



# **Justice in our society so that people can live in freedom and security**

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## **CRIME CHALLENGES AND CRIMINAL JUSTICE RESPONSE : AN INTERNATIONAL AND AFRICAN PERSPECTIVE**

### **INTRODUCTION**

The birth of the new post apartheid Republic of South Africa in 1994 has been a momentous occasion for both this country and the world. The advent of technology with the new information age provided a firm platform for the development of the minds and spirit of this nation. A global village has been spawned with no turning back. The advent of opportunities and the enterprise of citizens are only limited by their imagination and creativeness. Regrettably, most of these opportunities are subject to abuse by criminals. The scope and reach of the criminal law has been territorial while offending is increasingly trans-national and borderless in character.

## **OVERVIEW**

International offending has increased to an unprecedented scale in light of trade liberalization and globalization. International criminal enterprises engage in widespread offending including drug trafficking, terrorism, human trafficking, contraband smuggling, fraud, extortion, counterfeiting and intellectual property violations. Borders are generally ignored or become meaningless with new trading blocs and the creation of several regional common markets. Vast sums of money are generated globally from crimes that even exceed the gross domestic product of various states. The activities of criminal cartels worldwide are now a danger to international peace and security.

## **CHALLENGES TO SOUTH AFRICANS**

The threats to any society and South Africans specifically maybe considered threefold:

### **a) Threats to South Africans and their Communities**

The impact of crimes both domestically and internationally is felt directly by ordinary South Africans in their daily lives. Cocaine produced in the Asia golden triangle and in the Andes of South America are openly available on the streets and in the communities of Capetown, Johannesburg and Pretoria in South Africa. Direct consequences of drug abuse are measured in terms of damage to the social fabric of the South African Society. Street violence by gangs of young people, social dislocation and tensions in neighbourhoods are obvious. The devastating health costs and unemployment are some of the most visible effects everyday. Widespread smuggling and acquisitive crimes are committed by drug abusers to satisfy their habits. The victimization of households and the creation of fortress homes are common place as survival tools.

As for example, in 2003–2004 there were 13,793 car-jackings and 901 truck jackings. These figures have decreased remarkably from 15,773 and 6,134 in 1998-1999 respectively. However, the real costs is measured by the inflated costs of car insurance, loss of vehicles and the associated state of fear experienced by ordinary South Africans.

**b) Challenges to South Africans Financial Institutions**

South Africa with its relatively modern communications and transportation facilities coupled with modern banking and increased prosperity has experienced stress to its financial services sector. The increased trade liberalisation and expansion in financial services have been unparalleled. The continuous integration of the global financial and payment methodologies through credit cards and cyber products have led to enhanced opportunities for fraud, counterfeiting, money laundering and even corruption. The crime challenges for emerging and transitional societies like South Africa are multifaceted. The presence of West African fraud schemes have proliferated since the establishment of the Republic. The Nigerian “419” letter scams have been well entrenched and advanced to kidnappings and even murder. The scheme invariably involves appeals to international business persons requesting cooperation in transferring over budgeted or questionably quantities of money to overseas accounts. A promise of a sizeable commission is offered. A specific case in 1999 related to the arrest of three Nigerians, One Ghanaian and a local South African who had lured a Jordanian businessman to this country. On arrival the Jordanian was kidnapped and a ransom of \$40,000 US demanded. It is understood that several similar cases have been investigated by the local police.

The crime statistics for 2003-2004 show robberies of 54 and 192 for robberies of cash in transit while business robberies totaled 3,677. These figures have reduced from the 2000 period due in large measure to increased law enforcement and continued vigilance. However, the effects on the financial community is witnessed by the increased cost of security, various aspects of target hardening, loss of profits and bonus, decreased

productivity and inevitably loss of jobs and employment. Crime trends in South Africa have been marked by the advent of various nationalities in specific areas of offending. Links to some Hong Kong based triads such as “14k”, the “Wo Shing Wo” and “Table Mountain Gang” are suspected in the illicit trade in abalone to Asia. Abalone is a delicacy and alleged aphrodisiac in China. There is some indication of illicit trading in rhino horn and ivory by the said groups. The situation is exacerbated by the fact that abalone harvesting and trading is quite legal in China and is a rather expensive product netting almost \$1billion rand per annual from the Cape coast. Diversification by Chinese crime groups into mandrax smuggling is suspected following the arrest of several Chinese citizens in 1999 for the same.

