行政院所屬各機關因公出國人員報告書
(出國類別：出席國際會議)

國際檢察官協會二〇〇〇年第五屆年會報告

出國人：法務部主任秘書 吳陳鐶
台灣台北地方法院檢察署主任檢察官 黃全祿
台灣板橋地方法院檢察署主任檢察官 陳玉珍
台灣板橋地方法院檢察署檢察官 張慶林
法務部調辦事檢察官 孟玉梅
台灣台北地方法院檢察署檢察官 蔡佳玲
台灣板橋地方法院檢察署檢察官 李傳侯

出國地點：南非開普敦
出國日期：八十九年九月一日至九月十六日
報告日期：九十年五月

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國際檢察官協會第五屆年會與會經過報告

孟　玉　梅

壹、法務部出席「國際檢察協會」第五屆年會成員名單

國際檢察官協會於西元一九九五年六月在奧地利首都維也納成立，是現今全世界唯一一個非官方、非政府的國際檢察官組織。此一國際組織成立之宗旨，乃鑑於國際性販毒、洗錢及其他重大犯罪快速滋長，期望結合各國檢察官之力量，藉由跨國際之聯繫、合作，與各項資訊的交流，對遏止犯罪產生助益。自一九九六年在匈牙利首都布達佩斯舉行第一屆年會，之後歷次年會在加拿大渥太華、愛爾蘭都柏林及大陸北京舉行，每年均選定與檢察官職責切身相關之議題作為大會之主題，透過來自世界各地檢察官之共同討論，使與會的各國檢察官汲取更新的資訊與觀念。

西元二千年為國際檢察官年會第五屆年會，於九月三日至九月八日在南非開普敦舉行，近二百八十名來自世界各國之檢察官齊聚一堂，我國雖非「國際檢察官協會」之團體會員，本部仍指派成員積極參與此次年會。本部暨所屬參加此次年會之成員如下：

姓　　名	現　　職
吳　陳　鑣	法務部主任祕書
黃　全　祿	臺灣台北地方法院檢察署主任檢察官
陳　玉　珍	臺灣板橋地方法院檢察署主任檢察官
張　慶　林	臺灣板橋地方法院檢察署檢察官
孟　玉　梅	法務部檢察司調辦事檢察官
蔡　佳　玲	臺灣臺北地方法院檢察署檢察官
李　傳　侯	臺灣板橋地方法院檢察署檢察官

貳、第五屆國際檢官年會議程暨行程表

日　　期	時　　間	活　　動　　內　　容
九月一日(星期五)	下午五時三十分	啟　程。
九月二日(星期六)	上午十時	抵達開普敦。我駐開普敦代表處楊處長天行接機。
	晚上六時	楊處長天行設宴歡迎參加國際檢察官年會之全體成員。
九月三日（星期日）	下午四時	報　到。
	晚上六時	開幕典禮及歡迎酒會。
九月四日（星期一）	上　午	有關司法人權議題之專題報告及討論。
	下　午	分組討論案例。
九月五日（星期二）	上　午	分組報告及全體會員進行討論。
	下　午	參訪羅賓島（大會安排）。
九月六日（星期三）	上　午	司法制度與人權保障相關議題之專題報告及討論。
	下　午	大會討論及會員大會。
	晚　上	開普敦市市長晚宴。
九月七日（星期四）	上　午	分區討論各國司法人權現況。
	下　午	參訪好望角（大會安排）。
九月八日（星期五）	上　午	綜合報告及全體會員進行討論。
	下　午	檢察官在新世紀之角色之專題報告與討論及閉幕儀式。
	晚　上	閉幕酒會。

九月九日至十二日 （星期六至星期二）		自由活動及待轉機前往約翰尼斯堡。 楊處長天行設宴歡送。
九月十三日至十四日 （星期三至星期四）		考察克魯格國家公園野生動物保育實務。 我駐南非代表處杜代表稜設宴歡迎參加國際檢察官年會全體成員。
九月十五日（星期五）	上　午	待機返程
		返　程
九月十六日（星期六）		返　程

參、年會主題與討論經過：

一、前　　言

本屆年會探討的主題為「人權」。其中應如何積極保障被告在刑事訴訟程序中的地位、檢察官如何於行使職權的同時，兼顧被告人權的保障及在英美法制與大陸法制之實踐上，對被告人權的保障有何不同等議題，更是本次大會討論的焦點。

有關司法人權的保障，在一九四八年十二月十日聯合國大會通過的世界人權宣言（The Universal Declaration of Human Rights of 1948）第九條至第十一條即規定：不得無故逮捕、拘禁或驅逐任何人（No one shall be subject to arbitrary arrest, detention or exile.）；任何人均有權於其權利或義務受法院判決或受刑事訴追時，要求在一個獨立、中立的法庭中接受公平、公開聽審；（Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.）；任何人受刑事訴追，除經由公開法庭依法審理，且賦予其所有行使防禦權之必要保障後，仍能證明其犯罪前，均推定其無罪。依行為或不行為當時之國內外法律，並不構成犯罪時，之後不得認其為犯罪。又行為之處罰也不能重於犯罪時之法律規定。（1. Everyone

charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

2. No one shall be held guilty of any penal offence on account of any act or omission, which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall be heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.）除了將公平審理、無罪推定及罪刑法定等重要原則揭櫫於世界人權宣言中外，另於一九六六年十二月十六日聯合國決議通過的「公民權利和政治權利國際公約」（The International Covenant on Civil and Political Rights of 1966）第九條至第十五條，再度重申被告前述之基本人權，並詳細規範，任何人均享有人身自由及安全，除經由法定程序，否則不得對之逮捕或拘禁；任何人遭到逮捕時，應即時告知其受逮捕理由及任何可能被訴之罪名，且應即刻送往法官或有權行使司法權者前，使其能於合理時間內接受審理，否則應即釋放。任何遭到拘捕之人也有權採取訴訟程序，以使法院儘速判定其受拘捕是否合法，如不合法即命釋放。遭到非法拘捕的人有權要求賠償。而所有受拘禁之人，均應受到人道待遇並對其固有的人格尊嚴加以尊重。另刑事被告在刑事訴追的過程中，最起碼應保障其享有下列之權利：一、以其所能理解的語言，迅速且詳細地使其知悉遭控訴的事由；二、使其有充分的時間準備抗辯，及使其與其辯護律師接觸；三、受審時間不無故拖延；四、由被告親自到庭應訊，並由其或由其所選任的辯護人辯護，如其無選任辯護人，應告知其得享有此項權利，且在任何必要的案件中，應為其指定辯護人。如其無力支付費用時，即無需付費。五、有利或不利被告的證人，都能在相同的條件下受訊問。六、指定免費的翻譯協助之。七、不得強迫被告做不利於自己證詞或強迫認罪。

由此可知犯罪嫌疑人或被告之司法人權向為國際間深受關注之人權議題。

二、討論經過

大會除就專題由專家提出報告，並由全體與會者提出問題討論外，採分組座談之方式，討論模擬之刑事案例。參與會議之檢察官來自亞、歐、美、非及大洋洲等各洲，各自就國內實證法的角度進行討論。不論是英美法系（Common Law）或是大陸法系（Civil Law），刑事訴訟程序的目的絕對不止是將罪犯定罪，更重要的是建制一個公平的裁判程序，使被訴追的被告得立於與檢察官實質對等的地位，行使訴訟上的各項權利。且不論是大陸法系或英美法系的檢察官，都有實質的權力可實踐對被告人權的保障；英美法系的檢察官，在審判時，可拒絕採用警方非法或不當取得之證據，而大陸法系的檢察官在警方調查犯罪的過程中即可實質監督，防止對人權的侵犯。最後在各國人權之狀況分區討論中，吳主任祕書陳鏸就我國對各項基本人權之保障提出說明：我國對各項基本人權，諸如言論自由、集會結社自由、宗教信仰自由、祕密通訊自由、居住遷徙自由等之保障，不但明列於憲法中，且憲法第二十三條更規定，所保障之各項自由權利，除為防止妨礙他人自由、避免緊急危難、維持社會秩序或增進公共利益所必要者外，不得以法律限制之。我國並制定有冤獄賠償法，使遭受不當羈押或冤獄之被告，得按其受不當羈押或冤獄之日數，向國家請求每日合約美金一百至一百七十元之賠償金。我國還制定有犯罪被害人保護法，使犯罪被害人或其家屬於符合法定要件時，得向國家請求因犯罪受害之補償；此外，我國並已研擬「法律扶助法」草案，待完成立法程序後，將對無資力而符合一定條件者，提供法律扶助。現行法規有由國家提供公設辯護人為未選任辯護人之重罪被告辯護之制度。此項說明，使出席之各國代表對我國人權保障之現況更加明瞭，並對我國人權保障之週延大為驚訝。最後，大會在與會各國代表相互期許，於即將來到之二十一世紀中，檢察官應扮演好人權捍衛者的角色聲中圓滿落幕。

PROGRAMME OF EVENTS

Sunday	**03-Sep**	10h30 - 17h00	Conference Registration in the VOC foyer at Cape Sun Inter-Continental
		18h00	Delegates depart their hotels for Parliament
		Telkom Conference Opening Ceremony	
		18h45	Delegates assemble in Old Assembly Hall of Parliament
		19h00	Arrival of the President of South Africa
		19h15	Opening of 5th Annual Conference of the IAP
		19h30 - 21h00	Telkom Opening Cocktail Reception in the Queen's Gallery at Parliament
Monday	**04-Sep**	09h00 - 09h30	Presentation of Awards
		Opening Plenary Session in the VOC Room of the Cape Sun Inter-Continental hotel	
			Key Note Addresses:
		09h30 - 10h00	Nicholas Cowdery, QC Australia "Human Rights and The Prosecutor - setting the scene"
		09h30 - 10h30	Justice Arthur Chaskalson, South Africa "The South African Context"
		10h30 - 11h00	**Refreshments**
		11h00 - 13h00	"Human Rights Legislation - Headaches for the Prosecutor?"
			Chair : Robert Johnson, USA
			Panel: Colin Boyd, QC (Scotland)
			John Pike (New Zealand)
			Professor Egbert Myjer (Netherlands)
			Elaine Krivel QC (Canada)
		13h00 - 14h30	**Lunch**
		14h30 - 15h30	Simultaneous Workshops - (Workshop groups and venues will be advised)
			a) The Prosecutor's Dilemma
			b) Case Studies
		15h30 - 16h00	**Refreshments**
		16h00 - 17h30	Simultaneous Workshops to continue
		17h30 -	Evening at leisure for delegates
Tuesday	**05-Sep**	09h30 - 10h30	Feedback from Workshops in the VOC room
			Chair. Eamonn Barnes (Ireland)
		10h30 - 11h00	**Refreshments**
		11h00 - 12h30	"Questions and Answers"
			Chair: Nicholas Cowdery, QC
			Panel: Colin Boyd, QC (Scotland)
			John Pike (New Zealand)
			Professor Egbert Myjer (Netherlands)
			Elaine Krivel QC (Canada)
		12h30 - 14h00	**Lunch**

PROGRAMME OF EVENTS

The Transnet Robben Island Excursion

14h30 - 17h00	Tour programme to Robben Island
18h30	Delegates depart their hotels for Ratanga Junction

The South African Breweries Cape Experience Street Party

19h30 - 22h00	An informal social evening with a wide variety of foods, experiences and beer!!!

Wednesday 06-Sep 09h30 - 10h30 Human Rights Session 2 in the VOC room

Chair: Werner Roth (Germany)

Speakers:
1. Carl Aage Norgaard (Denmark) "Varying International Perceptions"
2. Barney Pityana (South Africa) "Human Rights and the Defence"
3. A victim of Human Rights Abuse in South Africa

10h30 - 11h00	**Refreshments**
11h00 - 12h30	Human Rights - The Rights of Others

Chair: Trevor Griffin

Speakers:
1. Martin Blackmore (Australia) "Equality of Arms, Common Law"
2. Francois Falletti (France) "Equality of Arms, Civil Law"
3. The Rt Hon Lord Williams of Mostyn (United Kingdom) "Human Rights of the Community"

12h30 - 14h30	**Lunch**

5th General Meeting of The International Association of Prosecutors

14h30 - 15h30	Held in the VOC Room
15h30 - 16h00	**Refreshments**
16h00 - 17h30	General Meeting to Continue
18h45	Delegates depart their hotels for City Hall
	City of Cape Town African Banquet
19h00 - 22h00	Formal Banquet hosted by the Mayor of the City of Cape Town - Nomaindia Mfeketo

Thursday 07-Sep 09h30 - 10h45 Regional Forums

1. Africa - Adv Leonard McCarthy (South Africa) - VOC room 1
2. The Americas - Mark Richard (USA) - VOC room 2
3. Asia-Pacific - Priscilla Adey (Australia) - Villa Room
4. Europe - Henning Fode (Denmark) - Stellenbosch Room

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PROGRAMME OF EVENTS

	10h45 - 11h15	**Refreshments**	
	11h15 - 12h30	Regional Sessions to continue	
	12h30 to 14h00	**Lunch**	
	14h00	Delegates depart hotels for Cape Point	
	14h00 - 17h00	Delegates travel to Cape Point	
	17h30	Evening at leisure	
Friday **08-Sep**	09h30 - 10h30	Feedback from Regional Forums in the VOC room	
		Chair:	Paul Rofe QC (Australia)
	10h30 - 11h00	**Refreshments**	
	11h00 - 12h30	"Questions and Answers" in VOC room 1	
		Chair:	Daniel A Bellemare, QC (Canada)
		Panel:	Carl Aage Norgaard, (Denmark)
			Martin Blackmore, (Australia)
			Francois Falletti, (France)
			The Rt Hon Lord Williams of Mostyn (UK)
	11h00 - 12h30	PARALLEL PROGRAMME in VOC room 2	
		Open Forum	
		Chair:	Brendan Nix (Ireland)
	12h30 - 14h30	**Lunch**	
	Closing Plenary "The Role of the Prosecution in the New Millennium"		
	14h30 - 16h30	Chair:	Retha Meintjes, South Africa
		Speakers:	Bulelani Ngcuka (South Africa)
			Justice Peter Hryn (Canada)
			Henning Fode (Denmark)
			Graham Blewitt (International Criminal Tribunal for the Former Yugoslavia)
	16h30 - 17h00	Closing Session	
	The Southern Sun Closing Cocktails		
	18h00 - 20h00	Cocktails and farewell reception with the Minister of Justice and Constitutional Affairs	
Saturday **09-Sep**	All day	Departure of delegates	

赴南非開普敦參加國際檢察官會議第五屆年會之我見

蔡　佳　玲

一、前　　言

參與國際會議對於生長在台灣的我們，誠然是一次難能可貴的經驗，尤其是來自世界各地、職司檢察業務的人們藉此機會齊聚一堂，互相交換工作、生活上的種種經驗與心得，此種盛況想必只有身歷其境者能領會其樂趣！對於甫投身於檢察工作的我而言，此次與會確實是為我開了一扇窗，使我得以窺見執法工作者之群像，並且勢必在未來的生涯中留下難以忘懷之扉頁。

二、大　　會

此次大會之主題為「檢察官與人權」，南非曾在人權史上留下惡名，導致國際間紛以禁運等手段來加以制裁，係舉世皆知之史實，時至今日，種族隔離已成過去，曾受政治迫害之黑人領袖曼德拉自階下囚搖身成為一國元首，且卸任後仍具有舉足輕重之地位，為人權之保障工作奉獻心力，此一歷程最為黑人（African）津津樂道，南非法務部部長，及小開普敦市市長等人均屢屢在各種場合闡述這段歷史。

而論及檢察官之角色與人權保障議題，來自各國之學者分別在會中為詳盡而多元之論述，較特別的是，學者們設計若干「實例題」，並將所有與會人員分成數小組分別進行進一步之討論，惟因大會中最為強勢之語言仍是英語，來自英語系國家之檢察官多能侃侃而談，發見問題所在、充分表達意見，有時難免一面倒地呈現英美法系色彩，反觀作為我國法律主要源頭之德國、日本、法國卻在一旁靜默……但若因此即認為英美法之思維已成主流倒也未必，中場休息時間來自大陸法系國家之國際友人常會三五成群，宛如喜獲志同道合之士，共同宣揚、捍衛自己法系之優點，呈現熱絡之景象。

三、與會人士之交流

大會所安排的各項聯誼活動對於生活空間有限的法律人而言，著實是拓展視野之絕佳良機，透過難得的相逢，了解各國關於文化、民情、乃至於法治觀念之異同，縮短彼此間因陌生而產生之隔閡。歸國之後，再與國際友人透過電子郵件之方式保持聯絡，互相提供資料，抒發工作心得，實現了天涯若比鄰的境界。

四、感　　想

台灣雖是海上孤島，但絕對不應成為國際孤兒，尤其在地球村已然形成，犯罪勢力漸趨國際化之今日，各國執法工作將不能自外於國際社會，而應透過國際合作始能竟其功。台灣作為亞太運輸之樞紐，國際犯罪集團之不法活動在此駐足，固有待吾國協助蒐集犯罪情報，而吾國長久以來緝毒工作「截毒於彼岸」之理想，乃至於各種跨國犯罪活動之偵查作為，同樣須他國之配合有以致之。此次聞見某些國家間司法互助管道通暢，著實令人生羨，相信此一境界亦應是吾國亟待努力之目標！

南非一九九七年國家檢察法就檢察總長設置之簡介

李　傳　侯

壹、背　　景

西元一九九六年，南非檢察官們計劃進行一項史無前例的罷工行動，他們要求南非當局，重新省視南非在量刑、保釋和假釋政策的不定性。以量刑為例，當時有件著名的 Motherwell 爆炸案，犯嫌 Gideon Niewoudt 在該案裏，殺了三個警察和一個告密者。Niewoudt 因此被判處徒刑二十年。但在另一件沒有任何人死亡的紐西蘭觀光客被強姦案裏，一個年青人卻被判處二十三年的徒刑。

而保釋也同樣可以以 Gideon Niewoudt 的例子來說明。Gideon Niewoudt 在被第一審判處徒刑後，提起上訴。上訴期間，以五萬蘭得（相當於新台幣二十萬元）交保。交保的理由竟然是基於「無罪推定」原則，所以在 Gideon Niewoudt 上訴後，即准予交保。完全沒有顧慮到 Gideon Niewoudt 對被害人和證人的生命所造成的威脅，也沒有考慮到 Gideon Niewoudt 是一個已經被一審判決有罪的被告，且具有潛在的危險性。

至於假釋方面，南非人民認為，國家對待犯罪者太過軟弱。有些重刑犯甚至在服了四分之一的刑期後，即被假釋。

然而，觀察家和司法當局認為，真正威脅、幾乎摧毀整個檢察體系，而急需要改革的，卻是檢察體系內部的問題。

檢察官和治安法官（Magistrate，註一）在資格上十分接近，但是治安法官的薪資卻遠高於檢察官。雖然治安法官和檢察官一樣，同隸屬於司法部，但是治安法官卻獨立行使職權，不受公務員委員會的監督，其身分及待遇也另依據「治安法院法」保障（註二）。在南非檢察體系裏，從檢察官到副檢察長的所有的檢察官，都是行政官，所以南非檢察官的職務和待遇，都是由公務員委員會來決定。這一點導致了大量的資深檢察官提出辭呈。

