy laws, some but not all of which were inherited from the era of colonial rule, serve to insulate inequitable conduct in both the public and private spheres from public observation. These laws have spawned a great deal of corruption, and rendered its detection difficult. There are many statutory provisions which seek to justify the concealment of information on the standard grounds of public security, national economic interests, or the interests of justice. Any of this legislation can be used to justify the victimisation of a whistle blower. Section 10(4) of the Defence Procurement Act, 42 for example, allows the
Minister of Defence to withhold information on the financial details of defence procurement. A subordinate public servant in the ministry or an officer in the defence force who reveals corruption in the procurement of firearms by the national army, for instance, places himself at risk, notwithstanding section 14(2) of the Prevention of Corruption Act. The First Schedule to the Public Service Regulations lists "the unauthorised or improper disclosure or use of classified or confidential information" (author’s emphasis) as an act of misconduct, which could justify a discharge from the public service. Authorised and ‘proper’ channels of disclosure are well known to be little more than avenues for the selective release of sanitised data by government mouthpieces. They are unlikely to be the avenues by which the information envisaged by the corruption legislation is made available.

To lend efficacy to the philosophy underlying section 14 of the Prevention of Corruption Act, it is necessary to review all the legislation that impacts on the protection of witnesses. Even a basic issue such as the concealment of the identity of sources of information, along the lines of Botswana’s Corruption and Economic Crime Act of 1994, should be addressed. In its current state, section 14 is so isolated and ineffective as to promise rather more than it can yield. Moreover, even though the stakes are likely to be high in corruption cases, the penalties prescribed for victimising those who reveal corruption are relatively insignificant.

**Swaziland**

There is no general witness protection scheme in place in Swaziland. The protection of prospective or actual witnesses is provided on an *ad hoc* basis in response to specific requests or in compliance with a court order. In corruption cases, the identities of informants are protected from disclosure, unless it becomes evident that false information was deliberately provided.

There is no provision for witnesses testifying at the venue of the trial to be protected or for the separation of witnesses and accused persons while evidence is simultaneously being taken, although direct testimony could be substituted by the use of interrogatories to prove formal facts.

**Special investigative capacity in respect of organised crime and/or corruption**

**South Africa**

The National Prosecuting Authority Act created a unified prosecution service and empowered it to play a more direct role in the investigation of certain serious economic crimes, such as fraud, theft and corruption. For the purpose of exercising these new powers, the Prosecuting Authority is structured into directorates, responsible for organised crime and public safety, serious economic offences, and the investigation of corruption, respectively. Sections 28 and 29 specifically relate to the investigative powers of the directorates, including powers of search, examination and seizure. The exercise of these powers normally depends on reasonable suspicion of the commission of an offence.

When read together, these sections would appear to permit the prosecuting authority to invoke search and seizure powers even in the absence of such a suspicion, but where it has insufficient grounds for harbouring such a suspicion. An investigating director may search for and seize property in order to carry out a ‘preparatory investigation’ to determine whether a suspicion is well founded. A warrant has to be obtained from a judicial officer. It was the latter requirement which persuaded the Constitutional Court to decide in *Investigating Directorate: Serious*...
Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others

that the provisions of section 28 and 29 were not in irreconcilable conflict with the right of privacy in the Constitution. The National Director of Public Prosecutions can delegate the investigative powers in these sections to any of his subordinate directors.

In the investigation of organised crime, the prosecuting authority has access to information held by the South African Revenue Service. This capacity is particularly useful in serious customs fraud cases.

The National Prosecuting Authority Act was amended in October 2000 to incorporate the Directorate of Special Operations. This directorate, known by its nickname ‘the Scorpions’, is dedicated to combat organised crime. It exists and operates outside police structures, although its functions are essentially the same as those of the police. The Directorate is intended to improve the manner in which policing has traditionally been conducted, however, in that it should combine the functions of intelligence-gathering, the investigation of crime and prosecution.

The related activities of gathering intelligence and investigating crime cannot always be done openly. Occasionally, they have to be conducted secretively. In respect of organised crime and corruption, this might involve surveillance, interception and monitoring of communications. In a legal system which places a premium on dignity and privacy, a balance has to be struck between the goals of legitimate policing and the protection of the rights flowing from these concepts.

The Interception and Monitoring Prohibition Act is intended to allow the interception and monitoring of communications transmitted by post and telephone. This has to be done in terms of a judicial order, granted on the understanding, first, that a serious offence is imminent or has been committed and, second, that it cannot be properly investigated in any other way. The offence must be a serious one, or must threaten the national economy. The order lasts for up to three months, but it may be extended, and it authorises the entry of premises to install a monitoring device or intercept a communication. The Act was extended in 1998 to cover a wider range of communications, including electronic mail. It might soon be extended to include the tapping of cellular telephones.

A related power available in the investigation of serious crime allows undercover operations and the employment of traps. No judicial involvement is necessary, and as long as police conduct during the operation does not go beyond providing an opportunity to commit a crime, the evidence thus obtained is admissible.

Studies have demonstrated that schemes of money-laundering are the easiest to detect at the first stage, generally referred to as the placement stage. It is at this point that the proceeds of crime are deposited in the financial system. This has shifted the limelight to the various entry points into the financial system. ‘Gatekeepers’ of these points are increasingly being drawn into the criminal law enforcement system. The duties imposed by this new status have inevitably conflicted with their confidential relationship with their clients.

A comprehensive system to combat money-laundering should include measures by which to capture information relating to financial transactions that may uncover laundering schemes. This calls for a reliable administrative system which facilitates customer identification, recordkeeping, and secretive information dissemination. As Smit puts it:
"The most important component of an administrative control structure is a duty to report certain information. Businesses are not required to identify money-laundering schemes, but the suspicious transactions that may uncover the scheme. This measure can only work if the person or institution making the report is protected from any liability for breaching confidential relationships."

In practice, this implies compelling financial institutions to report transactions involving large amounts of money or those raising suspicion. A bill to give statutory form to this thinking is under discussion in South Africa. The Financial Intelligence Centre Bill goes further to propose a central authority to which information from financial institutions will be submitted for analysis and possible reference to the police or prosecution services. The law will extend beyond the traditional financial services institutions, such as banks, to include other institutions considered vulnerable to money-laundering schemes. Attorneys, executors, trust companies, estate agents, unit trust management companies, insurers, gambling institutions, dealers in foreign exchange, money lenders, accountants and investment intermediaries will be drawn into the net.

Zimbabwe

Powers in terms of the Prevention of Corruption Act

The Prevention of Corruption Act gives power to the Minister of Justice, Legal and Parliamentary Affairs on the basis of a reasonable suspicion that a person or corporate body is involved in corruption to 'specify' the suspect. Apart from having a reasonable basis for the suspicion, the minister should also be "satisfied that it is in the national interest to declare specification."55

Specification is intended to facilitate an investigation of the affairs and business of the specified person, specifically to determine whether or not he or she or it:56

- has committed theft, fraud or some other unlawful act, resulting in the misappropriation or loss of property belonging to the state, a statutory body, a local authority or another person;
- has acquired property unlawfully derived from a crime against the state, a statutory body, a local authority or another person;
- has corruptly accepted or obtained a bribe;
- has corruptly obtained any advantage or profit; or
- is associated with any other person who is guilty of any of the above acts, or has benefited from them, causing such a person to be liable to the state, a statutory body, a local authority or another person.

It is clear that the power to specify a suspect is not restricted to violations of the Prevention of Corruption Act. The implications of specification are far-reaching. Having declared a person to be specified, the minister must appoint a special investigator without delay to probe the justification for the suspicion. The investigator is vested with extensive inquisitorial powers, set out in sections 8 to 10 of the Act. These include the power to search premises, summon and
examine witnesses under oath, and to call for and examine records held by a bank relating to
the account(s) of a specified person, his or her spouse and/or associates. During the period of
specification, the capacity of the specified person to carry out his or her ordinary course of
business is very limited.57

The Act is not specific about how, in a case in which an investigation was already under way
before the specification, the investigator should relate to an investigating entity already seized
with the case, such as the police. Two possibilities emerge from a reading of the relevant
provisions. The investigator could delegate or assign his or her functions in terms of section
8(3), in which case the delegate would continue investigating a matter of which he or she was
already seized, but with the benefit of greater intrusive power. On the other hand, the
investigator could choose to treat the investigating officer as a mere witness to be summoned
and directed to turn over to him or her the product of the prior inquiries. These possibilities
notwithstanding, the omission has been a source of confusion, conflict and suspicion in practice
between the police and the Ministry of Justice. In some cases, the impression has been created
that specified persons are placed beyond the police, and handed over to inept investigators who
waste valuable time battling to grasp fairly basic information. The absence of any prescribed
qualifications as a prerequisite for appointment, coupled with the functional link between the
investigator and the minister only adds to the apprehension that an investigation may be scuttled
by corrupt collusion.58

Powers in terms of the Serious Offences (Confiscation of Profits) Act

The second objective of money-laundering legislation has been identified above as increasing
the risk of apprehension of those who present funds for laundering, and facilitate the detection,
seize and ultimate confiscation of their illegally acquired funds and assets. It has often proven
difficult to achieve this. This is not because of the absence of a legislative framework.

There are numerous avenues through which unlawfully acquired proceeds of crime may be
concealed. The common avenues have tended to be in the financial institutions that serve the
formal sector of the economy, but not all of them are located there. Suspicion of involvement in
money-laundering is often, but not always, triggered by evidence of the commission of one or
more of the predicate offences. The investigation of money-laundering is usually superimposed
on a pre-existing inquiry. Where this is the case, the police will already have invoked the
provisions of the Criminal Procedure and Evidence Act.59

The Serious Offences (Confiscation of Profits) Act enables the police to invoke greater
investigating powers. The police, acting alone or as part of an investigating unit that includes the
Attorney-General, can search for and seize ‘tainted property’, or prevent its dissipation in
advance of criminal proceedings through an interdict. The application for an interdict is at the
instance of the Attorney-General, and the purpose is to keep the property available for forfeiture
at the conclusion of the trial. The interdict is applicable to both movable and immovable
property. If it is necessary to trace tainted property in the hands of a third party, or property
which has passed through the hands of a third party, the police can apply for a warrant to
search for any ‘property-tracking’ document. If the identity of the document is known
beforehand, an order for its production can be obtained. In addition, the Act also permits what
could amount to a virtual ‘fishing expedition’ by the police for information about financial
transactions conducted in respect of the suspect’s account with a financial institution during a
given period.60 In terms of section 57, a police officer may apply, ex parte, to a judge for a
‘monitoring order’ in respect of the account held by a suspect with a financial institution. Such an
order enables the police and the financial institution to circumvent the principle of confidentiality
that would ordinarily apply to the contractual relationship between the institution and the suspect.

Part IX sets out the obligations of financial institutions regarding the retention of records. Section 60 provides for the prescription, by regulations, of the kind of records to be maintained. It is a matter of regret that no such regulations have been promulgated to date. Section 62 allows a financial institution to hand over information relating to a client’s account to the police in the absence of a monitoring order, without exposing itself to legal action on account of the disclosure. It may do this if it believes, on reasonable grounds, that the information may be relevant to the investigation or prosecution of any person. The latter does not have to be the account holder.

Legislation to authorise surveillance of telephone communications was passed in 2000, in the form of section 98(2)(b) of the Postal and Telecommunications Act. Its application appears to be confined to the political sphere. It is activated by the President "in the interests of national security or the maintenance of law and order." If he considers it necessary on these grounds, the President may direct that:

"(b) any communication or class of communication transmitted by means of a cellular telecommunication or telecommunication service shall be intercepted or monitored in a manner specified in the direction."

No judicial intervention is involved, and this power is open to gross abuse.

Swaziland

Powers of the Anti-Corruption Commission

The Anti-Corruption Commission in Swaziland can invoke certain powers of access and search in respect of the matters falling under its jurisdiction. The Commissioner may require any public official or other person to answer questions concerning the duties of any other public official or person and order the production for inspection of any orders, directives, or office instructions relating to the duties of such other public official or person. He or she can also require any person in charge of any ministry, department or other establishment of the government or the head, chairperson, manager or chief executive officer of any public or private body to produce or furnish within a specified time, any document or a certified true copy necessary for the investigation of suspected acts of corruption.

The Commissioner, Deputy Commissioner, and officers of the Commission generally enjoy access to all relevant data relating to the functions of any ministry, public or private body. This includes all books, records, returns and reports. If they suspect that any property acquired in contravention of the Order has been placed, deposited or concealed on premises or on any vessel, boat or vehicle, they are able to search these repositories. These powers are exercised without any need for judicial authorisation.

A successful application to court (including a magistrate’s court) will confer the following additional powers:

- to investigate the acquisition of property in or outside Swaziland by or on behalf of such person during a given period of time;
to require the subject of the investigation to produce information relating to-

- expenditure incurred by him in respect of himself, his spouse, children and parents;
- all liabilities incurred by him, his agent or trustee;
- any money acquired or sent outside Swaziland during the specified period;

- to investigate and inspect any bank account relating to the investigated person;
- to require from third parties the production of accounts, books or company books of, or relating to the subject of the investigation; and
- to take copies of these documents.

The Anti-Corruption Commission’s powers override bank secrecy or other grounds for non-disclosure. In addition, the Commission has the residual capacity to ‘smoke out’ those suspected of surviving on ill-gotten gains. In terms of section 26(2) of the Prevention of Corruption Order, if the Commissioner suspects, on reasonable grounds, that persons who are not in gainful employment are living beyond their means, he can order such persons to account for what they have. If such a person is unable to give any satisfactory explanation (in writing), he or she shall be guilty of an offence. The offence carries a fine of E10 000 or five years imprisonment, or both.

In investigations of motor vehicle theft

Special powers of investigation are vested in the police when the charge relates to dealing in stolen motor vehicles. When investigating the assets of any person reasonably suspected to be engaged in the business of stealing and selling or other fraudulent dealings in motor vehicles, the police can obtain a court order. An order in terms of section 20 of the Theft of Motor Vehicles Act authorises an intrusive and wide-ranging investigation into the source of the suspect or respondent’s assets. The order may:

- prohibit dealings in or with such assets without the permission of the court;
- authorise the police to search, seize and hold any assets of the respondent until the completion of the investigation or a declaration of forfeiture;
- require any person to produce to the police any documents relevant to the identification or location of the respondent’s assets; and
- require any bank or other financial institution to provide the police with any information concerning the respondent’s assets.

Confiscation and forfeiture of instrumentalities and proceeds

Confiscation and forfeiture of the means used to commit crime, as well as its fruits are common mechanisms in modern criminal justice systems. The trend is confirmed by the Convention, which seeks to make it a matter of obligation for state parties to adopt procedural rules that permit confiscation and forfeiture. There should be methods of ensuring that the property to be confiscated is identified, preserved (frozen) and, if necessary, transferred.
South Africa

A central goal of the Prevention of Organised Crime Act is to ensure that perpetrators of crime do not benefit from its proceeds. The terms of the Act therefore seek to enable the state to seize any asset that has been used to commit a crime or that has been acquired through crime. The assets envisaged include residential premises from where drugs are sold.65

The Act incorporates a range of measures that can be taken in respect of tainted assets. These include restraint and preservation orders to secure the assets from pretrial dissipation,66 and confiscation and forfeiture orders to confirm ultimate asset acquisition. Measures of this nature are not a novelty in South African criminal justice law. They have featured prominently in the Criminal Procedure Act and customs legislation for many years. What is new about the forfeiture regime in the Prevention of Organised Crime Act is the employment of civil procedure in criminal proceedings.

The legislature opted for this route in the knowledge that civil forfeiture has certain advantages over criminal forfeiture. The main advantage is that, while criminal forfeiture operates against a specific person (in personam), its civil counterpart is aimed at the asset(s) as a distinct object. It may therefore be called an action in rem. In a criminal forfeiture, the order is restricted to assets owned or possessed by the convicted person at the time of conviction, but a civil forfeiture relates back to the time of illegal use.67 This makes the latter enforceable against third parties, regardless of their involvement in or knowledge of the underlying criminal conduct.68 The risk of forfeiture orders being frustrated by the disposition of property through convenient donation and fraudulent transactions is thereby minimised.

A related advantage stems from the fact that a less onerous standard of proof is required in civil proceedings. In practical terms, this means that the state only has to establish that the assets were probably used in the commission of a crime. In the case of a residence that is suspected of being used to market illicit drugs it has to be proven that there is a 51% chance that the residence was so used. In terms of illegal contraband, a similar threshold applies. Furthermore, it is not necessary to prove an offence against a particular person in order to sustain a forfeiture order.69 As Schönteich puts it:70

"The validity of such an order is not affected by the outcome of criminal proceedings … a suspected criminal can be acquitted in a criminal court where the state has to prove its case beyond a reasonable doubt (which is a higher burden of proof than a ‘balance of probabilities’) and still have his property forfeited to the state."

The Act provides for confiscation orders, sounding in money, but only in consequence of a conviction. The court makes such an order after an enquiry into the benefit derived from the offence or criminal activity related to the offence.71 Even though this appears to be a form of criminal forfeiture, it should be noted that civil rather than criminal rules apply to confiscation proceedings. The Asset Forfeiture Unit in the office of the National Director of Public Prosecutions is tasked with the effective implementation of forfeiture and confiscation legislation.

There is inevitable tension between the forfeiture provisions in the Act and the property rights of innocent third parties, especially where there is no antecedent conviction. The Act attempts to ameliorate this tension by giving an opportunity, through section 52, to third parties to prove both the lawfulness of their interest and excusable ignorance that the property was an instrumentality or the proceeds of crime.
Zimbabwe

Information gathered by the deployment of the policing powers enshrined in the Serious Offences (Confiscation of Profits) Act can be used both to prove the charge against the suspect and to found an application for a disposal order. The latter may be in the form of forfeiture of property or a pecuniary penalty equal to the benefit derived from the offence. The Act provides for the confiscation of the proceeds of crime, defined widely as any property that is derived or realised, directly or indirectly, by any person from:

"(a) the commission of any serious offence; or

(b) any act or omission which occurred outside Zimbabwe in relation to a narcotic substance and which, had it occurred in Zimbabwe would have constituted a serious narcotic offence …"

A serious offence is any offence that is punishable by imprisonment for at least 12 months, or any offence which yields property worth at least Zim $20 000. The forfeiture provisions in the Act are supplementary to general provisions in the Criminal Procedure and Evidence Act.

Swaziland

Swazi law is familiar with both criminal and civil forfeiture. Three provisions pertain to criminal forfeiture. Section 324(3) of the Criminal Procedure and Evidence Act applies to offences generally, to permit a court to declare forfeited any weapon, instrument or other article utilised in committing an offence. Forfeiture depends on a conviction being returned, but it is not mandatory.

In addition, there are at least two other notable specific provisions. The first relates to offences listed in Schedule I Part I of the Criminal Procedure and Evidence Act. It refers to offences under any law relating to the illicit possession, conveyance or supply of habit-forming drugs or intoxicating liquor; offences relating to the illicit possession of or dealing in precious metals or precious stones; and offences relating to the illicit acquisition, dealing in, importation or possession of arms and ammunition. After the seizure of these instrumentalities on the apprehension of a suspect, in terms of section 51 of the Criminal Law and Procedure Act, they may be forfeited to the government by court order in terms of section 324(4) if shown to have been used in the commission of the offence.

The second provision is located in the recently enacted Serious Offences (Confiscation of Proceeds) Act, which addresses the issue of forfeiture of instruments by which crime, in general, and economic crime, in particular, is committed. The Act defines the term 'proceeds of serious crime' widely, as:

"any property used in or in connection with the commission of a serious offence or any property that is derived or realised directly or indirectly by any person from the commission of any offence or from any act or omission which had it occurred in Swaziland would have constituted a serious offence." (author's emphasis)

An application may be made by the Director of Public Prosecutions for a forfeiture order following a conviction. Notice of the application should be given, and the affected parties given a chance to be heard and to testify. The court has the discretion to grant or refuse the application. Judicial discretion is to be guided by the following factors:
• the ordinary uses of the property for which forfeiture is sought;
• the use that was intended for the property in the instant case;
• the likely effect that forfeiture will have on any person; and
• the gravity of the underlying offence.

The emphasis on proportionality between the public interest served by forfeiture and the private property interests of the person(s) affected by the forfeiture is evident.

The legislative framework in both the Criminal Procedure and Evidence Act and the Serious Offences (Confiscation of Proceeds) Act is for criminal rather than civil forfeiture. Forfeiture is contingent upon the conviction of the person against whom it is principally made.

As with the Prevention of Organised Crime Act in South Africa, a duty is imposed on third parties with an interest in the property which is at risk of forfeiture to show an innocent connection to the property. The declaration of forfeiture does not affect the property rights of a third party who can show that "he did not know that it was being used or would be used for the conveyance of, or as a receptacle for" whatever illegal substance precipitated the charge. The third party has a right of appeal if the trial court should rule against him or her.

A similar provision for the vindication of third party rights or interests exists in the Serious Offences (Confiscation of Proceeds) Act.

This Act also provides for a pecuniary penalty order equal to the benefits derived by the convicted person. The order must take account of any forfeiture that may have been ordered in the same proceedings. Account must also be taken of any order for restitution or compensation that is payable on account of the conviction. In terms of section 9 of the Act, the pecuniary penalty is regarded as a civil judgement and enforced in the same way as a civil debt.

Civil forfeiture is available only in proceedings arising from motor vehicle theft. The scope of state action in cases involving the theft or suspected theft of motor vehicles is set out in section 20 of the Theft of Motor Vehicles Act. This section permits intrusive investigation as shown above and also provides for the forfeiture of assets traced during the investigation.

If identifiable assets of the respondent are found to have been derived from the business of stealing and selling stolen motor vehicles, the court is obliged to order the forfeiture of those assets to the Crown. The Act does not indicate who must make this finding, the police or some other investigating agency and the court. It is assumed that such a decision will be made by a court.

A trial appears to be unnecessary. At most, section 20 entitles the court to decide whether assets are tainted or not on the basis of documentary evidence, in the same way that civil applications are decided. Section 20 seems to provide for a civil application, in which it only has to be shown that the assets in question are probably derived from illicit dealing in motor vehicles.

An application for forfeiture in terms of the Serious Offences (Confiscation of Proceeds) Act may be preceded by a 'restraining order' in respect of:

• specified property of the suspect;
all of his property; or

specified property of some other person, alleged to have been used in, or in connection with, the commission of the offence or derived or realised, directly or indirectly, as a result of the commission of the offence.

The order lies at the instance of the Director of Public Prosecutions, on notice to the suspect. Notice does not have to be given in an urgent matter or where it is not in the public interest to give notice.

A suspect in a corruption matter may be precluded from disposing of property in terms of the Prevention of Corruption Order through an investigation order obtained by the Commissioner.

Transnational mutual assistance in criminal matters

The need to streamline mechanisms for transnational co-operation in criminal matters has never been greater. There is much movement of people and capital across borders. This movement involves criminals, victim and non-victim witnesses to crime, and tainted assets. The Convention supports the strengthening of regional and international co-operation in crime prevention, criminal justice and the combating of transnational crime. The objective is to facilitate a rapid and secure exchange of information concerning all aspects of organised crime. Whatever measures are taken to foster international mutual assistance have to be simple and effective. In respect of South Africa, Zimbabwe and Swaziland, it should be noted that these measures are not all legislative.

South Africa

The main statutes regulating this assistance are the International Co-operation in Criminal Matters Act (1996)77 and the Extradition Act.78 The former consists of five chapters and deals with four important aspects of international co-operation. It sets out mechanisms for:

- requesting evidence from a person who is in a foreign state;
- taking evidence from a local resident for use in a foreign state;
- mutual execution of sentences and compensation orders; and
- mutual requests for enforcement of restraint and confiscation orders and for the transfer of the proceeds of crime.

Provision is also made for the local enforcement of subpoenas issued in certain other states.79

A significant feature of the mutual assistance provisions relating to the gathering of evidence is the fact that they may be invoked before the commencement of criminal proceedings in the strict sense. Evidence could be requested, or taken during the course of an investigation.

Extradition80 may take place on the basis or in the absence of a treaty. In respect of the latter situation, certain states have been designated, including the United Kingdom, Namibia and Zimbabwe. Extradition agreements may provide for the mutual enforcement of warrants of arrest. Such agreements exist between South Africa and Botswana, Lesotho and Malawi.81 In the same way as a subpoena, this kind of warrant is first endorsed by a court before it can be executed locally. The Extradition Act allows the extradition of South African nationals.

Zimbabwe
The rarely invoked Criminal Matters (Mutual Assistance) Act is the main legislation on international co-operation in Zimbabwe. In respect of criminal activities originating outside Zimbabwe, the Criminal Matters (Mutual Assistance) Act entitles the Attorney-General to request the appropriate authority of a foreign country to assist in the investigation of a serious offence which has an impact on Zimbabwe. Assistance may be in the form of obtaining a search and seizure warrant, or the recording of evidence, or the production of documents. The Attorney-General may also request the enforcement of orders issued by the local judiciary or the enforcement of a forfeiture order pursuant to a conviction.

The Extradition Act of Zimbabwe is similar to that of South Africa. It also permits the extradition of nationals, where it is shown to a magistrate conducting an extradition hearing that there is a *prima facie* case against the national. Two forms of extradition are envisaged, in terms of a treaty and on account of designation.

**Swaziland**

The Criminal Matters (Mutual Assistance) Act regulates international co-operation procedures. In terms of section 4, where a foreign jurisdiction is involved, the Attorney-General may request the assistance of the appropriate authority of the foreign state. The legal assistance that may be sought depends on the nature of the case and the stage reached in its pursuit. However, the Act entitles the Attorney-General to request:

- that assets believed to be the proceeds of crime that are located in the foreign state should be ‘frozen’;
- that a search warrant for articles believed to be located in the foreign state and which may be relevant to investigations or proceedings in Swaziland should be executed;
- the enforcement of a confiscation order emanating from Swaziland;
- that confiscated property or any proceeds realised from its disposal or dealing with it should be transferred to Swaziland; and
- the transfer to Swaziland authorities of a prisoner who consents to assist Swaziland in criminal investigations or proceedings.

The Attorney-General has the authority to make reciprocal undertakings on behalf of Swaziland.

Non-political crimes are extraditable in terms of the Extradition Act, of which the provisions are broadly similar to those obtaining in South Africa and Zimbabwe. In addition to the Extradition Act, the Fugitive Offenders (Commonwealth) Act provides that:

"any person found in Swaziland who is accused of a relevant offence in any other country [designated country] … or who is alleged to be unlawfully at large after conviction of such an offence in such country, may be arrested and returned to such country under this Act."

**Law enforcement co-operation and the exchange of information**

For a long time, it has been apparent to law enforcement authorities in SADC countries that the
effective containment of organised crime requires the co-operation of various agencies. In this regard, the initiatives of the Southern African Police Chiefs Co-operation Organisation (SARPCCO) anticipated article 19 of the Convention Against Transnational Organised Crime. SARPCCO was set up to "promote, strengthen and perpetuate co-operation and foster joint strategies for the management of all forms of cross-border and related crimes with regional implications." Co-operation under its auspices has yielded notable success in the spheres of motor vehicle theft and firearms-smuggling.

Conclusions

Article 3 of the Convention defines a transnational offence as an offence that cuts across national borders by reason of the places where it is committed, where it is planned, the identities of the perpetrators, or a geographical difference between where it is committed and where the harm is felt. The response to this kind of offence needs to be broadly conceived in terms of its nature, its scope of application and the manner of enforcement. The Convention provides an impetus for the reform of substantive as well as procedural criminal law. It also seeks to bring about certain administrative changes.

If there is to be conformity with the requirements of the Convention, changes will have to be made to the coverage of the existing criminal law in South Africa, Zimbabwe and Swaziland. While the law relating to participation in organised criminal groups appears to be adequate in South Africa, the same cannot be said in respect of its treatment of corruption or the theft of motor vehicles. The law in Zimbabwe and Swaziland on participation in organised criminal groups is clearly inadequate, notwithstanding the content of the common law and the statutes regulating criminal procedure.

While there is universal recognition of the threat emanating from corruption, the legislative response in these three countries is neither uniform nor comprehensive. In fairness, it must be said that what the Convention calls for is also not comprehensive. Anti-corruption legislation should take account of the many kinds of shady activities other than bribery of public officials. This kind of bribery is fading into the realm of petty corruption, having been overtaken by more sophisticated innovations. In so far as the scope of coverage is concerned, the exemption of the highest public office holder in the Zimbabwean legislation is disappointing. The deficiencies of coverage are compounded by the weaknesses of enforcement structures in Swaziland and Zimbabwe. The common feature in both cases is that these structures are susceptible to improper influence.

There appears to be a common recognition of the seriousness of money-laundering, and that it should be criminalised. Unfortunately, there has been no co-ordination of efforts even in defining the offence with the result that, in the one case, a definition is on the statute book that is so wide that it distorts the meaning of the concept. A common definition is needed, and the Convention is expected to facilitate this process. It must be a definition arrived at in harmony with other SADC countries. There is an abundance of literature and models on the administrative structures that are required in order to support anti-laundering initiatives. South Africa is at an advanced stage in the formulation of such a structure. The product of the efforts in this country should be shared with other countries in SADC to prevent duplication and broaden the debate. No mechanism exists in the other two countries surveyed. Whatever structure is agreed upon requires legislative fortification, in the form of primary and subordinate legislation.

The matter of witness protection has also revealed disparities among the three countries. The role that protection schemes can play in ensuring the availability of evidence should be
considered, and appropriate mechanisms formulated. There are many current examples of such mechanisms. The only impediment might be the expense involved in implementation. The Convention offers scope for countries taking demonstrable steps to implement the letter and spirit of the Convention to be assisted, at least with pilot schemes.

The Convention envisages the expansion of policing powers. In each of the countries surveyed, the police is part of the executive arm of the state. Expansion of its power means expanding state power, with the concomitant constriction of the rights of the citizen. This proposition is likely to be controversial, in the light of perceptions about the risk of abuse of additional state powers. Yet, if SADC countries are going to co-operate in combating transnational organised crime, a common approach has to be adopted. It is submitted that this will be possible if safeguards to prevent abuses are built into the legislation relating to, for example, interception and monitoring of communications.

Since SADC countries have already committed themselves to the Convention, they must now expend energy in considering the issues to be raised in its implementation, some of which have been raised in this chapter.

Notes

1. The most visible and active was PAGAD (People Against Gangsterism and Drugs), operating on the Cape Flats since 1996. At about the same time, another group, the Mapogo-a-Mathamaga, established itself in the Northern Province. At the time of writing, it had grown immensely to a reported membership of 40 000.

2. Act 121/98.

3. Section 9 as read with the definition section.


6. Act 94/92.

7. Examples are the Railways Act (chapter 13:09), the Electricity Act (chapter 13:05), and the Air Zimbabwe Corporation Act (chapter 13:02).


9. The Act was passed in 1985. It is now cited as chapter 9:16.

10. The President is specifically excluded, unless he or she can be described as "a person holding or acting in a paid office in the service of the State, a statutory body or a local authority." This extension of the definition to include the President would be nullified by the constitutional immunity from prosecution that is enjoyed by a sitting President.
11. The facts in Martin v Attorney General and another 1993 (1) ZLR 153 (S) illustrated the limitations of the Act. The accused, a senior officer in the Department of Parks and Wildlife, was involved in negotiating a contract for the transfer of rhinoceros to an American organisation. Sometime after the conclusion of the contract, he received an imported new motor vehicle from the head of the organisation. There was a strong suspicion that the vehicle was given in appreciation of the work he had done in securing the contract. An attempt to prosecute him for violating section 3(1)(f) failed. The court held that obtaining the gift related to the element of mens rea and did not form part of the actus reus. If the actus reus was not proven, namely, a failure to disclose to the principal the full nature of a transaction carried out in the course of his agency, the acquisition of the gift became irrelevant.

12. T S Masiyiwa Holdings (Pvt) Ltd v Minister of Information 1996 (2) ZLR 754 (S).


14. If the Commissioner has reasonable grounds to suspect that any such person is living beyond his or her means, he is obliged to call on such a person to account for the acquisition of property or funds, and if he or she is unable to give a satisfactory explanation (in writing), such a person shall be guilty of an offence and liable on conviction to E10 000 or five years imprisonment, or both.

15. A survey of public opinion in Southern Africa found that politicians and civil servants were generally believed to be the most corrupt in Southern Africa. See M Sithole, C Kunaka & R Klein, SADC citizens speak on corruption, unpublished draft report, July 2000, p 42.

16. The Prevention of Bribery Ordinance (chapter 201) passed in Hong Kong in 1970 has a similarly worded ‘unexplained lifestyle’ provision, which reads:

"(1)?Any person who, being or having been a Crown servant - maintains a standard of living above that which is commensurate with his present or past official emoluments; or

is in control of pecuniary resources or property disproportionate to his present or past official emoluments,

shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence."


18. The deterioration of the economy has resulted in an increase in the number of would-be emigrants. To circumvent stringent entry requirements in certain countries such as the United States, some have resorted to forged travel and educational documentation. In other cases, such documents are used in order to evade restrictions (such as re-entry prohibitions) imposed in consequence of violations of residence laws. A syndicate offering falsified documentation was uncovered in Harare in January 2001. The case was pending
at the time of writing.