The interdependence of the global financial markets results in a consequential threat to domestic markets and prosperity. Confidence in the integrity of the financial system may be thereby undermined.

### **CHALLENGES TO AFRICA AND THE WORLD**

Criminal Enterprises in the Southern African cone, engage in large scale and inherently dangerous adventures. Such offending include trading in weapons of even mass destruction, transfer of sensitive technology sometimes to rogue states for handsome profits, trading in banned and dangerous precursor chemicals and human trafficking. The recent case of Mark Thatcher's alleged involvement in the hiring of mercenaries for the overthrow of the Government in another African State is illustrative of these realities. Such crimes are grave challenges to our concepts of security, stability and peaceful co-existence in the global community. South Africa has rightly taken its prominent leadership position since 1994 in the world and Africa in particular.

The core values of African Society are under stress from organized criminals. Such enterprises have no respect for concepts like the rule of law, human rights and democracy. Drug traffickers must be singled out for the brutality and single mindedness in seeking to obtain vast fortunes at any price. The use of threats, and intimidation and even homicide against civil society are common place. Deaths of

journalists who expose offending have occurred along with law enforcement, elected office holders, members of the judiciary and everyday citizens. Drug traffickers and organized criminals have no limit in their insatiable greed for gain. The fact that illegal drugs kills and debilitate persons, reduce productivity and stagnate economies while undermining good governance are irrelevant to such criminals.

The threat posed by organized crime globally is emphasized in newly emerging societies as the former Eastern Europe and several transitional African States. The continued political instability in Africa as changes to governments occur without elections is of real concern. The undermining of democratic traditions and the rule of law has left several states in abject poverty as civil and ethnic strife rages. Liberia, once a prosperous nation has now being decimated by civil and political unrest that pauperized much of the population. The standard of living of several states has fallen dramatically as criminal organizations infiltrated the social and political fabric. Corruption has been endemic as the wealth of nations like Nigeria from petroleum was looted and sent to Swiss and European banks under the Abacha regime. The resulting loss of funding for health, education and the general welfare of the population was spectacular. Roads were left in disrepair and citizens even found it challenging to purchase petroleum products for domestic use such as for cars and electricity. Some African nations with substantial privatization programmes are saddled with corruption that threatens democracy. The bribery prosecutions relating to the dam construction and hydro project in Lesotho are added proof of organized corporate offending and greed.

Other crime trends in Southern Africa and the African Diaspora are found in the use of the Internet. Cyber crimes as perpetrated by organized elements can be equally devastating to societies. In recent years, organized criminals have been able to hire and recruit financial and legal experts to follow standard business practices for market and product diversification. Such expertise provides an added level of insulation for the beneficial owners to conceal their identities and schemes. Jurisdictions with weak or lax controls are selected from which such operations are conducted. Accordingly, efforts by law enforcement and regulatory authorities are rudimentary or non-existent in such states. Policing the virtual world is at best, most complex as national borders and different legal systems render the process tedious and invariably cumbersome.

In short, organized crime syndicates have targeted New York garbage collection, and building industry, the construction of toxic waste disposal facilities in Italy and the banking and aluminium sectors in Russia. Internet use and the expansion of E-commerce present emerging targets for the exercise of influence and infiltration by criminals. Constant vigilance is mandatory in the selection of new business partners and prospective financial developers in the global economy and Southern African cone.

Another basic trend in African vulnerability to criminality over the worldwide web is the use of virus, Trojan horses and other corrosive products to infect computer systems. In 2000, a variation of the “love bug” virus was issued to access account passwords in the Union Bank of Switzerland and several banks in the United States of America. This incident was not given much publicity as the need to protect confidence and stability in the financial markets is paramount. However, when the perpetrator of the “love bug” virus was traced to be a student in the Philippines, there was little legal capability to punish him. The Philippines swiftly enacted cyber crimes legislation to address the issue and prevent reoccurrences.

Over the past decade, organized criminals globally and in Africa have shown themselves to be flexible and adaptable to modern realities. Such criminals have sought to benefit from every advance in technology and cyber opportunities to maximize gains by illicit means. The implications of such criminality are profound. The response from governments worldwide and Africa in particular must be wholistic, strategic, multilevel and trans-national in character.

## **RESPONSES**

The rejoinder of civil societies and governments globally and in Africa in particular to criminality has been swift, ad hoc but rather measured at times. The need to respect constitutional safeguards and civil liberties especially issues of privacy are long treasured rights that have been won over the decades. A surrender of such values is anathema to the way of life and well being of modern individuals.