另一方面，長期以來，檢察機關不當起訴、不起訴的案例不斷發生，一直沒有能有效率的控制檢察機關行使職權的機制，社會正義蕩然無存。

在一九二六年到一九九二年以前，任何一個檢察長（Attorney-General）在行使職權時，必須服從屬內閣成員的司法部長的指示，不論該項指示是針對通案或個案。司法部長甚至可以推翻檢察長起訴或不起訴的決定，並針對個案，自行行使檢察官或檢察長的職權。結果，政治力可輕易的介入檢察體系。

通常，司法部長只有在該案具有國家利益時，才會介入。但在一九四八年南非採行種族隔離政策後，與種族隔離有關的事項，廣泛的被解釋為具有國家利益，檢察體系亦因此成為內閣打壓或迫害政治異己的工具。

到了一九九二年，由於南非當時執政的國民黨預見到種族隔離政策將會被終結，黑人勢必成為執政者，為了避免日後成為新政府清算的對象，於是通過了「檢察長法」（Attorney-General Act），賦予全由白人擔任的檢察長獨立行使職權的權力。依「檢察長法」，檢察長可以國家的名義，在其指定的轄區內，起訴任何違法的人。司法部長僅負責提供檢察體系行政資源。這樣的轉變，雖然使檢察體系得以脫離政治力的干預，但卻導致了另一個嚴重的問題，也就是十個依照高等法院管轄區域配置的檢察長（註三），均可不受節制的獨立行使職權，致使無從對之進行監督及管制。

因此，南非一九九六年憲法，要求建立一套單一的國家檢察體系，這也就是「國家檢察法」在憲法上的依據。為了避免重蹈前述二個時期覆轍，「國家檢察法」必需在政治上的獨立性和檢察行為的可測性上，取得平衡。

貳、「國家檢察法」簡介

「國家檢察法」的立法重點在於：

(一) 依據一九九六年憲法所創設的檢察總長（the National Director of Public Prosecutions）的任命程序，總統必需根據

一個超出政治影響的委員會的建議，任命一個有資格的人來擔任職務。

(二) 為了保持檢察總長的獨立性，檢察總長的任期必需超過總統，而且不得再被任命。

(三) 只有在符合聯合國檢察官角色綱領中規定的情形時，才能停止檢察總長行使職權。

(四) 檢察總長必需時時要求檢察官公正客觀的，為了公共利益而行使職權。

(五) 檢察總長必需定期向國會報告由其發布的檢察政策和命令指示，以使檢察行為具有可預測性。

(六) 檢察總長可以以附理由的書面決定，要求重新審查檢察長（provincial Director of Public Prosecution 即原來的 Attorney General）的決定。然而這項作為，要能呈現在國會前。為了使這項職權的行使更為嚴格，可以指定一個獨立的檢察官來行使。

(七) 對檢察長，也要求以相同的程序來任命，並獲得相同的身分保障。

(八) 創設新的偵查檢察長（Investgating Director）（註四）一職，以便在特殊案件，直接由其或所屬的檢察官指揮偵辦案件，以統合資源，並提高偵查品質。

相較於以前，「國家檢察法」最大的不同在於檢察總長一職，以及偵查功能的提升。

參、檢察總長及其職權

首先，「國家檢察法」依憲法所創設的檢察總長（National Director of Public Prosecution）為檢察體系金字塔結構的頂端，並使原來獨立行使職權，配置於各高等法院的檢察長（Director of Public Prosecution）都受檢察總長的指揮監督。檢察長之下則是各個檢察官（Prosecutor）。建構了如此的結構之後，也廣泛的授與檢察總長一些權限和有效的手段，使檢察行為具有可預測性。

依據憲法，檢察總長權限如下：(1)決定檢察政策；(2)發布政策指令；(3)在政策指令不明時，介入個案；(4)在徵詢檢察長的意見後，對原起訴或不起訴的決定，進行事後審查。其中(1)(2)兩項，是針對通案行使職權，第(3)項事實上是對第(2)項的補充，所以也是通案性的，而第(4)項則是針對個案，對具體個案進行事後的審查。檢察總長在行使此項事後審查權時，可以推翻原檢察長對個案之決定。授予檢檢總長此項個案事後審查的權力，一方面是因為檢察總長是居於檢察體系金字塔的頂端，原本就具有命令及監督檢察體系成員公正行使權力的權力，另一方面則是因為，檢察總長的任命程序較為嚴謹，擔任的資格也更嚴格。然而，為了使檢察總長適當的行使這項敏感的職權，檢察總長必須以書面的方式，附具充分的理由，並登載於政府公報，儘速送交國會備查。

為了使檢察總長能公正的行使這些職權，檢察總長的資格、任命程序及身分保障與一般檢察官不同。

檢察總長必須具有得在全國各級法院出庭的資格並且是一個適格且適合於擔任此一職務之人（註五）。

在任命程序上，由於憲法明文規定，檢察總長由總統任命，所以法律本身不能變更這點。但要求總統必須依一個不受政治力影響的、公正的委員會的建議來任命檢察總長。

檢察總長的任期必需超過總統，但最多不得超過七年，而且不得再被任命。這一方面可以保持檢察總長的獨立性，避免為獲得連任，而受政治力不當的干預，另一方面也可以有機會由新人擔任此一職務，以便定期的重新省思檢察政策。

在身分保障方面，檢察總長的任期為十年，但如任期中年齡超過六十五歲時，則必須離職。但如果總統同意，其本人的身心狀況也適合時，可以延長其年限到六十七歲。

總統在檢察總長具有下列情況時，始得暫停其行使職權：(1)有不當的行為(2)持續性的健康狀況不佳無法有效的的執行其職務(3)不再是適格且適當的人。

在薪資上，檢察總長的薪水，不得少於高等法院的法官，副檢察

總長及各檢察長，則是以法官的百分之八十五及八十來計算，不受公務員法的限制。

肆、分　　類

最後，就目前南非的檢察制度依國內習慣的分類方法，說明如下：

一、職權進行主義或當事人進行主義

南非原屬英國殖民地，也繼承了英國式的刑事訴訟制度而採當事人進行主義。

二、起訴強制主義或起訴便宜主義

起訴便宜主義。如檢察機關決定不起訴後，私人仍可委任律師，比照公訴程序提起自訴。

三、檢察機關之地位

審檢不分隸，法院、治安法院與檢察機關同樣隸屬於司法部。檢察機關成員均屬行政官，但獨立行使職權。其內部適用檢察一體原則，以檢察總長為首，對外不受司法部長的干涉。

四、檢察官之任用

檢察總長及副檢察總長由總統自具有在全國各法院出庭資格的適當人選中選任，任期為十年，不得連任。如任期中已達六十五歲時，除非經總統及其本人同意得延長兩年外，即須離職。

檢察長並無任期的限制，但年齡達六十五歲時，即須離職。另為個案特別指定之檢察長，任期依總統任命時所定。

副檢察長及檢察官由司法部長基於檢察總長之建議而任命。

五、檢察官之保障

檢察總長、副檢察總長及檢察長三者有身分、任期及待遇的保障，非依國家檢察法內所訂事由，不得任意解職。在此部分，不適用公務員法的規定。副檢察長及檢察官，則適用公務員法。

六、檢察官之定位

檢察官依其所配屬的檢察長而決定。在一般的檢察機關裏，檢察官為公訴人，但在配屬在偵查檢察長底下時，其為偵查機關。

七、檢察官之職掌

檢察官依其所配屬的檢察長而決定。

在一般的檢察機關裏，由檢察長以國家名義起訴，並由檢察官以檢察長代理人之身分實行公訴，或於發現該案有不應起訴時，停止訴訟程序。在配屬在偵查檢察長底下時，其職掌則為協助偵查犯罪。

八、檢察官是否為偵查主體

南非在一般情形，其偵查主體為警察，但為了提高刑事偵查的品質，並整合偵查犯罪的力量，國家檢察法特別創設了偵查檢察長（Investigating Director）一職，並在同法第五章詳細規定其職權，其職權大致上與我國目前偵查檢察官所執行之職權相當。

九、強制處分權之歸屬

南非強制處分權由法官或治安法官行使，而由警察或偵查檢察長執行。

註一：治安法官是由司法部所任命，配置在區法院（或稱治安法院）的司法官員。這些治安法官並不是狹義的法官（Judge），而是司法部長在司法部所屬的人員中，選出一些人，對這些人施以大約三、四個月的民、刑事實體及程序法的訓練、研習之後，派至全國各地的區法院擔任治安法官。這些人的來源通常是檢察官，但也有許多其他的行政官員。由於南非政府的行政部門在南非大部分的蠻荒地區並沒有設置辦公處，所以治安法官在該地即兼理行政事項，並執行行政事務。區法院和地方法院同為地方性的管轄法院，但規模及管轄區域較小，通常一個地方法院的轄區包括了好幾個區法院的轄區。但兩者之間只有在司

法案件的事務管轄上有所不同，並沒有隸屬或審級上的差別。如果對區法院的判決不服，不能上訴到地方法院，只能上訴到高等法院。

註二：依據南非一九九六年憲法的規定，司法部負責南非所有司法機關的行政支援事項，並負有連繫獨立行使職權的法官、治安法官、檢察總長的功能。所以南非受到憲法保障獨立行使職權的，只有法官、治安法官和檢察總長，檢察官則不包括在內。

註三：目前南非依其行政上省之轄區設有十個高等法院。除了 Venda 區外，每個高等法院均由總統所任命的法官和 judge president 所組成。除了前述的高等法院外，在約堡、德班及伊麗莎白港也設有三個地區分院。由於南非地方法院和區法院在事務管轄上都有所限制，一直要到高等法院的層次才能擁有完整的事務管轄權，所以南非的檢察機關是相對於高等法院而配置。也就是檢察機關管轄區域，是以高等法院的管轄區域而定。檢察長得代表國家，在其指定的轄區內，起訴任何違法的人，包括處理上訴的案件。然而事實上，檢察長的職權在下級法院通常是授予檢察官行使。檢察長得依被告所觸犯的罪名、犯罪情節及重要性等考量，預測被告應被判處多久的徒刑（即以具體求刑的方式來表現），以決定被告應在區法院、地方法院或是高等法院起訴。所以如果各檢察長都不受節制的獨立行使職權，就等於南非境內有十個不同的標準。由於南非並未採行起訴法定原則，有可能某行為在甲地會被起訴求處死刑，在乙地求處十年徒刑，在丙地卻根本不起訴。

註四：在國家檢察法立法以前，南非的刑事偵查工作是由警察來執行，檢察官只負責審查警察送來的資料，決定是否起訴，並實施公訴。然而由於南非警察的偵查素質十分低落，甚至在一些極為重大、富有爭議的種族或政治性案件中，警察亦有涉案。所以南非當局就成立了一個特別的調查組織。Investigation Task Unit（ITU），統合治安機關的力量，負責調查這類案件。但是當時南非的各個檢察長均獨立行使職權，常與 ITU 的認定相

左，所以南非才想將此一單位納入檢察體系，統一由檢察總長指揮，並設置偵查檢察長一職。偵查檢察長直接隸屬於檢察總長，與其他檢察長地位平行，互不隸屬，由總統依個案需要設置，性質上並非常設機關。在偵查結束後亦不負責起訴，而是交由有管轄權的檢察長起訴並實施公訴。

註五：這裏所謂的適格指的就是資格上的限制。因為依據南非憲法的規定，法官並沒有資格上的限制，不需要具有律師資格，也不用通過什麼考試，只要是一個足以勝任法官工作的人就可以。但對檢察總長則要求至少要具有得在南非各級法院出庭的資格。至於什麼樣的人可以在各級法院出庭，則散見於其他法律的規定。

從南非組織犯罪防制法看南非打擊組織性犯罪實況

蔡　佳　玲

壹、前　　言

南非犯罪問題之嚴重，早已是舉世皆知之事實，惡質之治安導致全球觀光客躊躇不前，南非政府為了帶動觀光業之發展，以解決日益惡化之經濟問題及高居不下之失業率，始終在法制改革及實務面上，思索對抗犯罪之道。西元一九九八年公布之「組織犯罪防制法」（Prevention of Organised Crime Act），即為此一背景下之產物，該法賦予檢警前所未有之權力，使之足與勢力龐大之犯罪組織相抗衡，此外，更透過特殊之法律程序，沒收各種犯罪收益，聯合國毒品控制暨犯罪防制中心(Office for Drug Control and Crime Prevention) 之首長 Pino Arlacchi 前往南非訪問時，即對此一先進而高明之立法大加讚賞。因之，考察南非之犯罪防制法制，可說具有相當之意義。

貳、緣　　起

組織犯罪係潛伏於社會陰暗角落、啃噬社會資源之寄生蟲，有鑑於組織犯罪、洗錢及幫派活動之急速增長，對本國人權及國際安全均構成嚴重威脅，而新型態之組織犯罪亦對執法機構形成極大之挑戰，南非政府乃亟思在原有法制之外更立新法，以使打擊犯罪之措施跟上國際社會之腳步，最後終於在一九九八年十一月公布組織犯罪防制法，並隨即自一九九九年一月起實施。

參、特　　點

(一) 特殊行為態樣之入罪化：

A. 由於犯罪首腦係居於指揮者之地位，並不實際參與犯罪活動，且其指揮活動往往係抽象之指令，難以證明，故犯罪首腦之糾舉向來具有高度之困難性，為解決此一問題，本法乃

就管理行為或其他相關行為予以入罪化，使之無所遁逃。

B. 無所不在之幫派對於社區安全構成極大之傷害，因此，對於「參與」或促使他人參與幫派活動之行為，均為處罰之對象。

(二) 犯罪收益之處理：

A. 與不法收益有關之犯罪包括洗錢行為，幫助他人從不法收益中獲取利益之行為，持有不法收益之行為，以及企業職員疑有洗錢情事而故意隱匿不予檢舉等。其中最為特殊者係最後一項，企業職員懷疑其所保管或持有之物，與犯罪所得有關時，負有檢具相關資料向法務部下設機構檢舉之義務，且任何公司企業不得對職員課以保密之責，即使當事人因法律或契約負有保密義務，亦不得因該義務之違反而受負違約之責。

B. 組織犯罪違法行為或洗錢活動之收益，由執法機關予以扣押及沒收，使犯罪集團無法繼續從中得利，進而降低犯罪者鋌而走險之意願。

I 檢察官對於被起訴之被告，可就其所獲利益之金額進行確認，並具狀向法院說明其數額，請法院核發「沒收令」（Confiscation orders）命被告給付適當金額予國家。而金額之決定，必須綜合資產價值、服務、利益、孳息等因素而為考量，當然，檢察官在將核定書呈交法院前，會通知被告表示意見，但被告就數額有爭執時，必須提出相當之主張與論據，否則即無由被採認。更有甚者，只要被告無法證明某資產之取得係基於合法權源，該資產就會被視為犯罪所得之一部分。而刑事法院或治安法庭所為之沒收令，均與民事判決有同一之效力。

II 在沒收令核發之前，另有為保全財產而設計之「扣押令」（Restraint orders），類似民事程序之假扣押，法院基於一定之事實基礎，認為該資產將會遭宣告沒收時，即可透過扣押令予以保全，禁止對系爭財產為任何形式之交易及處分。該扣押令會發給被告及利害關係人，利害關係人可隨時提出異議或聲請撤銷。但在此階段該資產原則上仍在當

事人實力支配之下，除非懷疑會遭到破壞或毀棄之情形，始由警察機關予以扣押，移由公權力管領。

C. 用途：對於已經確定之沒收令，法院可以依職權，或依檢察總長之聲請，將沒收之財產變現，賠償予犯罪被害人。但所有取得之款項，又設有名為「Criminal Assets Recovery Account」之專戶集中保管，並由法務部、內政部、財政部等部會首長及檢察總長組成一委員會，負責規劃款項運用之方式，主要之用途係在提撥經費予執法機構，或是被害人保護組織，委員會草擬方案後，必須呈請國會決定實際之用途。將犯罪組織強取豪奪而來之財產透過法定程序還諸於民，且用於打擊犯罪工作，其立意確實值得讚賞。

D. 此法中許多章節均為民事程序，但多由檢察官執行，刑事法律與民事賠償程序之密切配合，檢察官作為公益代表人之色彩十分強烈，而犯罪被害人亦因而得有更週密之保障與照護。

肆、結　　語

組織犯罪除對人民造成嚴重威脅，對於執法機關而言更是重大之挑戰，如何讓制裁手段有效率、更有殺傷力，自是面對此種犯罪首須迎接之課題。如前所述，此一立法例之著眼於速效，係其大受推崇之原因，若能大刀闊斧地執行法律，相信民眾看待組織犯罪事件時，將會給予檢警更多的喝采，而不會有「重重提起、輕輕放下」之遺憾。

拜交通及通訊事業之賜，各地犯罪組織均有國際化之傾向，南非之幫派組織莫不如是，而世界各國均深知，打擊犯罪之力量應結合成嚴密而有效之網絡，任何一處之鬆懈，均可能導致全面性的潰敗，因此，為不使某一特定國家成為犯罪組織之溫床，進而更危及他國之經濟與治安，國際合作事宜對世界各國而言均為一助人又利己之課題。邇來美國、加拿大及歐洲部分國家，即在南非投注大量心力，協助當地發展犯罪防制事宜，非但一批批地遣送執法菁英到南非從事教育訓練，更密切地建立情報交換之機制，成績斐然。此外，早在一九九七年，法務部部長即成立一特別委員會，成員除部內官員外，更囊括外

交部官員、國際刑警組織代表等，共同依國際協定進行國際合作事宜，其如火如荼之用心可見一斑。而其等進行國際合作之成效如何，亦將是值得吾人持續關注之議題。

加拿大多倫多「藥事法庭」簡介

孟　玉　梅

壹、前　　言

此次年會，加拿大代表特別於大會中介紹多倫多市於西元一九九八年十二月一日首設的「藥事法庭」(Drug Treatment Court) 制度（相關資料請參閱附件：Canada's First Drug Treatment Court)。此一制度雖非源起於加拿大，且在加國實施時間不長，然在該國司法制度上確是一項重要的變革。適巧我國於同年（民國八十七年）五月二十日公布施行新修正之「毒品危害防制條例」，將行之多年的「肅清煙毒條例」自條例名稱以下，全面修正。不但重新修正毒品的定義及品項，採戒治優先原則，更兼對施用毒品者採「除刑不除罪」之刑事政策。即對初次施用毒品，經「觀察勒戒」後無施用傾向或完成「強制戒治」之施毒者，一律處分不起訴。我國與加國之毒品防制政策，可謂不約而同的均以戒癮治療為出發點。