21. See N South, On ‘cooling hot money’: Transatlantic trends in drug-related money laundering and its facilitation, <www.alternatives.com/crime/SOUTH.HTML>, in which the author cites Lyman’s definition: "the transformation of illegally obtained currency to that which appears legitimate. In addition it is the concealment of the illegal sources of the income or its applications." The US Customs conceives of the practice as a:

"process whereby proceeds, reasonably believed to have been derived from criminal activity, are transported, transferred, transformed, converted, or intermingled with legitimate funds, for the purpose of concealing or disguising the true nature, source, disposition, movement or ownership of those proceeds. The goal of the money laundering process is to make the funds derived from, or associated with illicit activity appear legitimate."

See also A Itsikowitz, The prevention and control of money laundering in SA, THRHR 62, 1999, p 88, an article which appears to have been written before the enactment of the Prevention of Organised Crime Act 121/98; and O S Sibanda, POCA: Targeting money laundering offences, *The Judicial Officer*, 2000, pp 37-44.

22. Omar, op cit, p 5.

23. The Drugs and Drug Trafficking Act (140/92) laid the foundation for money-laundering legislation, although its provisions were limited to the proceeds of drug-trafficking. The Proceeds of Crime Act (76/96), had broader application, in that it targeted proceeds of any type of crime.

24. In terms of section 63(1), a person is guilty if "he knows or ought to have reasonably known that the money or other property was derived or realised, directly or indirectly, from the commission of an offence." See Sibanda, op cit, pp 37-44.

25. This is so because he has knowingly engaged in a ‘transaction’ (not defined) involving the removal of property from Zimbabwe that is the proceeds of crime.

26. 1995(1) ZLR 50 (S).

27. At 52-3.

28. The text of the Money-Laundering Bill was not available at the time of writing, but the Deputy Attorney-General responsible for legislative drafting in Swaziland confirmed the content. See also a report by the *Pan African News Agency*, 28 December 2000, <allAfrica.com>.

29. 140/92.

30. In respect of dagga, see *S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC)*. For other
drugs, see S v Julies 1996 (4) SA 313 (CC)

31. Chapter 15:01.

32. Chapter 15:02, especially in Part V, which deals with prohibited drugs.


34. The Dangerous Drugs Act, having been enacted in 1955, predated the Single Convention on Narcotic Drugs (1961), the Convention on Psychotropic Substances (1971) and the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The legal regime adopted in this Act is derived from earlier international conventions (e.g. the Hague Convention of 1912, and the first and second Geneva Conventions (1925 and 1931).

35. Dias, op cit, pp 18-19.


38. Including dismissal, suspension, demotion, harassment, intimidation, transfer against their will, or the refusal of transfer or promotion. To entitle the employee to protection, disclosure should be made to one or more among a prescribed list, namely, a lawyer, the employer, national or provincial minister, the Public Protector or the Auditor-General.


40. Section 11(4).

41. Section 18 as read with section 23.

42. Chapter 11:03.


44. Section 45.

45. Section 36(1) and (2) of the Prevention of Corruption Order.

46. Act 32/98.

47. Section 28(13) and (14) as read with section 29.

48. See <www.butterworths.co.za/jol/SPECIAL/7338.htm>.


51. Act 127/92.

52. The Interception and Monitoring Prohibition Amendment Bill is due to be tabled in cabinet on 28 February 2001.

53. See the Criminal Procedure Second Amendment Act (85/96).


55. The notion of reasonable grounds entails justiciability, in the sense that the decision of the minister is an administrative one, which can be challenged in the courts of law. It is submitted that a specification can be subjected to judicial review, notwithstanding the apparent declaration of finality by section 12.

56. Section 6 as read with section 8 of the Prevention of Corruption Act.

57. Section 10. In the light of the various limitations imposed on the specified person, the statement in section 10(9) can only be regarded as cynical.

58. As appears to have happened in the wake of the collapse of the United Merchant Bank. The bank was suspected of improper dealings with client deposits and foreign currency receipts. It was also widely suspected of involvement in money-laundering. Its chairperson was on friendly terms with the Minister of Justice at the time. The Minister reportedly owed the bank a significant amount of money. Investigations into fraudulent transactions by the bank and its chairperson were removed from the police at an early stage by specification. This was followed by a long delay in finalising the case. The chairperson subsequently died, and to this date, the investigation is incomplete.

59. In the Zimbabwean Act, these powers are set out in Part VI.

60. It is necessary for the police to show that there are reasonable grounds for suspecting that the person whose account is to be probed has committed a serious narcotics offence or a money-laundering offence in relation to narcotics, or a prescribed offence or conspired with another to commit any of these offences. A person suspected of money-laundering would fall within the ambit of section 57 of the Act.

61. Chapter 12:05.

62. Section 11 of the Prevention of Corruption Order.

63. Ibid, section 12(2).
64. Act 16/91.

65. There are regular press reports of houses on the Cape Flats and the south coastal towns acquired for this purpose.

66. Section 26.

67. This aspect of the civil forfeiture provisions in the Act produced initial complications for its implementation. It was successfully contended that the Act in its initial form did not operate retrospectively, and therefore tainted assets acquired before the promulgation of the Act could not be forfeited on its authority. This resulted in an amendment to include retrospectivity.


69. Section 50(4) reads:

"The validity of an order under subsection (1) (i.e. a forfeiture order) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated."


71. Section 18.

72. Chapter 9:07.


74. Listed in section 4 (2) of the Act.

75. Section 324(4) of the Criminal Procedure and Evidence Act.

76. Unfortunately the Act is worded in a way which could render the requirement of notice to a third party subject to the whims of the state. In terms of section 4(3), the Director of Public Prosecutions is required to give notice to "any other person whom (the DPP) has reason to believe has an interest in the property." It is possible that the DPP may omit to give notice to a party on account of ignorance of the party’s existence, just as it is conceivable that the DPP could be actuated by bad faith. Section 4(4) seeks to retain the ultimate protective authority of the court by giving it the power to direct the DPP to give notice to other persons whose interest come to its attention. It is difficult to imagine how this situation can ever arise.

Section 6 of the Act affords a third party an additional opportunity to make representations in respect of the forfeiture. Such representations may be made within six months of the order, on notice to the DPP. This provision appears to be intended for instances in which notice of the original application was not given to the third party, although it is also available to a party who received notice. If he can show that:
• he was not in any way involved in committing the offence for which the order was made;
• he acquired the interest in the property in good faith and for value; and
• he acquired the interest in the property without knowing, and in circumstances in which he could not reasonably have suspected that the property-
• was used in, or in connection with, the commission of a serious offence; or
• was derived or realised directly or indirectly by any person as a result of the commission of a serious offence.
• he could get the forfeiture order reversed or compensation which equals the value of his interest.

77. Act 75/96.
78. Act 67/62.
79. These are listed in Schedule 1 as Lesotho, Swaziland, Botswana, Malawi, Namibia and Zimbabwe.
80. Defined as a process, initiated by an adequately founded, formal request from one sovereign state to another, based on treaty, reciprocity or comity, by means of which an individual, accused or convicted of the commission of a serious offence within the jurisdiction of the requesting state, is surrendered to competent courts in the territory of this state for trial or punishment.
81. For the purposes of the Act, these are called associated states.
82. Chapter 9:06.
83. Chapter 9:08.
85. Section 7.
86. Act 13/68.

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Chapter 4
INSTITUTIONAL RESPONSES TO ORGANISED CRIME IN MALAWI
Jai Banda

Background

Since the transition to the multiparty era from a single-party dictatorship, there has undoubtedly been a marked increase in criminal activity in Malawi. This unfortunate coincidence has fed the assumption that the rise in criminal activity is attributable to the abuse of personal liberties enshrined in and guaranteed by the 1994 Constitution of the Republic of Malawi.

Before 1994, Malawi was an autocratic state run single-handedly by former President Kamuzu Banda, through the Malawi Congress Party. The government had an enormous security machinery in what was known as the Malawi Young Pioneers and the red-shirted Youth League, which were branches of the ruling party. Ordinary citizens also acted as police informants on any suspected transgression, however trivial. On occasion, suspects would be arrested without a warrant and detained at the will of the regime.

The government had established traditional courts to deal speedily with serious criminal offences. No lawyer was allowed to represent any accused persons in such cases. It was therefore improbable that any person or group of persons would involve themselves voluntarily in organised crime. The fear of apprehension and ruthless punishment was a great enough deterrent. Statistics show that few major crimes were committed in Malawi during the ruthless years of Banda’s rule.

The advent of multiparty democracy in Malawi has seen a marked increase in crime, including organised crime. Criminal groups, which are loose affiliations of individuals varying in size in many cases, have since mushroomed. These groups have tended to be small and based on family, community or tightly constituted ethnic links. The conventional wisdom that organised crime is the preserve of structured hierarchies lauded over by godfathers is not substantiated in Malawi, where illicit activity is conducted by a complex and changing network of criminal groups and organisations. These organisations have generally involved themselves in a multiplicity of activities, including:

- armed robbery;
- drug-trafficking;
- corrupt practices;
- motor vehicle theft;
- money-laundering; and
- fraud

The list is obviously not exhaustive. The challenge presently facing Malawi is to have effective, comprehensive legislation to combat organised crime committed by perpetrators who are able to change their organisations and identities rapidly to suit the requirements of tasks as they arise. It is therefore imperative to consider the existing legislation against what it is meant to achieve, and thus evaluate whether Malawi needs more effective legislative measures. This chapter highlights the laws in force in Malawi with the aim of evaluating whether or not more legislative measures are required.

Legislation on trafficking in firearms and ammunition

It is common knowledge that Malawi has generally been a peaceful country and that it has never
provided a lucrative market for the firearms and ammunition trade. The known trade in firearms is mostly between Malawians and Mozambicans and not among Malawians themselves. This has been largely due to the influx of refugees from Mozambique during the time of the civil war in Mozambique.

The legislation which is in force to combat arms-trafficking is the Firearms Act, chapter 14:08, which provides "for regulating, licensing and controlling, transportation, dealing in and possession of firearms and ammunition and for matters connected therewith and incidental thereto."

This piece of legislation was evidently designed on the assumption that people will be law-abiding and will seek licences and permits before acquiring firearms. Furthermore, the punishments stipulated by the Act for transgressors are grossly inadequate (see table).

<table>
<thead>
<tr>
<th>Offence</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Importing and exporting firearms without a permit</td>
<td>K400 and 12 months imprisonment</td>
</tr>
<tr>
<td>Manufacture, sell or transfer a firearm without a licence</td>
<td>K200 and 6 months imprisonment</td>
</tr>
<tr>
<td>Furnishing of false information by licensed dealer</td>
<td>K200 and 6 months imprisonment</td>
</tr>
<tr>
<td>Acquisition or transfer of firearms or ammunition without a permit</td>
<td>K400 and 12 months imprisonment</td>
</tr>
<tr>
<td>Possession of a prohibited weapon</td>
<td>14 years imprisonment</td>
</tr>
</tbody>
</table>

Except for the general offence of the unlicensed possession of firearms, all other offences are punishable with fines and prison sentences that are grossly inadequate. In response to the increase in armed robberies, the courts have started to impose harsh sentences and adopt a strict attitude to the granting of bail.

It is suggested that the sentences elaborated above should be made more punitive if they are to be a realistic deterrent to would-be offenders intent on using firearms in their criminal frolics.

**Laws against domestic and crossborder motor vehicle theft**

The Road Traffic (Regulations and Licensing) Regulations 2000 made under the Road Traffic Act (chapter 69:01) control crimes related to motor vehicle thefts. Under the Regulations, every motor vehicle should be registered by its title holder. The requirement that an application for registration of a motor vehicle acquired outside Malawi must be accompanied by an acceptable identification of the title holder and the owner of the motor vehicle, as well as customs and police clearance, enables the police to detect vehicles which may have been stolen outside Malawi. This is also true of Road Traffic (International—Circulation) Regulations which require that vehicles in international traffic should have proper identification marks. Although the penalty prescribed under the Regulations for non-compliance is a somewhat inadequate fine, the requirements for registration have assisted the police to combat crossborder motor vehicle
thefts.

At the same time, it can be argued that the Regulations have been designed mainly as a means of revenue collection through registration and licensing fees and that they are therefore not a strong deterrent against persons determined to break the law.

In contrast, section 331 of the Penal Code (chapter 7:01) criminalises the receiving or bringing into Malawi of property dishonestly acquired or stolen outside the country, an offence punishable by imprisonment for up to seven years. This general section is much more effective in deterring potential perpetrators. However, the above pieces of legislation only focus on motor vehicles which have been brought into Malawi from other countries. A large number of motor vehicles are stolen in Malawi and used there. Many have been stolen from government departments, parastatal organisations, individuals and private companies. Some thefts have involved collusion between employees (mainly drivers) and thieves. The vehicles stolen have not been traced, although ownership appears to have been transferred. Transfer of internally acquired vehicles is relatively easier because there is no police clearance required.

It appears to be a simple matter to legislate a requirement for police clearance before any vehicle is transferred, regardless of its origins. The present practice, where even a ‘ghost owner’ may ‘complete’ a change of ownership leaves a lot to be desired as it opens the way for fraud and other criminal acts. It is also suggested that an application form for change of ownership, on which verifiable details of the identity of the transferor and transferee are entered, should be designed and prescribed.

**Laws against the possession of and trafficking in drugs**

The trafficking in what is commonly known as ‘Malawi gold’ - Indian hemp - manifests how organised crime has grown in Malawi. To put it bluntly, drug-trafficking occurs on a rather large scale. As recently as 16 February 2001, the police at the Mwanza border post impounded a truck headed for Zimbabwe carrying 15 bags of Indian hemp, each weighing 50 kilograms, as well as four travel bags loaded with the illicit drug. Last year, in co-ordination with SARPCCO, the police impounded 80 000 kilograms of Indian hemp, in a total of 1 198 drug-related cases. In this operation, 1 040 individuals were arrested, of whom 1 010 were Malawian nationals, and the rest Zimbabweans and South Africans.

Indian hemp is grown in the remote areas of Malawi, but finds its way to the cosmopolitan city of Lilongwe and the commercial hub of Blantyre. From within the borders of Malawi, the drug is exported to neighbouring Mozambique, Zimbabwe, South Africa, Zambia and even Botswana. A case in which a truck-load of Indian hemp from Malawi was intercepted in Harare just before the drug was exported to Europe shows that markets for the drug are situated as far away as Europe. This business is now increasingly run by sophisticated syndicates under cover of, or in conjunction with legitimate commercial activity such as import and export enterprises.

The legislation to deal with the possession of and trafficking in drugs is the Dangerous Drugs Act (chapter 35:02), which is designed to control the importation, exportation, production, possession, sale, distribution and use of dangerous drugs. Its major strength is in the hefty penalty provided under section 19:

"Any person who acts in contravention of and fails to comply with any provision of the Act …
(b) who in Malawi aids, abets, counsels, or procures the commission in a place outside Malawi of an offence punishable under a corresponding law in force in that place, or does an act preparatory to or in furtherance of an act which if committed in Malawi would constitute an offence against this Act shall be liable to a fine of K500,000.00 and to imprisonment for life."

The astronomical penalty sometimes has the negative effect of punishing disproportionately. This could be the case in respect of offenders found in possession of very small quantities of drugs for personal use. Fortunately, courts rarely impose the maximum penalty of imprisonment of life for minor offenders. All in all, the act is adequate and it is up to the authorities to utilise it to counter drugs-trafficking.

**Legislation against money-laundering**

Prior to June 2000, there was no specific laws against money-laundering in Malawi. The domestic legislation which existed in the form of the Reserve Bank of Malawi Act (chapter 44:02), the Banking Act (chapter 44:01) and the Exchange Control Act (chapter 45:01) and its Regulations, contained regulatory measures which could be used to detect money-laundering.

In terms of the newly introduced section 331A of the Penal Code (chapter 7:01), money-laundering is committed if:

- a person engages, directly or indirectly in a transaction involving property that the person knows to be tainted; or
- the person receives, possesses, conceals, disposes of or brings into Malawi property that the person knows to be tainted

Tainted property is property derived or realised directly or indirectly from unlawful activity either within or outside Malawi.

As can be seen from the above definition, the legislation is not clear enough. The offences outlined in section 331A do not cover all the possible instances of money-laundering. There is need to consolidate all legislation which has the objective and capacity of preventing money-laundering so that it can be applied in a more co-ordinated manner than is currently the case. Modern technology has provided criminals with new tools that enable them to launder huge illicit profits across borders and continents. New legislation that includes measures for the tracing, seizing and forfeiture of the proceeds of crime and the monitoring of large-scale cash transactions is required.

The new legislation should also contain measures for the implementation of bilateral and multilateral arrangements and the promotion of international co-operation to detect and control economic crime in its organised form.

**Mutual assistance legislation**

Domestic legislation on mutual legal assistance exists in the form of the Service of Process and Execution of Judgments Act (chapter 4:04) and the Evidence by Commissions Act (chapter 4:03).

The former applies to both civil and criminal cases, and is intended:
"to provide for the service in Malawi of any court of record of Zambia or Zimbabwe, the execution in Malawi of civil judgments of any such court and for matters incidental to the foregoing and connected therewith."

The Evidence by Commissions Act is described as:

"An Act to provide for the taking of evidence within or without Malawi in relation to proceedings pending before courts within or without Malawi for the ascertainment of foreign laws and for other purposes connected therewith."

The domestic legislation is deficient in that its application is confined only to two other countries, Zambia and Zimbabwe. The Act has to be broadened to bring in other countries, particularly those in the SADC region with which Malawi has most of its dealings. The legislation is also silent with regard to:

- the transfer of detained persons of one country to another country to assist in investigations, prosecutions or judicial proceedings;
- executing searches and seizures; and
- examining objects and sites.

Another aspect lacking in the domestic legislation is the issue of bank secrecy, which is not specifically addressed. It could be amended by the addition of a new section stipulating that mutual legal assistance shall not be declined on the ground of bank secrecy.

Extradition laws and agreements

The Extradition Act (chapter 8:03) makes provision for the extradition of offenders from and to Malawi. The Act provides that the relevant minister may enter into arrangements with the government of any designated country for the surrender, on a reciprocal basis, of fugitive offenders. The designated countries are the United Kingdom, South Africa, Lesotho, Botswana, Tanzania, Zambia and Zimbabwe. It goes without saying that there is a need for other countries to be included. Angola and neighbouring Mozambique are countries that readily spring to mind.

The legislation otherwise provides proper diplomatic channels for the surrender of fugitive offenders. It thus helps to prevent interference with the sovereignty of other countries by making it unnecessary for one country’s agents to infiltrate another country for the purpose of arresting fugitive offenders. The legislation further takes human rights issues into account by refusing requests for the arrest of fugitive offenders that might have the effect of infringing on the exercise of political, religious or other freedoms by such individuals.

Laws to augment investigative capacity

No laws to augment investigative capacity have been enacted. There is no provision for special investigative techniques such as electronic or other forms of surveillance and undercover operations for the purpose of effectively combating organised crime. However, the police is empowered under assorted legislation, such as the Police Act (chapter 13:01) and the Penal Code (chapter 7:01) to search any person reasonably suspected of having committed an offence, with or without a warrant. The police may also enter any premises for the purpose of conducting a search with or without a warrant.
Under the Bankers Books Evidence Act (chapter 4:05), a judge or magistrate may authorise a police officer, by warrant, to investigate the account of any specified person in any banker’s book. In terms of section 50 of the Banking Act, any employee of the Reserve Bank should disclose any information relating to the business of any bank or financial institution if directed to do so by a court of law.

It must be noted that, under the Corrupt Practices Act (Act 18 of 1995), which is discussed below, officers of the Anti-Corruption Bureau may have access to all records if authorised by a warrant issued by a magistrate. Section 43(1)(e) of the Corrupt Practices Act empowers the Director of Public Prosecutions to require any bank to furnish any information that would assist in expediting an investigation. The Director of Public Prosecutions may also require a legal practitioner to state whether he or she had acted at any time on behalf of any person in connection with the transfer or investment by such a person of any moneys out of Malawi or within Malawi. The Corrupt Practices Act insists that such information must be provided, notwithstanding the effect that compliance would be to disclose information, or a communication that is privileged. The derogation of lawyer/client privilege does not extend to information which came to the lawyer’s knowledge for the purpose of any proceedings began or contemplated before a court. It also does not extend to information given to him or her to enable him or her to give legal advice to a client. The derogation under section 51 only applies to instances where the lawyer has acted for the client in any financial transaction or other business dealing that is related to an offence under the Act (section 51(3)).

The most positive aspect about the Bankers Books Evidence Act and the Corrupt Practices Act is the overriding of bank secrecy, which can augment the capacity of the police to investigate matters relating to, and trace the proceeds of corrupt practices and money-laundering. The Corrupt Practices Act is even more encompassing in that it further waives the privilege that traditionally exists with regard to information exchanged between lawyer and client.

All in all, Malawi needs legislation to provide for electronic or other forms of surveillance and undercover operations for the purpose of combating organised crime.

Anti-corruption legal mechanisms

The law dealing with corruption in Malawi is mainly to be found in the Corrupt Practices Act (Act no 18 of 1995). It is also contained in the Penal Code. The former Act makes provision for the establishment of the Anti-Corruption Bureau of which the functions are, inter alia, to:

- take measures for the prevention of corruption in public and private bodies;
- receive and investigate complaints of alleged or suspected corrupt practices; and
- investigate any conduct of any public official who, in the opinion of the Bureau, may be connected with or conducive to corrupt practices and to report this to the minister.

The Corrupt Practices Act incorporates a stiff penalty regime as a deterrent against potential offenders.

The Act extends very wide investigative powers to the Anti-Corruption Bureau, giving it virtually unlimited capacity to access information. It is therefore disappointing that, since its inception, the Anti-Corruption Bureau has not secured the conviction of any of the prominent people suspected of corruption. The Bureau has been unsuccessful in almost 99% of the cases it
brought to court. Consequently, the public now questions:

- whether the Anti-Corruption Bureau lacks capacity and/or skill;
- whether the courts are failing to interpret the law; or
- whether legislative measures defining corruption are not broad enough.

The Anti-Corruption Bureau director, Gilton Chiwaula, told a press conference in 2000 that there was need for a review of the present law on corruption because the existing law had been "tested and found in need of improvement." On Tuesday 13 February 2001, the deputy director of the Anti-Corruption Bureau, Álex Nampota confirmed that the Corrupt Practices Act was currently under review. The review would cover:

- the definition of corruption;
- the protection of informants;
- evidential aspects; and
- arrest and search without a warrant from the court.

The scope of the definition of corruption will probably be widened. It is suggested that the proposed amendments should allow the Bureau to investigate matters currently lying outside its mandate. Declarations of assets and liabilities by public officials should be deposited with the Bureau.

The other problem is that some cases are brought to court in haste without proper preparation. A recent case in point is that against former Minister Brown Mpinganjira who was acquitted of corruption charges in March 2001. The Anti-Corruption Bureau needs more lawyers to assist in the prosecution of cases brought to court.

A major weakness of the Corrupt Practices Act is its failure to grant institutional and functional independence to the Anti-Corruption Bureau. The Act constitutes the Bureau as a government department and its director and deputy director are appointed by the president, who is also empowered to remove them from office. The Anti-Corruption Bureau cannot institute prosecutions under the Act without the written consent of the Director of Public Prosecutions. The Bureau is susceptible to undue influence by the executive branch of government.

It is suggested that amendment to the Corrupt Practices Act should be made with regard to the appointment of the director and deputy director of the Bureau. As is the case with the office of the Ombudsman, nominations for appointment to the office of director or deputy director should be received from the public following a public advertising process initiated by the clerk to the National Assembly. The successful candidate would be appointed by the Public Appointments Committee in accordance with specific requirements, which may be set down in the Act.

An impediment to the Anti-Corruption Bureau’s exercise of its investigative powers is a provision that is open to abuse by government ministers. In the case of investigations directed at a government department, the Bureau cannot have access to any information unless a search warrant is served personally on the relevant responsible minister. After service of such a warrant, the minister has a period of seven days to object to a court. It is conceivable that such an objection could be made in bad faith, or that the notice period could be used to frustrate detection by the Anti-Corruption Bureau. It is therefore suggested that the relevant provision should be reviewed to plug a gaping loophole.

**Laws relating to the forfeiture of the proceeds of crime**
The Forfeiture Act (chapter 14:06), which was repealed soon after Malawi adopted its new democratic dispensation, was a draconian statute. It empowered the Minister of Home Affairs to declare a person or persons subject to forfeiture. A criminal conviction or finding of civil liability was not required. The minister would merely make a declaration if he or she was satisfied that any person:

- was or had been acting in a manner prejudicial to the safety of the economy of the state or subversive to the authority of the lawfully established government; or

- while employed in the public service, had committed any theft of money or property received by virtue of his or her employment, whether or not such person has been convicted of theft.

The enforcement of the Act caused untold nightmares, particularly to political opponents of the ruling oligarchy during the one-party era. Under the new constitutional order, forfeiture is conditional upon conviction. Section 30 of the Penal Code provides that a court, in addition to or in lieu of any penalty which may be imposed, may order the forfeiture of any property which has passed in connection with the commission of the offence. Section 384 of the Penal Code empowers a court to order the forfeiture of any forged bank note, currency note or any counterfeit coin. Section 37 of the Corrupt Practices Act entitles a court to order the person convicted of an offence to pay to the rightful owner the value of any gratification actually received.

The Exchange Control Regulations under section 3(3)(d) empower the court to order the forfeiture of any currency in respect of which an offence has been committed.

As can be seen from the above, forfeiture may be imposed on an offender in addition to any custodial sentence imposed. It should be noted, however, that there are no forfeiture provisions in the legislation on money-laundering, the trafficking of dangerous drugs and firearms and motor vehicle theft. It is suggested that provisions should be incorporated to include forfeiture, rather than leaving it to the court to rely on the general provisions of the Penal Code.

**Conclusion**

There is an urgent need for more effective legislative measures in Malawi to combat organised crime. The list considered in this article is not exhaustive. The domestic law must cover all serious crimes involving organised criminal groups. The Law Commission, which was established under section 132 of the Constitution, is empowered to review and make recommendations relating to the repeal and amendment of laws.

Section 211(1) of the Constitution of the Republic of Malawi provides that any international agreement ratified by an Act of parliament shall form part of the law of Malawi if so provided for in the Act of parliament ratifying the agreement. Malawi therefore needs to enact legislation ratifying the United Nation Convention Against Transnational Organised Crime so that it forms part of the domestic legislation, in order to bring the latter into line with the Convention.

**Chapter 5**

**COMBATING ORGANISED CRIME IN TANZANIA**

Chris Maina Peter

"The organised criminal relies on physical terror and psychological intimidation, on economic
retaliation and political bribery, on citizen’s indifference and government acquiescence. He corrupts our governing institutions and subverts our democratic process."

Richard Nixon

Introduction

The choice of Palermo city on the island of Sicily on the coast of Italy as the site for the high-level conference to open the United Nations Convention Against Transnational Crime for signature was not accidental. Sicily has the significance of being the ‘home’ of the Mafia — probably the world’s best-known organised crime group.

But what is organised crime? The Economic and Organised Crime Control Act (1984) of the United Republic of Tanzania defines organised crime as:

"Any offence or non-criminal culpable conduct which is committed in combination or from whose nature a presumption may be raised that its commission is evidence of the existence of a criminal racket in respect of acts connected with, related to or capable of producing the offence in question."2

This type of crime is perpetuated by a well-structured group that specialises in serious crimes. The Convention is even more specific in its definition of such a group:

"Organised criminal group shall mean a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established pursuant to this Convention, in order to obtain directly, or indirectly, a financial or other material benefit."3

It is clear from the Convention that the main aim of the group is acquiring a financial or other form of material benefit. A typical organised criminal group is the Mafia, which originated on the island of Sicily, but now operates in various parts of the world. Explaining the Mafia, a former long-serving head of the Federal Bureau of Investigations (FBI) in the United States, J Edgar Hoover had this to say:

"La Cosa Nostra is the largest organisation in the criminal underworld in this country, very closely organised and strictly disciplined. They have committed almost every crime under the sun …

La Cosa Nostra is a criminal fraternity whose membership is Italian either by birth or national origin, and it has been found to control major racket activities in many of our larger metropolitan areas, often working in concert with criminals representing other ethnic backgrounds. It operates on a nationwide basis, with international implications, and until recent years it carried on its activities with almost complete secrecy. It functions as a criminal cartel, adhering to its own body of 'law' [and] 'justice' and in so doing, thwarts and usurps the authority of legally constituted bodies."4

Groups of this nature have been in existence for many years. What changes with time is the type of crimes they are involved in. They also move with both time and technology in their activities. Thus, they have been involved in prostitution, alcohol-smuggling, various drug-related crimes, money-laundering and, in recent times, to computer-related crimes.
Such organised groups are a danger to any democratic society. They have to be confronted. The problem is that these groups operate internationally. They are mobile and have accumulated vast wealth. They can even destabilise an unsuspecting weak state. For the war against organised crime to be successful, it therefore cannot be only national — it has to be transnational in character.

In Tanzania, organised crime is on the increase. The main threat is drug-trafficking. As a coastal state situated strategically on the western side of the Indian Ocean, it is used as a useful transit route for drugs en route to the southern part of the continent. In the process, some of the drugs remain in the country and find a market mainly among the middle and upper class in major towns. In an unprecedented recent situation, the police in Tanzania impounded a small, but complete machine for manufacturing mandrax tablets and heroin on the outskirts of Dar es Salaam. Together with the machine, the police also found the raw materials for making these drugs. How long this machine has been in operation and how far its products have been distributed in the country and in the region are as yet unknown. The picture will become clearer in the trial of the two people arrested in connection with this big ‘catch’.

Drug-trafficking goes hand-in-hand with high-level corruption. Carriers are protected by officials who have been bribed by tycoons who send youth to Pakistan and other destinations in Asia. As a result, these youngsters are never searched or arrested. There are attempts to deal with this problem, but the law is still inadequate.

There is little information in the country about other forms of organised crime such as money-laundering. This may be because of the sophistication of those involved and the lack of technical capacity to detect the crime.

In the early 1990s, Tanzania enacted several laws directly addressing organised crime. These include:

- the Proceeds of Crime Act (1991);
- the Mutual Assistance in Criminal Matters Act (1991);
- the Armaments Control Act (1991);
- the Arms and Ammunition Act (1991);
- the Drugs and Illicit Traffic of Drugs Act (1995) and
- the Tanzania Intelligence and Security Service Act (1996).

This group of legislation was to complement preceding laws that were out of date and could no longer match the current needs. These include:

- the Extradition Act (1965);
- the Fugitive Offenders (Pursuit) Act (1969);
- the Witness Summonses (Reciprocal Enforcement) Act (1969) and

The implementation of this group of laws was partly through the existing criminal law and procedure regime using:

- the Penal Code (1945);
- the Criminal Procedure Act (1985);
- the Evidence Act (1967);
- the Police Force Ordinance (1953) and
• the Peoples’ Militia (Powers of Arrest) Act (1975).  

The above represents the spectrum of the legal regime in the country to fight organised crime, which as indicated above, is increasing apace. This regime is examined below in the context of the Convention Against Transnational Organised Crime. The discussion is divided into four main parts. The first part looks at legislation relating to organised crime. This is followed by legislation relating to international co-operation in criminal matters. The third part is on corruption and unethical practices and their influence on organised crime in Tanzania. The last part examines the regular criminal law and procedure in the country. It is through this regime that those caught by the long arm of the law are dealt with.

Organised crime

Economic and Organised Crime Control Act (Act no 13 of 1984)

The Economic and Organised Crime Control Act was enacted to repeal and replace the controversial Economic Sabotage (Special Provisions) Act (1983), which created much heat in the legal fraternity. It had provided for a completely new system of dealing with economic crimes, a system which bypassed the regular judiciary and established parallel courts staffed by a mixture of lawyers and lay personnel.

This law which, inter alia, defines organised crime, is aimed at making better provision for the control and eradication of certain crimes and culpable non-criminal misconduct through the prescription of modified investigation and trial procedures. Jurisdiction for trying offences under this law is given to the High Court of Tanzania and, before any case takes off, it requires the consent of the Director of Public Prosecutions (DPP).

The Economic and Organised Crime Control Act conforms to a large extent with the Convention, for instance, in matters relating to the transfer of advantage or property involved in the commission of an offence. The transfer of such property is only permitted where there is determination of proceedings. Under article 7 of the Convention, it is provided that all state parties have to adopt measures that will enable the identification, tracing, freezing, or seizure of property. Whenever the proceeds of crime have been transformed, the transmitted property will be liable to seizure. The benefits or income derived from the proceeds of crime are also subject to seizure and confiscation. It is in the Convention’s interest that even bank, financial and institutions’ commercial records could be seized regardless of the duty of secrecy towards their customers. However, this requirement is not expressly or implicitly provided for in the Act.