## **LEGISLATION**

In South Africa, a spate of modern legislation marks the first legislative response to the rapidly expanding criminality. The Drugs and Drug Trafficking Act, the Prevention of Organised Crimes Act, the Money Laundering Act and Corruption Act along with other innovative legislative measures have been enacted. The authorities have rightly prioritised the need to provide an advanced legislative framework for the conduct of public affairs in a modern post apartheid South Africa. The legislative regime has been met with much success despite several challenges. The Prevention of Organised Crimes Act has been amended to correct deficiencies to ensure that criminals are deprived of their ill gotten fortunes with due process. The reality of the fight against modern criminals demands the deprivation of their illegally acquired assets for the benefit of the public good. This concept is still relatively revolutionary to a conservative judiciary but incremental changes are developing with wider acceptance of the policy and mischief that the legislation seeks to address.

## **REGULATION**

The Regulatory response in South Africa has witnessed a vibrant Stock exchange with active trading in equities, governmental securities, discounted bonds and commercial papers. Corporate governance is structured to ensure fair play and protection of minority shareholdings. A modern companies' regime and Securities Commission are constantly reviewed to ensure guidance is practicable and facilitate easy market interaction. The development of an active bond market, mutual funds and general money markets have been in existence to ensure that initial public offers from the corporate community are subscribed. The capitalization of the markets and rules to curb insider trading along with interlocking directorships must be subject to ongoing supervision and oversight. Financial fraudsters are ever alert to infiltrate corporate stocks and raid vulnerable industries with consequential economic run of individuals and well established entities. The collapse of Barings Bank, the oldest Merchant Bank in England in the early 1990 is lasting proof. The actions of a trader in Singapore by market manipulation and gambling on derivatives on the futures market must be subject to corporate oversight and control. South Africa as a leading

member of the Paris based FATF has played a major role in combating financial crimes. The Financial Action task Force with its 40 recommendations has been active in promoting anti-money laundering measures. The need to protect the integrity of the financial sectors worldwide cannot be over emphasized.

### **LAW ENFORCEMENT**

The South African response to criminality by law enforcement has been the object of much admiration recently. The Government's commitment to public safety and the provision of reasonable resources for this object is most commendable. The dramatic drop in specific crimes is a tribute to the dedication and steadfast purpose of ensuing a safe society. The criminal statistics show that homicides have decreased from 25,965 in 1994-1995 to 19,824 in 2003-2004. This is a spectacular achievement in such a period for a society that was characterized by violence and repression prior to 1994. Although serious efforts are ongoing, the future promises further reduction whereby South Africa can no longer be anecdotally referred to as the Murder Capital of the world.

Moreover, constant efforts by law enforcement to improve its efficiency and image are invaluable ingredients in overall human development. Training of officers especially in international humanitarian law such as protection of cultural property, rules of warfare, international criminal court concepts and respect for Red Cross and Red Crescent symbols are valued tools in the armoury of the police. A basic approach to human rights observations especially of those accused in custodial detention are pivotal to a developed society and respect for humanity. The significant reduction of custodial deaths, absence of political prisoners, legal advice for suspects, abolition of the death penalty and corporal punishment are hallmarks of a modern society.

### **PROSECUTORIAL REVAMP**

The establishment of a National Prosecution Service under the Directorship of Mr. Bulelani and now Adv. Vusi Pikoli marks the dawn of a new era. The original prosecution service has been revamped to enjoy a new image from the oppression

with which it was associated. A structured and organized national prosecution service with autonomous regional centres envisages the dispensing of justice for all in South Africa where people can live in freedom and security.

The independence and security of tenure of prosecutors are guaranteed to ensure free and fair decision making away from the vagaries of partisan politics and ethnic or tribal considerations. Remuneration and conditions of service are key components to maintain the attraction of the Prosecution Service as a career option and keep officers away from any thought of the corrosive and corrupting influences of criminals.

Moreover, the current inclusive Prosecution Service with both gender and geographic balance has added credibility to the justice system in effectively discharging its constitutional responsibilities to a modern democratic and prosperous South Africa.