爰依據本次大會由加拿大安大略省（Ontario）保羅・ 班特利法官（Paul Bentley）所提供的資料，試就多倫多「藥事法庭」制度，大略介紹如後。

貳、「藥事法庭」之緣起

「藥事法庭」制度源起於美國。在二次世界大戰期間，美國政府認知到對施毒者（亦包含藥物濫用）施以監禁的傳統刑事政策是失敗的，故而進行司法制度的改革。單是對施毒者施以監禁，是無法戒除其施用毒品的習性，且監獄的資源有限，應該用在真正危害社會安全的罪犯身上。但要真正解決施用毒品及濫用藥物問題，並不是一件容易的事，因為這是一項牽涉刑事裁判、公共健康、戒癮治療及社區資源利用的複雜的問題。因此，美國政府於二次世界大戰期間，創設「藥事法庭」(Drug Treatment Court) 制度。此項制度實施至今，從美國

各地不斷增設的「藥事法庭」可看出，美國司法體系相信此項制度對無暴力行為的施毒犯，已有效的提供了另一種有別於入監服刑的執行方式。

加拿大政府亦是意識到傳統的刑事制裁，並不能有效抑止濫用藥物、施用毒品的情形，故於一九九八年十二月一日在多倫多市創設「藥事法庭」。

參、「藥事法庭」概觀

「藥事法庭」是專門處理自願戒除毒癮或濫用藥物等案件的專業法庭。此專業法庭設置之理念，是希望能將傳統的刑事裁判程序和社區治療相結合，對施毒者採司法監督與戒癮治療雙管齊下的政策，並要求施毒者去面對及處理其等毒品成癮的問題。

由於施用毒品或藥物濫用，已經不祇是違反法律，或如何執法的問題，其隱含在背後的是對公眾健康的侵蝕及社會對此缺乏關懷。故嚴刑峻罰並不能根絕施毒者的施用行為，以傳統的監禁方式來制裁，結果只是提供施毒者另一個施用及交易毒品的管道，對施毒者刑後重返社會，更毫無幫助。即使在獄中強制工作，也無助於治療其藥、毒癮。在舊制度下，施毒者將一犯再犯，因為傳統之刑事政策並未認識到戒癮治療才是根本之解決之道。

「藥事法庭」從過去強調刑罰的政策，改變為強調治療。在司法監督下的治療，是採恩威並濟的方式—對未遵治療規定者立即予以制裁，對治療有成效者給予獎勵。然對不遵治療規定者，並非立即撤銷赦免，送監執行，而是對之施以一種「靈活的懲罰」（Smart Punishment）。藉由給予戒治者適當的懲罰，以達到減少違規次數及降低施用藥物的目的。戒治者並藉此學習為其行為負責，並習得如何停止施用毒品或至少減少用量。

肆、多倫多的「藥事法庭」的簡介

一、篩選適合的治療對象

「藥事法庭」適用的對象為被控單純持有或販賣少量毒品，如快

克（crack）、古柯鹼（cocaine）或海洛因（heroin），且已成癮並自願戒治之施毒者。被控單純持有毒品、犯行輕微且無前科紀錄或前科犯行輕微者，分入第一級（track 1），完成治療後，其原先的犯行可獲延緩起訴或撤銷起訴。如其被控販賣毒品或曾有較嚴重的前科犯行者，經其對起訴罪名認罪後，分入第二級（track 2）。第一階段（約八至十五個月）結束治療後，即進入約十二至二十四個月的第二階段之治療程序。如未能完成第一階段，不但撤銷其繼續治療之資格，並依其先前所認之罪宣判，或回到一般程序進行審判。

其分級治療的要件如下：

(一)、進入第一級（TRACK 1）治療之要件：

第一級之戒治者，除需符合輕罪的要件、經評估其具有成癮性外，還需經檢察官認為適當。其審核重點如下：

1. 有無前科紀錄，如有，犯罪型態為何。通常曾經有前科紀錄或曾經適用類似之處遇但失敗者，均不認為其符合進入本級戒治之要件；
2. 此施毒者是否正面臨其他犯罪的控訴；
3. 此施毒者對社區治安是否會造成威脅；
4. 此施毒者本次犯行之嚴重性；如其犯行通常都會被宣告三月以上有期徒刑者，亦不得進入本級治療。
5. 如其犯罪行為涉及到未滿十八歲的未成年人，或犯罪地點係學校、運動場或其他青少年經常出入處所，亦不得進入本級治療。
6. 經治療團隊評估認其合適此流程，且自願戒毒者亦立約願遵守治療規定。

(二)、進入第二級治療（Track 2）之要件：

不符合進入第一級治療流程者，或可進入第二級（Track 2）接受治療。同樣，能獲准進入第二級治療者，除經評估後，亦需檢察官認為適當。其審核之重點如下：

1. 其有無前科紀錄，前科紀錄為何。依據其前科紀錄，往往可判斷出被告有無可能於治療期間遵守規定；如從其過去

的犯罪紀錄可看出，此人不可能遵守戒治期間應遵守的規定，或此人過去就有適用「藥事法庭」的戒癮治療，但未完成等，均將排除進入本級接受治療；

2. 此施毒者是否正面臨其他犯罪的控訴；
3. 此施毒者是否對社區治安會造成威脅；
4. 其本次犯行之嚴重性；如所犯之罪一般宣告刑在九個月以下者，才可進入本級治療；惟若單純為營利而販賣毒品者，不在此限；
5. 如其犯罪行為涉及到未滿十八歲的未成年人，或犯罪地點係學校、運動場或其他青少年經常出入處所，亦不得進入本級治療；
6. 經治療團隊評估認其合適此流程，且自願戒毒者亦立約願遵守治療規定。

二、多倫多「藥事法庭」個案處理流程

在多倫多所有毒品案件經檢察官起訴後，均由檢察官審核是否符合上述戒治治療之要件。符合資格者，向「藥事法庭」報到的第一天，由負責與治療小組及「藥事法庭」間連繫工作的連絡官（Court Liaison staff）與之先行晤談，以確定其對毒品依賴的程度。經確認其對毒品具有成癮性後，戒治者即被帶往「藥事法庭」辦理保釋手續，以使其日後能充分參與治療小組的治療計畫。此種保釋制度，是專為「藥事法庭」制度而設計。戒治者次日必須再向「藥事法庭」報到，並商請法官是否一同參與戒治計畫。經檢察官審核適用第二級治療（track 2）者，其需先認罪，才能獲准接受治療。治療初期通常一星期向法院報到兩次，除不定時之驗尿外，治療計畫都是由「心理衛生戒癮中心」（The Centre for Addiction and Mental Health）（CAMH）執行，該中心並將執行結果向法院報告。

CAMH 對受戒治人之戒治內容包含五個部分：一、透過量表及戒毒動機的晤談，對受戒治人進行評估；二、針對戒除其對毒品的依賴性及如何復歸社會進行團體諮商及心理輔導，並為未來的更生預作準備；三、進行戒癮治療及建立明確的戒治目標；四、持續強化更生的

意志，建構更長遠的目標並防止再犯；五、對受戒治人持續關懷及給予精神上的支持，同時預防其等再犯。

每一個個案都有一位個案管理者，與受戒治人一同計畫、討論及實踐戒治目標，戒治的內容不止是如何維持生理健康，更及於受戒治人之就業、家庭、教育及社會支持等方面的諮商與輔導。

在法院每次開庭前，「藥事法庭」的戒治小組都會舉行審前會議。小組成員包括法官、檢察官、辯護人、假釋官及連絡官，於每次審前會議中檢視該名受戒治人之治療紀錄，並決定未來之治療計畫。起初的治療中包含個人諮商及團體諮商、驗尿及每週兩次向法庭報到。受戒治人如未依規定向法院或向 CAMH 報到，法官得視情節輕重加以處罰，從訓誡、增加報到次數到增加社區服務之時數，甚至撤銷保釋並對其施以短期拘禁。藉此可使受戒治人明瞭一旦未遵守戒治期間應遵守之規定，就立刻會受到處罰，進而服從戒治之相關規定，以達到戒除毒癮之效果；如受戒治人有繼續濫用藥物或企圖在驗尿結果上耍花樣的嚴重行為，將撤銷其繼續戒治之資格，並依其之前是否對檢察官起訴之罪名認罪，直接宣判或依通常程序處理該案。

三、社區的力量的結合

在加拿大多倫多實施的「藥事法庭」，是結合約四十餘個社區團體的力量共同運作。發展及結合社區力量及資源進而形成一套支援網絡，是這套處遇制度相當重要的一環。在「藥事法庭」制度下，任何一個戒治者，與其所在的社區居民一樣可享有該社區的基本的資源及社區服務，不止如此，該社區事務的負責人，隨時與該受戒治人保持密切連繫，以幫助其在戒除酒癮及藥毒癮的過程中，改變舊有生活型態。社區力量的長期關懷與支持，是「藥事法庭」制度成功不可或缺的重要因素。

四、外界對「藥事法庭」制度之疑慮

在多倫多實施「藥事法庭」這套制度後，批評者有謂這套制度對施毒者的處置手段太溫和，且施毒者一旦准予接受戒治治療後，就可獲保釋，回到社區，對社區治安亦會產生威脅，若因此使犯罪數量增

加，對司法威信亦是一大傷害云云。然而根據美國的實施經驗，證實這樣的憂慮是不存在的；在美國的州立監獄中，只有百分之三的暴力犯，在犯罪時是受古柯鹼、快克的影響；只有百分之一的暴力犯行兇時受到海洛因的影響。足見施毒者並不等於暴力犯，另外，也看不到施毒者回到社區進行戒治期間，對社區治安產生什麼威脅。事實上，對受戒治人在社區的監督，比起一般刑事程序對受刑人的監控要少得多，要求受戒治人所遵守的規定都是最起碼的，然而若受戒治人違反應遵守的規定時，是會立刻受到法庭的制裁。當然也有人質疑，若施毒者本身離不開毒品時，司法體系就不應該強制其等戒治。提出這種觀點者，顯然是對吸毒成因不瞭解。施毒者是有選擇戒除毒癮的權利，政府也必須提供如此之機會。當然，要終結對毒品的依賴性，必須靠其個人的意志及其對自身、對家庭責任的認知，而司法力量的介入，將有助於強化其等戒除毒癮的決心。

部分辯護人也質疑，受戒治人只要未遵守規定，法官無須經通常審理程序，就可撤銷其保釋並命拘禁達一段時間（通常是五日以上），是否符合公平原則？事實上，法官的此項權力是於法有據，且在受戒治人保釋前就以書面告知，此乃有條件的獲釋，受戒治人亦非常清楚於何種情形下，其等之保釋將會被撤銷。

在「藥事法庭」這套制度下，法官所扮演的角色已完全不同於傳統訴訟程序中的法官角色，法官積極介入，親自與參與戒治計畫，並與其他治療團隊成員包括假釋官、治療小組成員、社區負責人等共同合作。贊同「藥事法庭」制度的人，認為法官的積極參與，可排戒治的障礙，反對者則認為此項變革已經逾越法官應中立聽訟的傳統角色的分際。

施毒者是否獲准適用「藥事法庭」之制度，即以戒治治療取代刑事制裁，是檢察官的權力。然是否獲准接受戒治治療，法院仍有最終的決定權，法院除不能變更檢察官排除被告接受戒治治療之決定外，對於已獲檢察官准許治療及治療期間違反規定者，均有排除權。雖然對法院的這些決定，當事人並無救濟途徑，但法官若欲撤銷受戒治人之保釋或其繼續戒治之資格時，受戒治人之辯護人可到庭為其辯護，

其餘所有關於受戒治人的事項，則都是由小組成員共同決定。

五、實施成效

加拿大多倫多「藥事法庭」制度雖然實施未滿二年，沒有太多資料可供研究這套新制對慣犯及長期施用者的影響 ，但根據該國評估小組指出，自一九九八年十二月一日起至二〇〇〇年五月三十一日止，參與治療的一百六十八名戒治者，有將近百分之五十，仍繼續治療或結束治療，而有四分之三之受戒治人，戒治期間未曾再施用。

而根據美國實施的經驗，美國「藥事法庭」最近十年，從持續參與戒癮治療的受戒治人治療紀錄中，發現已成功的降低其施用的比率，並已減少刑事裁判所需的支出。一九九八年六月，哥倫比亞大學的國家藥毒癮研究中心（Columbia University's National Center on Addiction and Substance Abuse）（CASA）在美國國內首度發表一份自全美二十四個「藥事法庭」採樣做成的三十份評估的研究報告。CASA從治療之流程，檢視其成效，並與其他社區監督機制做比較。這份研究發現：(一)、「藥事法庭」能成功的安排受戒治人持續接受治療(二)、「藥事法庭」較其他社區監管系統，能提供更有效及嚴謹的監督(三)、參與治療者其再犯的次數，實際上都已降低(四)、雖然大部分的追蹤研究，都不超過一年，但發現慣犯參與治療之後，尤其是完成治療計畫者，其再犯次數都已降低(五)、「藥事法庭」所需之費用不多(六)、「藥事法庭」已經成功的在刑事法院與社區治療中，搭起一道橋樑。

在美國實施「藥事法庭」這套制度前，受戒治者刑後再犯的比率為百分之六十，而實施此一制度後，有百分之四十五之施毒者完成戒癮治療後，其再犯率降為百分之五至百分之二十八。再犯率降低，國家對於毒品防制所花費的金錢，自然就隨之減少，此即為何美國願意投下超過四十億美元的龐大預算去支持「藥事法庭」的制度。

伍、結　　語

綜上，雖然多倫多「藥事法庭」與我國「毒品危害防制條例」對於施用毒品者，都強調戒癮治療的重要性，但兩國在戒治的制度上仍有許多顯著的不同：

一、在我國，施用毒品者，不問其有無戒治的意願，一律進行觀察勒戒程序，如經判斷有施用毒品傾向時，即繼續施以強制戒治。在多倫多，欲進入「藥事法庭 」接受戒治治療，不但要經過施毒者同意，且要經過篩選程序，符合資格者才獲准其接受「藥事法庭」的治療程序。

二、在我國，只要是施用毒品者，不論其過去的素行如何、本次除施用毒品外，有無另犯他罪、所犯之他罪罪名為何，一律必須接受觀察勒戒或強制戒治；在多倫多，只有無前科或前科犯行輕微，且本次亦犯輕罪者，才可獲准接受治療。

三、在我國，觀察勒戒及強制戒治之地點設在看守所或監獄，受戒治人並無行動自由，並全程受到監管；在多倫多，一旦施毒者獲准接受戒治，即可獲保釋，並回到社區繼續就業、受教育，過著如常的生活。

四、在我國，對受戒治人，並無淘汰戒治的制度；在多倫多，對不遵守規定之受戒治人，則設有撤銷其等繼續戒治資格之制度。

五、在我國，戒治工作，尚未與社區資源相結合，在多倫多，社區資源的整合及支援，是推展「藥事法庭」制度的最重要因素。

當然，要能完成戒癮治療，不再碰觸藥、毒品是先決條件之一，然只有使施毒者澈底改變其生活型態，改進人際關係，乃至發揮自己的潛能融入社會，才算是真正的戒治成功。

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February 1998
South Africa
South Africa the Criminal Justice System and
the Protection of Human Rights : the Role of
the Prosecution Service

SOUTH AFRICA

The criminal justice system and the protection of human rights: the role of the prosecution service

In February 1998 the Parliament of South Africa, through its Portfolio Committee on Justice, began debating a vital piece of legislation which is intended to increase the accountability of the country's troubled prosecution service. The National Prosecuting Authority Bill, drafted in terms of Section 179 of the Constitution of the Republic of South Africa, 1996, has as its broad purpose the balancing of independence and accountability in the prosecution of crimes by the State. The Bill, if passed into law, will most immediately affect the position of the currently-serving Attorneys-General. Achieving the necessary balance will be a difficult matter, but is crucial to setting the prosecution service on the right course at a time of widespread public concern at the capacity of the criminal justice system to deal with high levels of crime. This lack of confidence in the capacity of the police, the prosecution service and the courts to address the crisis is reflected in the alarming rise in support for the restoration of the death penalty and the incidents of violent "self-help justice" which have occurred in different parts of the country.

In October 1997 Amnesty International, in the belief that the draft National Prosecuting Authority Bill could potentially result in improvements to the functioning of the criminal justice system and thereby to the protection of human rights, forwarded

comments and recommendations on the Bill to the South African Government and the Chairperson of the parliamentary Portfolio Committee on Justice. In the same month a representative of the organization presented the submission to the Truth and Reconciliation Commission (TRC), during its three-day hearings in Johannesburg on the role of the legal system in the human rights violations which took place under the former Government.The views put forward reflected the results of an inquiry conducted by Amnesty International earlier that year. On 3 February 1998 the organization sent its submission formally to the Portfolio Committee on Justice in the context of the Committee's public hearings on the Bill scheduled for mid-February.

The submission, which is printed on pages 5-36 below, looks at the importance of the draft legislation in the context of aspects of the previous history of the Office of Attorney-General and after reviewing the specific crisis which had developed in the province of KwaZulu Natal over prosecution decisions taken in political violence cases. The recommendations in Amnesty International's submission were made in light, also, of the United Nations (UN) Guidelines on the Role of Prosecutors, which were "formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings".

As noted in Part II of the submission, the proposed legislation will apparently reverse the consequences of the 1992 Attorney-General Act which had made these law officers independent of the control of the Minister of Justice. Prior to 1992 the Attorney-General exercised authority and performed functions of the office subject to the control and direction of the Minister. This earlier period had been characterised by the possession and use by the Attorneys-General of extraordinary powers, for instance, with respect to the withholding of bail and the detention and compulsion of witnesses.In this and other respects the Attorneys-General appeared to be indistinguishable from the then Government in its use of the law to persecute its opponents, a situation which must inevitably have contributed to the profound alienation from and distrust of the criminal justice system on the part of the majority of South Africans. The 1992 Act, hastily passed by the then Government during its negotiations with formerly banned opposition parties, gave the Attorneys-General full authority to prosecute on behalf of the State and reduced the role of the Minister to that of coordinating their functions. The Act imposed few obligations on them for reporting to the Minister or the Parliament, and created cumbersome and inadequate procedures for the suspension or removal of an Attorney-General.