Proceeds of Crime Act (Act no 25 of 1991)

There are many situations where the law has allowed criminals to get away with their crimes and, in fact, to benefit from their actions. More and more states are searching for ways to ensure that criminals do not benefit from their illegal transactions. This partly explains the enactment of the Proceeds of Crime Act which is aimed at ensuring that criminals cannot enjoy their illegally acquired wealth.

In this legislation, proceeds of crime have been defined as any property that is derived from the commission of an offence. All courts, with the exception of the primary court, have jurisdiction to try cases under this Act. If the court convicts a person, the Attorney-General can apply for an order of forfeiture against any property used in the commission of the offence involved.
The next issue is whether this legislation conforms to the Convention. Starting with the obligations of financial institutions, they are supposed to give information to a police officer if there are reasonable grounds to believe that such information will be relevant to an investigation or prosecution of a person.  

29 In the Convention, under article 12(6), it is provided that the government should empower the relevant authorities to order that bank, financial and commercial records are made available or seized, regardless of the duty of secrecy. The reason for this provision is that a person may have an account as a result of the commission of an offence, but he or she may have no other property in connection with the commission of the offence. Therefore, the Convention provides for the seizure of financial records to ensure that no person escapes liability because there is no property to be seized.

The Convention requires state parties to adopt measures necessary to enable the identification, tracing, freezing or seizure of any item that will enable confiscation.  

30 In the Act, it is clearly provided in Section 58 that police officers can require a person to produce any document relating to any property in order to identify it and, where possible, to seize the property. Restraining orders issued under sections 39 and 40 can also be used as a measure necessary to freeze property, because the property cannot be dealt with (if it is under restraining order) except as directed by the Attorney-General.

There is also conformity with regard to protection of the rights of bona fide third parties as provided for in article 12(8). The same is provided in section 43(3), whereby there will be an exclusion of personal interest in a restraining order if a person having interest in a property applied to the court for the variation of an order. In this case, the court will grant the application and such interest will be excluded under section 43(4). In this provision, the rights of bona fide third parties have been protected.

Section 71(2) of the Act makes it an offence to engage in money-laundering. If a person is found guilty of this offence, he or she will be liable for a fine and/or imprisonment. Penalties for this offence are significant enough to show the intention of the state to punish offenders. However, the provision does not comply with the Convention’s requirement in matters relating to money-laundering. There is no scope for co-operation and the exchange of information at national and international levels, or for the establishment of a financial intelligence unit to collect information regarding potential money-laundering.

There is also no conformity in matters relating to the confiscation and seizure of the proceeds of crime, particularly in matters relating to the demonstration of the lawful origin of alleged proceeds of crime. The Act has failed to provide for measures to be taken where there is income or benefit derived from the proceeds of crime as provided for in Article 12(5).

**Drugs and Illicit Traffic of Drugs Act (Act no 9 of 1995)**

Increased consumption and trade in hard drugs in the country prompted the parliament of the United Republic of Tanzania to enact the Drugs and Illicit Traffic of Drugs Act. This legislation consolidates preceding laws relating to narcotic drugs. It also provides for the control, regulation and forfeiture of property related to drugs and prevents the illicit traffic in narcotic drugs and psychotropic substances.

This law is a form of domestication of the International Convention on Narcotic Drugs and Psychotropic Substances. It was deemed necessary because the crime scene had changed to such an extent that the existing legal regime could no longer effectively deal with it.
Under this Act, the government is obliged to take all necessary measures to prevent drug abuse in the country.35 Thus, the Act provides for the establishment of the National Co-ordination of Drug Control Commission. The main duty of the Commission is to promote, define and co-ordinate the policy of the government on the control of drug abuse and drug-trafficking.36 The Commission, among others, is supposed to implement the provisions of international conventions on narcotic drugs and psychotropic substances, and to update and adopt drug control laws and regulations for the country.37 The Commission is required to report to parliament on the national situation and developments with regard to the supply of and demand for drugs.38

In terms of compliance with the Convention, the Act conforms to a large extent. The purpose of the Convention is to promote co-operation to prevent and combat transnational organised crime more effectively through legislative and administrative measures. The Act provides for punitive legislative measures to combat these crimes. The Act should combat organised crime effectively as required by the Convention.

*Tanzania Intelligence and Security Service Act (Act no 15 of 1996)*

For many years, the Tanzania intelligence service was a mythical entity. Service personnel were feared and shunned by society. They were negatively labelled as ‘flies’, ‘peeping Toms’, and others. They also had unlimited funds to use allegedly in pursuit of ‘enemies of the state’. Yet, they were above all using the taxpayer’s money without being accountable. This was considered to be unfair, hence, the enactment of the Tanzania Intelligence and Security Service Act. This legislation is primarily aimed at demystifying the so-called secret service and making it transparent and accountable to the public.

The Act formally establishes the Tanzania Intelligence and Security Service (TISS) as a government department in the Office of the President, with its main function to ensure security in the country.39

The Service is supposed to collect, analyse and retain information which, on reasonable grounds, is suspected to relate to activities that constitute a threat to the security of the United Republic of Tanzania or any part of it.40 In order to collect information, the Service has the power to investigate any person or body of persons who may cause a threat to the security of the country. In the course of the investigation, the service may enter into arrangements with international organisations to provide the government with security assessments.41 This is in line with article 13 of the Convention. Under this article, state parties are urged to enter into arrangements to establish joint investigation bodies. It is emphasised, however, that in the course of this form of co-operation, respect for the sovereignty of the other country must prevail.

Understandably, the duties of the Service are performed secretively. Information can only be disclosed for investigation purpose and in the public interest.42 Thus, there is protection of officials and employees of the Service, as well as their sources of information.43 In addition, employees of the Service are legally protected for acts bona fide done or omitted in relation to their duties and functions. Sources of information to the Service are protected, and no particulars of a person who is a confidential source of information will be disclosed. This form of protection is also covered by the Convention in relation to witnesses.44 It is an offence to obstruct an employee of the Service in the course of duty.45

The intelligence service in any country, if properly utilised, can play an important part in the war against organised crime.
Armaments Control Act (Act no 1 of 1991)

A big portion of organised crime is found in the arms and armaments business. It is thus important to regulate this area effectively. The Armaments Control Act was enacted to provide for the machinery and mechanism of controlling and managing the acquisition, manufacture and dealing in arms of war. It is the duty of the president to facilitate and ensure the formulation and implementation of a realistic policy for the control of all dealing in armaments in the country. These powers have been delegated to other officers of the government.

In addition, the Act establishes the National Armaments Control Advisory Board with the main function to advise the government on issues relating to the implementation of policy on armaments. In performing its duty, the Board is assisted by a secretariat which provides secretarial, research and information services to the Board. In the course of its duties, the Board is allowed to co-operate and collaborate with other persons or bodies. Due to the sensitivity of the functions of the Board, it is financed and supervised through the Ministry of Defence.

This Act does not relate to the Convention, as the Convention does not provide for guidance in armaments control.

Arms and Ammunition Act (Act no 2 of 1991)

The Arms and Ammunition Act was enacted to complement the Armaments Act of 1991. This law consolidates legislation relating to the control of civil arms and ammunition in Tanzania. It thus prohibits the carrying or possession of arms or ammunition without a licence. Licences are issued by the Arms Authority. However, licences issued in mainland Tanzania are not valid in Zanzibar.

The final issue is whether the Act assists in any way in the war against organised crime. Since organised crimes are committed by more than one person with the assistance of others, such criminal groups usually use arms and ammunition to commit offences, as well as to protect themselves against apprehension by the police. The Act attempts to restrict the possession or ownership of weapons to government. It is therefore arguable that the law, by imposing restrictions, contributes to a large extent to combating organised crime.

International co-operation in criminal matters

Extradition Act (Act no 15 of 1965)

Extradition is an important issue in both public international and human rights law. It involves moving a person from one national jurisdiction to another. It may also entail danger to the subject of extradition if it is not carefully handled. However, at a very general level, extradition aims to bring to justice an individual alleged to have committed or been convicted of a crime under the law of the requesting state.

In Tanzania, the applicable law is the Extradition Act. This Act does not apply to Tanzania only, but also to any other country declared by the minister. It is a principle of international co-operation between countries, and it ensures that every crime committed is punished regardless of the fact that the accused committed or was convicted of an offence in another country.

A country can apply through a diplomatic representative for the surrender of a fugitive criminal. In this case, the relevant minister will signify to a magistrate that a requisition has been made.
and the magistrate is required to issue a warrant of arrest. However, the accused will not be arrested if it is proven that the offence is of a political nature. An informative discussion of the nature of extraditable offences is found in the case of R v Calvin Cobb. A warrant of arrest was issued by Suffolk County Court in the United States. In the course of the hearing before a magistrate’s court, the accused contended that he was sought by the United States, not because of having committed any crime, but due to his civil rights activities. He argued further that the application for his extradition was politically motivated. In his own words:

"I say that I am only a small fly. 100 years from now I may not be alive, but the USA and Tanzania will remain. What happens will be a matter of history. If I am sent back the Court will be my executioner and this is the role which I hope the court will not assume."

The court ruled that the surrender of the accused was sought on political grounds and thus declined the application. The accused was accordingly discharged.

More or less the same situation faced the court in the case of Private Hezekiel Ochuka and Pancras Okumu. Here, the alleged leader of the 1982 abortive coup attempt in Kenya and a colleague hijacked a plane and landed in Dar es Salaam. They were arrested and the Kenyan government requested their extradition. The court ruled that the accused would be discharged because they were sought on political grounds.

Generally, it may be concluded that the Extradition Act conforms to the Convention. However, because of the passage of time, it is rather out of date and there are some areas that require updating.

**Mutual Assistance in Criminal Matters Act (Act no 24 of 1991)**

This Act is one of the new breed of legislation aimed at dealing with transnational crime in Tanzania. The Act was enacted to provide for mutual assistance between Tanzania, Commonwealth countries and other foreign countries; to facilitate the provision and obtaining of such assistance by Tanzania; and to provide for matters related or incidental to mutual assistance in criminal matters. Assistance is mainly sought in relation to evidence, the identification of witnesses and the forfeiture of property.

This piece of legislation conforms to the Convention in matters relating to evidence and witnesses. The Convention provides for state parties to lend mutual legal assistance to other state parties in investigation proceedings. The Act also stipulates that there should be assistance in taking evidence in the foreign country and in Tanzania, as well as assistance in investigations.

There is also conformity on the mutual assistance to be given. In the Convention, under article 14(3), it is provided that assistance can be requested, *inter alia*, in matters relating to the taking of evidence, executing searches and seizure, and any other assistance that is not contrary to domestic law. The same aspects are provided for under sections 4 and 5 with the latter stipulating categories of assistance under the law.

According to the Act, a person brought to Tanzania from a foreign country will be kept in custody. This is in compliance with the Convention’s stipulations that the state party to which the person is transferred, is obliged to keep such a person in custody.
Generally, it can be concluded that there is conformity between the Act and the Convention.

**Fugitive Offenders (Pursuit) Act (Act no 1 of 1969)**

This rather old piece of legislation seeks to enable the police of certain contiguous countries to be authorised to pursue offenders fugitive from such countries within Tanzania. Such a country has to be gazetted by the minister responsible for legal affairs. The minister authorises the police from such a country to operate in Tanzania in relation to a fugitive offender(s). Once an offender is arrested, he or she has to be delivered to a police officer in Tanzania.

The Act, to some extent, conforms to the requirements set out in the Convention. Section 5 of the Act provides for an arrested person to be delivered to the local police, while article 10(9) of the Convention provides for the requested state party to take a person, who is present in its territory or whose extradition is sought, into custody to ensure his or her presence at extradition proceedings.

**Witness Summonses (Reciprocal Enforcement) Act (Act no 14 of 1969)**

This law aims to enforce witness summonses issued by courts. It provides for the procedures to be followed in witness summonses, the service of summons, and the powers of the court and the minister to excuse the person to whom a summons was issued from complying with the summons. This law is rather old and its relation to the Convention is only by implication and not directly or by design.

**Immigration Act (Act no 7 of 1995)**

Immigration is an important aspect of human life. It is also of concern to all countries for their own security to know who enters and leaves their borders. For many years, immigration issues in Tanzania were governed by the Immigration Act of 1972. In 1995, new legislation was enacted that repealed and replaced it.

The new law provides for the control of immigration into the United Republic of Tanzania. The Act regulates the entry and stay of immigrants in Tanzania to ensure that they follow the law of the country. In order to ensure that all activities concerning immigration are properly conducted, the director of Immigration Services is appointed by the president for this purpose. The director works hand-in-hand with immigration officers whose duties are mainly to examine the documents of persons wishing to enter or leave the country, and to arrest those whose presence in the country is unlawful.

The Immigration Act conforms to the requirements of the Convention. In matters relating to deportation, it is only the relevant minister who has the power to make an order of deportation. Deportation will be recommended by the director of Immigration Services after an immigrant is convicted of an offence and is deported from Tanzania to his or her country of origin. A deportation order can only be issued to immigrants and not to Tanzanians. In the case of *Jama Yusuph v Minister for Home Affairs*, the applicant, a Tanzanian, was deported by the minister. The court held that the minister is not empowered to deport a citizen of Tanzania, and that it is upon the person who is the subject of an order of deportation to prove that he or she is a citizen of Tanzania.

The control over entry and departure from a country, if properly exercised, can contribute to the war against organised crime. It may make it harder for criminals to move freely and jump from
Corruption and unethical practices

Prevention of Corruption Act (Act no 16 of 1971)

Corruption in the public service is a headache for every democratic government. It undermines its legitimacy and the confidence of the population in its leaders. In Tanzania, the fight against corruption started with the colonial government and continues to this day.

The Prevention of Corruption Act represents the most ambitious drive against this vice. It targets both soliciting and accepting bribes and other forms of corruption. The concept of corrupt transaction under section 3 of the Act has the same meaning as that assigned in article 8(1) of the Convention. The Act also establishes the Anti-Corruption Squad in the Office of the President to investigate and prosecute offences relating to corruption. The Squad is supposed to provide legal advice to the government and the public at large on issues relating to corruption.71

To some extent, the Prevention of Corruption Act of 1971, as amended, anticipated the Convention. Corruption is defined in section 5.3 of the Act as solicitation, acceptance or obtaining from a person any advantage as an inducement to do or forbearing to do anything in relation to his or her business. Under article 8 of the Convention, it is the act of promising, offering or giving to the public official an undue advantage so that the official act or refrain from acting in the exercise of his or her duty.

With regard to sanctions and penalties, the Convention under article 9(1) urges state parties to take administrative and legislative measures to promote integrity and to prevent, detect and punish corrupt persons. Tanzania has adopted such measures by providing heavy sanctions and penalties in the Act for offences relating to corruption.72 In order for the functionaries involved in the war against corruption to be more effective, the Squad has been elevated to a bureau. It is now called the Prevention of Corruption Bureau (PCB). One weakness of the Act is its failure to make it an offence to participate as an accomplice in the offence.

Prevention of Corruption (Amendment) Act (Act no 20 of 1990)

The amendment to the Prevention of Corruption Act of 1971 was aimed at curbing corruption in general elections.72 Therefore, it addresses both direct and indirect corruption during elections by either the candidate, his or her agents, or his or her party. Treating of voters and potential voters is also defined,73 ill-treatment is punishable,74 as is exerting undue influence which is prohibited under the Act.

The penalty for corrupt practices is higher. It consists of a fine not exceeding Tshs 30 000/=, or imprisonment not exceeding six years, or both. In addition, a person convicted of corrupt practices must be reported to the director of Elections, and his or her name will be deleted from the voters’ register.75 In addition, a candidate convicted of corruption in court is barred from standing for elections for a period of 10 years.

This amendment to the Act was timely, as corruption in elections had reached alarming proportions. Candidates would do anything to be elected and both petty bribery and grand corruption were involved.
Public Leadership Code of Ethics Act (Act no 13 of 1995)

It is not uncommon for the political leadership to forget its undertakings to the population and engage in unethical practices. This tendency is addressed by the Public Leadership Code of Ethics Act of 1995. The Act is aimed at establishing a code of ethics for certain public leaders. Its goal is to control the acquisition of property by public leaders, particularly government officials.

The code of ethics seeks to invoke, among others, the principle of declaring all property or assets and liabilities owned by a person in a position of power. This principle extends to his or her spouse and unmarried children. The aim of enacting this provision was to enable the relevant authorities to trace the property of public officials, and if any official acquires any other property through corrupt means, this will be detected. This principle conforms to the Convention in the sense that the Convention requires state parties to establish the necessary measures to trace the origins of such property.

Although public leaders are required to declare their assets and liabilities under section 9(1), this will not suffice to control potential ownership of property, as all properties/assets and liabilities are not subject to declaration. There are non-declarable assets, some of which can be acquired corruptly. For example, vehicles and other personal means of transportation are non-declarable assets, but these can be bought with money corruptly acquired, or a public official can acquire them as an economic benefit that is contrary to the principles of the code of ethics. It would be prudent if all property and assets acquired by a public leader, other than through his or her lawful means of income, were subject to declaration.

There is a prohibition against public leaders dishonestly acquiring any pecuniary advantage by benefiting from information obtained in the course of their duties, converting government property for personal use, and soliciting transfers of economic benefit. By doing this, such a public leader will be committing corruption as defined in the Convention.

This code was enacted to bring about accountability among the public leadership. It is meant to curb corrupt practices among public leaders and to enhance good governance. If implemented effectively, the code will go a long way in reducing corruption among public leaders. They will no longer be able to accept any illegal economic benefit. In this respect, the Act has conformed to the Convention, which deals with the criminalisation of corruption in article 8.

Electoral Laws (Miscellaneous Amendments) Act

(Act no 4 of 2000)

This Act came in the wake of the general elections of 2000. It covers both elections for the National Assembly, and local government elections in Tanzania. Interestingly, this legislation does away with the safeguards against corruption in elections put in place in 1990. It is therefore controversial and not easy to understand. It is contrary to every logic as it more or less sanctions corruption, while everyone else condemns the practice.

Firstly, under this law, ‘treating’ is allowed and treating voters is no longer regarded as an offence. In addition, treating itself is not defined and the sky is therefore the limit. A candidate can decide to do a ‘favour’ for one person, a group of persons or a whole village — and get away with it.
Secondly, the Act makes it very hard to pursue corrupt candidates who have won elections. This is done through stringent conditions for filing election petitions. According to section 111(2) and (3), the registrar will not fix a date for the hearing of an election petition unless the petitioner has paid a deposit of *five million shillings as security* to the court. This means in practical terms that only rich petitioners can pursue their constitutional rights in electoral matters. A poor candidate who has been roughed up through corruption or treating, or a dissatisfied voter has no chance to pursue a corrupt ‘winner’.

The government seems to have protected itself, as this requirement does not apply to the Attorney-General if he or she is a petitioner or one of the petitioners. This provision seems to be absurd as it creates inequality before the law. It is not easy to justify the provision in general and more so the exemption given to the Attorney-General.

**Criminal law and procedure**

There are broad procedural laws in the statute book which are meant to operationalise the whole criminal justice system. These laws will be handy in any struggle to combat organised crime at national level, and they are extensive. A brief indication of their provisions is given below.

*Penal Code (1945, chapter 16 of the Revised Laws of Tanzania Mainland)*

This Ordinance was codified from the Indian Penal Code. The Code defines criminal offences and provides for the punishment of these offences.

Generally, if used properly, the Penal Code can combat organised crime because of its nature. It defines offences and, at the same time, provides for punishment.

*Criminal Procedure Act (Act no 9 of 1985)*

This legislation repealed and replaced the Criminal Procedure Code which was basically copied from India. The Act mainly provides for the procedure to be followed in criminal prosecution.

*Evidence Act (Act no 6 of 1967)*

Like all legislation dealing with evidence, this Act is vital in criminal matters as it determines the standards of proof and the question of the admissibility of evidence and the capacity to give evidence.

*Police Ordinance (chapter 322 of the Revised Laws of Tanzania Mainland)*

This Ordinance, enacted in the 1950s, established the police force. Among others, it allows the police to carry and, where necessary, use firearms. It also provides for discipline within the police force.

*Peoples Militia (Powers of Arrest) Act (Act no 25 of 1975)*

This Act gives the Peoples’ Militia, which are not part of the disciplined forces of the country, the same powers to arrest criminals like those given to the regular police. The Peoples’ Militia, popularly known as *Mgambo*, is a creature of politics, established in the one-party era.
Conclusion

Organised crime is a serious matter. It concerns states individually and collectively. It would be absurd for a single state to think that it can combat organised crime single-handedly. There is a need for joint efforts in this struggle. This could be at regional, as well as at global level. This will indicate to those involved in this type of crime that there are no safe havens left for them. The UN Convention Against Transnational Organised Crime comes at the right time to boost the war waged by the international community against organised crime.

At national level, there must be very clear policies on organised crime. However, a policy is not enough in itself. It should be translated into concrete legislation dealing with various aspects of organised crime. New legislation should be accompanied by amendments and revisions and, where necessary, old and out of date legislation must be repealed. Archaic laws should not be allowed to stand in the way of the struggle for change and the need to rid society of organised crime.

In Tanzania, much remains to be done. Legislation processes have always been haphazard and disorganised. So far, the country has reacted to new and emerging situations, such as the increase in business and the consumption of hard drugs. It is time to change and, from now on, to prepare itself proactively for situations which can affect the people and the nation. The struggle against organised crime should be intensified.

Notes


3. See Article 2 of the Convention.

4. Hoover was mainly relying on the testimony of Joseph Valachi, a well-known gangster before a Senate hearing. Quoted in Pearce, op cit, p 113.

5. The Zanzibar Chief Minister, Mr Shamsi Vuai Nahodha, is reported to have admitted that drug-trafficking is a major problem and a Bill was being drafted to curb the scourge. See L Lukumbo, Drug trafficking stalks Zanzibar, Daily News, 9 February 2001, p 1.


17. Chapter 16 of the Revised Laws of Tanzania Mainland.
22. Section 2(1) defines organised crime as any offence which is committed in combination or
of which its commission is evidence of the existence of a criminal racket.
23. The judge of the High Court is supposed to sit with two assessors. Formally, these three
officers of the court had equal powers and hence the two Assessors could out-vote the
judge. This happened in the case of R. v. Nuru Mohamed Gulamrasul (reported in the
Daily News, 13 February 1983). This situation has changed since the amendment of the
law in 1987. The role of the assessors has been reduced to that of advisers only and it is
the judge who decides on both the verdict and penalty.
24. Section 58.
25. See article 7(2), (3), (4), (5) and (6) of the Convention.
27. Section 8.
28. Section 9(1).
29. Section 70(1).
30. Article 7(2).
31. See Section 38(1) and (2)(a).
32. Article 8.
33. Article 7(7).
34. Act no 9 of 1995

35. Section 3(1).

36. Section 4(1).

37. Section 5(1).

38. Section 6.

39. See sections 5(1) and 4(1).

40. Section 14(1).

41. Section 15(4).

42. Section 17(2).

43. Sections 19 and 20, respectively.

44. See article 18(2).

45. Section 23.


47. Section 5.

48. This has been done under section 6.

49. See sections 7 and 8.

50. Section 9(1) and (8).

51. Section 9.


53. Section 4(1).

54. Section 5(2).

55. Section 3(1).

56. Section 5(1).

57. See sections 5(2) and 15(3).

58. District Court of Dar es Salaam at Kivukoni, Miscellaneous Criminal Cause no 41 of 1967.
59. District Court of Dar es Salaam at Kisutu, Miscellaneous Criminal Case no 1345 of 1982.

60. Section 4.

61. Article 14(1).

62. See sections 10, 14(1) and (2).

63. Section 16.

64. See article 14(1)(a).

65. Section 3.

66. Section 5.

67. Section 4(1).

68. Section 7.

69. Section 14(1).

70. [1990] TLR 80.

71. Section 2A(1) and (2).

72. See sections 3(3), 4, 5, 6, 8(2) and 9(1).

73. Section 9A.

74. Section 9D.

75. Under section 9B, the penalty for bribing, treating and exerting undue influence in the electoral process was put at a fine of Tshs 20 000/=, or five years imprisonment, or both.

76. Section 9H.

77. Section 6(b)(ii).

78. Section 10(1) and (2).

79. Section 10(2).

80. Section 6(f).

81. Section 12.

82. Article 8(1)(b).

83. Section 110.
84. See chapter VI of the Penal Code.

85. Chapter 20 of the Revised Laws of Tanzania Mainland.

References


Chapter 6
LEGISLATION AND ORGANISED CRIME IN NAMIBIA
Ray H Goba
Introduction

In the United Nations Convention Against Transnational Organised Crime, the concept ‘organised crime’ is not defined. What are defined, are the terms ‘organised criminal group’ and ‘structured group’.

The concept of being organised, in general, connotes the formation into a whole with interdependent parts to give an orderly and systematic structure to something. Being an organisation means consisting of dependent and interdependent parts or consisting of mutually connected and dependent parts constituted to share a common goal or common objectives. In the context of organised crime, there is not only a connotation of structural form, there is also an indication of premeditation, planning and execution. The organisation can be for a specific criminal enterprise, or it can be for a series of criminal operations. The participants may get together for a once-off operation, or they may be constituted with some degree of continuity or permanence. Because of this, the process of combating organised crime is made complex by the problems associated with identifying not only the criminal groups, but also their members.

For the purposes of this discussion, the question is approached in the broader context of premeditated, planned criminal conduct involving two or more persons either constituted as a group, or as individuals associating and participating with one another in the perpetration of criminal enterprise.

Namibia is a Roman Dutch common law jurisdiction. Its politico-legal history is well documented. The sources of law are its Constitution, the common law, legislation of successive legislative bodies since 1884 and judicial precedents. In addition, Namibia has acceded to and ratified various international legal instruments since independence.

Common law crimes recognised in Roman Dutch jurisprudence are part of Namibian criminal law. However, these crimes are not adequate to cater for the broad spectrum of human conduct and public interest requiring controls by recourse to the criminal justice system, hence the need for legislative initiatives.

In common law, the recognised ingredients of a crime are the presence of an act (actus reus) accompanied by the requisite state of mind (mens rea) in the form of intention or negligence. There are conceivable instances, however, when reprehensible conduct only is present without the requisite intent. Sometimes such conduct does further the commission of a crime.

While the common law recognises inchoate crimes as well as conspiracies to commit crimes and, as such, the concepts of accomplices (socius criminii) and accessories (before and after the fact), the common law has proven insufficient to address the problems encountered in the criminal justice arena with regard to issues of criminal liability.

In the case of criminal conduct involving a group of persons, the so-called doctrine of common purpose has regularly been invoked. The doctrine has its own critics, however. The major criticism against it is that it flies in the face of the very foundation of criminal liability which states that, before a person is convicted of a crime, both the act and the guilty intent must be present.

Further, problems are frequently encountered in the proof of facts peculiarly within the knowledge of the accused. This is as a result of the onus resting on the state to prove all the essential elements of a crime or offence. In this regard, legislation has been used to address the
problems with some degree of success. This has been achieved through so-called reverse onus provisions or presumptions.

With the advent of modern constitutional regimes and the emergence of modern democratic states, like Namibia, which are founded on constitutions that enshrine basic individual rights, this option is being curtailed.¹

The incidence of organised crime in Namibia

It is a matter of public knowledge that a gang known as the Red Eye Gang has existed in Namibia for some time. The identities of members of the gang are matter of speculation, whisper and rumour. However, some of the persons rumoured to be members of the gang are known to lead flamboyant lifestyles without keeping regular employment. They are also known to associate with well-known illegal diamond dealers. The Red Eye Gang is generally linked to illegal diamond-dealing.

At local level, organised crime tends to be associated with illegal diamond-dealing, robbery (particularly armed robbery), burglary with intent to steal, the theft of and from motor vehicles, shoplifting, fraud and corruption involving public institutions and schemes, illegal drug-trafficking, illegal hunting of protected species, illegal dealing in weapons and foreign currency, and smuggling.

Murder is often committed during the course of armed robbery. Notorious criminals have records of being involved in the commission of murder, armed robbery and burglary. In a number of cases, the same names have featured in different combinations with others, suggesting that these persons are somehow connected in an organised fashion. They also tend to be the same ones involved in escaping from prison time and time again, only to be rearrested after committing similar crimes.

In a number of cases, Namibian residents or nationals have been involved with foreign nationals in the commission of cash-in-transit armed robberies, diamond-dealing and drug-trafficking. Such cases have often been very serious involving huge sums of money or large quantities of dangerous drugs such as cocaine, methaqualone (mandrax) and marijuana.

Some cases dealt with by the courts may be pertinent and are discussed below.

Armed robberies

The Karibib heist

A security company was contracted to carry N$5 million from Windhoek for distribution to several banks and financial institutions in the Erongo region in the western part of the country. A small aeroplane was used for the purpose. Upon arrival at the Karibib airstrip, a small and infrequently used landing strip located in a remote area, the crew were accosted by several armed men who robbed them of all the money.

It emerged during investigations that one of the security guards on board was involved. Other persons involved in the conspiracy to rob and the actual robbery included a retired and a serving policeman. They were all Namibians, but there were also several South Africans involved.

On account of errors made at the scene by the criminals, including the abandonment of a
marked belt by one of the South Africans, and their failure to rob one of the victims of his mobile phone, the police were contacted, resulting in the prompt apprehension of the criminals and the recovery of the money.

One of the interesting pieces of circumstantial evidence that the state wanted to rely on to prove the involvement of the serving member of the police, were numerous telephone calls he made to his brother on his mobile phone during the period when the robbery was in progress. Unfortunately, the court was not satisfied that the circumstantial evidence was sufficiently cogent to prove his guilt and he was acquitted. The majority of the accused were convicted and sentenced to lengthy prison terms.

**The Brakwater heist**

At the time of writing, this case was still pending. It emanated from a cash-in-transit armed robbery of the largest amount in Namibian criminal history — over N$6 million. Again, it appears to have been an inside job involving Namibian and South African nationals.

One of the alleged accused was shot by a security guard at the scene. During follow-up investigations, some of the other suspects were arrested in Cape Town a few days later. Some property and a significant amount of cash were recovered.

These suspects are currently on remand in Cape Town awaiting extradition to Namibia. The other suspects are appearing in Windhoek.

There have been other reported cash-in-transit robberies before these two. A common thread running through all is the collusion between employees of security companies and outsiders. In a number of instances, some of the outsiders have been criminals from South Africa.

It can be concluded that the robberies have been committed with a remarkable degree of sophistication and enterprise by a well co-ordinated network of criminals operating between Namibia and South Africa.

**Drug-trafficking**

In the past few years, a number persons found in possession of mandrax, cocaine and marijuana have been arrested. Invariably, the accused have tended to be a combination of Namibian nationals and foreigners, including South, West, East and Central Africans.

In a case in 1998, a resident Nigerian married to a Namibian was arrested with a ‘Zambian’ national and a South African truck driver on their way to South Africa. The Nigerian and ‘Zambian’ had concealed themselves in the back of a heavy commercial truck driven by the South African. When the truck was stopped at a roadblock, the two stowaways — who were suffocating in the tent — drew the attention of the police to their presence on the truck. In the luggage of the ‘Zambian’ man, several pairs of ladies’ shoes were found. Upon examination, it appeared that the soles had been tampered with. Each of the shoes was opened and it was discovered that each sole contained several grams of cocaine. The cumulative total was about four kilograms of pure cocaine. The ‘Zambian’ admitted his involvement, but exonerated the South African truck driver and the Nigerian.

Further investigations revealed that he was in fact not a Zambian but a Tanzanian national travelling on a false Zambian passport. It also transpired that the Nigerian and the Tanzanian
had tried to enter South Africa through a border post which is not usually used a few days before. They had failed to reach the border post after the Nigerian’s vehicle, in which they were travelling, overturned. They then decided to hitch-hike. The Prosecutor-General, apprehensive that the state would not be able to prove a case against the two who denied involvement or knowledge of the contents of the Tanzanian’s luggage, decided to prosecute the Tanzanian only.

Other notable arrests have been made of persons at a local bus station. In one instance, a Namibian and a South African were arrested before boarding a bus bound for Gauteng. They were in possession of cocaine.

In a more recent case, a South African woman, who was in possession of cocaine, was arrested upon alighting from an Inter-Cape coach. The cocaine had been concealed in a loaf of bread in a basket which she was about to pass on to someone else.

In yet another case, a Namibian national and two South Africans were arrested under a bridge while in possession of bags containing several kilograms of marijuana. The Namibian exonerated the South Africans and pleaded guilty.

In a case which occurred early in 2001, the son of a well-known member of parliament was arrested outside a popular nightclub in a police sting operation. He and the manager of the nightclub had attempted to sell cocaine to police officers in the early hours of the morning. The nightclub was closed on the orders of the police despite its owner’s protestations of innocence. The politician’s ‘S’ class Mercedes Benz motor vehicle, which his son had been using, was impounded.

These cases show that Namibia is not only being used as a transit route for drugs to South Africa, but that some of the drugs are actually consumed locally.

*Illegal diamond-dealing*

Namibia has been a diamond producer for several decades, and is one of the highest gem quality diamond producers in the world. Because of the very high value attached to diamonds and the lucrative profits that can readily be made illegally if a person has access to diamonds, it is not surprising that this is an area in which organised criminal activity is rampant. The diamond industry is a heavily regulated environment, underscoring the importance attached to it by the state.