### **GLOBAL RESPONSES**

The relative prosperity of South Africa is based on its open markets, vast minerals and precious metals. Developed capital markets along with reliable banking and financial systems make it an attractive destination for organized criminals and contraband trading. The predominant consideration of international criminals is to profit for greed. As such vast sums of money are concealed to finance operations and amass fortunes even of terrorists whose primary aim is usually political. Their need to associate or rely on the legitimate financial systems provides exposure of their vulnerability with regard to wiretaps, asset seizure and restraint of property. The South African and global responses have targeted the need to strike against the financial infra-structure of transnational criminals by developing new modalities to trace illicit proceeds to their criminal origins and depriving the criminals of their revenue bases.

Secondly, the international community has developed a successful system to ensure harmonious legislation and an effective response to transnational offending. Each country is entitled to implement similar legislative provisions in accordance with its constitutional arrangements. The advent of Sectoral Conventions for specific subject matters has been a model arrangement on an international basis. The Vienna

Convention 1988 on Narcotic Drugs and Psychotropic Substances with wide ranging provisions for asset seizure, mutual legal assistance, extradition, transfer of witnesses and documents has lead the way. Similar conventions on transnational organised crimes with its three optional protocols: Convention on Corruption, European Convention on Cyber crimes and the establishment of the International Criminal Court in The Hague have been milestones in international cooperation in combating worldwide crimes.

Thirdly, the use of enhanced investigative and prosecutorial strategies has seen success in coping with multilateral offending. The establishment of specialized police investigative teams including prosecutors, accountants, information technology experts in multidisciplinary task forces are proving effective in coping with organized offending. In England, the establishment of the Serious Organised Crime Agency (SOCA) in 2006 as a non-departmental public body aims to reduce the harm of crimes caused to the United Kingdom and its citizens by organized crime including drug and human trafficking.

In South Africa, a similar operation has been in existence under the SCORPION label since 1999. The body has recently undertaken high profile prosecutions of corruption and other matters involving senior officials with mixed results.

The global response to offending and particularly terrorism since the 9/11 attacks in the United States of America has witnessed a new punitiveness. Several countries have enacted draconian legislation to combat terrorism pursuant to UN Resolution 1373/2001.

In **Dodo v State (2001) 4LRC 318** the Constitutional Court of South Africa was asked to review the validity of the Criminal Law Amendment Act, 1997. This Act had imposed mandatory minimum sentencing of life imprisonment for specified offences. It was held that the legislation was constitutional although the Legislature was not empowered to compel any court to pass a sentence which was inconsistent with the Constitution. The concept of proportionality was at the heart of the inquiry.

Increasingly long prison sentences are imposed as in England and parts of the United States of America especially California. The “three strikes” law allows for the

imposition of a life sentence after conviction for three serious offences. The result of such sentencing trends has been carceral inflation with overcrowded prisons and a disproportionate number of minorities. Caution must be exercised to ensure fairness in the criminal justice system and observance of civil liberties at all times.

### **FAITH BASED INITIATIVES**

It is refreshing to note that a faith based component is included in this Conference as part of a wholistic approach to crime fighting and responses. The need to improve the standard of living and confidence of the public in the justice system can only benefit from such aspects of culture and values that are inherent in human nature.

Again, the need for constant research and enquiry into the causes and methodology of offending are ongoing issues. The role of the Institute of Security Studies is to be welcomed as a valued partner in the quest for wider understanding of the direction for international crime control strategies.

Finally, other technological modalities maybe called in aid of the international and African response to offending. The use of geographical or location specific monitoring orders can play an invaluable role in the detection of vulnerabilities especially in the financial sectors. Such a measure is modeled from techniques used in Data Mining evaluations.

A Geographical Monitoring Reporting system can be cloned to track suspicious transactions in specific industries like banking or securities exchanges. This intelligence based information could then be assessed by regulators for consideration by law enforcement or multi-disciplinary teams. The object of such surveys would be early detection of trends of offending that could be disrupted in the initial stages. Much success could flow from such proactive measures rather than await a reactive prosecution when much of the losses have been incurred and the evidence disappeared.

### **CONCLUSION**

The evidence shows that South Africa has reacted positively to the global threats posed by organized offending both locally and internationally. The National Prosecution Service and the South African Police Service with all related stakeholders are in the vanguard of ensuring a safe and just society. The threat from organized offending is seeking to undermine the new democracy through bribery, corruption and violence. Such offending can utilise globalization and modern information technology as instruments of abuse. However, the reaction of the South African authorities in recognizing this threat and implementing counter measures are most encouraging to ensure good governance and a stable just society now and in the future.

**Thank you**