At the TRC's October 1997 hearings, former and currently-serving Attorneys-General for the most part denied that they had made decisions on prosecution matters at the direction of the Minister of Justice prior to 1992, but said they had only been implementing the existing laws. At the same time and somewhat paradoxically, they emphasised the importance of their independence from the Minister as provided under the 1992 legislation. In meetings with members of South Africa's organized legal profession and human rights monitors in early 1997, Amnesty International's representatives encountered strong skepticism of the merits of this independence created for the Attorneys-General by the former Government on the eve of the negotiated political transition. As the non- governmental Human Rights Committee noted in a press article in 1995, despite allegations that the Attorneys-General were failing to serve the interests of justice there were no remedies against that failure, "no way to ensure that the day-to-day exercise of power, which concern[ed] matters of vital public concern, [was] not being abused". See footnote 1

In relation to this very concern, Amnesty International had investigated the controversies which had emerged in the province of KwaZulu Natal over the investigation and prosecution of those responsible for grave violations of human rights. s noted in Part I of the submission below, the conflict which developed between the provincial Attorney-General and those involved in the investigation of these crimes was exacerbated by the lack of any appropriate means of adjudication and accountability. For a province which had been so long battered by political violence and undermined by a politically-manipulated law enforcement agency, the failure of the prosecution service to confront this situation effectively and impartially deepened the crisis. In a situation where the police had a poor reputation as investigators of crime, the effects of which were compounded by political bias, the traditional division of labour between the police and the Office of the Attorney- General needed to be re-evaluated. There was need for a more strategic and multi-agency approach to the investigation and prosecution of politically-motivated crimes. As reported below, Amnesty International concluded from its discussions with concerned individuals and organizations that the Office of the Attorney-General had failed to take such an approach. Furthermore, as was evident in a number of high-profile cases which had been investigated by the nationally-appointed Investigation Task Unit, this failure in certain instances effectively obstructed those investigations and prevented a prosecution approach which together may have led to the resolution of a number of cases of political killings linked to hit-squads operating in the province.See footnote 2

The National Prosecuting Authority, which would be established if Parliament were to pass the proposed legislation, could be a focus, as noted in Part I of the submission below, for developing more strategic approaches on crimes identified as national priorities, for injecting more accountability into the criminal justice system, for raising standards of professionalism among the staff of the prosecution service, and for providing a means to deal with complaints about decisions on prosecution or the conduct of a prosecution. At the same time, it will be vital to achieve in the legislation a balance between independence from political interference and accountability to the political process for the investigation and prosecution of crime. In light of the seriousness of the concerns expressed to Amnesty International during its inquiry in 1997, the organization in its October submission had recommended that there should be parliamentary hearings on the proposed legislation.

Amnesty International's recommendations on the draft National Prosecuting Authority Bill, elaborated in Part II of the submission below, include, in brief, that

1. In the appointment of the National Director of Public Prosecutions (NDPP), the President should act on the recommendations of a committee which is clearly beyond political influence and designed to ensure the highest qualifications of the office holder.
2. To help protect the independence of the office the term of appointment should be beyond the term of the President and there should be no provision for reappointment.
3. he procedures and grounds for suspension of the NDPP should be consistent with Articles 21 and 22 of the UN Guidelines on the Role of Prosecutors and Section 179, in particular Section 179 (4), of the Constitution.
4. The functions of the NDPP should include the requirement to act at all times consistently with Article 13 of the UN Guidelines which, inter alia, requires prosecutors to carry out their functions impartially and to act in the public interest.
5. To enhance the accountability of the office the NDPP should be obliged to table in the national parliament annual reports and a list of case-related reports and publish in the Government Gazette any prosecution policies or directives issued by the NDPP.
6. The legislation should indicate the full scope of the NDPP's power to "review" a decision on prosecution by a provincial Director of Public Prosecutions (DPP). The NDPP should be required to provide full, written reasons for decisions taken in such a review, and to place them before Parliament.
7. A stricter safeguard in this review process could be considered, involving the NDPP allocating the case file to an independent prosecutor for review.

8. With respect to the provincial DPPs, the same recommendations on the appointment process, term of office, and grounds and procedures for suspension or dismissal of the NDPP should also apply at the provincial level.

The following pages contain the full text of Amnesty International's submission together with an appendix, the United Nations Guidelines on the Role of Prosecutors.

THE CRIMINAL JUSTICE SYSTEM AND THE PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA: THE ROLE OF THE PROSECUTION SERVICE

Comments and recommendations on the draft National Prosecuting Authority Bill, 1997, in the contexts of the controversies surrounding the role of the Office of the Attorney-General for KwaZulu Natal and other concerns.

Amnesty International, October 1997

Since South Africa's first non-racial elections of April 1994 there seems to have developed a widely acknowledged national crisis of confidence in the capacity of the criminal justice system to deal with the high level of non-political crime, as well as with continuing incidents of political violence in KwaZulu Natal and elsewhere. Amnesty International has publicly expressed its concern about the resurgence of support for the death penalty and incidents of violent "self-help justice" - dramatically so in the Western Cape Province - which appear to reflect a despair in the capacity of the police, the prosecution service and the courts to address effectively rampant criminality.See footnote 3 This crisis was explicitly acknowledged in the May 1996 National Crime Prevention Strategy document produced by an interdepartmental team, including the Departments of Correctional Services, Justice, and Safety and Security among others. At paragraph 4.11.1 they note that

"Along with the absence of effective victim empowerment strategies and victim aidservices, the historically rooted problems with the popular credibility of the law enforcement agencies and the slow process of building public confidence in the criminal justice system as a whole, has contributed to a vicious cycle of defence and revengethrough mechanisms of private and informal justice. This may take both the socially constructive forms of community policing...as well as the more sinister forms such as vigilantism, gang formation, and the establishment of private para-military groups.

These latter developments have contributed to spirals of revenge and retribution andhave often been transformed into criminal operations in their own right. The magnitude of the destabilising impact of developing sub-economies based on the trade in arms, contract murder and protection cannot be overstated."

These concerns are undoubtedly motivating the development of an important piece of legislation which is likely to be debated by the national Parliament in 1998. In forwarding to the Parliament our comments and recommendations on the draft National Prosecuting Authority Bill, Amnesty International hopes to contribute to a legislative process which could result in improvements to the functioning of the criminal justice system and thereby the strengthening of human rights in the country. The organization also hopes that the newly legislated authority will provide an appropriate structural solution to such situations of conflict, for instance, which had emerged in the province of KwaZulu Natal from 1995 over the investigation and prosecution of those responsible for grave violations of human rights. Amnesty International undertook an inquiry into this particular controversy and in Part I of this memorandum we report on the results of that investigation, as a vehicle for illustrating the need for improved accountability within the prosecution service. Part II of this paper contains Amnesty International's recommendations on the draft National Prosecuting Authority Bill.

Part I : The Criminal Justice System and the problem of impunity for perpetrators of human rights violations in KwaZulu Natal

"The Natal Law Society notes with concern the comments of the Presiding Judge, Mr Justice Hugo, in acquitting General Malan and his coaccused, regarding the conduct of the prosecution by the Attorney-General, Mr McNally.

In order for the public to have full confidence in the Administration of Justice, it is vital that cases with a high political profile such as the Malan case, are fully ventilated before the Courts. It is disturbing, in these circumstances, that the Judge should have seen fit to criticise the prosecution for not calling several state witnesses, who could have corroborated the evidence of the three main state witnesses. In addition, the Judge referred to the failure of the State to call any evidence to justify certain of the charges against the accused.

While the Natal Law Society is satisfied that, on the evidence tendered, the decision of the court is correct, it is alarmed that, notwithstanding a finding by the Judge that the

KwaMakhutha massacre was carried out by Inkatha supporters trained by the SADF [South African Defence Force] in Caprivi, the State was unable to secure a conviction against anyone for the offence."

(Statement released by the Natal Law Society in the wake of the acquittal of the accused in the so-called Malan trialSee footnote 4 by the Supreme Court in Durban, October 1996)

In February 1997 two Amnesty International representatives visited South Africa to inquire into allegations of bias in decision-making and in the conduct of prosecutions by the office of the Attorney-General for KwaZulu Natal, in relation to cases of political violence including where the authorities may have been implicated.The outcome of the trial of former General Magnus Malan and 19 others, who had been charged with murder and conspiracy to murder in connection with the 1987 massacre of 13 people in KwaMakhutha township near Durban, had served to re-awaken a long-standing controversy surrounding the conduct and motivations of the Attorney-General, Advocate Tim McNally, who had prosecuted the accused in the Malan trial.See footnote 5 Whatever the reality of the allegations, Amnesty International viewed with concern the public expressions of a lack of confidence in the effectiveness and impartiality of the criminal justice system in a province that has been battered for some ten years by political violence and undermined by a politically- manipulated law enforcement agency shown to have been implicated in the violence. As noted in another context,

"The rule of law in a democracy requires the public's ongoing consent and confidence in order to survive. Any widespread unease with the essential fairness of [the] justice system can cripple it. Perception becomes reality when suspicion of injustice is allowed to fester. The system must be capable of quickly and convincingly resolving any such doubts".See footnote 6

This observation is certainly applicable to South Africa with its legacy of a criminal justice system which had been skewed to serve the interests of political repression for many decades. The failures or worse of the criminal justice system in KwaZulu Natal (formerly Natal and the "homeland" of KwaZulu) have been at the heart of many complaints made to Amnesty International by human rights lawyers and monitors, survivors as well as witnesses to human rights violations, members of political parties and other concerned individuals.See footnote 7 They identified as a major factor in the prolongation of the violence the absence of effective investigations and prosecutions of

known perpetrators, with the paucity of prosecutions being largely attributed to problems of will and capacity amongst the police. As noted during the course of one judicial inquiry, "this failure or inability to bring perpetrators to account is itself a substantial contributory cause to further violence because it encourages the view amongst perpetrators of violence that they can continue their actions with impunity". See footnote 8 urthermore, the consequences of these failures in criminal investigations and, inevitably, in prosecutions, was to encourage a belief in many residents that it was "better to take the law into their own hands and to turn to acts of retribution rather than o rely on the police for protection and justice". See footnote 9

Concerns regarding the role of the police in investigations

In a criminal justice system traditionally based on a division of labour between the police, who have responsibility for investigating crime, and the Office of the Attorney-General with its discretion to decide on the basis of a police investigation "docket" if there is a basis for prosecuting any person, any inadequacies in the police investigations will have a direct impact upon the decisions taken by the Attorney-General. This will especially be the case where the Attorney-General does not use the discretion which has been available to the office to direct the police to undertake further investigations to close gaps or otherwise improve the quality of evidence in a docket. In this regard the styles of the Attorneys-General have varied, with consequences for the administration of justice.

In KwaZulu Natal, as elsewhere in the country, the police have had a poor reputation as investigators. The current police leadership has acknowledged this situation publicly and in meetings with Amnesty International's representatives since 1994. The high proportion of Criminal Investigation Department (CID) officers with no formal training and often working under poor conditions has contributed over the years to a reliance upon coercive, "confession-oriented" investigations and on informants. These problems have been compounded by the past political use of the police and the under-resourcing of policing in black residential areas.

The incompetence and bias of the former KwaZulu "homeland" police force, which in 1995/6 was incorporated into the South African Police Service, was particularly notorious and the subject of adverse comment by judges and magistrates presiding in trials and inquests, by commissions of inquiry and by members of the Office of the Attorney- General, among others. The area of jurisdiction of the KwaZulu Police included densely populated black townships in Greater Durban, as well as rural areas

falling under homeland control. In his second interim report for the Goldstone Commission, Advocate Malcolm Wallis reviewed the evidence relating to five incidents of murder and other crimes in which members of the KwaZulu Police were themselves involved in illegal or potentially illegal conduct. The KwaZulu Police had been charged with the responsibility for the investigation of these matters. In each case, Advocate Wallis concluded, "the investigation [was] characterised by neglect, delay, disregard of elementary procedures and a failure to bring offenders to book. In [one] case...no investigation at all was undertaken". See footnote 10

The then Deputy Attorney-General, Advocate Chris Macadam, in a letter forwarded to the Wallis Committee, summarized the problems with the standard of investigation of murder cases in the Greater Durban area by the KwaZulu Police. He noted, among other problems, vague and incomplete witness statements with no attempt to corroborate their accounts or follow-up on issues they might have raised in their statements, no proper examination of the scene of crime, failure to hold identification parades, loss of evidence, and the failure of investigating officers to bring accused, witnesses or exhibits to court on request. As a result of these flaws, he found, "dockets have to be extensively queried by this office". See footnote 11

In one case which was concluded in the Supreme Court in 1995, two suspended KwaZulu Police officers and one other person were convicted on six counts of murder. The trial judge, Mr Justice Nick van der Reyden, commented that initially he had viewed the conduct of the original police investigation as incompetent, a systematic failure of the investigation by the KwaZulu Police into four of the murders and that, to all intents and purposes, no investigation had taken place. However, having now heard the uncontroverted evidence of the accused that they had acted under orders from higher authorities, the court could now see it as the intentional impeding of the proper investigation into the killings. See footnote 12

In a separate case arising from the torture and murder of eight men attempting to distribute election pamphlets in the Ndwedwe area north of Durban in April 1994, the trial judge commented while delivering his judgment

"There are, however, certain other things I wish to say before I finish my judgment on the merits, and that is that we are alarmed and distressed at what appears to have been we may be wrong in this - a failure to follow up all possible leads. We know that the old man... was present throughout. He must have seen all that happened. It may be that he is

now dead and not available as a witness, but we would have otherwise have expected him to give evidence. There is the chief's so-called brother...who came to the office with accused No.5 and there are various people named by accused No.5 as having been present. We have had no information placed before us as to what happened to them, whether they were arrested, put on an identification parade, or anything of the nature.

There is also the evidence of the chief...who said that when this was going on the security guards were a matter of a few yards away. Have statements been obtained from them, or were statements obtained from them then? To do so now, at the time [the new prosecutor] came into the case, would be hopeless. It had to be done in April and May of last year. We do not know." See footnote 13

The Investigation Task Unit and the Attorney-General

Faced with these kinds of legacies and the continuing political violence in KwaZulu Natal, the new minister responsible for the police in President Mandela's Cabinet, Mr F. S. Mufamadi, appointed an Investigation Task Unit (ITU) in August 1994. The ITU was instructed to investigate, among other things, alleged hit-squad activity within the ranks of the police. In September 1994 its mandate was extended to include the investigation of allegations that African National Congress (ANC)-aligned "self-defence units" were involved in organized violence in the Midlands area of the province. The ITU, which included detectives and civilian support staff, were to report to the Minister of Safety and Security through an Investigation Task Board (ITB) composed of three lawyers. In this respect they operated outside police ranks and controls. In addition to the ITB's legal supervision, the ITU received the support and advice of one and sometimes two state advocates seconded from the Office of the Attorney-General. Two European governments seconded senior police officers to the ITU to be present as observers with full access to the Unit's operations.

The senior police officer heading the work of the ITU was Lieutenant-Colonel Frank Dutton, whose exemplary detective work had been singled out by the presiding judge in the trial of five police officers for the killing of 11 people at Trust Feed, Natal. See footnote 14 The ITU's work was in many respects a a continuation of investigations which had begun under the auspices of the Goldstone Commission after 1991 and the Transitional Executive Council in the months prior to the April 1994 elections. Lieutenant-Colonel Dutton and some of the other detectives in the ITU as well as one of the seconded state advocates, Carl Koenig, had been involved in these earlier investigations.

It was to be anticipated, given the nature of its brief, that the ITU and its individual members would experience hostility and obstruction from different quarters, including from within the police and other sectors of the security forces and intelligence services. The Inkatha Freedom Party (IFP), then still locked in mortal conflict with the ANC and its allies, frequently accused the ITU of bias and refused to co-operate with its investigations. See footnote15 However, it was the difficult relationship with the province's Attorney-General which was to prove the most debilitating for the work of the ITU. Many aspects of the unfolding conflict between them are well-known, but are summarized here as they form the background to Amnesty International's inquiry.

The tensions between them emerged into the public domain in September 1995 when the Attorney-General issued a press statement noting his decision not to prosecute in a case which had been investigated by the ITU. The case concerned an alleged conspiracy to murder a KwaZulu Police officer, Captain Masinga, and involved eight people, some of whom held public office. The Attorney-General's statement named the suspects, gave details of the allegations against them, and named the key witness and the member of the ITU, Advocate Carl Koenig, who had apparently recommended the prosecution of the suspects. His stated reasons for refusing to proceed with the prosecution related mainly to his view on the credibility of the named witness. Prior to the publication of this statement the ITB had urged the Attorney-General not to release it on several grounds, including the likelihood that it would increase the danger to people who had made statements to the police in the matter, that it contained inaccuracies, and, were the case to be pursued in the future, it might prejudice the prospects for a successful prosecution. However, with the release of the statement to the media, the ITB felt compelled to reply publicly, reiterating their concerns and their confidence that there existed a prima facie case against the suspects. See footnote 16

Two days after the ITB issued its press release the Attorney-General faxed a letter to Advocate Koenig at the Magistrate's office in Durban where he was involved in a bail hearing connected with an ITU case. In the letter the Attorney-General stated that "I have decided to suspend your appointment as prosecutor with immediate effect and until further notice....Recent events have brought into sharper focus for me the fact that you are no longer answerable to me as Attorney-General." See footnote 17 However, after several days of public discussion and controversy, the Attorney-General and members of the ITU and ITB met and apparently resolved some of the issues between them. In a joint statement issued on 6 September 1995, they noted, among other things, that the Attorney-General had lifted his suspension of Advocate Koenig as a prosecutor

and that he would reconsider his decision in the Masinga case upon receipt of further representations from the Board and Unit.