The range of crimes provided for under successive legislation has increased in proportion to the perceived need to protect the industry. Draconian penalties are provided for would-be offenders. Strict controls are required from all operators in the industry and severe penalties are imposed for failure to maintain the prescribed standards.

Notwithstanding this, however, diamonds are still stolen through various means and dealt with outside the normal channels. Cases that have come before the courts suggest the involvement of organised crime syndicates in the theft and marketing of diamonds. There is an undoubted international dimension to the illegal trade in diamonds. In the experience of Namibia, some of the illegal buyers are from Europe, the Middle East, South Africa and Angola. The involvement of foreign buyers is indicative of the fact that there are effective communication channels between locals and foreigners. It is therefore apparent that, in order to increase the rate of detection and interdiction, advanced methods of surveillance including wire-tapping are
necessary.

Problems of detection make it imperative for diamond-mining companies and the Protected Resources Unit of the police to offer incentives to their security officers and informants to obtain information on who is involved and when deals are about to be made. This entails the use of traps to detect and apprehend offenders. In a number of instances, some traps have had tragic consequences.

**Burglary**

As is the case with many countries in transition, burglary is one of the most prevalent crimes in Namibia. The cases investigated by the police show that this is a serious problem for the community. The mushrooming of private security companies and the faith placed in and reliance on them by the public are clear indications of a proliferation of the problem, especially in urban areas.

In most reported cases, there has always been evidence of the involvement of more than one person and the use of vehicles such as taxis.

Burglars are invariably attracted to electronic equipment such as sound systems, televisions, video cassette recorders, computers and microwave ovens, which are easy to remove and to dispose of or sell. Most of the stolen goods are never recovered, suggesting a low risk of detection and apprehension which, in turn, encourages criminals to commit more burglaries.

In many instances, the police do not have leads, such as fingerprint evidence and, as such, have to rely on information. However, Namibian society tends to shun those who inform on others. This is perhaps attributable to the country’s relatively recent pre-independence history. This makes the task of law enforcement extremely difficult.

The stolen goods are usually sold far away from the place where the theft was committed. These goods are normally taken to the former Ovamboland in the extreme north of the country. Some goods are even exported to Angola. Police sources believe that Angolans and Namibians are involved in these activities at an organised level.

Many a suspect absconds to Angola, a country with which Namibia does not have formal extradition arrangements, thus frustrating efforts at mounting successful prosecutions. The unfavourable political and military situation between the two countries compounds the problem.

**Fraud and corruption in state institutions**

Low levels of qualified and experienced public servants afflict the Namibian public service. This is a historical problem that will take some time to address. The situation, however, leaves itself open to manipulation by criminally inclined persons from within and without the public service.

In the nature of government operations, business is conducted through a series of processes and transactions involving different persons at different stages. In the process, different ministries have to work together. At the same time, contacts are established between officials in different ministries or departments. While this may assist in the expeditious processing of government business, it may also have the unintended consequence of fostering relationships conducive to fraud and corruption.
In the presence of inadequate controls and systems, connivance between officials and misplaced trust can facilitate the commission of crime.

The Ministry of Finance, which effects all government payments is particularly vulnerable. In a number of cases, employees of other ministries have successfully created ghost employees and pensioners and submitted requests for payment. In other cases, fraudulent claims for payment for services not rendered have been made.

In several fraudulent medical aid claims, accounts prepared by individuals, sometimes with the collusion of pharmacists and doctors, have been paid. In a recently detected case, a pharmacist established a credit facility for her customers in terms of which they could buy any of the products in stock on credit. As the pharmacist was also in the business of stocking items such as electronic goods and toiletries, customers could even buy a television set on credit. As their levels of indebtedness increased, customers were instructed to authorise the pharmacy to recover the monies through submissions of false medical aid claims. They were encouraged to do this by signing blank claim forms. Further, medical prescriptions were forged so that they could be repeated several times or by making additions to the medicine genuinely prescribed. The pharmacist then prepared the claims and submitted them to the ministry with instructions for the collection of the cheques when ready or their postage to specific addresses. She also cultivated a network of collaborators in the ministry who hastened the processing of claims, frequently circumventing established procedures and even collecting the cheques themselves for delivery to the pharmacist. The cheques would then be deposited into accounts owned or controlled by the pharmacist and immediate members of her family. The banks facilitated the deposits, notwithstanding the fact that the account holders and payees, as stated on the cheques, differed. Some of the cheques were fraudulently endorsed to another person to facilitate deposit and clearance. Other cheques were simply used to purchase goods in supermarkets in order to obtain cash. The shops involved never asked questions or obtained identification of the persons cashing the cheques. Cheques were also deposited into accounts held in the names of untraced and untraceable people. Almost N$2 million was stolen in this way.

Upon investigation, it was found that bank officials who opened the accounts did not follow proper procedures. For example, unacceptable forms of identification were used, suggesting collusion with employees of the banking institutions. Automatic teller machine cards were issued, facilitating withdrawals which, in many instances, were done in a short period of time. Although the ‘patients’ knew what was going on, they did not have insight into the details and, even if they came to know later on, they were inhibited from raising the hue and cry because they risked being prosecuted.

When the matter came to light, the pharmacist, who is believed to be a South African citizen, fled to Cape Town where she is suspected to be taking refuge.

It is not uncommon for many people residing in Namibia to hold South African citizenship and after committing crimes that are detected, flee to South Africa.

Over the years, extradition of such people has proven to be almost impossible, despite the existence of formal extradition arrangements between Namibia and South Africa.

One of the biggest scams involving public finances occurred in 1992 when the government set up a subsidy scheme to assist drought-stricken farmers. In terms of the scheme, needy farmers were to be identified by agricultural extension officers. They had to complete certain forms that,
among other details, indicated how many head of cattle they owned. An important requirement under the scheme was that the farmers had to provide a contribution of 10% of their calculated needs, which they were to pay upfront when making a purchase of stockfeed from suppliers. The supplier would provide the stockfeed and claim the balance from the government through the Ministry of Agriculture. The majority of farmers, predominantly small-scale indigenous farmers, failed to raise their contribution. Instead, they claimed the proportion of their contribution in cash from the suppliers, obtained little or no stockfeed and surrendered the claim forms to the suppliers who then claimed the full 100% from the government as if supplies had been provided. In this way, the unscrupulous suppliers and the farmers colluded in defrauding the government of more than N$6 million.

During the prosecution of the suppliers, the key state witnesses were all accomplices. In many instances, it was impossible to prove the non-delivery of stockfeed as the indigenous farmers did not give reliable testimony and documentary evidence was missing. To make matters worse, the accused approached certain witnesses to influence their testimony in court, conduct which led to further charges against them. Towards the conclusion of the trial, the offices of the prosecutor and the presiding magistrate were broken into. The crime docket, the manual record of the proceedings and the sound recordings were all stolen. The culprit was never found and, following an arduous reconstruction of the record, the accused were all acquitted.

These examples indicate that organised criminal activity is prevalent in Namibia at both local and transnational levels. They also highlight some of the conditions that facilitate the perpetration of organised crime.

As pointed out earlier, most of this kind of criminal conduct is chargeable under one or more of the recognised common law crimes. Where this is not possible or insufficient, the common law is supplemented by legislation.

Namibian legislation and organised crime

Namibia gained independence from South Africa in 1990. Since then, new legislation has been passed by the legislature. Some of the legislation has broken new ground in addressing issues of public importance not previously dealt with, while other legislation has been passed to repeal and replace colonial legislation. In addition, numerous colonial statutes are still part of Namibian law, for example, the Criminal Procedure Act (Act no 51 of 1977).

Organised criminal activity is primarily preoccupied with making financial profit. Thus, it is prevalent in those sectors of commercial enterprise where maximum financial gain can be achieved with minimum effort. In these sectors, Namibia has some significant legislation in force. However, the legislation does not appear to have been passed with the specific aim and object of combating organised crime. It would rather have been enacted to address a specific area of public interest, but can incidentally be utilised to combat organised crime. Such provisions may pertain to the creation of criminal offences and penalties and the imposition of regulatory measures.

Because of this, modern thinking about the nature and various forms of organised crime, its incidence, methods of detection, interdiction and prosecution is not adequately encapsulated in the respective provisions. Some of the legislation is inherited from previous legislatures, while other legislation is post-independence.

Commercial and financial legislation
Examples of useful legislation in the commercial and financial services sector include the following:

- Banking Institutions Act (Act 2 of 1998);
- Bank of Namibia Act (Act 13 of 1997);
- Customs and Excise Act (Act 20 of 1998); and

The Bank of Namibia Act establishes the mother bank and provides for other matters related to the currency of Namibia and counterfeiting offences. The powers of the Bank and its relationship with other banking institutions, as well as the obligations of these banks are set out in the Banking Institutions Act.

It is well-known that organised criminal groups have an interest in the legitimisation of the profits of criminal enterprise. This means that they have to funnel such profits through legitimate financial channels and banking institutions.

The integrity of the financial services sector is seriously undermined if it allows ill-gotten gains to find their way into the legitimate market. To this end, a well-regulated financial services sector is not only important to frustrate the efforts of criminals, but also for public confidence in the banking sector.

**The Banking Institutions Act (Act 2 of 1998)**

The Act makes provision for the authorisation of persons to conduct business as a banking institution; the control, supervision and regulation of banking institutions; and the protection of the interests of depositors, among others.

The powers of the Bank of Namibia with regard to its relationship with banking institutions are set out. These include powers to grant banking licences and to investigate instances of illegal banking activity. In the exercise of such powers, the Bank can question persons including auditors, directors, members and partners, to compel the production of books and documents, to examine such documents and books and call for explanations, and to order banking institutions to freeze accounts and retention of money pending further instructions. The Bank also has the power to suspend operations or, in the event of conviction under the Act for illegal banking activity, to close down the business.

The Bank may also call upon the police for assistance in the enforcement of its powers, and has wide powers to enter, search and seize evidence.

To protect the integrity of the financial sector, the Bank has the power to inquire into the integrity of any person seeking to acquire or control a banking institution. The Bank will only approve if it is satisfied that the person is fit and proper.

The Bank can also prohibit a person from acquiring or exercising control by written notice if the individual concerned is not a fit and proper person in its opinion. Hence, the Bank can protect the banking sector from infiltration or control by organised crime syndicates. Furthermore, the Bank has the power to examine the financial affairs of any banking institution to ascertain its liquidity and viability.

The Bank has the power to require banking institutions to report to it or any person or authority
specified by it any suspicious financial transaction that may indicate that the person involved in the transaction may be engaged in an illegal activity. This provision is useful as it facilitates the tracing of the proceeds of crime and helps to establish an audit trail in the event of a criminal investigation.²

Concerning bank secrecy and confidentiality, the Bank is authorised to disclose information acquired by it, subject to the confidentiality of the information transmitted, to an authority in Namibia or in a foreign state which has supervisory responsibilities in respect of financial institutions. In this respect, the Bank can be of assistance in the process of obtaining evidence.

Banking institutions are also required to obtain and maintain details of their customers meticulously. This enables banks to know their customers, which may help to control money-laundering.³

Although directors or officers of banking institutions are bound to secrecy and confidentiality, an exception is recognised in the disclosure for the purpose of instituting criminal proceedings or in the course of such proceedings, or if disclosure is otherwise permitted in terms of the provisions of the Act or by any other law.

Banking institutions are also authorised to disclose information to a police officer investigating an offence under a law. The disclosure of such information is limited to the affairs or account of the customer who is a suspect in the investigation.

It is clear that the Act has useful provisions which may be utilised to combat organised crime. These include the powers to freeze accounts, compel disclosure, and to impose reporting obligations on banks.

The Bank has the power under section 71(3)(b) of the Banking Institutions Act to issue general determinations on any matter for the proper regulation of the financial sector. Using this authority, the governor of the Bank of Namibia issued General Determinations on Fraud and other Economic Crime Government Notice No 16 of 1999, and published them in the Government Gazette of 15 January 1999. In an introductory overview, the governor wrote:

"Given the growing incidence of fraud and other forms of financial and economic crime in a global perspective, banking institutions should be continually vigilant against such undesirable activities. Apart from causing financial loss to the banking institutions the various forms of economic crime may have far reaching consequences, not only to the afflicted banking institution but can also undermine public confidence in the banking system. Banking institutions are therefore required to bolster their surveillance systems and institute adequate and appropriate internal controls in combating fraud.

While it is accepted that there are costs attached in stepping up anti-fraud efforts and in placing improved control mechanisms, banking institutions should bear in mind that their costs represent additional barriers and hence costs to the criminal also. The prevention of fraud and other forms of economic crime should be regarded as part of risk management.

Given the far reaching consequences of fraud, the Bank of Namibia deems necessary the setting up of a reporting mechanism and a database on the perpetration of these activities in Namibia. It is envisaged that the reporting
mechanism and the database will constitute an effective means to monitor and keep abreast of these undesirable activities and to coordinate measures and develop strategies in the war against economic crime."

In terms of this determination, banking institutions are obliged to report to the Bank any fraudulent or criminal activity, or attempted criminal activity perpetrated against and involving the banking institutions whether by insiders or outsiders.

Banking institutions must report:

- each individual case involving an amount of N$10 000 or more within 14 days of detection of the fraud or attempted fraud;
- the amount estimated to be recovered including from any claim against a third party such as insurance; and
- immediately by telephone or otherwise, any fraud perpetrated upon the institution involving an amount exceeding N$500 000.

Inquiries to the Bank raised some interesting issues relating to the attitudes of banking institutions. It was reported that most banking institutions prefer to report to their principal offices in South Africa instead of the Bank of Namibia. It was not clear whether this is engendered by a lack of confidence in the central Bank or historical practices. It was pointed out that the fact that the Bank is a relatively new institution with little experience may be a contributory factor.

However, an instance involving a report made to the Bank concerning millions of dollars which passed through the account of a Chinese trinket shop within a short period of time, was cited as one example where a banking institution did report the suspicious movement of money. The matter was not pursued and therefore it is not known whether the money was the proceeds of criminal activity being laundered or not.

The fact that activity on the account was monitored and reported demonstrates that the system can be utilised to target criminal activity and facilitate the creation of an audit trail. It also demonstrates that banking institutions in Namibia are not immune to international criminal activity.

In an article in the Hume papers, Tom Sherman wrote:

"virtually no type of financial institution is immune from money laundering — the more so as anti-laundering measures are brought into effect in the banking sector."  

One noteworthy criticism of the Banking Institutions Act is the fact that it does not cover other financial institutions that are not banks. There appears to be a need for more legislation in this area.

It has been pointed out that organised criminal activity can cut across the whole spectrum of the financial sector. Detective Chief Inspector Hill wrote in an article:

"The examples given are intended to focus on all stages of the money laundering cycle: placement, layering and integration. It is not just banks, but all types of financial institutions, both in the financial sector and outside which may be used by
money launderers."

The Prevention of Counterfeiting of Currency Act (Act 16 of 1965)

This is an Act of the South African parliament which is still applicable in Namibia. It was specifically made applicable to South West Africa (Namibia) at the time of promulgation. It deals comprehensively with offences related to the counterfeiting of current notes and coins. It includes the performance of any part of the process of counterfeiting, forgery, uttering, illegal importation and exportation of counterfeit coins and notes; the possession of counterfeit tools and equipment; and fraudulent conduct related to counterfeit currency. Severe prison terms are stipulated. There is no provision for fines.

The Act also provides for extraditable currency offences in certain circumstances. If the Republic of South Africa acceded to the Geneva Convention for the Suppression of Counterfeiting Currency (1929), and a person is accused or has been convicted in the jurisdiction of a foreign state of specified counterfeiting offences, and an extradition treaty is in force with such a state and this state has signed and ratified or acceded to the Convention, such a person may be surrendered to the state in question.

In prosecutions for the illegal importation, exportation or possession of gold or silver bullion and dust solution, among others, the onus of proving lawful authority is shifted to the accused. With regard to the provisions of the Constitution of Namibia and existing decisions, it is probable that the Supreme Court would strike down this provision as being unconstitutional.

This Act is particularly relevant in Namibia because there is a high incidence of counterfeit currency, particularly US dollars, because of the unstable situation in Angola and the Democratic Republic of Congo, where monetary transactions have to be conducted in US currency. There is therefore substantial movement and informal trading between Angola, in particular, and Namibia, and many instances of counterfeit US dollars being found in Namibia suggest organised trafficking and importation.

Currency and Exchanges Act (Act 9 of 1933) and Exchange Control Regulations (GN 111/95)

These are also South African statutes which are still applicable in Namibia. They provide the regulatory framework for exchange control and offences which may be committed in this sector.

The Bank of Namibia is responsible for the administration of the Act. It does so by issuing directives to banking institutions concerning exchange controls, including directives on issues relating to procedures to be followed where money is exported, limitations of amounts, and other restrictions. On a day-to-day basis, banking institutions are responsible for applying to the Bank for exchange control authority on behalf of their customers. These provisions may help to prevent capital flight and money-laundering.

Customs and Excise Act (Act 20 of 1998)

This Act contains a number of provisions which can be used to combat transnational organised crime. The movement of persons and goods across borders can be a feature of organised criminal activity. In this respect, provision is made to deal with incidents of smuggling under section 14.

Persons entering or leaving Namibia are required to declare ‘unreservedly’, at the time of entry,
all goods in their possession which were purchased or acquired outside Namibia, or were remodelled or repaired outside Namibia or which are prohibited, restricted or controlled under any law. On departure, all goods being exported must also be declared. Such persons are required to comply with any request or instruction of a customs officer and, where necessary, to pay the relevant duty. The controller has the power to detain persons suspected of violating the provisions of the Act until their appearance in court.

Failure to comply with the provisions of section 14 is a criminal offence in terms of section 91. Severe penalties are stipulated. An offender may be liable for a fine of up to N$8 000 or to an amount three times the value of the goods, whichever is the greater, or to imprisonment of up to two years, or to both the fine and imprisonment. The goods involved are liable to forfeiture.

A number of arrests have been made recently of foreign nationals attempting to export illicit drugs, particularly methaqualone (mandrax), marijuana and cocaine, from Namibia to South Africa. While it has been obvious that Namibia was not the source of the drugs, it has been assumed logically that such drugs have been imported into Namibia overland from neighbouring countries for onward transfer to South Africa where there is a market. Thus, Namibia has been used more as a transit state than a final destination for illicit drugs. Evidence suggests that the tide is changing.

Criminals have taken advantage of the fact that Namibia has relatively little experience in customs regulation and enforcement. Furthermore, the national police service has severe limitations in terms of functioning as a police force, let alone to combat organised criminal activity. Prior to independence, there was no independent customs regime for South West Africa. The South African Customs Department was responsible for South West Africa. A Namibian customs department was only established after the country gained full independence in 1990. This also explains why the Namibian legislation was only promulgated in 1998.

Criminals have also taken advantage of the fact that Namibia is a vast, sparsely populated country with land borders that are not well staffed.

One case which fell under the provisions of sections 14 and 91 of the Act, was the case of the State v Gallit Kramash 7. The state had difficulty to prove that the accused had the requisite mens rea in the sense of knowledge of unlawfulness when she entered Namibia with 27 kilograms of diamonds and failed to declare them to customs at the Windhoek International Airport, despite the suspicious circumstances under which she entered Namibia from Angola. Had she been carrying drugs, the result would probably have been the same.

Customs officials are authorised to open and examine any container or package in the absence of the importer or exporter. Before doing so, all reasonable efforts must be made to find the importer or exporter to appear and be present when containers are opened. It appears that this provision contemplated genuine and legitimate importers and exporters. However, the fact that customs officials have such power is useful. The one criticism against the provision is that it does not go far enough to authorise the interception, opening, resealing and continued passage of parcels containing illicit goods such as drugs to their intended destination with the ultimate objective of identifying persons engaged in criminal activity in the ‘controlled delivery’ situation. An insertion of a provision clearly spelling this out would be beneficial.

Other provisions make it a criminal offence to reward any officer or any person employed by the government in respect of the performance by such official or person of his or her duties of employment, or to conspire with such a person, as well as for the converse situation where an
official or government employee solicits a bribe. Thus, conduct of a corrupt nature is specifically addressed in the Act.

The penalty provisions for offences under the Act are generally framed with the specific objective of financially taxing the offender as these offences are profit-motivated.

A provision which implicitly touches on the issue of organised crime within the localised environment of customs control provides that any person who makes or attempts to make any agreement with a supplier, manufacturer, exporter or seller of goods imported or to be imported into, or manufactured or to be manufactured in Namibia or any agent of such, regarding any matter to which the Act relates with the object of defeating or evading any provision of the Act commits an offence. The penalty is a fine of up to N$20 000 or three times the value of the goods, whichever is the greater, and/or imprisonment and forfeiture of the goods.

**Anti-Corruption law**

*Prevention of Corruption Ordinance (No 2 of 1928) as amended by the Prevention of Corruption Amendment Act (Act 21 of 1985)*

This Ordinance was initially passed by the South West African Legislative Assembly in 1928. Section 2 of the amendment of 1985, which substituted the original, created three offences that were intended to supplement the common law crime of bribery by introducing bribery offences in respect of agents.

Firstly, it is an offence for any person who is an agent to accept a gift as an inducement or reward for corruptly doing or not doing any act in relation to his or her principal’s affairs or business or for showing or not showing favour to any person in connection with the principal’s affairs or business. Secondly, it is an offence for any person to give or agree to give or offer gifts to agents for the same purpose as above. Thirdly, it is an offence for any person to give to an agent or, in the case of an agent, knowingly to use with an intent to deceive a principal, any account, receipt or other document in which the principal has an interest, containing false information and which, to his or her knowledge, is intended to mislead the principal. The penalties in respect of all three situations are the same as those which may be imposed for the common law crime of bribery.

In a real sense, these were progressive provisions at the time, as they dealt with a grey area of criminal conduct that regularly occurs, by its very nature or form, on an organised basis. On the other hand, these provisions do not go far enough to deal with the numerous kinds of undesirable conduct associated with white-collar crime. For example:

- The Ordinance does not address situations where agents by arrangement with sellers of goods or with persons hired to render services, secretly obtain gifts or advantage through the abuse of their position in carrying out the affairs or business of principals.

- It does not deal with the converse situation of sellers of goods or persons rendering services who offer secret inducements whether in kind or cash to agents in matters affecting the affairs or business of their principals.

- It does not address situations where an agent fails to disclose to his or her principal the full nature of a transaction carried out in connection with the business or affairs of a principal, with the intent either to deceive the principal or to obtain any gift or consideration for him
or herself or another person.

In many instances of corruption, the passing of money, property, gifts or favours is rarely capable of actual proof. Thus, it is necessary to criminalise conduct where certain acts carried out with corrupt intent can be proven notwithstanding the fact that the actual receipt of a gift or consideration cannot be established. It is also important to penalise conduct which is akin to fraud, but where some but not all elements of the common law crime of fraud are present such as the third situation mentioned above.

Even as the statute stands, it does not make provision for the penalty to include the forfeiture of gifts or consideration involved, or to give summary judgement in favour of a principal for loss or damage suffered as a consequence of the acts of corrupt agents in their relations with customers or clients of the principal's business. These measures would have a deterrent effect, as well as compensate principals for loss or damage.

It is submitted that the Ordinance needs further fine-tuning to incorporate the undesirable conduct of public officials. This refers to the abuse of power by doing anything which is contrary or inconsistent with the duty of such an official, or omitting to do anything which is a duty of a public official for the purpose of showing favour or disfavour to another person.

The Act should also address the question of the disclosure of receipts of gifts by public officials from persons whom they have either dealt with or are likely to have dealings with in the course of their normal duty as public officials. Failure to disclose should be made a criminal offence. Where disclosure is forthcoming, the modalities of handling the issue — whether the public official should be allowed to retain or surrender the gift — should be left in the discretion of heads of relevant ministries.

The Act should also cater for the examination of claims arising from general dishonesty or corruption by creating a mechanism temporarily to divest offenders or suspects in very serious cases of public interest of control over their financial affairs. This could occur through declarations as specified persons and appointing investigators with powers to question, compel the production of evidence, records and documents during such an investigation. Finally, a report should be produced aimed at recovering any loss or damage suffered by members of the public. This process would be akin to provisional liquidation procedures or judicial management and pre-empt or prevent the stripping or disposal of tainted assets.

An example of a fairly effective piece of anti-corruption legislation is the Prevention of Corruption Act (chapter 9:16) of Zimbabwe, which is recommended as a useful reference.

It is further recommended that Namibia should harmonise this legislation (indeed other legislation as well) with that of its fellow SADC countries to ensure uniformity of the measures to combat organised crime at local and interstate level.

It is noteworthy that the president of Namibia stated in a speech to parliament that a new anti-corruption bill will be tabled before parliament during 2001.

**Public Service Act (Act 13 of 1995)**

Among other matters, this Act also deals with acts of misconduct by public officials. An official is guilty of misconduct if he or she accepts or demands in respect of the performance of or the failure to perform his or her duties any commission, fee or reward, pecuniary or otherwise, to
which he or she is not entitled by virtue of his or her office, or fails to report forthwith to the Permanent Secretary concerned the offer of any such a commission, fee or reward.

The matter is dealt with as an issue of misconduct rather than a criminal offence. In this respect, the provision is complementary to the provision of the Prevention of Corruption Ordinance. A public official is liable to a disciplinary penalty for misconduct, as well as a criminal charge if he or she acted corruptly.

**Constitutional structures in Namibia**

*The Ombudsman*

Article 91 of the Constitution outlines the functions of the Ombudsman:

"The functions of the Ombudsman are to be defined by an Act of Parliament and shall include the following:

the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of Government (whether national or local), manifest injustice, or corruption or conduct by such official which would properly be regarded as unlawful, oppressive or unfair in a democratic society."

The Ombudsman is required in article 91(1)(e)(cc) to refer such a matter, where appropriate, to the Prosecutor-General.

In Article 91(1)(f), the Ombudsman is mandated:

"to investigate vigorously all instances of alleged or suspected corruption and the misappropriation of public monies by officials and to take appropriate steps, including reports to the Prosecutor-General and the Auditor-General."

*Prosecutor-General*

The Prosecutor-General is empowered in article 88 of the Constitution to prosecute in the name of the state in criminal proceedings in the High and Supreme Court. He or she is further empowered to perform all functions relating to the exercise of such powers, and to perform all such other functions as may be ascribed to him or her by any other law. It is implied in these provisions, including those dealing with the powers and functions of the Ombudsman, that both the Ombudsman and the Prosecutor-General have authority in respect of matters involving corruption.

A highly publicised case of alleged corruption involved the Minister of Fisheries in 1999. The minister is responsible for the allocation of fishing quotas. When he decided to get married and to have a public wedding, organisers of the event opened a bank account and approached various fishing companies for donations. The fishing companies donated generously, with the result that the minister hosted two wedding ceremonies, thereby achieving a feat without precedent in Namibia. In view of his official responsibilities, questions were raised whether there was any conflict of interest or corruption. The matter attracted such wide public interest and concern that the Ombudsman was called upon to investigate.
The minister denied any wrongdoing or knowledge of the actions of his fund raisers. Cabinet colleagues and the president himself publicly defended him. The Ombudsman's report was never made public and the matter somehow died a natural death. Questions probably still linger in the minds of the public concerning the propriety of the conduct of not only the fund raisers, but also of the minister.

**International legislative regimes**

Independent Namibia has also acceded to and ratified several United Nations conventions and SADC protocols.

**Protocols and conventions**

Namibia signed the Agreement in respect of Cooperation and Mutual Assistance in the Field of Crime Combating on 1 October 1997. It ratified the agreement on 10 June 1998.


However, Namibia has neither signed nor acceded to the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). For Namibia and indeed all the SADC countries, the 1988 Convention is the single most comprehensive multilateral treaty or agreement that forms part of efforts to combat current forms of organised criminal activity.

It enjoins member states to accede as soon as possible to all three drug control-related UN conventions (article 3). It further requires member states to promulgate and adopt domestic legislation to give full effect to the provisions of the Protocol, such as laws:

- to tackle drug-trafficking, money-laundering, the diversion of chemical precursors, conspiracy, incitement and instigation of drug abuse;

- to provide maximum custodial sentencing to serve as a deterrent and facilitate rehabilitation;

- to provide for proper accounting of the destruction of seized or confiscated drugs to prevent recycling;

- to provide effective measures for dealing with the proceeds of illicit drug-trafficking including the tracing, freezing, seizure, confiscation and forfeiture of the proceeds, including instrumentalities (equipment);

- to render mutual assistance in respect of illicit trafficking for investigations, confiscation, prosecutions and measures for the proportionate sharing among member states of forfeited assets;

- to provide for laws to facilitate extradition between member states;
to provide for the prevention and detection of money-laundering from the proceeds of illicit drug-dealing;

to provide for controlled delivery; and

to provide for measures to curb corruption resulting from illicit drug-trafficking, including the establishment of independent anti-corruption agencies, administrative and regulatory mechanisms for the prevention of corruption and the abuse of power, the strengthening and harmonising of criminal laws and procedures to curb corruption, the adoption of procedures for the detection, investigation, prosecution and conviction of corrupt persons and accomplices as well as the protection of witnesses, freezing, forfeiture and confiscation of property and money acquired through corruption, rendering mutual legal assistance in investigations of corruption and resultant prosecutions, effective channels of communication for members of the public to report corruption, obligatory disclosure of assets and investments by persons under suspicion of corruption and their dependants or associates, and for improved banking and financial regulations and mechanisms to prevent capital flight and tax and customs duty evasion (article 8).

It is clear that the SADC protocol incorporates, by reference, the 1988 UN Convention with all its progressive provisions. To this end, it can be utilised by member states to combat illicit drug-trafficking, an area where organised criminal groups operate, as a basis for mutual assistance in the absence of reciprocal bilateral agreements, as it is a binding treaty between member states. This is an option not always understood and thus not always utilised.

The SADC protocol also stipulates that member states should harmonise their domestic legislation and applicable penalties among themselves to ensure uniformity and prevent a situation where one or more states become weak links in the chain, and potential points of exploitation by unscrupulous criminals.

This SADC protocol, however, is only concerned with issues relevant to illicit drug-trafficking. It does not address serious economic crime in general.

At the operational level, the Protocol enjoins member states to establish mechanisms for co-operation among law enforcement agencies, including effective and speedy channels for the communication of information. It also requires them to provide effective infrastructure, such as search and inspection facilities at customs ports and multidisciplinary drug units. States should formulate specialised training courses for drug enforcement units, and co-operate with international organisations such as Interpol, UNDCP, WCO and INCB (article 6). The Protocol also urges the adoption and implementation of effective demand reduction measures (article 7).

Among others, the following aspects of organised criminal enterprise are also not addressed:

- the control of precursors and chemicals frequently used in the manufacture of narcotic drugs and psychotropic substances;
- controlled delivery as a tool in the identification of offenders;
- money-laundering;
- mutual assistance in criminal matters;
- extradition of offenders;
- transfer of convicted offenders to serve prison terms in their home countries;
- demand reduction;
• corruption;
• effective law enforcement;
• electronic monitoring and surveillance, including wire-tapping; and
• monitoring of bank accounts.

Abuse of Dependence-Producing Substances and Rehabilitation Centres Act (Act 41 of 1971)

Notwithstanding its obligations under the SADC Protocol, Namibia is still relying on the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act (No 41 of 1971). The Act is outdated and does not accommodate current legal philosophy on the subject and the methods of effectively dealing with drug control, abuse and illicit trafficking which are enshrined in the 1988 UN Convention and the SADC Protocol.

This Act has been amended on several occasions since its promulgation, notably by the Abuse of Dependence-producing Substances and Rehabilitation Centres Amendment Act (No 80 of 1973), the Mental, Dental and Supplementary Health Service Professions Act (No 56 of 1974), the Abuse of Dependence-Producing Substances and Rehabilitation Centres Amendment Act (No 14 of 1977) and the Criminal Procedure Act (No 51 of 1977).

The Act prohibits dealing in or the use of dependence-producing drugs, imposing a duty on owners and operators of entertainment premises to report drug activities on their premises to the police. It also provides for the forfeiture of the property and money of persons convicted under the Act, the cancellation of entertainment licences, the creation of presumptions for evidentiary purposes where certain facts are proved, the removal from the jurisdiction of persons who are non-citizens deemed to be undesirable residents, and the detention of persons in possession of information relating to drug-dealing, but who are unwilling to co-operate with law enforcement officers. It also empowers the state to establish rehabilitation centres and hostels.

Severe penalties are stipulated by the Act. These include lengthy prison sentences and heavy fines. Further, courts may order the forfeiture of:

• drugs and plants from which dependence-producing drugs can be manufactured;

• any vehicle, vessel, aircraft, receptacle or thing which was used in the commission of the offence or for removing or conveying of drugs; and

• immovable property which was used for the purpose of the commission of the offence, or the rights of the convicted person in the property, for example, owners or operators of entertainment premises such as night clubs, who allow the consumption of or dealing in drugs on their business premises, or persons who provide safe houses to drug dealers for the purpose of custody and illegal drug deals.

