

## CHAPTER 3

# CONTEXT

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It is difficult to remember that when the Scorpions were launched in 1999, the international security focus and “buzz-word” was organised crime and the “war on drugs”<sup>16</sup>, rather than terrorism and the “war on terror”. Despite South Africa’s brush in 1998–1999<sup>17</sup> with a home-grown form of the kind of terrorism that was to occupy international centre-stage after September 2001<sup>18</sup>, the Scorpions were launched as an organisation focused firmly on organised crime, in a world and country primarily concerned about organised crime.

Indeed, international concern about the role of corrupt “transitional states”<sup>19</sup>, in the burgeoning illegitimate economy created by “transnational organised crime”<sup>20</sup> put some pressure on the “new” South Africa to be seen to be addressing the threat, and launching South Africa’s own “FBI” was one way of doing that. Another way was to pass powerful and not uncontroversial legislation – drawing on international precedent – designed to combat organised crime, prior to the launch of the Scorpions, and which the Scorpions were intended to use.

### Organised crime

Organised crime is difficult to define. Indeed, in drafting the *United Nations Convention against Transnational Organised Crime* delegates spent many months trying to come to agreement on a definition for organised crime. The definition finally agreed upon in November 2000 and signed in Palermo, in typically dry convention style, seems to lose some of the glamour with which the concept is usually imbued:

*“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.”*<sup>21</sup>

However, what the definition does capture is the broadness of the concept, and how it does not exclude the actions of those attached to the legitimate

economy or to governments. Even terrorists could fall under this definition, as long as their actions are in some way aimed at a material benefit. Indeed, the Scorpions in the early days, together with the National Intelligence Agency (NIA), investigated the bombings in the Western Cape of 1998-1999.

More interesting is the question of why organised crime was and is of such particular concern to governments. The arguments in favour of extraordinary measures being taken by governments against organised crime focus unsurprisingly on the threat to the state. Organised crime creates an economy outside of official markets. Unchecked, these unofficial markets can channel monetary flow outside of the mainstream economy and outside of the reach of tax collection, destabilising the economy.

Some organised crime groupings may also become closely intertwined with the legitimate economy; furthermore, the illegal activities or illicit enterprises themselves may involve ordinary business persons, civil society, and government officials, thus destabilising society as a whole. For example, the illegal drug trade in many countries has resulted in the corruption of police and other government officials.

Organised crime can also create authority figures outside of the state, which can effectively control communities. For example, the communities who rely on abalone poaching in the Western Cape are reliant on organised crime for their livelihood and do not respect the authority of the police or any other government agency. Effectively, organised crime in such communities usurps the authority of the state.

Pressure from abroad to deal with organised crime, and the requirements of international conventions, had an impact on the measures taken by states.<sup>22</sup> International concern about the “growth in organised crime” from the 1980s onward lead to pressure on “problem” states, including South Africa, to be seen to be taking a stand against organised crime.

South Africa has since the early 1990s been perceived to be a transit nation for illicit goods, particularly drugs.<sup>23</sup> After 1994, as a “society in transition”, South Africa along with other transitional countries such as those arising out of the former Soviet Union, was perceived to be a country “spawning” organised crime<sup>24</sup> and to be “transit states” for the smuggling of illicit goods generally.<sup>25</sup> The impact of the problem of organised crime in South Africa was not felt by South Africa alone but also by other countries; hence these countries placed pressure on South Africa to combat the problem.<sup>26</sup>

During the 1990s therefore, South Africa began to orient itself to combating organised crime, and as part of that positioning requested and received assistance from the US to do so, not only in the creation of the DSO, but for other entities involved in combating organised crime.<sup>27</sup> South Africa's Prevention of Organised Crime (POC) Act<sup>28</sup> is part of that trend, and appears to be largely based on concepts pioneered in US anti-racketeering legislation.<sup>29</sup> Similar provisions have been adopted in many countries, and will be described in the next section.

## **Organised crime legislation<sup>30</sup>**

Laws aimed at organised crime often reflect the desperation of law enforcers when faced with sophisticated criminals who thwart efforts to police them, and this is also true of South Africa's Prevention of Organised Crime (POC) Act. Implicit in the Act is the idea: "We know you did something really bad, but we can't prove it."

Two basic strategies aimed at the essential characteristics of organised crime are adopted in laws targeting organised crime. The first type of law aims at the fact that organised crime implies groups of people organised in some way who repeatedly engage in criminal activities. The second type of law aims at the fact that these groups make a profit.

The first type of law usually defines a gang or a syndicate in terms of numbers of members, and types of crimes committed. Some countries make membership of a group, and actions in association with an actual perpetrator, a crime. The idea is that those who direct or otherwise assist criminal activities, but who do not carry them out themselves, can also be brought to justice in this manner.

With this type of law, a new crime (racketeering) is often also created, based on a series of other crimes (predicate offences). This new crime of racketeering attracts harsher penalties than the predicate offences on their own would normally warrant. Similarly, the commission of certain crimes as a member of a proscribed group may also be subject to harsher penalties than would otherwise be the case. In some countries, these laws come very close to limiting freedom of association.

The second type of law focuses on removing the profits of criminal activities, and then on following the money trails. The idea is that confiscating the profits of crime reduces the incentive to commit the crime. This procedure is

called forfeiture and is generally done in two ways. The first is known as “post-conviction” or “criminal” forfeiture. This type of forfeiture occurs after conviction of an accused.

The second is known variously as “non-conviction”, “*in rem*”, or “civil asset” forfeiture. This type of forfeiture can occur without conviction of an accused. Assets can be forfeited if it is proved, usually on a standard of proof lower than that required for a criminal conviction, that they are either the proceeds of crime, or that the assets were used to commit an offence.

Criticisms of civil asset forfeiture law include that it is a punishment and punishments should not be meted out without a criminal conviction. This criticism sees civil asset forfeiture as a means of “fining” a person where law enforcement is unable to prove a criminal conviction.

So-called “money laundering” legislation looks at a profit-related problem for organised crime: how can they use their profits without getting noticed? Money laundering laws provide for all sorts of persons to be on the lookout for dirty money. Those who unknowingly or knowingly assist in the “cleaning” of money so that it seems to originate from a legitimate source, can also be convicted. This is a means of forcing the public to become law-enforcement’s eyes and ears. It also makes it highly unattractive for anyone to assist organised crime in “cleaning” its money.

South Africa’s POC Act contains provisions providing for all of these types of laws described above. It is clear from the way the POC Act and the DSO’s legislation was drafted, that the DSO was intended to be the primary agency to enforce the racketeering and criminal gang provisions contained in the POC Act, while the Asset Forfeiture Unit would make use of the criminal and civil asset forfeiture provisions, in conjunction with the DSO and SAPS.

The DSO was therefore, to some extent, created in order to use the legislation and to meet the need to be seen to be combating organised crime in the international arena. Its legislative mandate revolves almost exclusively around the concept of organised crime as provided for in the POC Act. The DSO routinely sets monetary asset forfeiture targets, and sees the procedure as integral to its strategy.

Although international attention has shifted away from organised crime somewhat since September 2001, onto the threat of terrorism, organised crime remains the focus of the DSO.<sup>31</sup>