The ITU and ITB were not alone in experiencing difficulties with the office of the Attorney-General. In August 1995 about 70 members of the legal profession had met in Durban to discuss what they perceived as a crisis within the criminal justice system in the context of the serious socio-political conflict and violence prevailing in KwaZulu Natal. The lawyers present represented the Legal Resources Centre, the National Association of Democratic Lawyers, the Community Law Centre, Lawyers for Human Rights and the Black Lawyers' Association. The group also included non-human rights litigation lawyers who shared similar concerns. In their discussions they focussed particularly on what they saw as the failure of the office of the Attorney-General to make an impact on the situation. They expressed the opinion that the Attorney-General himself had "exhibited a reluctance to vigorously investigate and prosecute those currently and formerly involved in the commission of serious political offences". See footnote 18

Those at the meeting acknowledged the severe problems arising from the poor quality of police investigations, compounded by, especially in the case of the KwaZulu Police, a biased approach to law enforcement and crime investigation. However they felt strongly that there were additional factors at work which were contributing to "the growing loss of confidence in the office [of the Attorney- General]... and in the ability of the incumbent to carry out his duties effectively and impartially". See footnote 19

In an introductory note to their lengthy memorandum arising from their meeting, the lawyers expressed their belief that these factors contributing to this loss of confidence included the prior employment history of the Attorney-General; See footnote 20 the factors relating to the "biased nature and poor quality of investigation by the police force, particulary the KwaZulu Police", and "Advocate McNally's attitude and relationship with the Investigation Task Unit", and the "failure of the Attorney-General to prosecute those people in high office in the police and in government who are and who have been involved in the commission of serious crimes". In the view of the lawyers, this failure involved an actual reluctance to institute proceedings against high-ranking suspects. As substantiation of their concerns, the lawyers then outlined incidents which they saw as illustrating the Attorney-General's attitudes on certain issues and a pattern of decision-making in political violence and police abuse cases in KwaZulu Natal. See footnote 21

From 26 to 28 September 1995 the country's Attorneys-General appeared before a joint sitting of the multi-party Portfolio Committee of the National Assembly and the Select Committee on Justice of the Senate. The hearings had several broadly stated objectives, including making the Offices of the Attorneys-General accountable to Parliament, allowing the office holders an opportunity to raise problems and make recommendations, and providing an opportunity for the public at large to raise any problems relating to the prosecuting authorities. See footnote 22

Advocate McNally was among those Attorneys-General who gave evidence, although not under oath. He was questioned extensively on decisions which his office had taken in a number of cases connected with political violence or police abuses. It was a tense and, in the end, inconclusive exchange which demonstrated, as much as anything, the difficulty for a parliamentary committee in a short hearing to determine whether or not there is evidence of a pattern of improper decision making. See footnote 23

The momentum which appeared, in August and September 1995, to have been gathering towards some kind of impeachment process against Attorney-General McNally had fallen away by November when he proceeded to indict senior military, police and political figures on conspiracy and murder charges. The case was connected with the 1987 massacre of 13 people in KwaMakhutha township outside Durban and had been investigated by the ITU. However, the ensuing trial, commonly referred to as the "Malan trial", which was prosecuted by the Attorney-General, resulted in the acquittal of all of the accused by October 1996. The comments made by the presiding judge in his ruling regarding the conduct of the prosecution, including the failure by the State to call certain key witnesses, reopened the public controversy over the Attorney-General's attitudes and competence. In addition, soon after the conclusion of the trial, the Attorney-General declined to prosecute in a number of other matters investigated by the ITU, including in the case against 13 individuals accused of orchestrating hit-squad killings in the Esikhawini area, and in the case against a former Commissioner of the KwaZulu Police accused of obstruction of justice in relation to an investigation into an arms cache found in the KwaZulu Legislative Assembly building. The exchange of letters between the Attorney- General and the ITU and Board showed wide differences in their assessments of these cases. At the same time these differences were aired through exchanges reported by the media, with the Convenor of the ITB declaring in frustration that there seemed now "little prospect of organized political violence being exposed and stopped through the administration of justice". See footnote 24

The Minister of Justice was drawn into the public controversy, reportedly suggesting that there may be need for the President to appoint a "special attorney-general" to handle political violence cases in KwaZulu Natal. The Attorney-General replied that there was nothing under the current legislation which gave the Minister power to do this. See footnote 25 In the following months the ITU, before its closure in March 1997, continued with its investigations but did not attempt to submit further cases to the Attorney- General.

Amnesty International's February 1997 inquiry and conclusions

It was in connection with both the provincial and national-level problems that the organization's representatives, who included Mr Stephen Owen Q.C., then Deputy Attorney General for the Province of British Columbia, Canada, took the opportunity to make inquiries about proposed legislation intended to restructure and make more publicly accountable South Africa's prosecution service. See footnote 26 During the course of their visit they held discussions with the Minister of Justice, the Minister of Safety and Security, the Legal Adviser to the President, the Chairperson of the Portfolio Committee on Justice, the Attorney-General for KwaZulu Natal, advocates and attorneys who have worked as prosecutors and deputies in the Attorney-General's office, representatives and members of the Natal Law Society, the General Council of the Bar, the Black Lawyers' Association and the National Association for Democratic Lawyers, the Investigation Task Board, Judges of the Constitutional Court, the Truth and Reconciliation Commission, human rights monitors and lawyers who have represented clients from across the political spectrum.

General concerns and recommendations

A number of issues and conclusions emerged from these discussions. There was broad agreement that the criminal justice system, including the prosecution service, is in a state of crisis. Various reasons were cited for this situation, among them:

- low morale, poor skills and under-resourcing, as well as fragmentation of the prosecution service, with experienced people tending to leave for private practice;
- the lack both of public accountability of the prosecution service and availability of effective remedies when controversies arise;
- the inadequate resources, low level of skills, capacity and will in the police service, which is responsible for investigating crime, compounded by the history of the political use of the police, under-resourcing of policing in black residential areas, and police

reliance upon informants and extracted confessions;

• a lack of strategic approach, for the most part, in the handling of crimes indentified as national priorities;

• the further damage to the system caused by the lack of public confidence in it and consequent reluctance, for example, to co-operate as witnesses or in other ways with investigation processes;

• the impact of political processes involving amnesties for perpetrators of political crimes.

A number of those whom Amnesty International's representatives met expressed fears that, in view of the deeply entrenched nature of the problems and with the Government under intense pressure to address the crime situation, there would be a drift towards sacrificing human rights and the principles in the constitution in the search for short-term solutions to the crisis. This danger is all the more likely as the country heads towards the general election in 1999. See footnote 27

A team approach

As a way of addressing some of the legacies of the past and the continuing deficiencies, many of those interviewed saw a necessity for rethinking the traditional division of labour between the police and the prosecution service, preventing what one person described as "self-defeating buckpassing" between these two agencies. A team approach, involving co-operation at an early stage between police investigators and members of the Attorney-General's staff, could assist in raising the quality of evidence gathered in preparation for a trial, particularly in a case involving complexities or matters of particular national concern. Early close coordination could help preserve the chain of evidence, ensure proper legal guidance and the proper handling of witnesses and taking of statements. As one former prosecutor commented, as an issue of principle there is little difference in the Attorney-General or prosecutor receiving the investigation case docket one week later or eight months later, except that in the latter situation defects from the loss of evidence or the mishandling of witnesses were far harder to remedy. Another former prosecutor, who had been involved in the trial of police officers accused of involvement in a massacre, saw his early and close working relationship with the investigating officers as an important factor in the successful outcome from the trial. It was hopeless, he said, for prosecutors to continue to receive the case docket on the day a trial is set to begin. Their lack of familiarity with the case and resulting difficulties with witness evidence, among other aspects, were very important factors in the failure of so many prosecutions. However he added that, in

adopting a strategy of working more closely with the investigating officer in the preparation of a case, care needed to be taken to ensure that the prosecutor did not become a witness in the matter under investigation.

In relation to this possible difficulty, a team approach between the police and prosecutors should respect the differences in their respective roles and responsibilities at different stages in the investigation and prosecution processes. During the investigation stage, it is the police who are in authority in making decisions on the assessment of evidence to determine whether it raises reasonable suspicions of wrongdoing. At this stage, the prosecutor plays a support role providing legal advice as to the admissability and sufficiency of evidence in any subsequent prosecution. Once the decision to prosecute has been made, the lead passes to the prosecutor who draws on the police as witnesses to the evidence. Respecting these differences protects the prosecutor against being called as a witness in a prosecution arising from the investigation.

Setting priorities, encouraging the development of specialized skills in relation to priority crimes, sharing of information across cases so that linkages and patterns could emerge, were seen as more likely to occur where a cross-agency team approach was taken. A former prosecutor told Amnesty International's representatives that by linking up the ballistics evidence in a number of cases involving weapons offences and murders, he had been able to identify a pattern which led him to identify the perpetrator in 21 politically- motivated killings.

The advantage of a cross-agency co-operative approach was more marked, Amnesty International was told, where crimes crossed provincial boundaries, requiring national level solutions and investigation approaches. For instance, in relation to the pre-1994-elections political violence, involving members of law enforcement, intelligence and military agencies based in different provinces and orchestrated at a high level, few results could be expected from any investigation confined to locally-based police investigators. And the danger of a cover-up was always present, as was vividly shown by the initial investigation into the 1988 Trust Feed massacre and the early investigations into the murders which formed the basis for the prosecution of the Esikhawini hit-squad members.See footnote 28 A positive precedent frequently cited to Amnesty International for a holistic and active approach was that set by the Attorney-General in Pretoria in relation to the investigation and prosecution of former security force members involved in so-called "third force" killings and other crimes. See footnote 29 Several Deputy Attorneys-General worked closely with investigators in the preparation of the case against former police counter-insurgency operative, Colonel

Eugene de Kock, who was convicted in 1996 on multiple counts of murder, attempted urder and other crimes. Other cases involving security force and other suspects in "third force" crimes are in preparation. It is possible, though, that more and speedier results could have been achieved from the parallel investigations in the Eastern Cape, KwaZulu Natal and the former Transvaal Province, if there had existed a capacity for national level coordination of the prosecution service which is fragmented between 12 different jurisdictions in which the Attorneys-General have complete discretion.

Ad hoc appointments

Focusing on a different aspect of the problem, Amnesty International found that there was quite broad support, as a possible solution to the under-resourcing and lack of public confidence in the service, for the ad hoc appointments of members of the private Bar as prosecutors in special cases. Such cases could include those where the accused persons hold positions of public responsibility and have a capacity to influence the investigations or prosecution proceedings. The "special" or "independent" prosecutors could be used in those cases involving political and other sensitivities, to help protect the independence of the decision-making process and the conduct of proceedings from real or perceived political or other improper interference. Members of the private Bar could also be brought in to work with a team of investigators and lawyers from the prosecution service as advisors in the assembling and prosecution of complex cases. In the view of some, this approach would have been appropriate in the Malan case. At the same time the periodic involvement of members of the private Bar could help raise standards of professionalism and morale within the prosecution service. Members of the private Bar would need to be encouraged to see this involvement as a form of public service and be expected to undertake the work for reduced fees. Thought would have to be given to where authority for these ad hoc appointments should be located and the criteria used for the appointments to avoid politicization. It would seem necessary to develop neutral criteria and have the appointments made by an independent body. Finally, there were some who saw that this possible solution could only be useful if harnessed to processes intended to raise the level of skills and professionalism amongst police investigators themselves.

Police training and resources

Regarding the police, the Minister of Safety and Security, Mr F. S. Mufamadi, assured Amnesty International's representatives that his ministry is trying to address the deficiencies in resources and skills, as well as other historical legacies. He referred to

steps being taken to establish a joint detective and prosecutor academy, accountable to the Director-General: Justice and the Commissioner of Police, and with foreign government assistance. At a practical level, he saw the creation of the Investigation Task Unit in 1994, with its civilian oversight component, as an important example of the team approach and as a way of breaking the cycle of impunity in KwaZulu Natal. In particular, the involvement of experienced lawyers in the civilian board was a necessary safeguard, as the Unit was tasked to investigate crimes in which elements of the police were involved as perpetrators. It was necessary now to redeploy the Unit's officers to other tasks within police ranks, as he saw politically motivated crimes of violence as just one of a number of national priority areas requiring a collaborative approach and the kind of skills which members of the Unit had developed. The underlying philosophy and strategy, he noted, was dealt with extensively in the National Crime Prevention Strategy document which placed an emphasis on developing a coordinated approach across the criminal justice system as a whole towards crime prevention and raising public confidence in the effectiveness and legitimacy of the system.

Developing an effective balance between accountability and independence

The government's intention to address some of these problems through giving legislative content to the provision in the Constitution for a national prosecuting authority was viewed, on the whole, positively. The new authority which would be created under the legislation could be a focus for developing more strategic approaches on crimes identified as national priorities, for injecting more accountability into the system, for raising standards of professionalism among the staff, for providing a means to deal with complaints about decisions on prosecution or the conduct of a prosecution - as an alternative to an unsatisfactory parliamentary process, such as occurred in 1995. However, the important but difficult task of reaching a balance between independence from political interference and accountability to the political process for the investigation and prosecution of crime was a concern most frequently commented upon, particularly among members of the organized legal profession and some human rights monitors. There was acknowledgment that the prosecution service country-wide lacked credibility, partly as a result of the history of its use against political opponents of the former government and the notoriety of some Attorneys-General and prosecutors for the vigour with which they prosecuted political cases. And there was skepticism of the merits of the independence created for the Attorneys-General by the former government on the eve of the negotiated political transition. See footnote 30 This perspective on the past notwithstanding, there was a strongly articulated concern to ensure that the new authority possessed an independence from politicians regarding decisions on

prosecution, even while more accountability needed to be built in on issues of policy, budget and related matters. Other points frequently raised included the need to have a non-political appointment process, a strictly limited term, objective grounds for dismissal, full definition to be given in the law for the new authority's powers of review and a requirement for any directives to be given in writing with full reasons. The seriousness of these concerns expressed to Amnesty International, in a context where there is an urgent need to address the crisis of legitimacy and low public confidence in the criminal justice system, suggest the advisability of holding public hearings when the draft legislation is tabled in parliament.

Problems relating to the handling of political violence cases in KwaZulu Natal

In addition to these reflections and concerns which have a relevance to the country as a whole, observations were made to Amnesty International on some of the issues peculiar to the functioning of the criminal justice system in KwaZulu Natal. In this province the politicization of the police has been very marked, compounding the already considerable problems created by their underlying lack of investigation skills and the shortage of resources. The former "homeland" police were seen as particularly problematic, with respect to problems of both bias and competence. A Deputy Attorney-General noted that it had been difficult also to obtain co-operation across jurisdictional lines between the two police forces. These circumstances made close and early involvement by members of the Attorney-General's staff in the investigation process particularly necessary, a view strongly held by all of the former prosecutors met by Amnesty International. There seemed to be wide agreement among them and many of the others interviewed that the current provincial Attorney-General has been predisposed to maintaining a strict division of labour between the police and his department in the investigation and prosecution of cases. At least one former prosecutor complained that the Attorney-General discouraged an active team approach in political violence cases. In his comments to Amnesty International, the Attorney-General said that in his experience over many years the police had shown little interest in having prosecutors "interfere" with their work. As for currently they seemed to be reluctant to do anything without pressure from the prosecutor. See footnote 31

A related issue raised by the former prosecutors and others concerned a lack of any apparent strategic approach by the Office of the Attorney-General to the handling of political violence cases. No specific circulars or guidelines seemed to have been issued which might have encouraged members of staff to look for patterns within and between cases and to develop prosecution strategies accordingly. As noted above, some former

members of staff did attempt on their own initiative to adopt such an approach, but it is likely that their efforts could have been enhanced if encouragement had come from the top. In addition, several former prosecutors described situations where apparently less urgent civil matters were given greater priority than the speedy trial of accused in cases involving multiple murder. Amnesty International's representatives did not gain the impression from their discussion with the Attorney-General that he had issued guidelines other than general circulars and seemed in fact to minimise the role of the criminal justice system in reducing political violence. He noted the difficulties in gathering solid evidence, particularly where attacks occurred at night, and commented that "our role is exaggerated. The players who can stop [the violence] are the politicians". While it is undoubtedly true that political party leaders have a crucial responsibility to discipline their members, in the context of a province which has experienced at least 12,000 politically-related deaths and the destruction of homes, livelihood and psychological well-being for many thousands of others since 1985, See footnote 32 the apparent lack of interest or initiative in urgently and systematically tackling a class of serious crime seems bizarrely complacent, if not actually constituting an abandonment of his responsibilities as Attorney-General.

The conflict which developed between the Attorney-General and the Investigation Task Unit and Board seems partly to have arisen through differences in approaches to the investigation and prosecution of crime, notwithstanding the former's agreement to second staff to the ITU. By its very nature, the ITU broke down the traditional divisions of labour by providing police investigators with legal supervision and advice on an ongoing basis. Furthermore, the ITU, following on the work of previous inquiries, attempted to identify the networks and enabling mechanisms which they believed were authorising and facilitating the activities of individual killers, with a view to the eventual prosecution of these higher level actors. The conflict in approaches emerged starkly in a number of cases.

The Mbambo case

In one such case, that of The State versus Romeo Mbambo, Brian Gcina Mkhize and Israel Hlongwane, the Attorney-General had authorised a prosecution of the accused on six counts of murder after refusing a request from investigators, then attached to the Goldstone Commission, to delay the prosecution to allow for further investigations into allegations made by the accused that they had acted on higher orders. The three accused were part of a group of men who had been trained secretly by the then South African Defence Force (SADF) in the Caprivi and later incorporated into the KwaZulu Police. It

was the allegations made by two of the men in statements to the police after their arrest in November 1993 that prompted the Commission's investigators, Lieutenant-Colonel Dutton and Advocate Koenig, and several others connected with the investigations to approach the Attorney-General to recommend that the arrested men should be used for further investigations into those suspected of orchestrating the violence. The Attorney-General refused this request. See footnote 33

The prosecution went ahead in late 1994 and was conducted by a member of Attorney-General's department, Mr James de Villiers. In his opening address, the prosecutor told the Court that the cases before it were common law crimes of murder and that there was no political involvement. The accused, however, in their evidence in mitigation, persisted in their version that they had acted under instruction from senior political and police officials whom they named. The presiding judge, Mr Justice N van der Reyden, was led to query the State's view, noting at one point that

"All the evidence up to this stage, uncontested evidence, indicates that even Nathi Gumede's murder was committed on orders from higher authority, and you are still trying to show the contrary...that this murder was not committed on higher authority. Is that what you are trying to prove?" See footnote 34

The prosecutor replied in the affirmative, saying that this view was based on "previous inconsistent statements [by the accused] and probabilities". Earlier he had told the Court that the State would not subpoena those named by the accused.See footnote 35 This decision left the Court without the benefit of hearing the evidence of those who had been accused by the defendants of having identified targets and ordered the killings carried out by the defendants. Nevertheless, as already noted, the judge concluded that

"The issue of sentencing must be approached on the basis that the kidnapping and all the murders were committed by the accused on instruction from persons in authority and in the execution of hit-squad activities...The present case is confirmation of speculation that hit-squads are one of the problems contributing to violence in this country and particularly in KwaZulu- Natal". See footnote 36

Commenting on the initial investigations, he noted that "the lack of proper investigations into these murders tends to support the version that the murders were committed on instructions as part of hit-squad activities". He called for a thorough probe into the allegations, adding that if this was not done, he would forward the

transcripts of the trial record to the national ministers of justice and safety and security.

The ITU continued with its own investigations into the allegations made by Gcina Mkhize and his co-defendants. The investigation was overseen by Advocate Shamila Batohi, who had been seconded to the ITU from the office of the Attorney-General. The ITU delivered a report on the case to the Attorney-General in October 1995. In view of concerns which he apparently expressed regarding the acceptability of Daluxolo Luthuli, Gcina Mkhize and Romeo Mbambo as State witnesses, the ITU undertook further nvestigations to corroborate their evidence and address certain discepancies between their statements. Their second report was delivered to the Attorney-General in about June 1996. The suspects identified and recommended for prosecution included high-ranking police officers and members of the IFP who also held public office. They were accused of involvement in a conspiracy in relation to a number of murders and attempted murders in the North Coast area of the province. See footnote 37 According to the ITB, the report was studied on the Attorney-General's behalf by a member of staff, James de Villiers, who, as noted above, had prosecuted Gcina Mkhize and his co-defendants in 1994/5. In the Board's view, he was not in a position to review the report and seven associated police dockets impartially because of his role in that trial.