In the event of a second or subsequent conviction, the court can order the forfeiture of any money found in the possession of the convicted person or which is standing to his or her credit in a bank account or other savings account.

The forfeiture provisions are important as they are aimed at punishing the offender financially. The primary motivation for illicit drug-dealing is monetary profit. The imperative to address the issue of the proceeds of crime as a necessary ingredient of effective drug law enforcement appears to have been appreciated fairly early in the evolution of anti-drug legislation.
The Act also creates certain basic fact presumptions designed to ease prosecution by casting an evidentiary duty on the accused to show on a balance of probabilities the falsity of the inference suggested by the facts. Some of the presumptions are:

- If an accused is found in possession of dagga exceeding 115 grams in mass or any dependence-producing drugs, it is presumed that the accused dealt in dagga or drugs unless the contrary is proven.

- If it is proven that the accused was the owner or occupier or manager of property of cultivated land on which dagga plants were found, a presumption arises, unless the contrary is proven, that he or she was aware or could reasonably have known and by extension did know and thus dealt in dagga.

- An owner or operator of entertainment premises is presumed to have been aware of violations of the Act if it is proven that some person, while on the premises, used, possessed or dealt in drugs unless the contrary is proven or it is found that reasonable precautions were taken to prevent this.

There are other presumptions which are not repeated here. As the Namibian Constitution has a justiciable Bill of Rights, it remains to be seen whether these presumptions can withstand constitutional challenges that they are in conflict with the presumption of innocence and the incidence of the onus of proof.

In terms of section 11 of the Act, police officers have wide powers to carry out warrantless intrusions of places, vehicles, vessels, aircraft, and others, and of search and seizure and the interrogation of suspects upon a reasonable suspicion of the commission of a drug offence. Again, in the context of a constitutional human rights regime, it is possible that these provisions may be successfully challenged.

Similarly, a provision which empowers the relevant minister to expel non-citizens from the jurisdiction whether or not they are lawfully domiciled in the country, because the minister deems him or her to be an ‘undesirable inhabitant’, probably belongs to another historical era and would not be upheld by the courts.

Issues such as controlled delivery, the use of judicially sanctioned surveillance where wire-tapping is concerned, money-laundering, the confiscation of the proceeds of drug-related criminal activity or other tainted property and corruption offences related to drugs should be addressed in any new legislation.

The issue of organised crime as contemplated in the UN Convention Against Transnational Organised Crime should specifically be addressed.

**Extradition Act (Act 11 of 1996)**

The Act came into effect on 1 August 1996. It provides for the extradition of persons accused of crimes committed in certain other countries. These countries have either entered into an extradition agreement with Namibia in terms of the Act, or are countries which have been specified and to which the provisions of the Act apply. At the moment, specified countries are members of SADC and the Commonwealth. The Minister of Justice administers the Act and is the authority to which extradition requests should be directed.
Extradition is permissible only in respect of an ‘extraditable offence’, defined as an offence committed within the jurisdiction of a country which has an extradition treaty with Namibia or is a specified country. It constitutes an offence under the laws of the particular country punishable with imprisonment for a period of 12 months or more and which, had it occurred in Namibia, would have constituted an offence under Namibian law punishable by the imposition of imprisonment of 12 months or more. Thus, the principle of dual criminality is recognised.

In determining whether any conduct constitutes an extraditable offence, all the surrounding circumstances should be considered. Differences in terminology and description, categorisation, or the constituent elements of the offence, between Namibia and the requesting country are immaterial. Also immaterial is whether the offence for which extradition is sought pertains to taxation, customs duty, exchange control or any other form of fiscal regulation not enforced in Namibia.

The Namibian position is commendable, especially in view of the fact that, in the realm of organised criminal activity, the motivation is usually the acquisition of monetary gain. In cases of transnational organised crime involving the laundering of money, and in some cases of violations of exchange controls, the request for extradition may indeed be related to a contravention of exchange control statutes. In cases of the transnational shipment of goods, the relevant customs duties may have been evaded and the offender may be required by the requesting country for trial under the relevant customs legislation. In cases where the predicate crime cannot be proven, recourse to sanctions under tax laws may still ensure that the offender does not benefit from the crime.

Liability to extradition is limited, however, to persons found in Namibia who are not Namibian citizens and who are either accused of committing extraditable offences or are fugitives from justice on account of convictions of extraditable offences in the requesting countries.

Extradition is permissible for offences committed prior to the coming into effect of the Act or an applicable extradition agreement, but it is not permitted where the person was convicted in absentia. Accomplices and accessories are also liable for extradition.

Other restrictions to extradition are:

- where the person is liable to be sentenced to the death penalty, unless guarantees are provided by the requesting country that such penalty will either not be imposed or, if imposed, will not be carried out (the Namibian Constitution does not provide for capital punishment);
- where the offence has become prescribed;
- where the offence is regarded under Namibian law as having been committed in Namibia and proceedings are pending in Namibia, a final judgement has been passed, or the Prosecutor-General has decided not to prosecute or has terminated proceedings against such person; and
- where the principle of autrefois convict or acquit would be applicable.

As stated earlier, extradition is specifically prohibited where the conviction was obtained in absentia. It is not in the interests of justice to return such a person on the ground of such a conviction, or if a period of less than six months of the sentence remains to be served.
Extradition will not be permitted if the requesting country does not provide in its laws for the prohibition of secondary extradition to a third state. Finally, unless the requesting country provides in its laws or makes prior arrangements for the prosecution for an offence or offences other than the one for which extradition was sought or any lesser offence or an offence committed after extradition, such an extradition request would not be granted.

The Act provides for the prosecution and punishment in Namibia in accordance with the laws of Namibia for any extraditable offence committed or allegedly committed in the requesting country. However, prosecution is only permitted where a formal request for extradition has been requested and the Prosecutor-General has authorised such a prosecution in writing. This provision necessarily implies that the requesting country would have to submit the results of any investigation and all the available evidence, applicable statutes, and other relevant material to the Prosecutor-General through the minister in order for a prosecutorial decision to be made. In terms of the Act, in such a case and for purposes of local jurisdiction, the conduct constituting the offence is deemed to have been committed in the magisterial district of Windhoek for the purpose of trial.

Although these provisions demonstrate an intention to deal with Namibian external offenders under Namibian law, the minister has the power to authorise, in writing, a magistrate to endorse a warrant received from the requesting state for the arrest and detention of such a person pending an extradition hearing. The minister is empowered to do this only if he or she is satisfied that extradition is warranted due to the seriousness of the extraditable offence, the cost involved in bringing the necessary witnesses and other evidence to Namibia or any other circumstances justifying extradition. This flexibility allows the minister a wide discretion to determine when it may be justified to institute and ultimately extradite a Namibian.

The minister's opinion in the matter is not conclusive as a hearing is still required before a magistrate who, based on the evidence tendered, will have to be satisfied that the offence is an extraditable one; the requesting country is competent to make the request; the identity of the accused is established; the evidence adduced would be sufficient to warrant committal if the crime had been committed in Namibia; and the provisions of the Act have been complied with. Only then will the person be committed to prison pending the issue of an order for removal to the requesting state.

The general procedure to be followed in the case of requests, as well as the documentation and the facts or evidence required are stipulated and are the same in respect of Namibian and foreign citizens. The Act does not state what standard of proof is required in an extradition enquiry. A recent judgement suggests that bald allegations without more evidence will not suffice. The required standard of proof appears to be that of a prima facie case.9

The Prosecutor-General or any person thus delegated may appear at any enquiry or proceedings in the High Court (including appeals) under the Act. In practice, the state is represented by a prosecutor or prosecuting counsel at such proceedings who adduces the relevant evidence and argues the case for extradition.

The presiding magistrate has the power to discharge a person from prison if he or she is not satisfied with one or other of the issues stated in the Act, and to make his or her recommendations to the minister accordingly.

Provision is made for appeals to the High Court by any person who was subject to extradition, or by the government of the requesting country. The High Court has the power to make any order
which, in its opinion, the magistrate should have made. It may also order discharge from prison on specified grounds.

A person who is liable to extradition can waive his or her right to an enquiry to facilitate his or her expeditious extradition.

Concerning extradition to Namibia, the Act is sparse on detail. It does not spell out the circumstances in which extradition will be sought, the types of crimes, the procedures, the amount of evidence required before a request is made, who initiates such requests and other pertinent matters. It seems that this is left to the discretion of the Prosecutor-General in the exercise of his or her constitutional powers. It is also assumed that any request would need to be made on the basis of the requirements of the legal statutes of the requested state or, in the event that an extradition agreement exists, in terms of such an agreement.

In practice, such requests are processed through the minister. Extradition requests have been made only to South Africa since independence. Of these, only a handful has been successful. The primary reasons for this include a lack of understanding on the part of the officials in the local minister’s office of South African expectations, the need to authenticate documents and the fact that the Prosecutor-General, in spite of the fact that he or she is the person responsible for prosecutions, has a limited role in the process. A lack of training and experience in this area generally affects the outcome of extradition requests.

One of the most important provisions in the Act pertains to the issue of provisional warrants of arrest on grounds of urgency. This facilitates the enforcement of, for example, red letter notices issued by the International Police Commission (Interpol).

Other notable provisions relate to the authentication of foreign documents for use in evidence, the treatment of concurrent requests for extradition, legal representation and bail.

With regard to evidence specifically, no documents are admissible unless they are authenticated and are either original or certified copies. If these requirements are met, the documents are *prima facie* proof upon production of the facts stated in them in any enquiry or appeal. Bail is specifically prohibited in extradition matters.\(^\text{10}\)

Finally, subject to the rights of third parties, property found in Namibia which is proven to have been acquired as a result of the offence for which extradition has been granted, or which may be required as evidence, at the indication and expense of the requesting country, may be transferred under a magisterial order.

*International Co-operation in Criminal Matters Act (Act 9 of 2000)*

The object of the Act is to facilitate the provision of evidence, and the execution of sentences in criminal matters. It also deals with the confiscation and transfer of the proceeds of crime between Namibia and foreign states. A foreign state is defined as a state which is specified in the schedule to the Act, or which is a party to an agreement. At present, the only states mentioned in the schedule are SADC states. In terms of section 27, the Minister of Justice has the power to enter into bilateral and multilateral agreements with other states. Namibia has not yet entered into any agreement with any other state.

Broadly speaking, the Act deals with three main issues: mutual provision of evidence; mutual execution of sentences and compensatory orders; and confiscation and transfer of the proceeds
of crime. All requests by Namibia in connection with any of these matters are initiated through the issue of letters of request.

**Letters of request for the provision of evidence**

**Two situations are envisaged in this respect:**

- During proceedings in court, it appears to the court that the examination at such proceedings of a person who is in a foreign state is necessary ‘in the interests of justice’, or the attendance of the witness concerned cannot be obtained without undue delay, expense or inconvenience.

- The Court has a discretion when an application is made to issue a letter of request seeking the assistance of a foreign state in obtaining evidence for use at the proceedings.

An application is made to a judge or magistrate in chambers for a letter of request to be issued for the purpose of a criminal investigation. In this case, the judge or magistrate has to be satisfied that:

- There are reasonable grounds for believing that an offence has been committed in Namibia or that it is necessary for the purpose of determining whether an offence has been committed.

- A criminal investigation is in progress in Namibia.

- For the purpose of the investigation, it is necessary and in the interests of justice that information must be obtained from a person or authority in a foreign state.

It is not stated in the Act whether such an application can be made ex parte or on notice of motion, and whether any affidavits have to be filed and who deposes to such affidavits. Presumably, affidavits would be required of police officers or investigating officers and prosecutors. It also appears that there is no prohibition for making these applications through the chamber book or by formal appearance in chambers.

Hence, it is logical to assume that these applications can be made ex parte as notice would have detrimental consequences in many instances for the outcome of the investigations. Again, it would seem to be proper for such applications to be filed by police officers, the prosecutor or the Prosecutor-General on behalf of the police, subject to the filing of founding and supporting affidavits of police officers or any relevant persons. It is submitted that regulations for the proper administration of the Act in these respects are perhaps required.

The parties to the criminal proceedings in court have a right to submit interrogatories to the court to be incorporated in the letter of request and to appear at the examination in person or through counsel, to examine and to cross-examine witnesses in the foreign state, *provided* this is permitted by the laws of the foreign state. Similarly, where a letter is issued pursuant to a chamber application, the investigating officer may submit interrogatories to accompany the letter, appear at an examination in the foreign state and question witnesses if the law of the foreign state permits it. Letters are transmitted to the competent authorities in the foreign state through the Permanent Secretary for Justice.

Evidence obtained by way of a letter of request is deemed to be evidence under oath if it
appears that the witness was warned to tell the truth, in accordance with the laws of the foreign state. Such evidence is admissible if:

- the parties agree that it may be admitted; and

- the Court, having regard for the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the likelihood of prejudice, or any other factor which the court thinks should be considered, is of the opinion that it is in the interests of justice to admit the evidence.

If the 'interests of justice' concept is considered as not only influenced by considerations of fairness to the accused but also to the state, then it seems more probable that the courts will lean more in favour of admissibility than exclusion.

Provision is made for the handling of foreign requests in respect of evidence. They must be received through the Permanent Secretary for Justice or in the case of urgent requests, may be forwarded to the magistrate’s court within whose area of jurisdiction the witness is or resides. A request received through the Permanent Secretary must still be referred to a magistrate. The witness will then be subpoenaed to testify or produce any required record or exhibit and to be examined under oath or otherwise. The record of evidence will later be submitted to the foreign state through the Permanent Secretary.

The rights and privileges of witnesses include the right to object on the basis that, under the laws of the foreign state, they would not be compellable, an issue which the magistrate would be required to investigate.

Provision is also made for the receipt of foreign subpoenas by magistrates in Namibia who would endorse such subpoenas for execution as if issued by them. The Act enables persons in Namibia, including residents and citizens to travel to foreign states to testify if their travelling and subsistence expenses are secured in advance.

**Mutual execution of sentences and compensatory orders**

A court which has sentenced a person to pay a fine, or which has ordered a person to pay compensation for damages to another person (victim of crime), for example, in a case of fraud or motor vehicle theft, may issue a letter of request seeking the assistance of a foreign state to recover the required amount or enforce its order where the person has insufficient assets or money in Namibia, but holds property in the foreign state.

Foreign sentences and compensatory orders can also be enforced in Namibia, but they have to be registered with the clerk of court, which has the effect of making them civil judgements of the local court, and thus executable in the normal way.

**Confiscation and transfer of the proceeds of crime**

The Act provides that, where a court makes a confiscation order, it has discretion upon an application made to it, to issue a letter of request seeking the assistance of a foreign state to enforce the order if insufficient money is available in Namibia to satisfy the order and the person against whom the order is made holds property in a foreign state.

There is no requirement for a criminal conviction before the provisions of this particular Act can
be invoked.

It is apparent from this provision, as well as similar provisions mentioned earlier with regard to the enforcement of fines and compensatory orders, that the state must not only investigate and obtain sufficient evidence to prove the crime charged, but must also trace assets and proceeds of criminal activity in Namibia and abroad.

These provisions are particularly useful when dealing with economic crimes such as money-laundering, fraud and its kindred offences, and corruption, which are of an organised nature and frequently transcend territorial borders.

An important feature of these provisions is that there is no requirement for proof of a direct link between the crime and the money or property before the order becomes enforceable. This is important in many instances because the laundering of money may have been so perfected that such a nexus is difficult to establish.

As Namibia has not yet criminalised money-laundering, it is submitted that, if such legislation should be promulgated, these provisions would be useful in confiscating the proceeds of crime such as drug-trafficking offences or motor vehicle theft.

Provision is also made for the receipt, processing and registration of foreign confiscation orders with the clerk of the court. Registration has the effect of making the foreign order a civil judgement of a local court, executable in the usual way. Conviction for a criminal offence is not a necessary precondition.

The High Court of Namibia is empowered to issue restraining orders. The High Court can also issue letters of request to foreign states seeking assistance in the enforcement of such orders in respect of property held in a foreign state. It seems that the property does not have to be linked to a crime. Hence, such a restraint may have the beneficial effect of freezing assets and thus help to prevent their disposal. This may be done with a view to attach or confiscate these assets at a later stage. Conviction for a criminal offence is not a necessary precondition.

This provision contemplates that the requested state would have the legal mechanism to enforce the order or a bilateral agreement with Namibia, as Namibia would not be in a position to control the process in a foreign state. Foreign restraint orders can also be accepted in Namibia, provided the Permanent Secretary is satisfied that they are final orders not subject to review or appeal. They are forwarded to the Registrar of the High Court where they are registered. The effect is that these are made orders of the High Court of Namibia enforceable in the usual way.

Foreign depositions, affidavits, certificates, records of conviction, orders of court, copies and sworn translations are admissible in criminal proceedings if they are properly authenticated in the foreign state in the manner in which foreign documents are authenticated for the purpose of production in a Namibian court or in a manner provided for in an agreement entered into with the foreign state. For the purposes of this Act, the specified countries to which the provisions of the Act apply are listed in schedule 1 to the Act. At the moment, these are all members of SADC.

It seems clear that, for the Act to be effective, as with other laws concerned with combating transnational organised crime, complementary reciprocal legislation is required in these countries or any other state which enters into an agreement with Namibia.
Finally, although the Act empowers the minister to make regulations for the proper administration of the Act, none have so far been made. The Act has not yet come into force and it is hoped that, at least in the short term, regulations of general application will be forthcoming. In the longer term, the minister may have to make regulations specific to different states as the provision exists that enables him to do so.

**Motor Vehicle Theft Act (Act 12 of 1999)**

Motor vehicle theft has undoubtedly become one of the most serious crimes in the region. It takes many different forms, ranging from the clandestine to its more bizarre form where people are accosted at gunpoint and forced to relinquish their vehicles or are killed in the process. The latter situations have come to be known as ‘car-hijacking’.

A significant number of stolen motor vehicles are smuggled across borders, others are dismantled for spare parts, while others are simply altered to give them a different appearance or identity.

In this context, the Namibian legislature enacted the Act to combat this specific type of theft by creating statutory crimes that complement the common law crimes of theft and receiving stolen property.

Broadly speaking, the Act provides mechanisms for the control of activities in the motor industry or sector. It does so, not by redefining the common law crime of theft, but by creating additional statutory offences and regulatory controls in respect of the operations of motor dealers. It seeks to supplement and not to replace the common law of theft and receiving stolen property known to be stolen. These crimes are not re-enacted as statutory offences.

A motor dealer is defined as:

"any person who is engaged in the business of dealing in motor vehicles or motor vehicle parts, or both, and includes-

a. a manufacturer;
b. a builder;
c. an importer;
d. a repairer of motor vehicles;
e. a panel-beater of motor vehicles; and
f. in relation to a scrap-yard for motor vehicles or motor vehicle parts, or both, the owner of such scrap-yard."

Other issues of relevance are the following:

- Legislation promulgated to address an area of public concern or interest may and does incidentally contain provisions which can be utilised to combat organised crime.

- Existing legislation does not import new and current philosophies in the detection, investigation, interdiction, prevention and prosecution of crime generally and organised crime, in particular.

- Legislation, which deals with aspects of organised criminal activity contemplated by the UN Convention Against Transnational Organised Crime, inadequately addresses issues of
public concern and requires amendment or overhaul to comply with the provisions of the Convention.

- Legislation to provide victims' rights and witness protection generally simply does not exist.

- The pace of legislative reform is slow and has to be accelerated to be able to address the methods used by organised criminal groups, which are always being perfected to counter law enforcement initiatives.

- Organised criminal activity is thus not specifically targeted in any existing legislation, but is combated as part of general law enforcement.

- Existing laws may not be in harmony with one another and with the laws of states contiguous to Namibia, or with which Namibia shares a common interest and vision in the fight against crime.

What are the options?

Firstly, existing legislation could be amended to incorporate aspects of the Convention to the extent that they are relevant matters in the specific area.

The problem with this approach is that the end-result could be various provisions scattered in different pieces of legislation with the obvious result of making their effective application or enforcement difficult.

Secondly, a single piece of consolidated legislation could be passed encompassing the whole breadth of matters related to organised crime.

Finally, existing legislation could be appropriately modernised, while at the same time, new legislation is promulgated to address matters not dealt with under existing legislation such as the transfer of offenders, witness protection, and others. The new law would embrace serious crimes and money-laundering and the techniques to combat them, such as controlled delivery, electronic monitoring and surveillance, and freezing and confiscation of assets.

Recommendations

In the circumstances prevailing in Namibia, it is recommended that a comprehensive serious crimes statute should be enacted which:

- defines organised crime, as well as organised criminal and structured groups as envisaged by the Convention;

- incorporates current thinking on the various forms of organised crime;

- targets the methods used by organised criminal groups in committing economic crime;

- within the parameters of its Constitution, gives legal blessing to modern investigation techniques and the admissibility of evidence thus obtained in court, including controlled delivery, judicially supervised wire-taps, entrapment, monitoring and surveillance, the use of lie detectors, and others;
gives law enforcement officials greater and more effective powers in the interrogation of suspects and the compulsion of the production of evidentiary material or information;

addresses problems associated with the admissibility of documents;

addresses problems associated with the proof of facts within the peculiar knowledge of the accused;

creates the offence of money-laundering, and addresses the issue from the perspective of the entire financial sector and cash transactions;

seeks to attack the motivation for engaging in criminal activity by targeting the proceeds of crime and confiscating them;

facilitates applications by investigating officers for search warrants for documents and the disclosure of banking information relating to persons under investigation for serious crime and for judicial monitoring orders concerning these accounts; and

facilitates the issue of freezing orders of sufficient duration to ensure effectiveness, and the use of interlocutory interdicts such as Mareva injunctions, which makes it possible to use civil and criminal remedies in combination.

A new anti-corruption statute should also be enacted which incorporates the issues discussed earlier in this chapter and makes provision for the establishment of an independent anti-corruption agency.

Notable government efforts have been made to accelerate reform in the sphere of corruption. One of the important decisions was the establishment of an anti-corruption agency within the Office of the Prosecutor-General. Media reports indicate that the decision may have been rescinded. It is unclear what has happened since, but it is anticipated that the proposed anti-corruption bill will address this issue.

The dependence-producing drug legislation is now outdated. It should be rewritten to comply with the 1988 Convention and the SADC Protocol on Illicit Drug Trafficking. The current draft bill is completely unsatisfactory and it is hoped that it is not enacted in its present form.

A new statute to facilitate the transfer of convicted offenders from Namibia to serve prison terms in other countries is required. With regard to extradition and the implementation of the provisions of the International Cooperation in Criminal Matters Act, a single ‘competent authority’ should be established as a focal co-ordination point for implementation. This could be set up in the Attorney-General’s Office and could be staffed by a small team of legally qualified personnel with specialised training to deal with what is sometimes a complex field of international law enforcement.

At the operational level, it is recommended that a specialised investigation unit should be established in the police force. Its members should not be susceptible to the routine transfer practices endemic in the force, to ensure a build-up of a professional élite team of investigators, continuity and experience. This recommendation stems from the perception that the present Commercial Crime Unit is understaffed and overworked.
In fact, all units dedicated to organised crime in the public and private sphere, the Namibian Police, including the Commercial Crime Unit, the Syndicated Crime Unit, the Protected Resources Unit and the Drug Enforcement Unit require greater and more effective evidence-gathering powers.

To prevent costly investigative mistakes in serious investigations, these units should work in close liaison with the Prosecutor-General's office from the inception of investigations until the conclusion of a case.

It is also recommended that bail provisions have to be reviewed to make it difficult for persons accused of participation in organised criminal enterprises to be released on bail. Invariably, witnesses tend to feel unprotected and are therefore reluctant to come forward if such persons are routinely granted bail.

It is further submitted that Namibian legislation should be harmonised with that of its immediate neighbours within SADC. This is important not only with respect to the offences created, but also with regard to prescribed sentences. For example, disparities in prescribed sentences for similar crimes exist between Namibian legislation and that of its neighbours, and criminals may find it less risky to engage in criminal activity in Namibia or against Namibian interests. In the case of drug-trafficking, Namibia could well become the weak link in the chain and could be used as a conduit for drugs destined for other countries.

Conclusion

While Namibia has made remarkable progress in passing legislation in specific areas of public interest. Where it exists, it is inadequate to deal with certain aspects of organised criminal activity because it was never promulgated with the specific aim and object of addressing the problem of organised crime.

The situation could be resolved by making appropriate amendments to existing legislation where possible. In other situations where legislation simply does not exist, new and progressive legislation is necessary.

It is also necessary to enact a comprehensive serious crimes statute in which relevant aspects and measures to combat organised criminal activity not specifically dealt with in other statutes will be incorporated.

It is wiser to anticipate future problems in dealing with organised crime than to wait until the problem has proliferated out of control.

As Detective Chief Inspector Hill wrote:

"Whatever the future holds for money laundering practices, reality is that ways in which money from crime is laundered will be limited only by the imaginations, abilities and networks of launderers themselves. This is true for both the profits of crime, particularly drug trafficking and complicated major frauds. Laundering requires a washing mechanism as well as a recycling process. Banks have primarily provided the mechanisms and processes during the past ten years, but banking and non-bank financial institutions in ever-changing combinations are likely to provide both in the next decade."11
The same sentiments are true of organised criminal activity generally, which makes the problem one of grave public concern, requiring specific, adequate and effective measures at the legislative and operational level, in order to control its further development.

Notes


4. David Hume Institute, ibid, p 15.


8. A cognate provision in South African legislation was held to be unconstitutional, in S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC) (editor's note).

9. *Vito Bigione v The State High Court of Namibia* Case No CA 15/2000 (unreported).

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Chapter 7
LEGISLATION TO COMBAT ORGANISED CRIME IN LESOTHO
Sakoane Peter Sakoane

Introduction

Lesotho is a landlocked country which lies in the belly of its only neighbour, the Republic of South Africa. It shares all its borders with South Africa and conducts most of its commerce with this country. There is much movement of people, goods and services between the countries.

Most of the movement to and from South Africa is by Basotho nationals who are either traders, miners or factory workers who make their living in industries in South Africa. For all practical purposes, Lesotho is therefore an open market for goods and services emanating from South Africa.

Most of the borders between the two countries consist of easily passable rivers and poorly fenced land enabling routine and unchecked movement to the border towns, farms and villages on either side of the border.

It is within this geocommercial context that the efficacy of Lesotho’s legislative endeavours to combat organised crime has to be appreciated.

Philosophical underpinnings of legislative strategies

An analysis of legislative responses to organised crime reveals a five-pronged strategy:

- The first is to reduce and eliminate the proceeds of or benefits from participation in criminal enterprises. The strategy is to include provisions in laws that empower law enforcement agencies to seize the assets of criminal suspects and forfeit them to the state, particularly in cases of corruption, motor vehicle theft, drugs and arms-trafficking.

- The second is that of rendering unusable or non-negotiable property and finances derived from criminal activities. This is found in the money-laundering draft bill currently under discussion in Lesotho.

- The third involves the deployment of the ‘know your client’ principle which enjoins institutions to evaluate the character and activities of their customers or risk criminal
liability if they fail to do so. Such institutions include banks, professional bodies, voluntary associations, traders and dealers.

- The fourth is to make instant millionaires account for wealth that is disproportionate to their known, legitimate and above the board wealth-creating activities. In this approach, unexplained lifestyle is criminalised. This is found in corruption laws.

- The fifth is that of cross-jurisdictional co-operation and mutual assistance in evidence-gathering, the extradition of offenders and the transfer of property found in one jurisdiction that is the subject of criminal proceedings in another jurisdiction. Laws relevant to this prong would be extradition laws and mutual assistance treaties.

Legislative regimes

Participation in organised crime

Organised criminal activity is prescribed by section 183(2) of the Criminal Procedure Act (No 7 of 1981) which states that:

"Any person who

a. conspires with any other person to aid or procure the commission of an offence; or

b. incites, instigates, commands or procures any other person to commit an offence, whether at common law or against a statute or statutory regulation, is guilty of an offence and liable to the punishment to which a person convicted of actually committing that offence would be liable.

Conspiracy to commit an offence, whether under common or statutory law, arises once there is a meeting of minds. It is not necessary to prove the existence of any further acts or conduct in the execution of the agreement. The meeting of minds to commit an offence is, without more, in itself an offence.1

The following principles can be extracted from case law:2

- The gist of the offence of conspiracy lies not in doing the act, or effecting the purpose for which the conspiracy is formed, but in forming the scheme or agreement between the parties; and the external or overt act is concert, by which mutual consent to a common purpose is exchanged.

- Conspiracy envisages the involvement of not less than two conspirators as an individual cannot conspire with him or herself. Therefore, if all other conspirators are acquitted, the one remaining conspirator must also be acquitted.

- Except where two or more conspirators are charged with others who are not before the court, and it is proven that those not before the court were involved, either of the conspirators before the court may be acquitted despite the conviction of the other(s) and vice versa.

- A conspiracy does not have to be established by proof that brings the parties together, but may be shown, like any other fact, by circumstantial evidence. Thus, a conspiracy may
exist between persons who have never known or seen each other, provided there is an awareness and acknowledgment of an illegal enterprise.

- Where circumstantial evidence is used to infer the existence of a conspiracy, not only must the inference contended be consistent with all the proven facts, but the proven facts should also negate the existence of any other contrary or competing inference save the one sought to be drawn.

- It is not necessary for all conspirators to join at the same time, nor for all conspirators to remain in the conspiracy all the time. They may join at various times or opt out at various times. Therefore, it is not a defence to indicate that there was a change of mind or withdrawal later. However, such a change of mind or withdrawal may be relevant in mitigation of sentence.

**Obstruction of justice**

Obstruction or defeat of justice consists in unlawfully and intentionally engaging in conduct which defeats or obstructs the course or administration of justice. Snyman observes that this compendious description overlaps with other crimes such as contempt of court, perjury, tampering with witnesses or exhibits, obstructing the police in the course of their duties and being an accessory after the fact to another crime.3 An accession after the fact to a crime arises where a person covers up a crime or remains passive and does nothing in order to accomplish something prohibited by law, for instance by refraining from arresting an offender thus giving an offender an opportunity or assistance to evade justice.4 The necessary intent is supplied if the accused associate themselves with the crime knowing of its commission, regardless whether their purpose is to benefit themselves or the principal offender.5

The Criminal Procedure and Evidence Act (No 7 of 1981) requires every male person between the ages of 16 and 60 to render assistance to the police in arresting suspected offenders or retaining them in custody. Failure without a reasonable excuse to render such assistance when called to do so is a criminal offence.6 The Act also provides for the arrest and imprisonment of witnesses and other persons who default when summoned to attend proceedings, abscond from giving evidence or refuse to be sworn, answer questions put to them or refuse or fail to produce documents or other proof required of them.7

The effectiveness of the administration of justice is also served by the power and ability of a court of law to punish summarily or otherwise for contempt of court. The rationale and basis for this offence is not to "pander to the wounded feelings, real or imaginary, of judicial officers as individuals but to protect the social fabric of society and to enable the court to function free from pressure, with decorum and in dignity."8 Barring contempts committed in the face of the court (in facie curiae), which call for rapid redress, the principles followed by the courts are:9

- Except in flagrant cases where a warrant of arrest may be issued, sufficient time should be afforded between the date of the order or the rule and the date of return to allow the contemtor to reply and prepare his or her case.
The nature of the contempt complained of should be explained in as much detail as possible, and supported where necessary by documents and by affidavits if facts are likely to be disputed.

The person called to appear should be urged to do so and to seek legal advice, and should be allowed to have legal representation at the hearing.

The person should be given ample opportunity to file replying affidavits by him or herself and/or others in advance of the hearing.

The person must be afforded the right to take an oath to swear to facts as known to him or her and to explain his or her state of mind in open court.

If facts are material to the resolution of the issue, oral evidence should be heard.

The Internal Security (General) Act of 1984 contains provisions that could be used to prosecute people who engage in conduct that impinges on the administration of justice and the enforcement of law. Section 28(1)(c) makes it an offence to prevent or defeat by violence or by other unlawful means the execution or enforcement of any law or to lead to defiance or disobedience of any law, or of any lawful authority. The penalty is a M2 000 fine or imprisonment of five years, or both. Section 29 makes it an offence to use violence or intimidation against a person or his or her spouse or children, or to injure his or her property, to follow him or her persistently from place to place, watch or beset his or her house or other place of abode, work or business with the intent to compel him or her to abstain from doing, or to do an act which he or she has a legal right to do or not. The penalty is a M1 000 fine or imprisonment of three years, or both.

Clearly, the fines have to be reviewed to increase them so that these should not be easy options for what are undoubtedly serious offences.

A gaping hole in the battery of laws on the obstruction of justice is the absence of procedures and administrative arrangements on witness protection. This is a matter that needs urgent attention. Fortunately, the culture of witness intimidation or harm has not developed to the extent that it could be said to paralyse the administration of justice. The current practice is that the prosecution liaises with its witnesses, the chiefs and the police regarding the welfare of witnesses and problems that they may encounter.

**Gun control**

The Internal Security (Arms and Ammunition) Act no 17 of 1966 prohibits the possession, sale or transfer of a firearm and/or ammunition without a licence issued by the Commissioner of Police. The Act also prohibits the purchase and possession of firearms and ammunition by people under the age of 18, alcoholics, mentally disturbed people and people with a criminal record for an offence involving violence and attracting punishment for a term of six months or more. The latter prohibition has to be for a period of five years from the date of their release from jail.