On 24 October 1996 the Attorney-General informed the ITU that he had decided not to prosecute any of the suspects in connection with the incidents referred to in the report and dockets. As explanation for this decision he stated that "the allegations in the relevant police dockets rest on the evidence of accomplices [who]...made statements to the Goldstone Commission. All three of these witnesses claim in subsequent statements that they lied in material respects to that commission. There are major discrepancies between the statements of the accomplices as well as between the statements made by individual accomplices at different stages." He concluded by noting that he was satisfied that "there is no prima facie case and no reasonable prospect of successful prosecution being instituted.". See footnote 38

In a reply which they released to the press, the ITB conceded that there would have been some difficulties in the prosecution of this case, but argued that there was "sufficient consistency in [the witnesses'] versions relating to the essential elements of the offences in question, which was corroborated in part by objective evidence, to put the suspects on their defence in a court of law". In their view "the place for the testing and assessment of the evidence against the suspects was in a court of law". See footnote 39

Amnesty International is not in a position to say from any scrutiny of relevant documents whether or not there were sufficient grounds for believing there was a reasonable prospect for a successful prosecution in this case. The Attorney-General, in his comments to Amnesty International's representatives, emphasised his doubts about the witnesses, but also added, in relation to one of the high-ranking suspects, a concern that "the community" would be led to believe that the Attorney-General's decision to prosecute must mean that he is guilty. For "higher status" persons the consequences of wrongful prosecution are greater, he said. In Amnesty International's view, however, it seems likely that if a different stance had been taken by the Attorney-General on this case in 1994, there would have been opportunity then for a more extensive and timely investigation, possibly leading to the resolution of a larger number of cases than the six for which Gcina Mkhize and his co-accused stood trial and a full exposure in the courts of the evidence relating to those who allegedly directed the activities of the Caprivi trainees. Such an outcome would also have reassured the surviving victims and families affected by the operations of the hit squad. Moreover, the Constitution and national law impose upon the prosecution the same strict burden of proof in all cases, regardless of rank, to overcome the presumption of innocence.

The Light Machine Gun case

In another case decided by the Attorney-General in October 1996, he declined to prosecute Lieutenant-General R. During, the former Commissioner of the then KwaZulu Police, on charges relating to illegal weapons which were found in the storeroom of the KwaZulu Legislative Assembly in September 1993. Among the weapons found was an FN (MAG) Light Machine Gun, a spare barrel and a large quantity of ammunition. Commissioner During appointed an investigator and ordered a fingerprint examination to be made of the storeroom. Following the intervention of the Secretary to the Chief Minister of the then KwaZulu Government, Mr S. Armstrong, Commissioner During stopped the investigation. The weapons cache was removed. When the ITU became involved later in an investigation of this incident, they were unable to trace the weapons. From an examination of relevant records they found no evidence that any person within the KwaZulu Government or police force had authority to possess such a weapon and ammunition. In the view of the ITU and Board, the action of Commissioner During in stopping the investigation was criminal and a particularly serious matter, taking into account his position of authority over the police. They recommended that he be charged with defeating the ends of justice.

Although the case was dealt with by one of the Deputy Attorneys-General, the Attorney-General publicly supported the decision not to prosecute, while noting that he had not personally read the docket nor had he been personally involved in the decision-making process. See footnote 40 The reasons provided for declining to prosecute on this particular charge were two-fold: firstly, that "[t]here is no evidence to suggest that Lt Gen During or any of his subordinates were defeating or obstructing the course of justice" and "[i]n fact During set in motion the investigation regarding the origin of the achine gun and the ammunition"; secondly, "[t]he explanation of During that he received instructions from Armstrong must be accepted". See footnote 41

In reply, the ITB drew attention to the contemporaneous use of such highly lethal illegal weapons in acts of violence in the province and the evidence which emerged in the trial of Colonel Eugene de Kock regarding the flow of ex-SADF machine guns from Namibia via De Kock's police unit into Natal prior to the 1994 elections. For this and other reasons outlined, "[i]t is quite evident that this matter is not an isolated one and the pursuance of it may have led to the exposure of those behind the supply of weapons to hit- squads in the region". It was unacceptable, the Board stated, for a commissioner of police to stop the investigation in question. He was not obliged to and should not have accepted the instructions of the Secretary from another government department. See footnote 42

The Malan case

The Attorney-General's decisions in these matters came shortly after the final collapse of the prosecution case against former General Magnus Malan and 19 other accused in the Durban Supreme Court. In acquitting the remaining accused on all counts, See footnote 43 the presiding judge, Mr Justice J. Hugo, made critical observations on aspects of the conduct of the prosecution in this case. He noted the State's reliance almost exclusively on three accomplice witnesses, whose deficiencies he scathingly detailed. See footnote 44 He repeatedly drew attention to the State's failure to call certain witnesses in connection with the alleged conspiracy, See footnote 45 and to lead evidence either on the nature of the military training which had been provided by the Defence Force in Caprivi to some of the accused See footnote 46 or in clarification of some of the crucial terms used in the documentary evidence submitted by the State. See footnote 47 He also made some criticial remarks about the conduct of the investigation preceding the trial. See footnote 48 During the course of the trial he had commented a number of times on these and other gaps in the prosecution's case.The Court had "little doubt that the deceased at Kwa Makhutha were gunned down by people who were

members of the trainees recruited by Inkatha and trained in the Caprivi," See footnote 49 but found that the State had not proven beyond a reasonable doubt that any of the accused had been involved in the killings.

The outcome of the trial provoked a storm of public comment and criticism, including expressions of bitter frustration from relatives and others close to the victims of the 1987 massacre, among them a brother of the intended target in the attack who told journalists,

"Those who died were innocent children who knew nothing of the struggle. They were murdered, yet it seems no-one killed them....South African law has always been like that; I never had confidence in the judicial system. Perhaps people who are taking the law into their own hands are right. South African law doesn't favour victims, it favours murderers. It seems that truth is not absolute; it depends on how you argue in court". See footnote 50

It was evident to Amnesty International's representatives from their meetings with members of the legal profession and others in February 1997 that the conduct and outcome of the trial and the associated public controversy had created a considerable amount of unease. Some commented that the Attorney-General, as a result of the parliamentary hearings and the media's scrutiny in 1995, may have felt under pressure certainly failed to present convincingly to the trial court, particularly in relation to the conspiracy charge. See footnote 51 Concern was expressed also that the legal advisers who had been involved in the investigation of the case and had a close knowledge of the evidence were marginalised by the Attorney-General during the course of the trial. The failure by the Prosecutor to call certain witnesses important for the State's case was most frequently commented upon.

It is certainly worrying, from a reading of the judgment, to note the number of times Mr Justice Hugo drew attention to the inability of the Court to reach conclusions on important issues as a result of certain witnesses having not been called. At one point in his ruling he commented:

"I shall permit myself yet a further interposition with some comments at this stage about the witnesses that were not called by the State. Colonel van den Berg who, on the evidence before us, could have corroborated [state witness] Opperman as to the acquisition of the firearms from Ferntree [military base]was not called. He could also have assisted in the interpretation of some potentially very incriminating documents of

which he was the author. He was available and he was not called.

Colonel Blaauw, the original senior Staff Officer of Operation Marion, who could have supported all three of the witnesses as to the nature of the training and in general about the creation of the trainee force, was not called, despite his availability.

[Daluxolo] Luthuli, the political commissar and the fons et origo of the whole investigation was not called, despite his potential to provide corroboration of all three of the witnesses on matters as crucial as the selection of targets and the identity of the accused that were selected to perform the operation at KwaMakhutha. Not only was he available but we have been given to understand that he was under the witness protection program at all relevant times.

Other witnesses whose names appear on the indictment in the list of witnesses could have supported the accomplices in one way or another but were not called. Some of these were not accomplices nor coconspirators in any sense and would not have been subject to the cautionary rules that I have already referred to. Based on the evidence that we did hear they should have been able to provide objective support for the State on various aspects of the case." See footnote 52

Members of the ITU and Board were adamant in their comments to Amnesty International's representatives that the failure to call these witnesses, including expert witnesses, was contrary to their advice and that, at all relevant times, they had been in a position to produce these witnesses when called to give evidence. See footnote 53 The trial judge clearly saw these witnesses as essential to the State's case. Amnesty International is not in a position to know if the Court, having heard their evidence, would have reached a different conclusion in relation to the culpability of the accused for the killings in 1987. But, in so far as every effort was not made to provide the Court with the necessary evidence to enable it to establish the truth of where responsibility lay, the State failed in its obligations.

In conclusion, the controversy which developed around the conduct and outcome of this trial, which we have only briefly touched on here, and the bitter public exchanges which ensued between the Attorney-General and those who have been most intimately involved in the lengthy investigation and preparation of the case, in the context of all that had gone before it, point to the urgent need for some appropriate means for adjudication and accountability. It is vital for the province, as well as the country as a

whole, to ensure that public confidence in the system of justice is restored.

Part II: Amnesty International's recommendations on the National Prosecuting Authority Bill

International Standards

Before discussing the purpose and content of this Bill, it is useful to bear in mind the United Nations (UN) Guidelines on the Role of Prosecutors, See footnote 54 which were "formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings". The draft legislation refers to the need for the content of the Guidelines to be made known and promoted amongst members of the prosecution service. They include among their recommendations regarding the prosecutor's role in criminal proceedings the following principles:

**Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest (Article 11).*

**Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system (Article 12).*

**In the performance of their duties, prosecutors shall:*

(a) Carry out their functions impartially and avoid all political, social, religious, racial,cultural, sexual or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(c) Keep matter in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Article 13).

**Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded (Article 14).*

**Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences (Article 15).*

**When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice (Article 16).*

**In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to co- operate with the police, the courts, the legal profession, public defenders and other government agencies or institutions (Article 20).*

**Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review (Article 21).*

**Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines (Article 22).*

The draft legislation responds to section 179 of the Constitution of the Republic of South Africa, 1996, which has as its purpose the balancing of independence and accountability in the prosecution of crimes by the State. See footnote 55 As such it must also be viewed within the context of the history of the Office of Attorney-General in South Africa.

Previous history of the Office of the Attorney-General

From 1926 until 1992, an Attorney-General exercised authority and performed the functions of the office "subject to the control and directions of the Minister [of Justice], who could reverse any decision arrived at by an attorney-general and could himself in general or in any specific matter exercise any part of such authority and perform any of such functions". See footnote 56 During this period, according to academic scholarship, the Minister of Justice, who was also a member of the cabinet, usually refrained from interfering with the decisions of an attorney-general "where the national interest [was] not involved" (emphasis added). See footnote 57 Clearly, however, suppressing the activities of opponents of apartheid rule after 1948 was construed by the government of the day as being in the "national interest", a fact which was reflected in the extraordinary powers granted to successive ministers of justice under security legislation. See footnote 58 So it was, in turn, with the authority granted to the Attorneys- General in the prosecution of government opponents charged with political crimes under statutory or common law in this period. They possessed extraordinary powers, for instance, with respect to the withholding of bail and the detention and compulsion of witnesses; and in their willingness to use these powers and to proceed on the basis of confessional evidence extracted under duress; in their practice of charging accused with a multiplicity of (political) offences arising out of substantially one offence often resulting in heavier sentences; in these and other respects they appeared "in many instances...[to be] handmaidens of the government". See footnote 59 The failure of the Attorneys-General, on the whole, to distinguish their role from those who wielded political power and to conduct their functions impartially and without discrimination must inevitably have contributed to the profound alienation from and distrust for the criminal justice system on the part of the majority of South Africans.

In 1992, in the context of difficult political negotiations with formerly banned opposition parties, the National Party Government rushed through Parliament a bill to make the Attorneys-General independent of the control of the Minister of Justice. The government's motivation for passing the Attorney-General Act (No. 92 of 1992) has been strongly criticized as reflecting its "fear of what future prosecutors would do [more]

than any real desire to secure independent status for the attorney-general"and as lacking any credibility. See footnote 60 The Act is still in force, but is scheduled to be repealed in its entirety once the National Prosecuting Authority Bill is passed into law.

Under section 5(1) of the 1992 Act, the Attorneys-General are given "the authority to prosecute on behalf of the State in criminal proceedings in any court in the said area any person in the name of the Republic in respect of any offence in regard to which any court in the said area has jurisdiction". The authority of the Minister is reduced to that of co- ordinating the functions of the Attorneys-General. The Minister may request an Attorney- General to provide him with information or a report on any case, matter or subject handled by that Attorney-General, and "provide him with reasons for any decision taken by the Attorney-General concerned in the performance of his duties or the exercise of his functions" (Section 5(5)). There is nothing in the Act which indicates the reciprocal obligations of an Attorney-General, other than a yearly obligation to "submit to the Minister a report on all his activities during the previous year". As indicated, for instance, by the report of the Attorney-General: Natal for the January to December 1995 period, which was provided to Amnesty International's representatives in February 1997, these reports can be quite bland statistical accounts of staffing, number of cases handled and so forth.

The legislation allows for an Attorney-General, who is appointed by the State President, to remain in office until statutory retirement age (65) and possibly for up to two further years. Other than this there is a carefully circumscribed process under which the State President "may" suspend an Attorney-General and, subject to certain conditions, remove him from office "for misconduct" or on account of continued ill-ealth or "on account of incapacity to carry out his duties of office efficiently". The State President must inform parliament within 14 days of the decision to suspend and the reasons for doing so. If the parliament petitions for the State President to restore the suspended Attorney-General to office, he must do so. If no petition is forthcoming, the State President then confirms the suspension and removes the Attorney-General from office. The parliament can initiate the process by petitioning the State President to remove an Attorney-General on the same grounds as noted above. If so petitioned, the State President must remove that Attorney- General from office.

These procedures for the removal of an Attorney-General are fraught with difficulty and have not been exercised since 1992. They do not appear to be consistent with Articles 21 and 22 of the UN Guidelines. Notwithstanding the inconclusive

parliamentary hearings on the Attorneys-General in September 1995, the renewed crisis of confidence that year, and subsequently, in the Office of the Attorney-General for KwaZulu Natal revealed the damaging consequences from the system's lack of any quick, convincing and fair means of settling public unease and doubts. As noted by two members of the South African non- governmental Human Rights Committee, "...we find ourselves in the undesirable position where, despite allegations that [Attorneys-General] are failing to serve the interests of justice, there are no remedies against that failure.... Although there are general mechanisms for accountability, there is no way to ensure that the day-to-day exercise of power, which concerns matters of vital public concern, is not being abused." See footnote 61

The National Prosecuting Authority Bill, drafted in terms of the final Constitution, represents an attempt to locate a balance between accountability and independence within the prosecution service. The National Prosecuting Authority Bill, 1997 See footnote 62

The proposed National Prosecuting Authority Bill creates a National Director of Public Prosecutions (NDPP), appointed by the President and responsible to Parliament through the Minister of Justice. Specifically it provides for the NDPP, with the concurrence of the Minister of Justice, to issue prosecution policy directives, to intervene in the prosecution process when policy directives are not complied with, and to carry out other functions indicated under section 179 of the Constitution. The Bill also provides for the appointments of provincial Directors of Public Prosecutions (DPP), currently the provincial Attorneys-General, and other Directors, as decided by the President.

Qualifications and Appointment Process for the NDPP

The draft law requires the National Director of Public Prosecutions, as well as other officials under the terms of the Act, to take an oath or make an affirmation affirming that he or she will "uphold and protect the Constitution of the Republic and the fundamental rights entrenched therein and enforce the Law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law".

These important principles and obligations should be matched by a process for the appointment of the NDPP which ensures that the office, from the start, is placed beyond any suspicion of political interference affecting its integrity.

Section 6 provides for the appointment of the National Director of Public Prosecutions (NDPP) who must be a legally qualified person, with the right to appear in the High Court and having at least ten years' experience in the application of the law and "such experience as, in the opinion of the President, renders him or her suitable for appointment as the National Director". The section does not refer explicitly to an appointment process other than by referring to section 179 (1)(a) of the Constitution in terms of which the President has the power to appoint the NDPP. While this provision cannot be altered by the legislation, it would be appropriate as an administrative process for the President to act on the recommendations of a committee which is clearly beyond political influence and designed to ensure the highest qualifications of the office holder. The need for such an independent advisory body is indicated also by the additional discretion given the President under section 6(c) of the draft law. Such a committee could be the current Judicial Services Commission; or a committee composed of such persons as the Chief Justice, Presidents of the Bar Council and Association of Law Societies, the Minister of Justice and representatives of non-governmental organizations. An all-party committee may be another option, although if such a committee were making a series of appointments there would be the danger that they may barter political favours for different positions. There is another possibility, a committee representing civil society, an option pursued prior to the appointment of the members of the Truth and Reconciliation Commission. However, this could present a real difficulty in identifying a full-range of interest sectors and representatives of each which would be universally accepted.

Whatever appointment process is decided upon and indicated accordingly in the legislation, it should be adopted as a means of enhancing public confidence in the office and the capacity of the appointee to conduct him or herself "in good faith and without fear, favour or prejudice and subject only to the Constitution and the law". In the long-run, it would be advisable to amend the Constitution to ensure some mechanism is entrenched to provide independent advice or review in connection with the appointment of prosecutors.

Appointment Term for the NDPP

Section 7 limits the period of appointment to a maximum of seven years. To help protect the independence of the office the term of appointment should be beyond the term of the President and there should be no provision for reappointment, as currently envisaged under section 7(2). A term of longer than seven years or a reappointment

risks politicizing the incumbent. The NDPP should be expected to deal with major, controversial cases throughout the term of office and this can lead to personalizing and politicizing of the position around what might be unpopular decisions. Also not allowing for a reappointment avoids any perception of the tailoring of decisions to favour reappointment towards the end of term. It also provides for the opportunity for fresh approaches and thinking on a regular basis Section 7 (4) allows the President to extend the term of the NDPP up to two years beyond the age of retirement. As a safeguard there should be some specified criteria indicated as guidance to the President. Similarly, it is not clear what purpose will be served by providing the President with the discretion, without any specified criteria, to determine the length of the initial appointment of seven years or less. This provision may have a negative impact on the operational independence of the office.

Section 7(10) also gives the President the power to appoint "any fit or proper person" to act as the NDPP during any period when the NDPP is absent or unable to perform his or her functions. As interim arrangements could possibly be necessary for significant periods of time for a variety of reasons, it would seem wise, in the interests of the operational independence of the office, to provide for, under section 5(2), a Deputy National Director of Public Prosecutions. The Deputy should be appointed on the same basis and through the same process as recommended above for the NDPP.

Suspension and Removal of the NDPP

The procedures and grounds for suspension should be consistent with Articles 21 and 22 of the UN Guidelines on the Role of Prosecutors and Section 179, in particular 179(4), of the Constitution. See footnote 63 The use of "misconduct" in section 7(6) of the Bill is likely to mean that the NDPP is failing to carry out statutory responsibilities in a responsible manner and this should perhaps be defined specifically in the Act. The only other ground for removal which is likely to be necessary is the inability to carry out statutory responsibilities due to mental or physical incapacity. The reference to incapacity to carry out duties "efficiently" is either redundant with misconduct or unhelpfully vague and could allow for political manipulation.

Regarding procedures for removal of the NDPP, there should be some reference to a hearing before Parliament, a Parliamentary Committee or a Judicial Inquiry Commission to ensure natural justice and procedural fairness through such elements as standing, cross- examination, opportunity to lead evidence, and full reasons for the decision. An impeachment procedure in the Parliament should require a two-thirds

majority vote and clear criteria. The inclusion of these safeguards will bring the law into line with Articles 21 and 22 of the UN Guidelines and Section 179 of the Constitution.