Where a person is convicted of an offence under the Act or any crime for which he or she is sentenced to imprisonment or such a person has been ordered to be subject to police supervision or to enter into a recognisance to keep the peace or be of good behaviour with a
condition that he or she shall not possess, use or carry a firearm, the court may make an order of forfeiture or disposal of any firearm or ammunition and cancel such a person’s firearm certificate.

Upon receipt of such a court order, the Commissioner of Police has to cause the convict to surrender the certificate within 21 days. Failure to surrender the certificate is a criminal offence punishable by a M100 minimum fine or a minimum of three months imprisonment, or both.

The effective control of the acquisition of guns and the regulation of their use are crucial for the safety of individuals and for the reduction of crimes of violence.

The penalties for contravening the provisions of the Internal Security (Arms and Ammunition) Act (1966) were increased through the Internal Security (Arms and Ammunition) Amendment Act (No 4 of 1999). For example, purchasing or possessing a firearm or ammunition without a certificate or making a false statement when applying for a firearm certificate, carries a penalty of a minimum of M500 or a minimum imprisonment of six months, or both. The use of or attempt to use a firearm or ammunition with the intent to endanger human life or cause injury to any person or property attracts a minimum sentence of five years imprisonment. Carrying or using a firearm with the intent to commit an offence or to prevent or resist lawful apprehension or detention carries a minimum penalty of 10 years imprisonment. Failure to renew a firearm certificate attracts a penalty of M10 for each month that the offence continues.

Notwithstanding these penalties and the administrative set-up for enforcement, there has been an increase in the use of unlicenced firearms in the last five years in the commission of offences like the crossborder theft of stock, robberies and murder. The increase in the circulation of unlicenced firearms was exacerbated by the political violence and army mutiny that followed the abortive 1998 general elections. Police stations and an armoury at one of the army barracks in Maseru were broken into and arms and ammunition stolen.

In an attempt to stem the tide, the government established the Counter Crime Unit in March 1999. This is a special body comprising police officers and soldiers whose task is to search for unlicenced firearms and arrest the culprits. According to superintendent Sekoateng Serabele of the Lesotho Police Service, the Unit has managed to unearth more than 2 000 unlicenced firearms so far ranging from heavy calibre to light calibre weapons.  

A significant infirmity in the Act is the absence of a definition of ‘possession’. The legislature left it to the courts to interpret. This has resulted in the term being interpreted as implying more than mere physical detention of uncertificated firearms. The courts have held that ‘possession’ of an article under the Act envisages both the physical detention of the article and the mental element of an intention to control the article.

Drug-trafficking

The draft Drugs of Abuse Bill (2000) seeks, among others, to prevent the diversion from lawful trade of controlled chemicals, equipment and materials for use in the unlawful manufacture of drugs. It also seeks to provide for criminalisation and punishment of drug-trafficking and other
drug abuse.

More importantly, the draft bill seeks to bring Lesotho’s drug laws in line with the following international drug conventions: the 1961 Single Convention on Narcotic Drugs and its 1962 Protocol; the 1971 Convention Against Psychotropic Substances; and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

It is suggested that a body known as the Lesotho Narcotics Bureau should be established by law and should consist of the following:

- a chairperson nominated by the Minister of Health;
- a magistrate nominated by the Chief Justice;
- the Attorney-General or nominee;
- the Commissioner of Police or nominee;
- the Director of Public Prosecutions or nominee;
- the Director of Customs or nominee;
- the Director of Legal Affairs in the Ministry of Foreign Affairs or nominee;
- the Director-General of Foreign Affairs or nominee;
- the Chief Medical Officer or nominee;
- the Chief Pharmacist or nominee; and
- the Legal Officer in the Ministry of Health.  

The Bureau will have advisory and legislative review powers. It will also play a co-ordinating role, and will be tasked to collect and analyse data on types of drugs, abuse patterns, trafficking routes and seizures in order to plan for proper intervention measures. The Bureau should be proactive and pilot alternative income-generating projects in the dagga cultivation areas. It should assist the government in implementing the relevant conventions and the SADC Protocol on combating drugs and illicit drug-trafficking.

The draft bill proposes the establishment of an account in the Consolidated Funds of Lesotho to be known as the Lesotho Fund for Prevention and Control of Drug Abuse. The Fund shall be under the Narcotics Bureau, which will submit annual reports to parliament regarding its administration.

The assets and monies of the Fund will be credits of:

- sums of money allocated from time to time through parliamentary appropriation;
- property paid or transferred to the Fund pursuant to or in accordance with the provisions of the laws on money-laundering, the proceeds of crime and mutual assistance in criminal matters;
- voluntary payments, grants or gifts made by any person; and
- any income derived from the investment of any amount standing to the credit of the Fund.  

The Fund will be used to meet the expenses incurred in carrying out and promoting the purposes of the draft bill, more particularly, the prevention of drug abuse, providing treatment and rehabilitation facilities and services to drug dependent persons, and the detection, investigation, prosecution or adjudication of proceedings under the draft bill. It will also be used
to render assistance and co-operation under the laws governing international mutual assistance in criminal matters.\textsuperscript{17}

The use of covert monitoring devices in the investigation of offences is allowed. Where a person is reasonably suspected of having committed an offence under the draft bill, or is about to do so, a police officer of the rank of superintendent or above and a customs officer of the rank of principal customs officer or above may apply to the court for a time-specific permission or order to monitor and record covertly by any means the suspected person’s conduct, movements and communications (including telecommunications).\textsuperscript{18}

Evidence unearthed, obtained or collected by or through covert monitoring is admissible in any proceedings relating to an offence under the draft bill and may be communicated to any competent national or international authority.\textsuperscript{19}

It is also proposed that the prosecution service, the police and the customs department should be allowed to engage in an investigative technique called ‘controlled delivery’. This involves allowing an illegal or suspect consignment of drugs, equipment, material or property, believed to be derived directly from any offence, to pass in or out of the country under the supervision of an authorised officer to gather evidence on the identity and involvement of any person in such a consignment.\textsuperscript{20}

The Director of Public Prosecutions, senior police officers and customs officials are also to be empowered to give written approval to their colleagues to monitor and detain for further investigation suspect mail and to approach the courts for authority to access computer systems for data, to enter specific places and to conduct a search. They can also search a person, his or her clothing and internal body cavities, provided this is done by a police officer of the same gender.\textsuperscript{21}

Property liable to forfeiture is defined as property derived or realised directly or indirectly from such an offence and includes, on a proportional basis, property into which any property derived or realised directly or indirectly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the commission of the offence.\textsuperscript{22}

Any person (natural or legal) who conspires, aids, counsels or procures another to commit or attempt to engage in conduct that constitutes an offence under the proposed provisions, or incites, urges or encourages any conduct that is prohibited, will be liable for prosecution and punishment similar to the actual offender. In determining the nature and severity of punishment, the court will have to take into account, inter alia, whether the convicted person belonged to an organised crime syndicate, used violence or firearms, or is a health professional, or person responsible for combating the traffic in or abuse of drugs.\textsuperscript{23}

Lastly, the draft bill proposes trial and punishment in Lesotho of persons who assist in or induce the contravention of a drug law of another state.\textsuperscript{24}

If Lesotho can adopt and pass the proposals of the draft bill into law, it will have made a decisive break with the antiquated legal regime of the Dangerous Medicines Act (No 21 of 1973). This law lacks all the progressive investigative, international and extraterritorial jurisdictional dimensions that feature so prominently in the draft bill. In this era of rapid globalisation where cross-country movement is easy, drug laws have to run in tandem with international trends and co-operation in combatting trafficking and abuse of drugs.
Stock theft

The Stock Theft Act (No 4 of 2000) was enacted against the background of crossborder theft of stock involving residents of both Lesotho and South Africa. This had become so serious that it involved raids of villages on the Qacha’s Nek and Matatiele border and resulted in the destruction of life and property of Basotho and South Africans.

Section 3 puts an acquirer or receiver of stock or produce on guard regarding the legitimate or lawful title of the person from whom the stock or produce is acquired or received. The acquirer or receiver has to have a reasonable belief that the stock or produce is the property of the person from whom the stock or produce is acquired or received.

The police, chiefs and ordinary citizens have been given the power to arrest without warrant any person who is found in possession of stock or produce if there are reasonable grounds to believe or reasonable suspicion that the possession is unlawful and such a person is unable to give satisfactory account of its origin.25

A person to whom stock or produce is sold, bartered or given, or who has acquired, in any manner, the stock for any purpose, has to register the stock within seven days of acquiring it.26 The registration is done by the chief under whose jurisdiction the possessor or owner of the stock falls. The chief has to verify ownership or possession of the stock before registering it.27

Failure to register stock within the stipulated period or at all is a criminal offence. The making of a false statement or entry in the register is also a criminal offence.28

Other critical parts of the Act relate to the authority to convey stock and the times within which it can be conveyed, delivered or accepted. Section 9 provides that stock cannot be conveyed from or through the jurisdiction of one chief to another unless the conveyor has the authorisation of the owner or possessor of the stock. Such authorisation has to be in the form of bewys (proof) in respect of the stock. Section 10(1) provides that stock or produce shall not be conveyed, delivered or accepted between the hours of sunset and sunrise. The purpose is to curb the nocturnal movement of stock and delivery of produce — something which is common. It will serve the police well, as thieves will not want to be exposed in daylight.

Stock cannot be sold, bartered or disposed of in any other manner unless accompanied by its bewys which must have been issued by the bewys writer not more than three months before the disposal of the stock.29

At the time of writing, none of the provisions of this Act had been litigated in the High Court. All the cases that have been dealt with in this respect were heard in magistrates’ courts at district level. Therefore, there has not been any authoritative interpretation of the provisions of the Act.

The Stock Theft Act suffers from a number of limitations. Firstly, it does not cover cases of actual theft of stock as did the repealed Stock Theft Proclamation. In this law, theft was defined to embrace, besides actual stealing:

"(1) receiving knowing to have been stolen, (2) attempting to steal, (3) being or having been in unlawful possession not being able to give a satisfactory account of such possession, and (4) inciting or counselling or procuring the theft of stock or produce."30
The Act does not even bother to define theft. At best, it empowers a chief, a police officer or any person authorised under the provisions of the Criminal Procedure and Evidence Act (No 7 of 1981) to arrest without warrant any person who is found in possession of stock or produce where there are reasonable grounds or suspicion that the possession flows from unlawful acquisition or receipt and the person is unable to give a satisfactory account of such possession. The offence for which such a person should be prosecuted remains a mystery.

It is difficult to appreciate why such a provision was inserted in the Act without clearly stipulating the nature of the charges that the arrested person should face. If this provision is an aid for further investigation, then it offends against the principle that an arrest should follow investigations and not vice versa, barring imminent harm to life, limb or property.

It is suspected that the drafters failed to appreciate the relevance of defining theft to include, *inter alia*, being or having been in unlawful possession, not being able to give a satisfactory account of such possession, or criminalising the inability to give a satisfactory explanation as was done when the Stock Theft Proclamation as amended by Act No 33 of 1967.

Consequently, the theft of stock cannot attract any of the heavy penalties that have been provided for under the Stock Theft Act of 2000. Indeed, the prosecutors and magistrates do appreciate this fact and moves are afoot to amend the Act to plug this gaping hole.

Thirdly, even if a charge of stock theft is preferred, following "failure to give a satisfactory account or explanation of unlawful possession," it would not stand unless the prosecution has evidence to show that the stock belonged to someone, or was lost by someone, or was recently stolen from someone, or there are circumstances (other than failure to give a satisfactory explanation) from which an irresistible inference can be drawn that theft had originally taken place.

**Motor vehicle theft**

The Motor Vehicle Theft Act (No 13 of 2000) was published in the *Government Gazette* number 92 of 26 October 2000. It is therefore a new law of which the full character will be developed in time. For the moment, its textual analysis will reveal its skeleton. The essential features of this Act are to curb the illegal importation, ownership, registration and trade in motor vehicles and spare parts.

Section 14 provides for the search, seizure and arrest of persons and vehicles reasonably suspected of being involved in suspicious or criminal enterprises. Police officers are empowered to stop, search and arrest any person found driving, or in possession, in charge, or in control of a motor vehicle reasonably believed to be stolen and to seize the vehicle and documents relating to it and to take the person and the vehicle to the nearest police station.

Where criminal proceedings are instituted in relation to the seized vehicle, it cannot be released by the court until the prosecution of the matter has been concluded and within six months of the date of such a conclusion or the date of seizure of the vehicle, whichever is later, an application is made supported by satisfactory documentary proof of lawful ownership or possession. Otherwise, the vehicle shall be handed back to the police at the end of the six months after prosecution to be dealt with as an unclaimed vehicle.

Unclaimed vehicles are dealt with under a scheme provided for under section 19. Motor vehicles...
that are found abandoned on any road, convenient place or premises and those seized in accordance with the provisions of the Act and of which their owners are unknown or cannot be found, or the accused is at large or deceased and the cases cannot be finalised, may be removed to the nearest or most convenient police station to be disposed of as unclaimed vehicles. 38

The procedure for disposing of an unclaimed vehicle requires the Commissioner of Police to publish details in a Gazette and in at least one newspaper circulating in Lesotho, and at a place outside Lesotho where the motor vehicle is suspected to be registered. This notice should give the particulars of the vehicle, or where no particulars are available, a fair description of the vehicle. The life of the notice is defined as a reasonable period of time, but it is envisaged that there should be at least two such notices. If no person comes forward to claim the vehicle, it will be forfeited to the Crown and sold by public auction or dealt with as the Commissioner may direct. 39

Disposal, purchase and sale of motor vehicles are regulated under section 7. It is a criminal offence to sell, transfer or otherwise dispose of a motor vehicle or to purchase, receive or accept delivery of a motor vehicle without a document effecting such sale, transfer, purchase or delivery. 40

It is, however, a sufficient defence for a purchaser making use of a dealer to produce a declaration or certificate from such a dealer specifying the dealer’s name and place of business and stating that the vehicle has been lawfully sold to the purchaser. The following also apply:

- In the case of a vehicle purchased outside Lesotho, the declaration or certificate must be produced before a customs officer and stamped at the point of entry into Lesotho. Within seven days of such importation, the purchaser must present the vehicle, together with the declaration or certificate, to a police station for verification.

- In the case of a vehicle purchased in Lesotho, the purchaser must present it, together with the declaration or certificate, to a police station within seven days of the purchase for verification by the police. 41

A vehicle dealer who refuses or fails to issue a declaration or certificate as required or who issues a false declaration or certificate, and any purchaser who fails to present a vehicle and a declaration or certificate to the police for verification commits an offence and is liable, on conviction, to imprisonment for a period of not less that three years or to a fine of not less that M5 000. 42

The significance of these provisions is that they compel sellers and buyers of vehicles to get proper and authentic documents for the vehicles and keep the records of the identity and address of persons they engage with in business.

Section 6 obliges dealers to report forthwith to the nearest police station, any vehicle delivered or received in the course of business suspected to be stolen or tampered with. Failure to report is a criminal offence punishable with a minimum imprisonment of five years or a M5 000 fine, or both. In addition, the convicted dealer’s license or permit has to be cancelled or suspended for a period of not less than two years.

Public officials who fail, omit or neglect to do their duties under the Act or any other law regulating the registration of vehicles or their importation commit an offence punishable by a
minimum fine of M12 000, or imprisonment for a period not exceeding six years, or both. If the dereliction of duty relates to a vehicle proven to be stolen, the public official involved may be prosecuted and punished as an accomplice to the theft or any other offence involving the vehicle.43

Where it emerges that the convicted public official intentionally failed, omitted, or neglected his or her duty, he or she will be liable to summary dismissal from service with loss of benefits.44 The Act provides for orders of compensation to victims of offences under the Act. Compensation may cover the actual and consequential loss.45 Lastly, the police have powers, subject to judicial control, to investigate and seize assets of persons reasonably suspected of engaging in the business of stealing, receiving or dealing in stolen vehicles and any other fraudulent activities. Any other person who has an interest in the seized assets has the right to apply to the court for their release.

**Laundering of the proceeds of crime**

Lesotho does not have any law regulating or proscribing activities of laundering money and other ill-gotten property. There are moves, however, to put in place administrative procedures to scare off money launderers. The Central Bank set up a special committee to make recommendations on how commercial banks should approach the problem. The committee has produced draft legislation for consideration by the Attorney-General's Chambers.

The draft bill, bearing the title Anti-Money Laundering Bill 2000, has nine parts, apart from the definition section.

Part II deals with identification procedures to be followed when establishing a business relationship or concluding a single transaction with an accountable institution. An accountable institution is defined as:

a. a legal practitioner as defined in terms of the Legal Practitioners Act of 1983;

b. a board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property;

c. an estate agent as defined in the Estate Agents Proclamation;

d. a group of persons that may be described by the term or concept known as 'stokvel' which-

   (i) establishes a continuous pool of capital by raising funds by means of the subscriptions of members;

   (ii) is a formal or informal rotating credit scheme with entertainment, social and economic functions;

   (iii) consists of members who have pledged mutual support to each other towards the attainment of specified objectives;

   (iv) grants credit to and on behalf of members;

   (v) provides for members to share in profits and to nominate management; and
(vi) relies on self-imposed regulations to protect the interests of its members;

e. a person, other than a bank, who carries on the business of-

   (i) collecting money from other persons into an account or a fund; and

   (ii) depositing the money in such an account or fund into a bank account on behalf of the
persons from whom he had collected the money;

f. a person who carries on ‘insurance business’ as defined in the Insurance Act of 1976;

g. a person who carries on ‘the business of a bank’ as defined in the Financial Institutions Act
   of 1973;

h. a person who carries on the business of a casino or gambling institution;

i. a person who carries on the business of dealing in bullion;

j. a person who carries on the business of effecting a money lending transaction directly
   between a lender and a financial institution as borrower through his intermediation;

k. a person who carries on the business of exchanging amounts in one currency for amounts
   in another currency;

l. a person who carries on the business of lending money against the security or securities,
   excluding-

   (i) the Central Bank of Lesotho;

   (ii) any person registered as a bank under the Financial Institutions Act of 1999; and

   (iii) any person registered as an insurer under the Insurance Act of 1976;

m. a person who issues, sells or redeems travellers’ cheques, money orders or similar
   instruments;

n. a public accountant as defined in the Accountants’ Act of 1977;

o. a member of a stock exchange;

p. a totalisator agency board or a person operating a totalisator betting service."

The draft bill suggests that accountable institutions, as soon as they have been approached by a
prospective client, should obtain the prescribed proof of such a client’s identity. Where a
prospective client acts in a representative capacity, the accountable institution will have to
obtain proof of:

- the identity of the person on whose behalf such a prospective client is acting; and

- the authority of the prospective client to establish the business relationship or to conclude
  the transaction.
If a transaction is proposed to be concluded in the course of an established business relationship, the accountable institution will have to ascertain:

- the identity of the person who approached it;
- the identity of the client with whom the relevant business relationship was established; and
- the identifying particulars of all accounts at the institution that are involved in the transaction.48

Part III of the draft bill obliges the keeping of records for business relationships and transactions for a period of at least five years commencing from the date that the relationship ceases or the activities relevant to a transaction are completed.49 It will be for each accountable institution to formulate and implement an internal policy that will ensure the capture of information and keeping of records.50 The accountable institution will have to take reasonable steps to ensure against unauthorised access to its records.51

Part IV deals with the reporting of transactions above a prescribed limit, suspicious transactions, electronic fund transfers and transfer of cash into or out of Lesotho.52 It also deals with protection from legal suits for reporting.

The Bill proposes that reports should be made to a Financial Intelligence Centre. The Centre will be responsible for:

- collecting, retaining, compiling and analysing all information disclosed according to the provisions under Part IV;
- disseminating information to the relevant investigating authority where such information warrants a criminal investigation;
- advising and assisting a relevant investigating authority; and
- supplying information relating to criminal conduct to an investigating authority upon request.53

It is proposed that no duty of secrecy or confidentiality or any other restriction on the disclosure of information about the affairs of a client or customer of an accountable institution, whether imposed by any law — statute or common law - or any agreement must affect duties imposed on the institutions and persons under the provisions of the draft bill. Further, it is suggested that evidence on the identity of individuals who disclosed or initiated the disclosure of information should be inadmissible as evidence in criminal proceedings.54

An exception to the duty to disclose will have to be made in respect of the obligation of secrecy and/or restriction based on the common law right to professional privilege between an attorney and his or her client in respect of information communicated to the attorney to enable him or her to provide advice, to defend or render other legal assistance in connection with a criminal charge under any law, or in respect of an investigation with a view to institute criminal proceedings.

Information retained by the Financial Intelligence Centre will be accessible only to:
• a relevant investigating authority in respect of information about a reportable transaction;
• an investigating authority, inside or outside of Lesotho, which the director of the Centre reasonably believes requires the information to investigate criminal conduct;
• an authority outside of Lesotho performing similar functions to that of the Centre in respect of which the director reasonably believes that such information, or an analysis of it, is required for the purpose of investigating criminal conduct;
• the Commissioner for Income Tax; and
• any other person that may be entitled to the information by virtue of an order of the court or under any other law.55

Information obtained from the Centre can only be used for the purpose stated in the request and shall not directly or indirectly be communicated to another person.56

Lastly, Part IX provides for offences and penalties for failure to obtain the required proof of identity of prospective clients, to keep records, to report transactions to the Centre, and the abuse or misuse of information released by the Centre.57

This draft bill encapsulates commendable approaches to be taken when tackling the problem of the concealment and laundering of money that is the product of a crime. The broad range of institutions that is proposed to be involved in this effort is testimony of the necessity for a multifaceted approach to combat the laundering of the proceeds of crime.

Corruption and bribery

The common law knows no crime called corruption. What it recognises is bribery, which has been defined to include the offering of a gift to an official of the state to induce him or her to do something in the interests of the offerer. It does not matter that the public official's assistance is sought in an issue that is not within his or her official functions. Nor is it important that the bribe is made to induce the official to refrain from executing his or her functions unlawfully.58

In an endeavour to move beyond the narrow compass of common law bribery, parliament passed the Prevention of Corruption and Economic Offences Act (No 5 of 1999). Although this important law came into operation on the date of its publication in the Gazette on 12 August 1999, the investigatory institution created in it, called the Directorate on Corruption and Economic Offences, has not been established due to financial and human resource constraints.

The functions of the Directorate are:

a. to receive and investigate complaints alleging corruption in public bodies;

b. to investigate alleged or suspected offences under this Act or others disclosed during investigations;

c. to investigate alleged or suspected contravention of fiscal and revenue laws;

d. to investigate conduct of any person which may be connected with or conducive to corruption;
e. to prosecute, subject to the DPP’s consent, any offence committed under the Act;

f. assist law enforcement agencies in the investigation of offences involving dishonesty or cheating of the public revenue;

g. examine practices and procedures of public bodies in order to facilitate discovery of corrupt practices and to secure the revision of methods of work or procedures which may be conducive to corrupt practices;

h. instruct, advice and assist any person, on the ways in which he/she may eliminate corrupt practices;

i. advise heads of public bodies on change in practices or procedures compatible with the effective discharge of the duties of such bodies and necessary to reduce the likelihood of the occurrence of corrupt practices;

j. educate the public against the evils of corruption;

k. enlist and foster public support in combatting corruption; and

l. undertake any other measures for the prevention of corruption spots and economic offences.”

The Directorate can demand that any suspected person must enumerate, in writing, all movable and immovable property belonging to or possessed by him or her in Lesotho or outside of Lesotho and the mode of such acquisition or possession; furnish all information or documentation in connection with a suspected person or his or her accounts and bank statements and specify any money acquired in or outside Lesotho or sent out during such a period, as may be specified. Failure to comply is a criminal offence punishable with a maximum fine of M2 000 or imprisonment not exceeding two years, or both.

Corruption is defined in eleven sections, to cover the following conduct:

- the making of a promise or the acceptance of a gift to do a public duty or not;
- acceptance of a gift as a reward to do or a public duty or not;
- participation or voting in the proceedings to conclude a deal involving a public body and a company or undertaking in which an employee of a public body or an immediate family member has a direct or indirect interest and failing to disclose the exact nature of such interest;
- bribery to influence or assist in promoting, administering, executing or procuring (including any amendment, suspension or cancellation) of any contract (including a subcontract) with a public body;
- cheating the public revenue;
- offering or accepting a bribe or promise by an agent to do anything or not in relation to his or her principal’s affairs or business;
• offering or accepting a bribe or promise to withdraw or refrain from making a tender for any contract with a public body; and

• offering or accepting a bribe to refrain from bidding at any auction conducted by or on behalf of a public body.

It is clear that a swath is cut across the public administration and the private sector.

An offence with wide ramifications and implications for the property rights of public officers looming on the horizon is that of the possession of unexplained property. The Directorate has the power to investigate, where there is reasonable suspicion, a public official who:

• maintains a standard of living not commensurate with his or her present or past known source of income or assets reasonably suspected to have been acquired illegally; or

• is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets reasonably suspected to have been acquired illegally.62

There is a presumption of corruption if a public official fails to explain to the Directorate’s satisfaction how he or she was able to maintain such a standard of living, or how pecuniary resources or property came under his or her control or possession.63

In a prosecution for an offence of the unexplained possession of property, if the court is satisfied that the resources or property is held by some close relation of the accused or some other person without adequate consideration from the accused, it will be deemed, until proven otherwise, that such property or resources have been under the control or in the possession of the accused.64

The Act also provides for the protection of informants and the non-disclosure of the identity of other persons who might have assisted the Directorate in its functions.65 Last, but not least, the Act provides for the arrest and prosecution of citizens and those resident in Lesotho whose acts and conduct of corruption:

• have consequences with an effect or intended to take effect outside Lesotho;

• is committed outside Lesotho, provided that an act of the kind in question corresponds to offences of the same nature that are punishable under the law in force in the foreign country; and

• is committed outside a territory recognised by international law as belonging to any state, irrespective where the actual or intended consequences of the corrupt act have taken effect or have been intended to take effect.66

It can be said that the extent of the definition of corruption in the Act exhibits the seriousness with which the legislature views corrupt practices. It manifests the resolute purpose with which it has to be tackled.

Apart from the Prevention of Corruption and Economic Offences Act, the Public Service Act (No 13 of 1995) also applies. This Act is specifically meant to regulate the conduct of public officials
and to ensure that they do not abuse their offices. Part 2 contains a code of conduct which, among others, decrees that a public official should not be employed in any other paid occupation outside the public service, or accept any money, fee, gratuity or reward for services rendered otherwise than in the public service. However, the Minister of Public Service may approve the non-observance of these provisions. As there are no written criteria or guidelines on which the minister’s decision is based, nepotism, arbitrariness and political discrimination may influence decisions.

The minister may also exempt a public official or a group of public officials and any kind of interest or employment from the provisions of section 16 of the Act. Such an exemption may be absolute or subject to conditions that should be specified in a notice published in the Gazette.

Where a public official has a direct or indirect financial interest (including loans and shares) in any undertaking, and if such interest is incompatible with the discharge of the public duties of such an official, then the official has to disclose such interest to the minister for the latter to require such an official to dispose of all interests specified by the minister.67

Public officials are also prohibited from accepting any fee, reward or remuneration of any kind beyond their emoluments for the performance of any service to government. However, the door can be opened for receipt of such fees or reward if authorised by law, in the terms of appointment, or by the minister.68 A breach of the code of conduct can attract penalties ranging from caution or reprimand to outright removal from office following a disciplinary enquiry.69

The drawback in this Act is that public officials are left to police themselves and their colleagues. Such an arrangement leaves room for collusion and may explain the reason why there are no reported instances of disciplinary proceedings involving the unauthorised receipt of fees, rewards or remuneration for private employment and the pursuit of private interests. Senior public officials are those with the social influence to engage in private employment or hold interests in private sector enterprises. Given the hierarchical chain of command and their proximity to the minister, they are unlikely to expose themselves.

International co-operation

The Fugitive Offenders Act (No 38 of 1967) provides for the return of offenders to countries that are designated from time to time in a Gazette. The designation has to recite or embody the terms of the arrangement with the country to which it refers.

Persons liable to be returned are those accused of relevant offences or alleged to be at large after conviction of relevant offences. Section 5 of the Act classifies a relevant offence as one:

- against the law of the designated country, however described, falling under any of the descriptions set out in the First Schedule of the Act, and punishable under the law with imprisonment for a term of 12 months or more; and

- in which the act or omission constituting the offence or the equivalent act or omission, would constitute an offence against the law of Lesotho in the case of an extraterritorial offence, in corresponding circumstances outside of Lesotho.

Offences in the First Schedule of the Act pertinent to this article are bribery, perjury, subornation of perjury or conspiring to defeat the course of justice, an offence against the law relating to dangerous drugs or narcotics, stealing, embezzlement, fraudulent conversion, false accounting,
obtaining property or credit by false pretences, receiving stolen property or any other offence in respect of property involving *falsitas* or fraud.

General restrictions are that:

- the offence must not be of a political character;
- the request must not be for the purpose of prosecuting or punishing the person on account of race, religion, nationality or political opinions;
- there should not be any potential trial prejudice, punishment, detention or restriction of personal liberty by reason of race, religion, nationality or political opinion;
- it should not appear that, if charged with the same offence in Lesotho, the person would be entitled to be discharged under any rule of law relating to previous acquittal or conviction;
- provision should be made by the law of the requesting state or by arrangement that the person will first be given an opportunity to return to Lesotho before he or she is dealt with in respect of any other offence committed before the request for his or her return except if:
  - the offence in respect of which his or her return under the Act is requested;
  - any lesser offence proven by the facts is proven before the court of committal; or
  - any other offence being a relevant offence in respect of which the Minister of Foreign Affairs may consent that a person may be dealt with.

The Fugitive Offenders (Amendment) Order (No 38 of 1971) provides for the obtaining of evidence in Lesotho by other countries, or testimony of any witness in relation to a criminal matter pending in a court or tribunal of such a country. The only exceptions are criminal matters of a political nature.

Of the SADC countries designated so far, Zambia is the only one to which offenders may be returned. This designation was done in March 1972. The legal notice in which the designation was done further provided for co-operation with any other country party to any treaty or other international instrument concerning unlawful acts on board or in relation to aircraft to which Lesotho is a contracting party.

South Africa and Lesotho entered into a bilateral extradition agreement on 20 June 1995 which lists, among others, the following offences as extraditable on a reciprocal basis:

- murder, sedition and rape;
- bribery, whether under the common law or a statutory provision;
- escaping from lawful custody in respect of any of the listed offences or in respect of an offence of escaping from lawful custody;
- forgery, fraud and hijacking;
- theft, whether under the common law or statutory provision;
• receiving stolen property with the knowledge that it has been stolen;

• any offence under any law relating to the illicit dealing in or possession of precious metals or stones;

• any offence under any law relating to the illicit killing of an elephant, a black or white rhinoceros, or any such animal; and

• any offence under any law relating to the illicit possession, conveyance or supply of dependence-producing drugs.72

Apart from the list of offences liable for extradition, there is also a sentence-based approach and extradition shall be granted:

• in respect of offences punishable by a sentence of imprisonment for a period of not less than six months, or by some other severe penalty and not only a fine;

• for the purpose of enforcing a sentence in respect of a person convicted and sentenced for a listed offence that attracts a minimum sentence of six months and not only a fine;

• in respect of a person convicted but not yet sentenced for a listed offence or one categorised as punishable with imprisonment for a minimum period of six months and not only a fine; and

• on a discretionary basis in respect of requests relating to more than one offence with the punishment for some of these offences less than six months imprisonment.73

The treaty also provides for the handing over of property which may be required as evidence and which has been seized under the authority of a search warrant, or which was found in the possession of the person whose extradition is sought at the time of arrest. Such property may be handed over even if extradition, having been granted, cannot be carried out for any reason.74 Such property shall be handed over on condition that it is returned after the completion of criminal proceedings in the requesting party if it is liable to seizure or confiscation in the requested party, or where a requested party or third parties may have acquired rights in it unless such rights have been waived.75

Mandatory grounds on which extradition will be refused are offences regarded by the requested party as political offences or offences connected with or related to a political offence; military offences; if under the laws of either party, the person whose extradition is sought has become immune from prosecution or punishment for the extraditable offence including lapse of time, or final judgement has been passed by the competent authorities of the requested party on the person in respect of the offence.76

Discretionary grounds on which extradition may be refused include offences which carry the death penalty in terms of the laws of the requesting party and not the requested party. In such cases, extradition may be on condition that the requesting party provides written assurance that the requested party considers to be sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.77

Other cases of the discretionary refusal of extradition are where the competent authorities of
the requested party are initiating proceedings against the offender in respect of the offence, or where such authorities have decided either not to institute proceedings or to terminate proceedings in respect of the same offence.  

It should be realised that the weakness with discretionary refusal, even when the competent authorities have decided not to institute proceedings, is that an offender may be provided with a safe haven by the requested party. This could strain co-operation between countries especially if the benefactor of the decision is a national of the requested party. 

A comment is also necessary in relation to political offences. This is in the exclusive domain of the requested party. It is this party that has to determine whether or not an offence is of a political character or is an offence connected with or related to a political offence. Perhaps aware of the various and even complex permutations that may lead to the omission of offences deserving extradition, the parties have chosen the option of definition by exclusion rather than inclusion. Hence, the treaty provides that offences of a political character shall not include:

- an offence against the life or person of a head of state, deputy head of state or acting head of state, or a member of his or her immediate family or any related offence, consisting of aiding and abetting, counselling or procuring the commission of, or being an accessory before or after the fact or attempting or conspiring to commit such an offence;
- an offence against the life or person of a head, deputy head or acting head of government, or a minister of a government, or any related offence;
- murder, or any related offence; and
- an act declared to constitute an offence under a multilateral international convention of which the purpose is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the particular person.

The last word on the treaty is that it has not been incorporated into domestic law and is therefore not enforceable. This serious omission is not even appreciated by the Director of Public Prosecutions who has attempted to institute extradition proceedings against four Lesotho nationals wanted by South Africa in connection with offences ranging from burglary, theft, armed robbery, attempted murder and murder.

The Acting Director of Public Prosecutions has argued in court that the publication of the treaty in a Gazette is an act of its incorporation into municipal law. This contention has been rejected on the trite reasoning that international agreements are not enforceable nor justiciable in municipal courts, unless and until they have gone through the ratification process at parliamentary level. Hence, the gazetting of the treaty by the government of Lesotho fell short of the required sanction to make it binding.

**Mutual legal assistance**

Mutual legal assistance is governed by the Foreign Tribunals and Extradition Acts Procedure Proclamation (no 5 of 1911) amended by Order no 39 of 1971. This Proclamation provides for rules that govern the taking of civil, commercial and criminal evidence pursuant to letters of request or commissions rogatoire under the Foreign Tribunals Evidence Act of 1856 or the Fugitive Offenders Act 1967.
When it appears to the High Court that any foreign tribunal of competent jurisdiction is seized with a civil, commercial or criminal matter and desires to obtain testimony in Lesotho relating to any witnesses within the High Court’s jurisdiction, the High Court may issue an order for assistance.\(^{82}\)

An order for examination of the witness may be obtained \textit{ex parte} upon application by any person authorised by the foreign tribunal or court and on production of the commission \textit{rogatoire}, letter of request or other evidence that may be required by a judge of the High Court. The application has to state that a competent court of foreign jurisdiction is desirous to obtain the testimony of witnesses within the jurisdiction of the High Court in a matter pending in a foreign tribunal.

The examination may be ordered to be taken before any fit and proper person nominated by the applicant, or before the judge.\(^{83}\) The judge has the discretion to determine the manner in which the examination may be taken and may direct it to be in a manner or form requested by the foreign court or tribunal or, in the absence of special directions from the requesting court, to be taken in the manner in which evidence is ordinarily taken on commission \textit{de bene esse}.\(^{84}\)

After the examination is concluded, the registrar of the High Court has to certify the original court order and the examination and depositions taken pursuant to the order and then transmit them to the registrar of the requesting court for transmission to the latter court’s judge.

No case law was found that elaborates on the provisions of the Proclamation and the parameters of its implications for Lesotho courts. Experience from elsewhere is that the principles on which the court’s discretion has to be exercised are that:

- judicial and international comity require that requests should be treated with sympathy and respect;
- compliance should be to the extent that domestic law permits;
- applicable principles are those which are applied to the calling and examination of witnesses initiated in the requested court;
- the procedure under the Foreign Tribunals Evidence Act (1856) is not to be used to obtain discovery against a person not party to the proceedings; and
- courts are reluctant to accede to requests where the evidence required is of a material nature and it is necessary to observe the witness’s conduct and demeanor to make a just assessment.\(^{85}\)

\textbf{Conclusion}

Although the survey of Lesotho’s laws on organised crime reveals serious efforts being made to align municipal laws with international trends, there remain three areas that need attention.

The first is a specific law on organised crime that definitively answers the question of what an organised criminal gang is and the kind of legislative regime that will yield effective investigative techniques and seizure of illegally acquired assets.
The second terrain that needs to be covered relates to computer and internet crime. Special legislative efforts must be made to amend and reform procedural, evidentiary and substantive laws in order to meet the challenges of the globalisation of crime and to facilitate co-operation through technology in areas of evidence-gathering.

The third terrain that has to be covered is that of the effective protection of witnesses. There is a growing culture of intimidation and murder of witnesses. This calls for the development of witness protection measures so that justice cannot abort at the behest of criminals.

Notes


4. *Nkau Majara v The Queen* 1954 HC TLR 38 (PC); *Makamole And Two Others v R LAC* (1980-1984) 29 at 33 I-S to 34 A; *R v Letsie And Another (6)* (1991-1996) LLR 1041 (HC) at 1104- 1105


7. Sections 68, 203 and 205.


10. Interview with Superintendent Sekoateng Serabele, 7 November 2000.


12. Draft section 58(1).

13. Draft section 59(1).


17. Draft section 107(2).

18. Draft section 68(1) and (2).
19. Draft definition, section 3(1) and section 69.

20. Draft sections 69(3) — 75.

21. Draft definition, section 3(1).


23. Draft section 47.

24. Section 3(2).

25. Section 4(4).

26. Section 4(2).

27. Section 4(8).

28. Section 8(1) and (2).

29. Section 1(2) of Stock Theft Proclamation no 80 of 1921,

30. See note 10.


34. Section 4(1).

35. Section 14(2).

36. Section 14(3).

37. Section19(1).

38. Section 19(2).

39. Section 7(1).

40. Section 7(2).

41. Section 7(3).

42. Section 14(1) and (2).
43. Section 14(3).
44. Section 17.
45. Draft section 3(1).
46. Draft section 3(2).
47. Draft section 4(1).
49. Draft sections 19 and 20.
50. Draft section 7.
51. Draft sections 9-12.
52. Draft sections 22-23.
53. Draft sections 15 and 17.
54. Draft section 28(1).
55. Draft sections 28(4) and 29.
56. Draft sections 35-41.
58. Section 6.
59. Sections 8 and 17(2).
60. Sections 21-31.
61. Section 31(1).
62. Section 31(2).
63. Section 31(3).
64. Section 50.
65. Section 51.
66. Section 16(3).
67. Section 17(1).
68. Sections 18(1) and 27(1).
69. Legal Notice no 17 of 1972.
70. Legal Notice no 162 of 1996.
71. Article 2(1).
72. Article 1(2), (3), (4) and (5).
73. Article 21(1) and (2).
74. Article 21(3) and (4).
75. Article 3, 4, 8(1) and 9.
76. Article 5.
77. Articles 6 and 8(2).
78. Article 3(2).
79. Article 28.
81. Section 2 of the Proclamation.
82. Section 4.
83. Section 6.

Chapter 8
MOZAMBICAN LEGISLATION ON ORGANISED CRIME
Ângelo Matusse

Background

Mozambique is located on the eastern coast of Africa and borders the Republic of South Africa to the south, Swaziland, South Africa, Zimbabwe, Zambia and Malawi to the west and Tanzania to the north. It is bathed by the Indian Ocean for about 2 000 kilometres to the east.

On 25 June 1975, Mozambique gained its independence from Portugal, but it inherited the administrative structures and territorial divisions, as well as the judicial, legal and legislative systems of the colonial power. As the greatest indication of its sovereignty, Mozambique promulgated the Constitution of the Republic shortly after independence. This Constitution did not indiscriminately repeal the laws passed during the colonial era. It only repealed those that were directly or indirectly against the Constitution itself. Hence, most of the Mozambican laws are those that prevailed during the colonial period. Many of them are outdated.
The legal system that predominates in Mozambique (inherited from Portugal) is Continental Law, of which one of the main features is the use of codes, for example, the Civil Code, the Penal Code, the Criminal Procedure Code, the Civil Procedure Code, the Administrative Procedure Code and the Labour Procedure Code. Apart from codes, the Mozambican legal system also contains various laws, some of which have been introduced since independence.

Generally, there are few laws dealing specifically with organised crime. There are, however, provisions to be found in various items of legislation such as the Constitution, the Penal Code, the Criminal Procedure Code, the Civil Procedure Code and other legislation which deal with this subject in an indirect manner. The legal instruments of conventional nature (treaties) deserve particular mention, in so far as they represent the growing efforts of the Mozambican government to harmonise the fight against this evil in society.

The purpose of this chapter is to examine Mozambican legislation that, in one way or another, is related to crimes presumed to have been committed by organised criminal groups. The following sets of norms are analysed:

- legislation against money-laundering;
- extradition laws and agreements;
- laws relating to the trafficking in drugs;
- laws relating to the trafficking in firearms and ammunition;
- mutual assistance legislation;
- laws against crossborder motor vehicle theft;
- anti-corruption legal mechanisms;
- laws to augment investigative capacity (for example, surveillance laws);
- witness protection laws;
- laws relating to forfeiture of the proceeds of crime, and any other laws that assist the state to combat any type or aspect of organised crime; and
- other legislative initiatives.

The following legal instruments are considered:

- the Constitution of the Republic of Mozambique;
- the Criminal Code;
- the Criminal Procedure Code;
- the Civil Code;
- the Civil Procedure Code;
other domestic instruments:

- Law no 3/97 of 13 March 1997, on the legal regime applicable to drug-trafficking and consumption, and the establishment of the Central Cabinet for Drug Prevention,
- Law no 5/98, 15 June 1998, on the Treasury, and
- Law no 7/98, 15 of June 1998, on conduct applicable to public officials;

international legal instruments to which Mozambique is party:

- the 1997 Harare Convention on Mutual Assistance Cooperation in the field of crime prevention (Resolution of the National Assembly no 31/99),
- the 1958 New York Convention on the recognition and enforcement of foreign judgements (Resolution of the National Assembly no 22/98),
- the 1996 Maseru Protocol on Unlawful Drug Trafficking Prevention in the SADC Region (Resolution of the National Assembly no 23/98),
- the 1997 Ottawa Convention on the prevention of use, storage, production and transfer of land mines (Resolution of the National Assembly no 21/98),
- the 1990 Lisbon Judiciary Cooperation Agreement (Resolution of the National Assembly no 10/91),
- the 1961 UN Convention on Drugs (Resolution of the National Assembly no 7/90), and
- the 1971 UN Convention on Psycho-tropical Substances (Resolution of the National Assembly no 8/90);

other legislative initiatives on similar matters.

**The Constitution**

This is the fundamental legislation of the Republic of Mozambique currently in force. It was passed by parliament in 1990. It makes no special provisions for the fight against organised crime. Of particular importance are the freedoms of assembly and association which are guaranteed in terms of articles 75 and 76, although such freedoms are strictly limited to legal purposes. Article 75 establishes that "[a]ll citizens have the right to assemble in terms of the law." Article 76 states that:

"1 All citizens have the right to assemble.

2 Social organizations and associations shall be entitled to pursue their aims, create institutions directed at reaching their specific objectives and hold assets with which to conduct their activities in terms of the law."

The law which guarantees these rights excludes the possibility of holding meetings or
establishing organisations for the purpose of committing crimes or for unlawful purposes.

Article 103 refers to extradition, a measure that is often associated with organised crime, involving people of other nationalities: "Extradition shall only occur upon the decision of the court." It further states that "No Mozambican citizen shall be expelled or extradited from the national territory." It should be noted that, before a person can be extradited from Mozambique, an extradition agreement must exist between the country requesting such extradition and Mozambique, and then only upon the decision of the court.

Penal legislation

Substantive law

Penal law contains most of the rules governing the prevention of and fight against organised crime. In fact, chapter IX of the Mozambican Penal Code deals specifically with associations of malefactors, secret organisations, vagrancy, begging, and associations of people for purposes of committing crimes. Chapter X of the same Code deals with illegal lotteries, monopolies and others.

The following sections of the Penal Code deal with organised crime:

Article 34 (Aggravating Circumstance)

Clauses 7, 8, 9 and 10 of this article specify those conditions which may be aggravating circumstances with reference to crimes perpetrated by two or more people; crimes committed with the help of people who could facilitate or ensure impunity; and crimes agreed to by organised criminal groups.

Article 38 (Accumulation of Offences)

An accumulation of offences occurs when a person commits more than one crime on the same occasion, or commits a crime before having been sentenced by a court of law for a crime which may have been committed previously. Article 102 of the same Code, which sets out punishment, is also applied to organised crime given that this type of crime is always accompanied by one or more offences.

Article 53 (Application of Penal Law in Mozambican territory)

Should no treaty to the contrary exist, Penal Law shall be applicable to:

"1 All offences committed in Mozambican territory regardless of the nationality of the offender …

3 Crimes committed by Mozambicans in a foreign country against the internal or external security of the state, the falsification of public seals, the falsification of Mozambican coins, negotiable instruments or bank notes issued by the national bank or by companies or establishments legally authorised to issue such notes, should the criminals not have been judged in a court of law in the country where the crimes were committed.

4 Foreigners who commit any of the above crimes should they enter Mozambican territory or when it is possible to arrange for them to be handed over.
5 Any other crime or offence committed by Mozambicans in a foreign country, provided that:

a. The criminal or offender is found in Mozambique;
b. The fact is considered a crime by the laws of the country in which it was committed;
c. The criminal or offender has not been judged in a court of law in the country where the crimes were committed."

Article 71 (Application of Security Measures)

Clause 9 of this article establishes that security measures are applicable to all persons found guilty of the crime of association with malefactors, a gang or organised group.

Article 75 (Non-Penal Effects of a Sentence)

With concern to the non-penal effects of a sentence, in the case of organised crimes in which various instruments are normally used, clause 1 of the above article states that a person found guilty of a crime, regardless of the sentence, shall forfeit the instruments used in the crime to the state and that the victim, or a third party, shall not be entitled to their restitution. Hence, all arms or other instruments used must be returned to the owner or to the state.

Article 177 (Illegal Gathering)

An illegal gathering is a crime against public peace and order and occurs when people gather or meet in contravention of the legal provisions underlying such gathering. The people who organised or called such a gathering shall be deemed to have infringed the law.

Article 178 (Armed Gathering)

This crime is also related to organised crime and refers to situations where two or more people in a specific gathering are openly carrying arms.

Article 187 (Coercion against a Public Servant)

Any act of violence aimed at hindering any public official from performing any of his or her duties, should it have had the desired effect, shall be punished in terms of the rules dealing with the crime of resistance.

Article 215 (Falsification of Negotiable Instruments)

The falsification of cheques or the use of fraudulent cheques, punishable by a prison term of between two and eight years, is a crime generally committed by professional groups.

Article 253 (Prohibited Arms)

A person who manufactures, imports, purchases, transfers, sells or in any manner disposes of, transports, keeps or uses firearms or other instruments which may endanger lives, or put at risk the physical integrity or freedom of others, or which may be used in the destruction of buildings and goods, for purposes of committing a crime or knowing that they were to be used in the perpetration of any crime, shall be sentenced to 12 years imprisonment unless a more severe sentence is applicable.
Great emphasis is placed on the issue of arms because organised crime generally, if not always, involves firearms or it is presupposed that criminal organisations have access to firearms.

**Article 263 (Association to Commit Crimes)**

This article refers to persons who form part of a group, organisation or association whose objectives or activities are directed to the commission of crimes. Members of such groups, organisations or associations may be sentenced to a prison term of two to eight years and the leaders may be sentenced to a prison term of eight to 12 years.

Taking into account the amendments brought about by Law 10/87 which makes provision for more severe sentences, the establishment of groups or organisations with the objective to practice crimes, is defined in the law as a criminal offence. This offence can take the form of crimes against the safety of individuals, financial crimes, crimes against the sovereignty of the state, and crimes against public order and safety.

It is a crime sui generis, considering that the legal definition is based on the general provisions of the Penal Code, particularly article 14 of the Penal Code, which defines as preparatory actions all external actions conducive to the preparation or facilitation of the execution of a crime, not constituting the start of the perpetration of the crime.

Furthermore, according to the law, those actions conducted even before the start of the perpetration of the crime, are deemed to constitute an offence. All persons involved in actions that led to the perpetration of the crime are held criminally liable provided that these actions are foreseen in the law.

The fundamental objective is to extend criminal liability in order to be able to deal with organised crime. Thus, preparatory actions may be seen as aggravating circumstances, or as facts expressly foreseen in the law, and may be connected to theft, robbery, fraud, abuse of trust and to other types of crimes. For instance, it may be extended to the illegal traffic in narcotics and psychotropic substances, as set out in section 4, article 42 of Law 3/97 of 13 March 1997. It may also be extended to the receipt of or traffic in arms and explosives.

**Article 270 (Illegal Lotteries)**

Businesspeople, agents of any national lottery or any operation considered to be a lottery who, through an unauthorised lottery, stimulate the hope of making gains among the public through a game of chance shall be considered to be running unauthorised lotteries in terms of the law.

**Article 279 (Smuggling)**

The illegal import or export of goods that are expressly prohibited from entering or leaving the country is often carried out by highly organised groups.

**Article 280 (Embezzlement)**

People may form organised groups to commit this offence. In other words, they come together to practice fraudulent actions aimed at avoiding, in all or in part, the payment of duties and taxes payable on entry, exit or consumption of goods.

**Article 282 (Unauthorised Organizations)**
All organisations consisting of more than 10 people who, without having obtained the necessary permission from the government under the conditions which it may deem applicable, meet to deal with matters of a political, religious, literary or any other nature, shall be dissolved. The leaders shall be punished with a prison sentence of between one and six months. Other members shall be punished with a prison sentence of up to one month.

**Article 283 (Secret Organisations)**

This consists of members undertaking, whether by oath or not, to hide the purpose of their meetings or their internal organisation from the public authorities. Persons occupying administrative or managerial positions in such organisations shall be punished by a prison sentence of between two months and two years, and ordinary members shall be punished with a prison sentence of half this duration.

**Article 318 (Bribery and Corruption by Public Servants)**

All public officials who commit the crime of bribery and corruption by accepting a donation or gift, for themselves or for a third party with their authorisation and approval, to perform a task which forms part of their duties, should such a task have been executed and its performance have been unjust, shall be punished with a prison sentence of two to eight years and a fine corresponding to one year. However, should such a task not have been executed, such persons shall be suspended for three months and liable for the payment of the same fine.

**Article 319 (Corruption of Judges and Members of the Jury)**

Judges or members of a jury who accept a bribe to pass a judgement either for or against a specific person in a criminal case, before or after the indictment, shall be sentenced to a prison term of eight to 12 years.

**Article 321 (Active Corruption)**

Any persons who corrupt a public official through gifts, presents or promises in order to obtain a favour, buy a vote or to ensure a specific result shall be punished with the same sentence as that which apply to the public official who accepted this form of corruption, except that the requirements of dismissal or suspension shall be replaced by suspension.

**Article 322 (Acceptance of Offer or Promise by Public Servants)**

The provisions of article 318 shall be applicable to public officials who, on their own behalf or on behalf of others, accept an offer or promise to receive a gift or present from a person requesting a decision or order, or whose business or objectives depend on the exercise of the respective public functions.

**Article 323 (Forfeit, in Favour of the State of Proceeds Received)**

All proceeds received as a result of corruption shall always be forfeited to the state.

**Article 363 (Use of and Threats with Firearms or Knives)**

This article states that "the firing of a firearm, the use of a knife against a person, given that any of these facts are not classified as attempted homicides and provided that they do not cause
injury or lesion, as well as threats with such arms with an intention to offend, or done by three or more people gathered with the intention of causing immediate harm shall be deemed to be bodily crimes and shall be punished by a prison sentence of between 2 and 8 years."

**Article 406 (Corruption of Minors)**

These are situations where minors are used to satisfy the unlawful wishes of a person. This is the case, for example, in the sex trade of which children are the victims.

**Article 451 (Deceit to Defraud)**

Deceit to defraud occurs when a false identity or false attribute, among others, is used to convince another person to hand over money or movable assets, or any funds or deeds.

**Criminal procedure law**

Very few provisions in the Criminal Procedure Code deal with organised crime. These provisions in the Code are examined below.

**Article 45 (Territorial Competence to Judge a Crime)**

The court in the area where the offence is committed is considered to be the competent court to try the suspected offender. Due to the fact that sometimes, not all of a series of offences are necessarily committed in the same territory, this principle has had to be modified.

**Article 46 (Crimes Partially Committed in Local Territory)**

The Mozambican court in the area where the last offence that is punishable by Mozambican law was perpetrated, executed or aided, is considered to be the competent court to judge such an offence. Hence, this article also deals with the application of the law in Mozambican territory and should be read together with article 53 of the Penal Code.

**Article 55 (Accumulation of Offences)**

Should several criminal offences have occurred, the competent court is the court in the area where the most serious crime was committed. Should two equally serious crimes have been committed, the competent court shall be the court in the area where the offender has been detained. Should the offender not be detained, the court in the area where the most recent crime was committed would be the competent court. Should two crimes have been committed on the same date, the competent court is the court in the area where the warrant of an arrest or equivalent was issued.

**Article 202 (Seizure of Arms and other Instruments used in Criminal Acts)**

This article makes provision for the seizure of the instruments used in the crime.

**Article 203 (Searches)**

Should it be suspected or should there be an indication that a person is in possession of instruments used in perpetrating a crime, the judge may order a search and seizure or detention.

**Civil procedure law**
Article 8 (Legal Personality of Illegal Collective Persons and Organisations)

This article stipulates that illegal or unregistered collective persons cannot object when sued and, as a result, may be held civilly liable for any offences which may have been committed.

Article 49 (Enforceability of Sentences and Decisions handed down in Foreign Countries)

Generally, people involved in organised crime are known to have committed crimes in other countries. Thus, clause 1 of this article states that "the sentences handed down by the courts and arbitrators of foreign countries may only be executed once they have been reviewed and confirmed by the competent Mozambican court."

Article 87 (Plurality of Defendants)

This article stipulates that, "[s]hould there be more than one defendant in the same case, they shall all be called to appear in the court in the domicile of the majority of them. Should an equal number of them be domiciled in different areas, they may choose any of them."

Furthermore, "should pleadings be applicable to various defendants with a relationship of dependency between them, the competent court shall be the court in the domicile of the defendant on whose pleading all the others are dependent."

Article 112 (System Applicable in the Case of the Plurality of Defendants)

Should there be more than one defendant, the sentence shall produce effects in relation to all. However, should an exception be made for one, the others may contest and shall be notified in the same terms as the plaintiff.

Article 139 (Language to be Used in Case Documents)

Case documents shall be drafted in Portuguese, but foreigners who do not understand Portuguese may be heard in court in another language, in which case an interpreter shall be appointed to facilitate communication.

Article 960 (Incapacity Due to Wastefulness or the Abuse of Alcohol or Narcotics)

This article refers to the possibility of a person’s incapacity due to alcohol or narcotics abuse.

International legislation

Mozambique has signed and ratified a substantial number of international treaties dealing with organised crime, which places the country in a relatively good position in terms of its legal machinery to combat this social evil.

However, it should be mentioned that Mozambique is a poor country and, as such, suffers from a serious lack of mechanisms and resources to implement these treaties. The following are some of the international treaties in effect in the Republic of Mozambique:

- Resolution 31/99 of 1 November 1999 (which ratifies the Convention on Mutual Assistance Cooperation in the Field of Crime Prevention);
Resolution 23/98 of 2 June 1998 (which ratifies the Protocol on Unlawful Drug Trafficking Prevention in the SADC Region);

Resolution 21/98 of 26 May 1998 (which ratifies the Convention on the prevention of, storage, production, transfer and destruction of land mines);

Resolution 10/91 of 20 December 1991 (which ratifies the Legal and Judicial Cooperation Agreement signed in Lisbon on 12 April 1990 between the Republic of Mozambique and Portugal);

Resolution 7/90 of 18 September 1990 (which ratifies the 1961 Convention on Narcotics);

Resolution 8/90 of 12 September 1990 (which ratifies the Convention on Psycho-tropical Substances); and the

Declaration on a Plan of Action for the Control of Drug Abuse and Illegal Trafficking in Africa, Yaoundé, 8 to 10 July 1996 (AHG/Decl. 2 XXXII).

Final considerations

It is not easy to discuss legislation on organised crime in Mozambique. There are no specific laws in the country dealing with the issue, although there are various items of legislation that make direct or indirect reference to the matter.

It could therefore be said that there is a gap in the law with regard to the issue of organised crime. However, it should be mentioned that one of the issues concerning organised crime, narcotics and psychotropical substances has received special attention. Other important issues, such as illegal arms-trafficking, money-laundering, armed robbery and vehicle theft, among others, are not covered by specific laws.

It is of great importance for the Mozambican government to take the necessary steps to review, update and harmonise its legislation on organised crime.

Chapter 9
COMBATING ORGANISED CRIME IN ANGOLA
Dr Astrigildo João Pedro Culolo

Introduction

The purpose of this chapter is to examine organised crime and the fight against it in Angola, as well as other related issues.

In the research undertaken for this chapter, it was discouraging to note that Angola has no policy structured and specifically designed to combat organised crime. The official reason given is that the country is totally committed to employ all its resources to resolve the armed conflict in which the country has been embroiled for almost 40 years. Hence, all resources, whether human, material or financial, are being channelled into this objective. The police force has been involved in military action in support of the military.

There is also a total absence of studies or published research on this issue. It is expected, however, that more attention will be paid to other sectors of civic life from 2001 onwards.
Taking into account the country’s current level of economic development, organised crime has not been considered a problem that requires much attention or a concentration of efforts for its effective combat. The weak banking system contributes towards the fact that money-laundering in Angola is seen as a problem of another world — in fact, there is no legislation covering this issue, which leaves the field wide open for people who wish to take advantage of the situation.

The legal system does not have the training required, which means that the majority of roleplayers, including police officers, magistrates, judges or public prosecutors, do not have the required educational qualifications.

Second only to the war, corruption is considered one of the factors that has contributed most towards making Angolan life more difficult. This was the reason for the establishment of the High Authority Against Corruption in 1995. To date, no one has been appointed to the Authority and no strategy has been implemented against corruption to make an impact on the current state of this phenomenon.

Closely connected to corruption and money-laundering is organised crime and, in this regard, there is no specific legislation. This forces members of the legal profession to interpret the laws that are in force loosely in order to try, by any means possible, to accommodate these types of actions. This is a very difficult task if it is taken into account that the application of criminal law is vested in certain guarantees, for example, the principle of legality or nulum crimem sine lege.

With regard to mutual assistance, bilateral agreements have been signed with some countries and others are at an advanced stage of negotiation. Among these, specific mention must be made of the agreement signed with the Republic of Namibia on the illegal traffic of vehicles along the two countries’ common border.

Another great stumbling block, which is perhaps also the most important, is the lack of infrastructure (new infrastructures are not established and those that do exist are either not maintained or have been destroyed by the war). This requires large investments, which have not been made available to date. This situation may be connected to the fact that organised crime in Angola has not reached alarming proportions, or so it appears. It would be excellent if conditions were in place that would be able to respond when the first signs do appear, so that the risk of having to fix what has been undone can be avoided.

**Existing legislation**

Apart from the 1886 Penal Code, Angolan criminal law also includes other laws and decrees — so-called sundry laws.

Generally, the Penal Code and the Criminal Procedure Code are the two main instruments in the system. Both are outdated in terms of current Angolan social reality. In some cases, they go so far as to contradict certain constitutional provisions — sometimes quite blatantly. Given that the Constitution is more recent (it was passed in 1992), it contains values that are much more current than those contained in the 1886 Penal Code.

When the Penal Code and the Criminal Procedure Code were passed, organised crime did not have the harmful effects it has today. As such, neither law addresses the phenomenon to the extent that is required under current circumstances.
Reference is made to crimes committed by groups of people, but these provisions are inadequate before the huge proportions of organised crime on an international level.

It is extremely difficult to combat new criminal phenomena with outdated legislation. This forces members of the legal fraternity to attempt veritable feats of interpretation in order to ensure that crimes, some of which are quite repugnant in terms of the damage caused to society, do not go unpunished. This task becomes truly complicated as the person responsible for applying the law, when performing his or her duties, is faced with the constitutional limits beyond which he or she cannot act, as repugnant as the crime may be (principle of legality, prohibition of analogy in the application of the criminal laws, and others), given that the people responsible for applying the law must adhere to the spirit and letter of the law.

Besides these two codes, there is also some relatively new legislation. This does not necessarily mean that these legal instruments are modern — they were merely passed and promulgated more recently. Thus, there is the law on economic crimes and the law on drugs, which were promulgated in 1999, the law on the trafficking and illegal possession of diamonds, passed in 1994, and the law on the possession and use of firearms, which was passed in 1967.

Unfortunately, there are no modern laws in place against organised crime and corruption, neither are there laws dealing specifically with issues such as mutual assistance and witness protection, among others. Some reference is made to organised crime and corruption in the Penal Code, but against the background that prevailed more than a century ago (1880s).

Some bilateral agreements dealing with mutual assistance have been signed, but these usually deal with certain specific cases only.

In terms of the Constitution, the extradition of national citizens is not permitted. The extradition of foreign citizens requires the existence of an agreement with the country requesting such an extradition.

The lack of modern legislation renders the legal system vulnerable, particularly in respect of those who know the Angolan juridical and legal realities and are predisposed to act in a manner that would normally not be permitted and would be punishable in the large majority of countries.

For 2001, the Ministry of Justice has identified the review and updating of legislation as one of its priorities. Should this be effected, it would perhaps be the start of the process of change in the current state of Angolan legislation.

**Strengths and weaknesses in current legislation: Reasons for the lack of modern legislation**

Without a shadow of a doubt, it can be said that the greatest drawback in the Angolan legal system is the fact that it has not kept pace with developments in society. There are reasons for this stagnation. These will be examined from the perspective of combating organised crime.

*The legislation itself*

Because criminal groups move large amounts of money, they constantly seek to become better organised in order to attain their objectives in the best manner possible. In many cases, they have access to experts in the various fields of science and technology.
Globalisation and the international exposure of economic markets facilitate the perfection and enrichment of methods used in performing these crimes, often through the exchange of experiences in other parts of the world. Crime also takes advantage of technological developments. In this sense, it would be normal for all legal systems, regardless of their geographic position, to keep abreast of developments by drawing from the positive and negative examples offered by other countries in the world on the same issues.

Unfortunately, this has not been the case in Angola to date. After 25 years of independence, only drugs are dealt with in recent legislation. Issues such as corruption, money-laundering, witness protection and mutual assistance mechanisms simply do not feature in the legislation presently in effect.

As has already been mentioned, judges, magistrates and public prosecutors are currently forced to conduct veritable feats of interpretation. Despite all the limitations they face at all levels, they are forced to try and combat organised crime in any way possible. Although the dimensions of organised crime are still small, it cannot be ignored, given the snowball effect that is usually felt over time.

It is hoped that the Justice minister’s announcement on the revision of the penal legislation is a signal of the intention to introduce changes in the system. For example, the illegal use of computer technology and the internet is not covered by any law. This is because the issue has not been prioritised by the government.

There is also no criminal studies institute in the country or another association of legal professionals that concentrates on legal matters. It is highly probable that, if institutions of this kind existed, it would be possible to draw attention to certain aspects that are sometimes not taken into account by the authorities when defining their priorities. Such institutions could assist in narrowing the gaps and could contribute more positively towards the establishment of a crime prevention and justice system policy that is in line with current realities. At the moment, it is imperative that a process must be instituted to revise Angolan legislation and that this process must be undertaken speedily. No studies on the status of crime, its trends and occurrences have recently been carried out. This being the case, it is difficult to formulate effective policies as objectives cannot be clearly defined, even though there is a general idea of the situation.

**Legal system: Human component**

Besides the fact that legislation has changed very little, the human component of the legal system, as is the case with the system as a whole, is not free of problems. The quality of work and the development of the system itself are dependent on this component. The educational level of human resources is a very important indicator when analysing the state of readiness in the fight against crime.

The current educational levels of members of the Angolan judicial system are linked to Angola’s history. Angolans were given access to the legal profession only after 1975. Until then, these positions were normally reserved for the Portuguese who, being the colonisers, were in the best position to hold such posts as the system favoured this state of affairs. Angolans did not live — they merely survived — and could not afford the high cost of educating their children.

Following independence and the exodus of the Portuguese, this sector suffered a huge vacuum. Minimum conditions had to be created to ensure, at least, that the justice system could respond to the demands that arose, even if inadequately. It was felt that the courts could not be shut
down because of the lack of trained people, as the need for their services never stops. Given these deficiencies, maximum advantage was taken of those people who worked in the judicial system, even if in lower grade jobs, in order to keep the system operational (particularly the courts and the police force).

Today, the country has only one public law faculty which operates under great difficulty and sometimes haphazardly. Because of the low salaries, most of the graduates opt for careers other than a career in the justice system, which does not hold much attraction. Only approximately 40% of the magistrates have a tertiary education in law, which, in itself, is very significant.

The police academies do not have the facilities (material and curricular) to overcome the deficiencies in the quality that is expected of them. There is no special criminal investigation school, and this becomes clearly apparent when examining the work done by criminal investigators.