Functions and Powers of the National Director of Public Prosecutions and the Accountability of the Prosecution Services

Together with section 179 of the Constitution (see above), section 8(1) provides a generally appropriate and effective means for the NDPP to hold the prosecution services accountable, help direct resources towards identified priority areas, and raise the standard of professionalism within the service. The constitutional provision gives the NDPP the authority to determine prosecution policy (with the concurrence of the Minister and in consultation with the provincial directors), to issue policy directives and intervene where not complied with, and to review a decision to prosecute or not to prosecute after consultations with the relevant provincial director and receipt of representations. It would be important to include in the draft legislation a requirement that, in considering such representations, the NDPP should act at all times consistently with Article 13 (a) and (b) of the UN Guidelines which requires prosecutors in the performance of their duties to:-

"(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination; [and] (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect...."

Section 8 of the draft law, among other provisions, gives the NDPP the discretion to conduct investigations into a prosecution or a prosecution process or directions or guidelines issued by a provincial director, and to require reports from a provincial director with respect to a case, a prosecution or other specified matters. The NDPP will also have discretion to bring proceedings including criminal proceedings in a competent court.The NDPP will be obliged to liaise closely with the provincial directors, the prosecutors, the legal professions and institutions in order to foster common policies and practices and cooperation in the handling of complaints. Other obligations include the development, in consultation with others, of a code of conduct for prosecutors and training programs. The NDPP will be obliged to assist the provincial directors and prosecutors in "achieving effective and fair administration of criminal justice" and in bringing to their attention the UN Guidelines and promoting "their respect for and

compliance with the [guidelines] within the framework of national legislation".

Under section 8 (1) (k), the NDPP is obliged to prepare a comprehensive report annually on matters relating to the range of responsibilities in this section and submit it to the Minister of Justice. This responsibility is elaborated in section 19, whereby the NDPP is obliged, on request, to provide the Minister of Justice with reports regarding any case, matter or subject dealt with by the NDPP and a Director and provide reasons for any decision taken by a Director in the exercise of his or her powers. The NDPP is also obliged to provide the Minister with information regarding prosecution policy and policy directives, as indicated under section 179 of the Constitution. Finally, the NDPP is obliged to submit to the Minister any report from a Director with regard to any matter relating to the prosecuting authority. While constitutionally the Minister of Justice has final responsibility over the prosecuting authority and must therefore be the recipient of these reports, it would seem important for the accountability of the office itself that, at the very least, the annual report from the NDPP should be tabled in the national parliament. As it stands, the draft law leaves it in the discretion of the NDPP to submit any report on matters relating to the prosecuting authority to Parliament if he or she deems it necessary. Some reports on current prosecutions would be too sensitive to make public, however, and there may be need for some conditions on confidentiality, even with respect to Parliament. Nevertheless, perhaps a list of such case-related reports could be tabled in Parliament.

It is helpful for reasons of the wider accountability of and public confidence in the NDPP that section 8(2) obliges the NDPP to publish in the government Gazette "as soon as practicable" and to table in Parliament any prosecution policies and directives he or she may issue.

On a final related point, the NDPP, as noted above, has the power to "review" a decision by a provincial Director to prosecute or not to prosecute in a particular matter, and to intervene in a prosecution process where policy directives are not being complied with. This power of review, to judge from comments made to Amnesty International by members of the Bar Council, the Law Society and other lawyers, includes the power to examine and override a decision to prosecute or not to prosecute. They saw it as advisable to include in the legislation a full reference to the scope of this power of review implied in the Constitution. The full import of this right of review highlights the great importance of ensuring the best possible appointment process for the NDPP, as already noted above, and the inclusion of other safeguards to prevent abuse of this

power. In so far as the NDPP is appointed as an impartial person and is in effect at the top of the chain of command within the prosecution service, this sensitive function could perhaps be appropriately exercised, but the NDPP should be required to provide full, written reasons which must be published and placed before Parliament at the earliest appropriate opportunity. However, in appropriate cases, publication could be delayed so as not to prejudice a proceeding.

A stricter safeguard regarding the exercise of this function could be considered, involving a more "horizontal" review process. If the necessary criteria are met, the NDPP could order the relevant file to be removed (perhaps subject to judicial review) from the DPP or prosecutor and given to an independent prosecutor for a determination on whether or not to prosecute. Victims could have a say in the process. See footnote 64

Finally, in exercising this function, the NDPP should bear in mind the principles in the UN Guidelines, including Article 14, which states that "Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded".

Appointment of Directors and Deputy Directors of Public Prosecutions

The appointment of DPPs regarding selection, term, extension and removal should be the same as for the NDPP, given the importance of their role and the necessary exercise of independent authority in most cases.

Section 9 provides for the President to appoint a Director of Public Prosecutions (DPP) in each of the nine provincial divisions of the High Court, the Witwatersrand Local Division of the High Court and potentially in respect of any other local division of the High Court. Since the Constitution is silent on this aspect, there should be nothing to prohibit the legislation including the requirement that the President, in making these appointments, should act on the recommendations of a committee which is clearly beyond political influence and designed to ensure the highest qualifications of the office holder. This may be helpful to emphasize the non-partisan nature of the appointments. Section 9 (3) obliges the President to make the appointments "in consultation with the Judicial Services Commission". So also with section 11, consideration should be given to having the NDPP, in consultation with the relevant DPP, appoint the Deputy DPPs, rather than the Minister of Justice, to avoid any appearance of partisanship. This would also serve to emphasise the administrative reporting responsibility of the Deputies to the NDPP rather than to a politician. However, there could also be parliamentary scrutiny of

the appointments.

The importance of employing transparent procedures in the appointments of the Directors of Public Prosecutions is highlighted by the provisions covering the existing Attorneys-General. Under section 27 anyone holding the office of Attorney-General when the new Act comes into effect becomes a "Director", defined to include Directors as contemplated under section 2(c) (referring to Director: Office of Serious Economic Offences), 9(1)(a) (referring to the floating DPPs attached to the Office of the NDPP), 9(1)(b) and (c) (referring to Directors of Public Prosections in each of the privincial and in any local division of the High Court). Section 27 permits the President to determine to which of these offices the Attorneys-General/Directors will be appointed.

Under section 10 the President, in appointing the DPPs, will determine the duration of their term in office up to but not exceeding seven years, including in the case of those holding the office of Attorney-General when the Act comes into effect. A second term prior to retirement age is possible. The concerns and recommendations noted above regarding the term of appointment for the NDPP apply in large measure here, as it is important to ensure that the appointments of the DPPs and their terms of office are made in a uniform, non- partisan manner and unrelated to the term of office of the President.

Regarding the grounds and procedures for the suspension or dismissal of a DPP, the same concerns and recommendations made above in relation to section 7 for the NDPP apply here also.

Powers and Functions of the Directors and Deputy Directors of Public Prosecutions

In addition to the normal functions currently carried out by the provincial Attorneys-General, the draft law usefully makes explicit the DPP's role in directing investigations.As is evident from the approach taken by the current Pretoria Attorney-General on "third-force" cases, Attorneys-General or their delegates have had the discretion to play a more interventionist role in coordinating with police investigators the investigation and preparation of complex cases. As has already been noted above in Part 1 of this memorandum, there is significant support for this approach, particularly in relation to crimes of national concern. Section 13(1)(e) gives a DPP the power to "supervise, direct and co-ordinate specific investigations...." Under subsection 3, the DPP may issue directions or guidelines in relation to, presumably, the handling of

particular cases and may specify that the DPP should have referred to him or her matters involving particular offences or a class of offences. Under subsection 5 a provincial police commissioner would also be obliged to act on a request from a DPP for further investigations in relation to particular cases.

Floating Directors of Public Prosecutions

The draft legislation provides for the appointment of Directors of Public Prosecutions additional to those appointed to the provincial divisions of the High Court. Sections 2(b) and 5(2)(b) provide for the appointment of two or three DPPs to the office of the National Director of Public Prosecutions. The President has the power to appoint them, under section 9(1)(a) and 9(3) in consultation with the Judicial Services Commission. It is envisaged, under section 13(8), that they will work under the direction of the National Director of Public Prosecutions who may request them to undertake any functions and exercise any powers as indicated in section 8(1), that is, the full range of duties, functions and powers assigned to the National Director.

In addition the President has the discretion, under section 9(1)(d), to appoint one or more Directors of Public Prosecutions "to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by notice in the Gazette". Under section 13(9), these Directors shall operate subject to the directions of the National Director. However, if their duties and powers include those assigned under the law to the provincial Directors, they must act in consultation with the relevant provincial Director.

Under section 14 the provincial Directors have the authority to delegate to any person who has the right to appear in the High Court the authority to institute criminal proceedings, and to conduct on behalf of the State, as a prosecutor, any prosecution in criminal proceedings in any court within the area of jurisdiction of such Director. A person delegated as a prosecutor under this section may also be assigned to the office of the NDPP or of a provincial Director, as contemplated under section 9(1)(d) above. Where so assigned, the person may exercise any of the powers or carry out any of the functions attributed to the NDPP or a provincial Director under the Act.

It is not clear on the face of the Bill, and therefore may lead to unnecessary suspicions, what the role of the extra DPPs would be. Perhaps the intention is to create additional resources to allow for the the handling of matters of systemic concern, such as those relating to political violence, violence against women and children, organized crime and drug traffiking. As a symbolic matter, the use of DPPs for these ad hoc

positions may add confusion or unnecessary aggravation to the Provincial DPPs. The use of the term "special prosecutors" may be preferable. They could be appointed also to handle matters where there is potential for real or apparent improper interference with a conduct of prosecutions, a model which is used in other jurisdictions. The NDPP and not the President should have the authority to assign them to avoid any danger of political assignment or perception that assignments were being made on political grounds.

Appendix

[Image]

[Image]

Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

[Image]

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation, Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts undertaken to

translate them fully into reality,

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime, Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions,

Whereas the General Assembly, by its resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials, on the recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Whereas in resolution 16 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Committee on Crime Prevention and Control was called upon to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors, Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, subsequently endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,Whereas, in resolution 7 of the Seventh Congress the Committee was called upon to consider the need for guidelines relating, inter alia, to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses,

The Guidelines set forth below, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.

2. States shall ensure that:

(a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex. Language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;

(b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Status and conditions of service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.

6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.

7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.Freedom of expression and association

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

(a)Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Discretionary functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution. Alternatives to prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

Relations with other government agencies or institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

Disciplinary proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines. Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

24 Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

[Image]

Footnote: 1 *Cited below in note 59*

Footnote: 2 *On 29 October 1997 after Amnesty International's representative had presented the organization's submission at the TRC's legal hearings, the Attorney-General for KwaZulu Natal, Advocate Tim McNally, present at the hearings, requested the right to question the witness. His ensuing questions appeared directed to establish mainly (1) that the representative lacked credibility on the grounds that she was not a lawyer; (2) that the courteous exchange between himself and Amnesty International's representatives in February 1997 was not reflected in the submission; (3) that he had cooperated with the Investigation Task Unit, as shown by his agreeing to second two members of staff to the Unit, and had apologized to Advocate Carl Koenig for having temporarily removed his authority to prosecute; and (4) that the Unit, including its commanding officer, Lieutenant-Colonel Frank Dutton, were in full agreement with him on the question of not calling certain witnesses to the prosecution during the trial of former General Magnus Malan and 19 others. With respect to the first point, the submission both reflects the findings of Amnesty International's representatives from their February 1997 inquiry and was prepared in close consultation with one of Amnesty International's Legal Advisers at its International Secretariat in London. On the second issue, the organization's representative acknowledged to Advocate McNally that he had indeed conducted the meeting in February in an open and courteous manner, but Amnesty International had to reach its final conclusions based on all of the evidence it had gathered. Regarding the third area of concern, the Attorney-General's agreement to second staff to the Unit would seem to have shown a willingness to cooperate with it. However, as Amnesty International's representative said in reply, the consequences of this secondment did not seem to have had much impact on the process of reaching final decisions on prosecution or the conduct of proceedings. Finally, on the substantial issue of the calling of certain witnesses in the Malan trial, Amnesty*

International continues to maintain the position as stated in its submission (at pages 22-25 below). Amnesty International has attempted to obtain a transcript of the exchange between its representative and Advocate McNally, but has been advised by the TRC that to date they have been unable to recover it due to recording difficulties.

Footnote: 3 *As for instance in Southern Africa: Policing and human rights in the Southern African Development Community (SADC), AI Index: AFR 03/02/97 (April 1997); An open letter to all members of the Constitutional Assembly of South Africa, TG:AFR/53/96.01 (1 February 1996); Address by Pierre Sane, Secretary General of Amnesty International, Transvaal Northern Technikon, Shoshanguve, South Africa, 9 November 1995, and in various interviews with broadcasting and print media during visits to South Africa.*

Footnote: 4 *The State versus Peter Msane & 19 Others, Supreme Court of South Africa, Durban and Coast Local Division, Case No. CC1/96.*

Footnote: 5 *Advocate McNally has been the Attorney-General for this province since December 1992.*

Footnote: 6 *Stephen Owen, Discretion to Prosecute Inquiry Commissioner's Report, Province of British Columbia, Canada, November 1990, Vol.1, p.111. Mr Owen, then Ombudsman for British Columbia, was the sole commissioner in this inquiry.*

Footnote: 7 *Amnesty International has reported and commented on these concerns particularly in South Africa: Political Killings and Torture in KwaZulu Natal (May 1996); Amnesty International Delegation in South Africa Issues Call for Urgent Steps to End Killings in KwaZulu Natal (November 1995); South Africa State of Fear: Security force complicity in torture and political killings, 1990-1992 (June 1992).*

Footnote: 8 *Interim Report of the Wallis Sub-Committee of the Goldstone Commission, 31 August 1993, p.12. The Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, chaired by Mr Justice Richard Goldstone, was established in 1991 and held hearings in different parts of South Africa inchuding in KwaZuhu Natal.*

Footnote: 9 *Submissions and recommendations concerning the investigation of unrest related offences, the administration of justice and other aspects relating to the*

violence in Natal - 1December 1992, prepared by the Legal Resources Centre (Durban) p.2.

Footnote: 10 *Second Interim Report of the Wallis Subcommittee of the Goldstone Commission, February 1994, p.15.*

Footnote: 12 *Summary of the Judge's comments in The State versus Romeo Mbambo, Brian Gcina Mkhize and Israel Hlongwane (North Eastern Circuit Local Division Court Case No. CC123/94) for the murder of a police officer, who had been attempting to investigate politically-motivated killings, and five others. The Judge, who delivered his final ruling in the Durban Supreme Court, said that "this is a case of exceptional seriousness, which would have justified their imprisonment for life...had it not been for mitigating factors...and the fact that the accused acted on instructions from people of higher authority". He said that it was the duty ofhe authorities to investigate the allegations made by the defendants. "If those authorities do not take the relevant action, I will call for the full transcript of these proceedings to be forwarded to the Minister of Justice and the Minister of Safety and Security" (The Star, Johannesburg, 30 August 1995).*

Foot note: 13 *Judgment delivered on 13 October 1995 in The State versus Bongani Shangase, Siyabonga Msomi, Sifiso Nzama, Sithembiso Mngoma, Qhaphela Buzuyise Dladla, Supreme Court of South Africa, Durban and Coast Local Division, Case No.CC95/95, pp. 44-45. Three prosecutors had been involved in this case, the last one of whom, Deputy Attorney-General Macadam, had been, as the Mr Justice Wilson noted, "pitchforked into the trial halfway through, and [had] endeavoured to close some of the loopholes [in the initial preparation of the case]" (pp.36-37).*

Footnote: 14 *In his ruling in the Pietermaritzburg Supreme Court in April 1992 against the five officers found guilty of murder of 11 people, the judge commented extensively on the cover-up involving officers of the South African and KwaZulu Police. He noted the "extreme irregularity" of the interventions of one of these officers, who, in 1990 and 1991, had been given responsibility for investigating political killings and allegations of police misconduct. The judge commented positively on the work of (then) Captain Dutton and Warrent Officer Wilson Magadla who had taken over the case in July 1991 and battled against the police hierarchy to ensure that the police officers involved in the killings were brought to justice.*

Footnote: 15 *In the highly politically polarized context of KwaZulu Natal, creating an investigation body which is generally accepted as impartial has proven very difficult. The IFP, through its then Secretary General, raised its concerns regarding the ITU with an Amnesty International delegation in November 1995. Their concern was mainly one of bias in the focus of the investigations, but at the same time they made it clear that they were not prepared to co-operate with the ITU. The problem thus became something of a vicious circle. From Amnesty International's point of view, the Government has an obligation constitutionally and under international human rights law to ensure respect for the right to life of all persons within its territory or jurisdiction. Where there exists grounds for believing that members of the security forces are involved in politically-directed assassination squads, then the Government has an obligation to ensure that effective, independent investigations take place. Inevitably, because of the history of the military and police support for Inkatha in its conflict with ANC-aligned organizations before the 1994 elections, the ITU would be involved in investigating the activities of certain IFP members. In interviews with Amnesty International neither of the European police observers who monitored the ITU's operations concurred with the allegations of bias made against it.*

Footnote: 16 *Media Statement by the Attorney-General, Natal (Adv. Tim McNally) on Hit Squad Police Docket (1 September 1995); Media Statement by the Investigation Task Board (ITB) on Hit Squad Police Docket (2 September 1995).*

Footnote: 17 *The letter is dated 4 September 1995.*

Footnote: 18 *Pp.3-4 of Report on the Attorney General of KwaZulu Natal, 16 September 1995. The report was submitted subsequently to the State President, the Minister of Justice and the parliamentary Portfolio Committee on Justice in connection with hearings relating to the prosecution service.*

Footnote: 19 *P.4, idem.*

Footnote: 20 *Here the lawyers were referring to Advocate McNally's role in two inquiries into allegations of police involvement in death squads. In 1989 he took partin an official inquiry at the request of the then President F W de Klerk, after newspapers published damaging claims made by former Security Police Captain Dirk Coetzee and another officer, Almond Nofomela, that they had taken part in officially-sanctioned killings of government opponents while serving as members of a special security police*

unit based at Vlakplaas near Pretoria. Advocate McNally, then Attorney-General for the Orange Free State, and a senior police officer, Lieutenant-General A B Conradie, undertook an inquiry and handed in a report to the President on 28 November 1989 (Verslag Van Ondersoekkomitee Insake Bewerings Van Almond Nofomela). The President refused to make the report public, but its contents became known a year later after the Johannesburg Supreme Court subpoened the State to make it available in connection with a libel case brought by the police against certain newspapers. The "McNally Report" concluded that the allegations were without substance, and that Dirk Coetzee and Almond Nofomela were motivated respectively by grievances against the police and a desire to escape the death penalty. The report showed little by way of independent research undertaken to corroborate the allegations and, at the same time, a willingness to accept at face value the denials of then currently serving police officers implicated in the alleged murders. (One of those officers, Eugene de Kock, is now serving life imprisonment after being convicted in the Pretoria Supreme Court on multiple counts of murder and other crimes, some of which the McNally Report had briefly considered and dismissed.) In 1990, under mounting public pressure, President De Klerk ordered a judicial inquiry to be chaired by Mr Justice L Harms and with lead Counsel, Advocate McNally. As Amnesty International noted in its report, State of Fear, in light of the conclusions of the 1989 inquiry, "it is difficult to see how the government could expect Mr McNally to conduct an impartial investigation into allegations of police "death squad" activity for the Harms Commission so soon after he had concluded in a previous investigation that such activity did not exist" (p.17). An international human rights law expert, Professor John Dugard of the Witwatersrand University, commented after the contents of the 1989 report became public knowledge that Advocate McNally should have recused himself or should never have been allowed to lead evidence because he had already reached his conclusions. "Without reflecting on the Harms Commission at all, I will find it hard to accept any finding [it makes] on police death squads" (cited in Jacques Pauw, In the heart of the whore: the story of apartheid's death squads, Halfway House: Southern Book Publishers, 1991, p.143). As shown by subsequent judicial.

proceedings and commissions of inquiry, including that of the Truth and Reconciliation Commission, some of the police in the Harms Commission's investigation team were themselves implicated in the alleged crimes. Not suprisingly then the Harms Commission found no evidence for the existence of police death squads, dismissing as uncorroborated much of the evidence of Dirk Coetzee and others whom the Judge found to be lacking in credibility and driven by personal motivations (Report

of the Commission of Inquiry into Certain Alleged Murders, September 1990, pp. 69-178). Human rights lawyers who had represented at the hearings families of murdered or "disappeared" victims of the suspected death squad complained afterwards that the Commission's Counsel and investigators showed little inclination to attempt to corroborate the claims of Dirk Coetzee and the other "whistle blowers" and took a narrow approach to each of the incidents under investigation. Indeed much of the corroborating evidence which was eventually presented to the Commisson came from those representing the victims (see WHO LIED ? A discussion of the findings of the Harms Commission of Inquiry, Independent Board of Inquiry into Informal Repression, Johannesburg).