The lack of a better quality of human resources justifies, as a last analysis, the current state of affairs of the current criminal justice system.

It is with these human resources that the fight against crime is conducted in Angola. There is a department responsible for dealing with issues connected with organised crime, but miracles cannot be performed under these obviously difficult circumstances.

There is also the salary factor. Because salaries are so low, it is illogical to expect work of a high standard. Certain alleged cases of corruption have also come to the fore, which have been investigated as far as possible.

**Structures**

The Achilles heel of the Angolan legal system is the infrastructure or rather the lack of infrastructure.

Because of the war that broke out after independence, the country has lost much of its infrastructure. The majority of police stations and courts are in a bad state of repair, partly owing to the lack of maintenance and partly owing to the armed conflict. Their rehabilitation will require a tremendous effort on the part of the government.

The criminal investigation police do not have access to modern methods of investigation. Frequently, officers have to take recourse to foreign countries to conduct certain examinations, simply because they cannot be conducted in the country, or because the quality of the work in foreign countries and, by extension, the reliability of the examination are greater. However, this is an expensive exercise and constitutes an exception rather than the rule.

Combating organised crime is very difficult and the lack of adequate infrastructure (whether physical or even in terms of communication systems) is used to the advantage of those on the other side of the fence, who are normally well organised and equipped with the latest technology and huge financial resources. They are not subject to budgets and complicated bureaucratic procedures that result in delays before any action can be taken.

The criminal investigation services do not yet make use of computers, a tool that has increased efficiency in all fields of endeavour by almost 100%. These technological advances have not
been made available to the justice system.

Although the country has not attained a high level of development, certain operations have revealed a considerable degree of organisation, which can only bode well, provided that the system’s state of preparedness can be improved.

**Legislative and other procedures for the application of the UN Convention Against Transnational Organised Crime**

**Signing and ratification**

For international agreements to be valid in Angola, these must be signed by the government and then submitted to the National Assembly for ratification. Such an international agreement is then incorporated into the country’s body of laws. This means that the provisions of the UN Convention will be binding on the Angolan state only after it has been ratified by the National Assembly. With concern to the additional protocols, the situation is exactly the same. However, the government has not as yet signed these. There is a possibility that parliament may refuse to agree to the ratification, but this is only in theory as the party in power holds the majority in parliament. Should this not be the case, it would have been easier not to sign the document and reject it from the start.

It is not envisaged that there will be any obstacles in the ratification of the Convention by the National Assembly. It covers a very current issue and its signing can only be of benefit to the signatories. It should be stressed that Angola followed the negotiations with great interest and was represented in all the meetings of the ad hoc committee by delegations who travelled from Angola even before they were entitled to the allowance which was accorded to underdeveloped countries.

**Implementation**

The greatest difficulties will be encountered in the post-ratification phase when Angola will be required to comply strictly with its obligations in terms of the Convention. The areas of greatest concern and doubt are concentrated on the implementation phase. The issue is one of capacity and strict compliance with undertakings agreed to — it has never been one of lack of will.

The Convention obliges all signatories to adopt a certain conduct that stands in direct opposition to the difficulties discussed above. In other words, the Convention requires from Angola a veritable revolution of its criminal procedure system. It is true that these changes are not only imposed by external factors — they are required fundamentally for the reasons already discussed. But now there is another thrust, given the provisions of the Convention. This may impel the government to prioritise the modernisation of the Angolan legal system, in which case the necessary resources may be made available to attain this objective. This would be of great benefit to the country.

There is some doubt about the capacity within the country to undertake the changes that are required with the desired effectiveness, given the well-known lack of financial resources.

The issues dealt with in the Convention are current and Angolan law does not cover most of them. This represents an opportunity to review the Angolan criminal legislation as a whole, which is currently based on a Penal Code dating back to 1886.
Besides legislative changes, other changes are also required, such as the establishment of certain bodies and organs to be responsible for initiating contact and co-operation with other states party to the Convention. In specific cases, this would also include other international organisations interested in certain issues which are regulated by the Convention. The improvement of the selection methods and training of officials is also required so that they can be in a position to deal with new challenges.

These changes are not impossible or even extremely difficult, provided the will exists. In this respect, it should be stressed that the signal received in contacts with the competent authorities is that they have no problem at this level. However, the expectation is that it will be difficult to put all the conditions required to attain the objectives in place, given the resources normally made available for this type of action.

The creation of legal mechanisms to deal with the globalisation, industrialisation and internationalisation of the economy

In modern society, development is closely linked to industrialisation and globalisation, with the effect that distances are shortened and the task of those responsible for preserving peace and stability is made all the more difficult.

Angola has no special legislation on money-laundering, corruption and the forfeiture of goods obtained from criminal acts, among other issues. The lack of such specific legislation renders the country vulnerable to the dangers caused by criminal practices. Many so-called foreign investors, of dubious origin, seem to be entering the country but the legal system, because of the lack of legislation, cannot certify the origin of their investment capital. It is impossible to establish whether it is in fact investment aimed at the development of the country, or whether these are cases of money-laundering.

Angola is also faced with the problem of corruption. Indications are that this type of behaviour is widespread in the public service, practically at all levels, and the level of acceptance by society as a whole is alarming. In certain cases, these practices are deemed to be absolutely normal and do not receive the expected disapproval from society. By the way things are going, it could be said that Angola is fast moving towards a culture of corruption and, unless urgent measures are taken, risks reaching this point. In the public service, for instance, it is said that officials "create difficulties to sell facilities." This clearly shows the danger which prevails in the country when referring to the phenomenon of corruption.

The reason normally given for this phenomenon is the low salaries of public officials. It is also said that everything is possible with money.

A very interesting fact has come to the fore. There are almost no cases of corruption in the Angolan court rolls. This in itself reflects the low priority given to combating this type of crime.

There is a lack of policy directly aimed at this evil and a lack of modern legislation to stabilise the situation. There are, for example, no guarantees to protect people who report such crimes as, in terms of current legislation, a person forced to pay under any circumstances is also guilty of the crime of corruption. The Penal Code makes provision for an active and a passive party to a crime. Hence, no one will report this crime knowing the unpleasant consequences that they will have to face.

Because of the lack of legislation, this phenomenon is compounded and continues unabated.
Corruption is an issue that often comes to the fore, particularly among senior officials. At times, there is proof of irregularities that have been committed and, at times, the criminal procedures are started but the people with knowledge of such acts almost always refuse to give evidence for fear (just and founded) of reprisals.

Apart from the lack of modern legislation, there seems to be a lack of a policy directed at this evil. There is no government anti-corruption programmes in place to examine the situation in detail and indicate the best way to reduce these practises to acceptable levels, at least as a start. The envisaged High Authority Against Corruption has yet to start functioning.

**Conclusion**

In conclusion, the Angolan penal system is a fertile ground for the continuation of all types of criminal action, owing to the fact that its laws are outdated, the lack of adequate training for the human resources component, the lack of proper structures and the lack of specific policies to deal with specific problems that arise. The Convention Against Transnational Organised Crime and the fact that Angola participated in the full process will unleash, in all probability, a chain of events that could lead to the review of the criminal legal system.

This process would be faster and would probably be more successful if research institutions were in place to examine the phenomenon of crime. This would most certainly contribute towards a greater and more effective awareness of the problem.

**Chapter 10**

**HARMONISING LEGISLATION AGAINST ORGANISED CRIME IN SADC COUNTRIES**

*Charles Goredema*

**Introduction**

The United Nations Convention Against Transnational Organised Crime was signed in the Italian city of Palermo, in Sicily. Between 12 and 15 December 2001, representatives of at least 123 countries appended their signatures. Among the signatories were Angola, Lesotho, Malawi, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania and Zimbabwe.\(^1\) The Convention can be regarded as the product of a concerted effort by the international community of nations to design a strategy for dealing with organised crime. It indicates the contemporary trends in the formulation and implementation of legislation against crime of this nature.

It is appropriate to treat the Convention as a benchmark against which to determine the steps that need to be taken and measures to be implemented in updating SADC legislation. Signatories are expected to proceed with the process of ratification, which should involve their respective legislatures. By its own terms, the Convention will become effective 90 days following the 40th ratification. The primary objective must therefore be to identify what is needed for compliance with the stipulations of the Convention.

It must not be assumed that, because most of the SADC states signed the Convention, they are all in an immediate position to ratify the Convention and implement a set of measures to comply with the obligations it creates. This chapter briefly sets out the key challenges to be considered during the ratification process. It also attempts to make a prognosis of the prospects of harmonising the organised crime legislation discussed in the preceding chapters.

At this stage, certain challenges that are bound to have an impact on efforts to fight organised
crime are already evident. They are considered under the broad categories of context, content and enforcement.

Context-related challenges

The first challenge arises from the weakness of the economic systems (in some cases, the pillars on which these economies rest are disintegrating) of many of the SADC states. At a time when all of them are labouring under the demands and pressures of transformation (economic empowerment of previously marginalised groups, privatisation of an erstwhile huge public sector), the financial services sector in some of the SADC states is in a brittle state. This sector is a key player in fighting manifestations of organised crime, such as money-laundering.

In Zimbabwe, the demand for investment capital exerts pressure on the capacity of the financial services sector to police money-laundering. The attitude of a sector besieged by a shortage of investment capital to an injection of cash is likely to be ‘deal first, ask questions later’, especially if the cash is in hard currency. Tainted money, like a gift horse, is not likely to be subjected to too much scrutiny by a bank that is desperate to survive. Contemporary press reports indicate that the banking sector is afflicted by bad debts amounting to more than Z$10 billion (R1.4 billion) and that some banks could go bankrupt if they cannot secure heavy capital injections. As South points out:

"Laundering strategies involve financial transactions the size of which are extremely profitable and hence attractive to the legitimate financial enterprises that process them; laundering diverts money from an illegal economy into needed and welcome investment in the legitimate economy; and, generally, it is now so well integrated into the 24-hour a day global network of financial transactions that its curtailment might ... have consequences beyond those that legislators and enforcement officials conventionally suppose."

A major player in the banking sector in Swaziland, the Swazi Bank, has reportedly been on the verge of collapsing for a long time. Its precarious position has been attributed partly to inadequate capitalisation, precipitated by injudicious benevolence to certain well-connected individuals. The bank’s position has an adverse impact on the rest of the financial system, compromising its capacity to play a role in enforcing money-laundering laws.

Apart from the incentive to flout a new money-laundering legislative system, there is the cost factor. Requiring financial institutions virtually to become an arm of the state involves imposing an additional administrative infrastructure, which costs money to set up and run effectively. Common elements of a money-laundering control system include:

- a customer identification mechanism;
- effective recordkeeping; and
- a duty to report information about transactions entered into with the financial institution.

The duty to report may be onerous if it is widely defined to include both transactions of a certain magnitude and transactions which raise suspicion. Yet, a system which purports to be effective must define the duty widely. In addition, if reporting is to be performed timely, it must be done, in the case of a multi-branch financial institution, directly from branch level rather than through a central unit. This has significant cost implications. The resources involved even in a basic investigation of the source of an unusually hefty cash deposit can certainly be imagined.
The system envisaged in the Financial Intelligence Centre Bill in South Africa and the Anti-Money Laundering Bill in Lesotho widens the net of institutions that should file reports. The ability of these institutions to absorb the additional costs involved varies. It cannot be assumed that this is a model which will work well in all states in the region.

From the perspective of the client, the wanton violation of the principle of confidentiality can introduce a new risk to the notion of investment. The risk is magnified in environments where there is little or no trust between the public, in general, and the state system, for whom the banker will now be acting as agent. The distrust harboured by the client quickly gets transferred to the banker-agent, resulting in a breakdown of confidence in the bank. An incentive to withhold information or assets from the bank is created. The simultaneous incidence of shortages in the supply of commodities can exacerbate this breakdown of the banker-client relationship. In an economy afflicted by high inflation, the inevitable result is a tendency to keep money at home rather than in the bank.\(^7\) This, in turn, could affect key aspects of the functions of the banking sector, such as lending, and later the viability of the financial services sector as a whole. The ‘parallel market’ phenomenon tends to result from an absence of confidence in the official system. As has been demonstrated time and again, the stability of a country’s economy is closely linked to the health of its banking system.

At the same time, it is in the interest of financial institutions, and the economies in which they operate to take effective measures to prevent organised crime entrenching itself. Productive, long-term foreign direct investment is unlikely to be attracted to an institution or a country that is openly receptive to the proceeds of organised crime. There have been countries that perceived such proceeds with indifference, or even encouraged their investment, but on account of international initiatives, the latest of which culminated in the UN Convention, the number of these countries is rapidly diminishing.\(^8\)

The second challenge may be attributed to fragile and/or hesitant democratic institutions. In a number of SADC countries, mutual suspicion and fear dominate the relationship between central government and other centres of power. On account of the fear of losing governing power, sitting governments perpetually seek to dominate the entire state sector, marginalising other institutions. This has two notable consequences. The first is that it diminishes the capacity of institutions outside central government to make an input in the formulation of legislation. The second is that it leaves very little room for political neutrality in decisionmaking, including decisions on the implementation and enforcement of laws. This insidiously weakens the ability of the state to deal with organised crime, particularly if it emanates from, or aligns itself with functionaries within central government.

The extent to which this has already happened varies between states. In some, police structures have been co-opted into the ruling party, in others, even the judiciary is being cowed into subservience.\(^9\) The inevitable subversion of the rule of law manifests itself in inconsistent or erratic enforcement of the law, as law enforcement dances to the tune of transient political interests.\(^10\) In almost every case where this happens, public confidence in the system of justice is eroded. Civil society becomes reluctant to entrust greater powers in the government or its agencies, on account of the apprehension that this would fortify totalitarianism. There are misgivings and even resistance in states such as Malawi, Swaziland and Zimbabwe to the extension of powers of surveillance to law enforcement authorities, in the absence of reliable safeguards against abuse.

The formulation and implementation of legislation in a number of SADC states tend to be dominated, if not monopolised, by central government. As a result, the content of legislation is
determined almost entirely by government’s perceptions, as is the timing and manner of implementation. There are states in which legislation with the potential to tackle corruption and organised crime has been passed, but never brought into effect. A continuation of this trend may blunt the declared resolve to combat organised crime.

A related challenge is to prevent abuse at the instance of malicious functionaries for political or economic purposes. Removal of the bank confidentiality principle in suspicious transactions can easily become the thin end of a wedge, exposing every customer to surveillance and even undue harassment. The risk of such a result increases if the lifting of confidentiality is combined with the introduction of the ‘unexplained lifestyle or assets’ presumption of corruption, as is the case in Botswana, Lesotho, Swaziland and Zambia.

In Zambia, abuses were recorded on account of a combination of the Corrupt Practices Act and the Preservation of Public Security Act. Ailola notes that, during the enforcement of these statutes, many people were detained for long periods and others had their properties confiscated and bank accounts frozen or closed altogether. Enforcement of these measures occurred in the heyday of the one-party state in Zambia, and the centralisation of power within the state by President Kaunda. In this situation, perceived political opponents of the president were at risk of victimisation. It is a scenario which could well repeat itself in Zimbabwe and Swaziland.

Secrecy laws, some but not all of which were inherited from the era of colonial rule, present another challenge. These laws serve to insulate iniquitous conduct in both the public and private spheres from public observation. It is not surprising that they have spawned a great deal of corruption, and rendered its detection difficult.

There is a dangerous combination of official secrets legislation, and two other factors, the delegation of a great deal of discretionary power in executive bureaucrats and the absence of a framework for the protection of informants giving information on organised crime or corruption within institutions where they work. The combination has the potential to detract from the crusade against syndicated crime. Action precipitated by revelations of corruption in the public sector in Zimbabwe, for instance, has tended to be directed at those responsible for such revelations, rather than the corrupt.

Section 45 of Botswana’s Corruption and Economic Crime Act deserves to be lauded as a positive step. It is intended to encourage the free flow of information to the authorities responsible for combating corruption and economic crime. Similar provision is made in the Swazi legislation relating to corruption. Its efficacy in a relatively small community depends on the confidence which the informant is prepared to repose in the authority to which he or she reports.

**Content-related challenges**

The Convention pays some attention to the issue of legislative content, prescribing the substance of laws that can be used against transnational organised crime. This part of the chapter considers how much modification is required to relevant legislation in SADC states.

**Participation in organised criminal activity**

State parties are required to make participation in an organised criminal group a crime. This entails both conspiracy and management of such a criminal group. The Convention defines an
organised criminal group as:

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

A serious crime is described as an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

The criminal law in many of the SADC states already criminalises the 'incomplete' crime of conspiracy, although it is not every state that has codified the law. States whose substantive criminal law has Roman Dutch roots include Botswana, Lesotho, Swaziland, South Africa and Zimbabwe. In most of these countries, the uncodified common law generally already covers conspiracy to commit crime and managing a criminal enterprise. In addition, statutes regulating criminal procedure render conspiracies punishable in some instances. States of which the substantive law was influenced by English law have been more forthright in codifying the general principles of criminal liability in penal codes. The Malawian Penal Code, for example, criminalises participation in an organised criminal group. Of the Roman Dutch-oriented systems, Botswana has codified principles of criminal liability, albeit somewhat restrictively.

It would not be difficult for any SADC state to adopt the recommended criminalisation of participation in organised criminal activity. South Africa and Tanzania already have dedicated statutes, which could be used as examples. The challenge becomes formidable in the enforcement of such laws.

**Money-laundering**

The problems likely to arise in the introduction of domestic money-laundering control regimes have been alluded to above. They assume that every state has abolished money-laundering. Out of the 11 SADC states surveyed, five had specific laws against money-laundering. In two states, bills are at different stages of consideration. Four states had no such legislation, although one had laws which could be used against money-laundering.

It is submitted that, in this regard, all SADC states have to agree on a definition of money-laundering, to be incorporated into legislation. The conceptualisation in the Prevention of Organised Crime Act in South Africa would be a useful guide.

**Corruption**

There is unanimity in SADC that corruption should remain a criminal offence. This unanimity does not extend, however, to the definition of corruption. Most SADC states are comfortable with conceptualising corruption as the abuse of office to procure a private benefit. The definition is narrow, in that it seems to assume that all corruption is bureaucratic. It is also premised on the vain assumption that public and private interests can easily be distinguished. Hope offers a definition that is both more comprehensive and relevant. He takes the view that corruption is:

"the utilization of public office for private gain, either on an individual or collective basis at the expense of the public good, in violation of established rules and ethical considerations … It is an act undertaken with the deliberate intent of deriving or extracting personal or private rewards against the interests of the State. Such
behaviour may entail theft, the embezzlement of funds or other appropriations of state property, nepotism, or the granting of favours to personal acquaintances, and the abuse of public authority to extract monetary benefit or other privileges."\textsuperscript{16}

While the Convention only requires the criminalisation of corruption by public officers (national, foreign and international), it is clear that its stipulations are the absolute minimum. States should criminalise forms of corruption other than bribery and extortion, and consider penalising corruption in the non-state sector. The legislation in all but three states needs review on account of its narrow approach to corruption.\textsuperscript{17}

\textit{Obstruction of justice}

The Convention requires state parties to criminalise the intimidation of witnesses and law enforcement and judicial officials. Notwithstanding the recognition by the common law of the offences of contempt of court, and obstructing the course of justice in the states under Roman Dutch law, this is a sphere where there is a significant deficit.

The laws impacting on the welfare of witnesses in many SADC states seem to be premised on the attitude that the role of witnesses is confined to the adjudicative stages of criminal proceedings. The reality is that witnesses are more important than this. Their intervention and participation can influence the fate of an investigation, or a bail application. If the role of witnesses is conceived in wider terms, so will the breadth of the legislation relating to their protection. It is suggested that such legislation should be proactive to encompass witness protection.

Only South Africa has embraced a scheme of witness protection. Lesotho could use the Internal Security (General) Act (1984), but it was not designed with non-political transgressions in mind.

\textit{Motor vehicle theft}

There appears to be consensus within law enforcement authorities in SADC that the theft of motor vehicles is a priority offence, and that it is committed by organised criminal groups. Many of these groups are prepared to use violence, sometimes with fatal results. At least three states have opted to supplement the common law of theft with legislation. The thrust of such legislation is to target the markets for stolen motor vehicles, as well as the proceeds of the disposal of stolen motor vehicles. Motor dealers are required to keep records, be on the lookout for stolen vehicles and vehicle parts, and purchasers have to obtain documents of identification.

In view of its prevalence and persistence in SADC, it is suggested that all states should consider adopting the approach taken by Swaziland, Namibia and Lesotho in criminalising the theft of motor vehicles by statute. It would then make it easier to formulate, at regional level, an administrative mechanism for the identification of stolen motor vehicles.\textsuperscript{18}

\textit{Enforcement-related challenges}

The Convention makes certain demands of member states relating to the enforcement of legislation against organised crime. It requires state parties to co-operate with one another to confront organised crime. For a state to be able to co-operate with other states against transnational organised crime, it must have a legal system that is conducive to such co-operation. The Convention has identified a number of factors that affect capacity to relate to other legal systems. These include laws on the extradition of persons, the confiscation and
forfeiture of the proceeds of crime, and mutual assistance in criminal matters. The challenge for SADC states is to harmonise laws in these spheres.

Extradition

Most SADC states have extradition laws allowing extradition either in terms of a treaty or to designated states. The offences envisaged by the Convention would all fall within the ambit of extraditable acts. Problems might arise from disparities in respect of the extradition of nationals and the attitude to capital punishment. In addition, not all SADC states are linked by extradition treaties. Only Namibia can be regarded as having a quasi-extradition treaty with every other SADC state, in that it has designated them. South Africa also has extradition arrangements with most of the other SADC states.

The Convention provides a basis, in respect of organised crimes, for extradition between states in the absence of extradition arrangements. In this respect, it is similar to the SADC Protocol on Drugs, which can be used in drug-trafficking offences.

Mutual legal assistance

In terms of article 18 of the Convention, state parties are obliged to extend the widest measure of legal assistance in cases of transnational organised crime. This entails assistance in facilitating investigations as well as during criminal proceedings that are under way. Only one of the SADC states surveyed did not have a framework to facilitate this kind of assistance. There are two notable shortcomings:

- the absence of uniformity on the scope for mutual assistance, with some states not including assistance with investigations, and
- the tendency by some states to designate the countries to which assistance would be afforded.

Inevitably, not all SADC states can benefit from the assistance provisions of others. This is an area in need of harmonisation.

Co-operation in enforcing the law across national borders involves joint work not only on the part of law enforcement officials, but also among legal systems. In an environment where states differ in terms of background, values and levels of development, the practicality of co-operation is bound to be tested. Questions of the mutual compatibility of investigative systems and probative rules of evidence will arise. The former are probably easier to harmonise than the latter.

An illustration from undercover operations and entrapment could be used. State A may have a legal system that permits the use of traps and sting operations in detecting and apprehending the perpetrators of crime, while State B takes a dim view of the use of trickery by the police. Another example is the practice of ‘cordon and search’, which is acceptable to the law in some countries, but considered potentially unconstitutional in others.

The problem arises where an activity is undertaken by State A (in response to an ad hoc request, or in terms of a general agreement), acting in terms of its law, which yields evidence that can be used by State B. If the methods used by State A violate the rules which obtain in State B, this evidence is potentially inadmissible at a trial held in the latter. Does this nullify the
efforts of State A?

Article 18 provides no answer to the dilemma. The closest reference to what is postulated is subarticle 21(c), which allows State A to decline a request for mutual assistance if the assistance would be contrary to State A's laws. The converse is not provided for. To give effect to the spirit of article 18, it seems that state parties have to conclude multilateral agreements to anticipate and reconcile procedural conflicts. This appears to be the objective of article 18(30).

Linked to the contest between systems of adjectival law, but technically distinct from it, is the phenomenon of the felonious state. This entails a situation where the state slides (or sinks) into criminal activity. At this stage, the state has gone beyond the classic forms of corruption, predation or kleptocracy. Certain countries exhibit the interconnection of politics with crime of an organised and transnational nature. A few such countries are in Africa. Bayart, Ellis and Hibou (1999) have proposed six indicators of the criminalisation of politics:

1. "the use for private purposes of the legitimate organs of state violence by those in authority, and the function of such violence as an instrument in the service of their strategies of accumulation of wealth;

2. the existence of a hidden, collective structure of power which surrounds and even controls the official occupant of the most powerful political office, and which benefits from the privatisation of the legitimate means of coercion, or is able with impunity to have recourse to a private and illegitimate apparatus of violence, notably in the form of organised gangs;

3. the participation of this collective and clandestine power structure in economic activities considered to be criminal in international law, or which are so classified by international organisations or in terms of moral codes which enjoy wide international currency;

4. the insertion of such economic activities in international networks of crime;

5. an osmosis between a historically constituted culture which is specific to the conduct of such activities in any given society and the transnational cultural repertoires which serve as vehicles for processes of globalisation;

6. the macro-economic and macro-political importance, as distinct from the occasional or marginal role, of such practices on the part of power-holders and of these activities of accumulation in the overall architecture of a given society."23

Developments of the last few years have yielded one or more symptoms of state criminalisation in some SADC member states. Current events unfolding in Zimbabwe, where the government is sponsoring what it calls 'war veterans' in pursuing a campaign of intimidation of virtually all sectors of the socio-economic fabric, probably bring this state closest to the characterisation above. Zimbabwe appears to exhibit at least the first three indicators, and possibly the sixth as well. It is difficult to say at this stage whether there is any single state that fulfils all the factors. It is probably not necessary for this to happen before a state can be regarded as criminal. The ultimate labeling is less important than the implications of the incidence of any combination of these factors for the capacity of the state concerned to contribute in combating organised crime.

There is a proven relationship between the criminalisation of a state and its participation in practices such as drug-trafficking, diamond-smuggling and money-laundering.24 It goes without saying that a criminalised state cannot be expected to take effective steps against transnational
organised crime originating from itself. If anything, it becomes easier for organised crime to take root or thrive in such a state. The challenge for SADC is to ensure that member countries are assisted to prevent the slide, if need be through economic pressure.

Confiscation and forfeiture of proceeds of crime

Articles 12-14 of the Convention are devoted to the seizure and confiscation, or forfeiture of the proceeds of organised crime. Article 12 also deals with the confiscation of the means by which these crimes are committed (the so-called instrumentalities of crime). Procedures should include measures to enable identification, freezing and seizure. Bank confidentiality should not be used to deflect the identification processes. At the same time, article 12 allows for the protection of the rights of bona fide third parties.

The majority of SADC states surveyed have legislation authorising seizure, confiscation and forfeiture. Forfeiture is dependent on conviction, and civil forfeiture is rare. In one state, forfeiture is automatic for a certain kind of offence. It is only in South Africa where civil forfeiture precipitated by an investigation into organised crime can be encountered. There seems to be a revulsion against civil forfeiture in Malawi, where non-criminal forfeiture has been linked to despotism during the Banda era. One SADC state has no forfeiture provisions at all.

In most SADC states legislation on confiscation and forfeiture is part of mutual assistance law.

Prospects

On account of the variables articulated in this chapter, it is difficult to assess the prospects of SADC states adopting collective legislative responses to organised crime. However, the positive factors which enhance the chances of these initiatives succeeding can be outlined.

It is clear that there is a universal awareness that organised crime poses a threat to human security and economic development. This awareness has evoked a commitment to combat organised crime. The president of South Africa reiterated his government’s commitment to the cause on the occasion of the opening of parliament on 9 February 2001. At SADC level, the commitment to combat organised crime has been expressed often enough to avert any lingering scepticism.

The minimum capacity exists to face up to organised crime of a transnational character. All states have mutual assistance legislation in their legal systems, a common feature of which is extradition legislation. In addition to specific extradition provisions in local legislation, ties through the Commonwealth can be utilised to trace the movements and activities of organised criminals. Most SADC states belong to the Commonwealth.

The content of criminal law in much of SADC already recognises the offences that the Convention requires to be criminalised. There is no reason to doubt that all member states are keen to criminalise money-laundering, the one offence in respect of which disparities still exist.

The formation of SARPPCCO is a positive development. The organisation has already proven its value in improving the exchange of knowledge and skills among the structures responsible for detecting and investigating organised crime.

There are doubts, however, about the capacity to establish the administrative mechanisms
envisaged by the Convention for the detection and nullification of money-laundering strategies. Mechanisms are also required to give effect to the imperative of protecting witnesses, both during investigations and trials. It is not every state that can afford to establish such mechanisms. In the short to medium term, there is unlikely to be much progress in this area.

Some legislative changes will need to be complemented by political reforms to be acceptable to civil society and the judiciary alike. There are disturbing signs of a retreat to autocracy in certain parts of SADC, which do not augur well for positive political reform. If the trends in Zambia, Zimbabwe, Swaziland, Lesotho, Mozambique and Angola continue, there is little hope that the expansion of state powers envisaged by the Convention will be accepted by civil society in these countries.

Notes

1. Other SADC states were expected to sign later. It could not be ascertained at the time of writing whether this had happened.

2. Adapted from N South, On cooling hot money: Transatlantic trends in drug-related money laundering and its facilitation, <www.alternatives.com/crime/SOUTH.HTML>. The attitude problem was highlighted in a submission to the Constitutional Commission in Zimbabwe in October 1999, by a local advocate of black economic empowerment, who runs a commercial bank in Harare. He submitted that, in his opinion, institutions in developing countries that were starved of investment capital should not be required to investigate the origin of funds deposited with them. His reasoning was that this would discourage investment and prejudice them in the competition for capital.


4. Ibid.

5. On account of its history (as an indigenous bank set up by King Sobhuza to assist indigenous economic empowerment), the Swazi Bank is particularly susceptible to patronage politics. Over the years, dozens of well connected entrepreneurs have ‘borrowed’ from the bank for all sorts of projects, but never paid back, or only did so at a pace which prejudiced the bank. This raises two risks to which the bank is exposed: firstly, the bank would not scrutinise the source of a deposit made in repayment of a long overdue loan, and secondly, a ‘tainted’ deposit from a source introduced by an influential political patron is unlikely to be detected. The Lesotho Bank went through similar turbulence in recent years, leading to its collapse.


8. The other significant initiative is the international, intergovernmental Financial Action Task Force (FATF) that was created in 1989. FATF groups governments from the world’s major

The sentiments expressed by the governor of the Bank of Namibia in his General determinations on fraud and other economic crime, GN 16 of 1999 are instructive. He observed:

"Given the growing incidence of fraud and other forms of financial and economic crime in a global perspective, banking institutions should be continually vigilant against such undesirable activities. Apart form causing financial loss to the banking institutions the various forms of economic crime may have far reaching consequences, not only to the afflicted banking institution but can also undermine public confidence in the banking system. Banking institutions are therefore required to bolster their surveillance systems and institute adequate and appropriate internal controls in combating fraud.

While it is accepted that there are costs attached in stepping up anti-fraud efforts and in placing improved control mechanisms, banking institutions should bear in mind that their costs represent additional barriers and hence costs to the criminal also. The prevention of fraud and other forms of economic crime should be regarded as part of risk management."

The bank has set up a functional reporting system.

9. Swaziland, Zambia and Zimbabwe provide examples.

10. Zimbabwe exemplifies this situation perfectly. Corruption scandals involving senior public officers abound, without the necessary enforcement of criminal law. Patronage of the ruling party usually suffices to shield culprits from criminal sanctions. A strategy to combat organised crime needs to establish an effective regulatory infrastructure, with bodies that are institutionally independent of the government of the day. Included are the central banks, procurement boards, committees of the legislature, and anti-corruption commissions. Regulatory institutions should be given the capability to pre-empt organised crime, as well as the capacity to react to it. A study of SADC states reveals that there is no uniformity of approach on this issue. Central banks in Botswana and South Africa are relatively autonomous, unlike their counterparts in the rest of the region.

11. All kinds of reasons are advanced. In the case of the Procurement Act in Zimbabwe, non-implementation was put down to disagreements over who, between one of the Vice Presidents and the Minister of Justice, Legal and Parliamentary Affairs should administer the Act. Occasionally, an Act is not implemented on account of the absence of regulations to give detail to some provisions.


14. Lesotho and Swaziland

15. Zambia, Namibia, Angola and Mozambique. Of these, Namibia has laws that impose reporting obligations on financial institutions which could be used to detect and intercept laundered money. When used in combination with confiscation legislation, Namibia’s laws could work against money launderers.


17. States with extensive provisions are Zambia, Malawi and Tanzania.

18. SARPCCO has been calling for uniformity in procedures for the identification of stolen motor vehicles.


20. Angola.

21. For example, Tanzania, where unannounced searches for arms can occur in the street, in terms of section 39 of the Arms and Ammunition Act 2/91.

22. Unless one was acting in terms of the Criminal Procedure Act 51/77 in South Africa (with a reasonably grounded suspicion of the commission of a crime as a basis), a cordon and search which is done without the authority of a provincial commissioner of police would be unlawful.


24. Two prominent examples are Panama under General Noriega and Zaïre during the Mobutu era. Bayart et al include Equitorial Guinea, the Comoros and the Seychelles in their list of criminal states.

25. See the International Co-operation in Criminal Matters Act, 9/2000 (Namibia), and the Mutual Assistance in Criminal Matters Act, 24/91 (Tanzania).

References