Footnote: 21 *Report on the Attorney General of KwaZulu Natal, pp.4-5 and passim.*

Footnote: 22 *Letter from the Chairperson, Portfolio Committee on Justice, to the Director-General, Department of Justice, 6 September 1995.*

Footnote: 23 *Mail & Guardian, 29 September to 5 October 1995, and views expressed to Amnesty International by legal and official sources, February 1997. In April 1997 the Portfolio Committee on Justice did produce a report as a result of the hearings, containing a number of recommendations for improving the functioning of the Offices of the Attorneys-General. The report recommended that regular hearings should be held to promote accountability of Attorneys-General to the Parliament. (Human Rights Committee, Human Rights Report, April 1997, p.8.)*

Footnote: 24 *Investigation Task Board, Media Statement, 14 November 1996; see text below for further comment on the cases involved and note 9 with accompanying text above.*

Footnote: 25 *The Star, Johannesburg, 28 November 1996.*

Footnote: 26 *As Deputy Attorney General for the province, Mr Owen was the senior non-political official responsible for criminal justice, crown civil litigation and the administration of the courts.*

Footnote: 27 *A 1997 report produced by the Centre for Policy Studies apparently expresses similar concerns. A spokesperson for the Centre, Louise Stack, in commenting on the report referred to the ill-preparedness of state prosecutors, whom she described*

as 22-year-old law graduates with six months' experience whocontended with a work overload and conducted cases which were often defended by senior defence advocates. She warned that "the poor functioning of the criminal justice system is helping to erode the rule of law. If the Government cannot exercise its monopoly over the use of force by demonstrating its ability to protect citizens' personal security, this might lead to the constitution losing its meaning for the average citizen" (The Star, Johannesburg, 25 September 1997).

Footnote: 28 *See notes 10 and 11 above.*

Footnote: 29 *The work of the office of the Pretoria Attorney-General had resulted from the initial investigations by a nationally-coordinated team including the Attorney-General and local and foreign police investigators which had been set up in the wake of the publication of the March 1994 report by the commission of inquiry chaired by Mr. Justice Richard Goldstone.*

Footnote: 30 *See comments below on the 1992 Attorney-General Act.*

Footnote: 31 *Interview with Attorney-General Tim McNally and Deputy Attorney-General Ross Stuart by Amnesty International, Pietermaritzburg, 24 February 1997.*

Footnote: 32 *Human Rights Committee, "Special Focus Political Violence and Justice in KwaZulu-Natal", Human Rights Report, March 1997, p. 17. Approximately 4,902 of these deaths occurred between January 1993 and December 1996. Sources for the monthly, annual and cumulative figures include the South African-based non-governmental organization, the Human Rights Committee (prior to 1994 the Human Rights Commission) and the South African Institute of Race Relations.*

Footnote: 33 *Interview with the Investigation Task Board by Amnesty International, February 1997. They felt that the Attorney-General's refusal to allow a widening of the investigation reflected his view that there was no orchestration of the violence or politically-motivated hit squads in operation. In its Interim Report dated 6 December 1993, the Goldstone Commission, in referring to the recent arrest of members of the KwaZulu Police and associated evidence, commented that this development "establishes the high probability that a hit squad consisting of five KZP policemen has been responsible during 1992 and 1993 for the murder of no less than nine people including leaders and members of the ANC...From the police investigation it emerged that the*

persons suspected of operating in the hit squad had received training from the South African Defence Force in the Caprivi in 1986" (paragraphs 2.1 to 2.4).

Footnote: 34 *Extract from the trial record, pp. 1431-1432. cited in Report on the Attorney General of KwaZulu Natal, 16 September 1995, p.17. See note 9 above.*

Footnote: 35 *The Attorney-General, however, did insist that the ITU make available a witness, Daluxolo Luthuli, who was then out of the country under a witness protection program, in order that he should give evidence on behalf of the State against the three accused. Luthuli was co-operating with the ITU as a potential state witness in connection with investigations into a number of matters which they expected to come to trial. Accordingly the ITU and Board appealed against this request, concerned that the Attorney-General's use of this witness in the sentencing phase of the Mbambo trial could potentially jeopardise his value as a state witness later on "in key prosecutions" which, they argued, would "have the real potential of exposing and stopping certain hit squad networks". The Attorney-General nonetheless insisted, stating that "[I]t is important to call Luthuli to rebut the political overtones ascribed to the killings by the accused [in Mbambo]". (Letter from the Attorney-General to the ITU, 3 August 1995; Letter from the Investigation Task Board to the Attorney-General, 7 August 1995; Letter from the Attorney-General to the Investigation Task Board, 11 August 1995.) Luthuli gave evidence on 21 August 1995, but without the effect which the Attorney-General had hoped, as his evidence-in-chief supported the claims of the accused. He was, however, later not called by the Attorney-General as a witness for the prosecution in the Malan trial apparently because of certain "discepancies" which had emerged in his evidence under cross-examination in the Mbambo proceedings. See further below.*

Footnote: 36 *Reported in The Star, Johannesburg, 30 August 1995.*

Footnote: 37 *Interview with the Investigation Task Board by Amnesty International, February 1997.*

Footnote: 38 *Letter from the Attorney-General to the ITU, dated 24 October 1996. The letter referred them to Mr De Villiers for any further inquiries.*

Footnote: 39 *Media Statement, 25 October 1996. As it is, the allegations and suspicions have continued to be aired in the hearings of the Truth and Reconciliation Commission and in the media.*

Footnote: 40 *The Attorney-General informed Amnesty International in February 1997 that he could not personally handle the thousands of dockets which come into the system in the course of a year. There was a system, he said, for allocating cases to staff at different levels within the prosecution service. However, he stressed that he has overall responsibility.*

Footnote: 41 *Letter from the Attorney-General to the ITU, 18 October 1996; Media Statement by the Attorney- General: Natal (Adv Tim McNally), Ulundi Police Docket Concerning Light Machine Gun, 13 November 1996.*

Footnote: 42 *Letter from the Investigation Task Board to the Attorney-General, 13 November 1996; Investigation Task Board, Media Statement, 14 November 1996.*

Footnote: 43 *The accused, who included both serving and former senior military and police officers and officials and members of the IFP, had been each charged with 13 counts of murder in connection with the 1987 massacre in KwaMakhutha and alternative charges of conspiracy to murder opponents of the IFP (arising out of the planning and establishment of Operation Marion by the military in response to the request by the former Chief Minister of the KwaZulu Government for a para-military capacity). Some of the accused had been discharged at an earlier stage in the trial.*

Footnote: 44 *The State versus Peter Msane & 19 Others, trial record, Vol.57, pp.4384 and at numerous points throughout the ruling.*

Footnote: 45 *Idem, as for instance at pp. 4389, 4409, 4480, 4489, 4526, 4527, 4529in relation to Colonel Van den Berg.*

Footnote: 46 *Idem, as for instance at pp.4458, 4459, 4469, 4484, 4485, with consequences for the Court's assessment of the lawfulness of that training and the intentions of those involved in it.*

Footnote: 47 *Idem, as for instance at pp.4473, 4474, 4475, 4476, 4477, 4478, 4483, 4520 through 4524, regarding the interpretation of the word "offensive" used in the military and other official documents submitted to the Court and referring to one of the sub-groups trained in the Caprivi. The Court noted that the State had tendered no expert evidence on this point to counter the "innocent" interpretation provided by defence witnesses.*

Footnote: 48 *Idem, pp.4385 and 4386, for instance, where he criticizes the investigators for using "cut and paste" computer technology to copy part of one witness statement to another, although he noted that the result was "innocuous"; pp.4388 and 4423, where he criticizes the failure to hold an identification parade and attacks the head of the ITU for being a "complacent" witness.*

Footnote: 49 *Idem, at 4452 of judgment.*

Footnote: 50 *Reported in the Sunday Tribune, Durban, 13 October 1996 and The Independent, London, 12 October 1996.*

Footnote: 51 *Since his appointment at the end of 1992 as Attorney-General for the province of Natal, Advocate McNally had prosecuted in only one case prior to undertaking the Malan case, as he noted in his meeting with Amnesty International's representatives in February 1997. The defendants in the Malan trial were represented by seven sets of attorneys and 14 counsel.*

Footnote: 52 *The State versus Peter Msane & 19 Others, at pp.4389-4390.*

Footnote: 53 *Interview with Investigation Task Board and Investigation Task Unit members, February 1997, and in interviews by telephone subsequently with Advocate Koenig and Lieutenant-Colonel Dutton, both deployed with the United Nations in Europe.*

Footnote: 54 *Adopted by consensus by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders on 7 September 1990. A copy of the Guidelines is attached to this document.*

Footnote: 55 *179 (1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of - (a) a National Director of Public Prosecutions, who is head of the prosecuting authority, and is appointed by the President, as head of the national executive; and (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.*

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions –

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5)

(4)National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions –

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting with the Director of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

Footnote: 56 *"The Attorney-General: Man or Marionette", by Advocate Chris Nicholson [now judge of the High Court, Natal Provincial Division], 1993 , p. 6, referring to the various enactments of the Criminal Procedure Act from 1926.*

Footnote: 57 *John Dugard, Human Rights and the South African Legal Order, Princeton UP, 1978, pp 11-12.*

Footnote: 58 *See, for instance, Political Imprisonment in South Africa, Amnesty International, 1978, AI Index: PUB 81/00/78, and the authors noted below.*

Footnote: 59 *Nicolson, op cit, pp. 7,16; Dugard, op cit, pp. 114-116, 254 - 267; Anthony Mathews, Freedom, State Security and the Rule of Law, Sweet & Maxwell, London, 1986, pp.96f.*

Footnote: 60 *Nicholson, op.cit.,pp.15-16, adding that "there is much [for them] to*

fear from the revelations arising out of the death squads which roved the country and may still be active". Another human rights lawyer, Richard Spoor, commented bluntly that "The Attorneys-General Act of 1992 was part of a package of last-gasp apartheid legislation calculated to ensure that the prosecuting authorities could continue in office, free from any interference by the new democratic government. In the name of prosecutorial independence it entrenched in office the then attorneys-general for the rest of their working lives. In democratic systems this type of independence guaranteed by security of tenure is only granted to high court judges." The Star, Johannesburg, 17 June 1997. As noted in Part 1 above, this skeptical view was also conveyed to Amnesty International in February 1997 by members of the organized legal profession, even where there was concern regarding the impact of the National Prosecuting Authority Bill.

Footnote: 61 *Jeremy Sarkin and Suzie Cowen, "Attorneys-General must be accountable", in Mail & Guardian, Johannesburg, 13 October 1995.*

Footnote: 62 *The comments following relate to the Fourth Departmental Draft: Working Document, dated 30 July 1997.*

Footnote: 63 *See citation above.*

Footnote: 64 *See in this connection the recommendations for ensuring prosecutorial independence made by Amnesty International in relation to the establishment of an International Criminal Court (The International Criminal Court Making the right choices - Part II Organizing the court and guaranteeing a fair trial, July 1997, pp.21-22, AI Index: IOR 40/11/97).*

REPUBLIC OF' SOUTH

GOVT COAWNICATIOH & INfORMA;ION SYST[M

GOVERNMENT GAZETTE

STAATSKOERANT

VAN DIE REPUBLIEK VAN SUID-AFRIKA

No. 19021

ACT

To regulate matters incidental to the establishment by the Constitution of theRepublic of South frica, 1996, of a single national prosecuting authority; and toprovide for matters connected therewith.

PREAMBLE

WHEREAS section 179 of the Constitution of the Republic of South Africa, 1996 (ActNo.108 of 1996), provides for the establishment of a single national prosecutingauthority in the Republic structured in terms of an Act of Parliament; the appointment bythe President of a National Director of Public Prosecutions as head of the nationalprosecuting authority; the appointment of Directors of Public Prosecutions andprosecutors as determined by an Act of Parliament;

AND WHEREAS the Constitution provides that national legislation must ensure thatthe Directors of Public Prosecutions are appropriately qualified and are responsible for rosecutions in specific jurisdictions;

AND WHEREAS the Constitution provides that national legislation must ensure thatthe prosecuting authority exercises its functions without fear, favour or prejudice;

AND WHEREAS the Constitution provides that the National Director of PublicProsecutions must determine, with the concurrence of the Cabinet member responsiblefor the administration of justice, and after consulting the Directors of PublicProsecutions, prosecution policy which must be observed in the prosecution process;

AND WHEREAS the Constitution provides that the National Director of PublicProsecutions may intervene in the prosecution process when policy directives are notbeing complied with, and may review a decision to prosecute or not to prosecute;

AND WHEREAS the Constitution provides that the Cabinet member responsible forthe administration of justice must exercise final responsibility over the prosecutingauthority;

AND WHEREAS the Constitution provides that all other matters concerning theprosecuting authority must be determined by national legislation;

B E IT THEREFORE ENACTED by the Parliament of the Republic of SouthAfrica,as fllows:—

CHAPTER 1

Introductory provisions

Definitions

1. In this Act, unless the context otherwise indicates—

(i) ''*Constitution*'' means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996); (v)

(ii) ''*Deputy Director*'' means a Deputy Director of Public Prosecutionsappointed under section 15(1); (ii)

(iii) ''*Deputy National Director*'' means a Deputy National Director of PublicProsecutions appointed under section 11(1); (iii)

(iv) ''*Director*'' means a Director of Public Prosecutions appointed under section13(1);

(v) ''*Investigating Director*'' means a Director of Public Prosecutions appointedunder section 13(1*)(b)* as the head of an *Investigating Directorate*; (x)

(vi) ''*Investigating Directorate*'' means an Investigating Directorate established under section 7(1); (xi)

(vii) ''*Minister*'' means the Cabinet member responsible for the administration of justice; (viii)

(viii) ''*National Director*'' means the National Director of Public Prosecutions appointed in terms of section 179(1*)(a)* of the *Constitution*; (ix)

(ix) ''*Offyce of the National Director*'' means the Office of the National Director of Public Prosecutions established by section 5; (vii)

(x) ''*prescribed*'' means prescribed by regulation made under section 40; (xvi)

(xi) ''*prosecuting authority*'' means the single national prosecuting authority referred to in section 2; (xv)

(xii) ''*prosecutor*'' means a prosecutor referred to in section 16(1); (i)

(xiii) ''*Public Service Act*'' means the Public Service Act, 1994 (Proclamation 103 of 1994); (xiv)

(xiv) ''*Republic*'' means the Republic of South Africa, referred to in section 1 of the *Constitution*; (xii)

(xv) ''*Special Director*'' means a Director of Public Prosecutions appointed under section 13(1*)(c)*; (xiii)

(xvi) ''*this Act*'' includes the regulations. (vi)

CHAPTER 2

Structure and composition of single national prosecuting authority

Single national prosecuting authority

2. There is a single national prosecuting authority established in terms of section 179 of the *Constitution*, as determined in *this Act*.

Structure of prosecuting authority

3. The structure of the single *prosecuting authority* consists of—

(a) the *Office of the National Director*; and

(b) the offices of the *prosecuting authority* at the High Courts, established by section 6(1).

Composition of national prosecuting authority

4. The *prosecuting authority* comprises the—

(a) *National Director*;

(b) *Deputy National Directors*;

(c) *Directors*;

(d) *Deputy Directors*; and

(e) *prosecutors*.

Office of National Director of Public Prosecutions

5. (1) There is hereby established the National Office of the *prosecuting authority*, to be known as the Office of the National Director of Public Prosecutions.

(2) The *Office of the National Director* shall consist of the—

(a) *National Director*, who shall be the head of the Office and control the Office;

(b) *Deputy National Directors*;

(c) *Investigating Directors* and *Special Directors*;

(d) other members of the *prosecuting authority* appointed at or assigned to the Office; and

(e) members of the administrative staff of the Office.

(3) The seat of the *Office of the National Director* shall be determined by the President.

Offices of prosecuting authority at seats of High Courts

6. (1) There is hereby established an Office for the *prosecuting authority* at the seat of each High Court in the *Republic*.

(2) An Office established by this section shall consist of—

(a) the head of the Office, who shall be either a *Director* or a *Deputy Director*, and who shall control the Office;

(b) *Deputy Director*s;

(c) *prosecutor*s;

(d) persons contemplated in section 38 (1); and

(e) the administrative staff of the Office.

(3) If a *Deputy Director* is appointed as the head of an Office established by ubsection (1), he or she shall exercise his or her functions subject to the control and directions of a *Director* designated in writing by the *National Director*.

President may establish Investigating Directorates

7. (1) *(a)* The President may, by proclamation in the ***Gazett***e, establish not more than three Investigating Directorates in the *Offyce of the National Director*, in respect of specific offences or specified categories of offences.

(b) proclamation referred to in paragraph *(a)* shall be issued with the concurrence of the *Minister* and the *National Director*.

(2) A proclamation referred to in subsection (1) *(a)* must specify the offences or the categories of offences for which an *Investigating Directorate* had been established.

(3) The head of an *Investigating Directorate* shall be an *Investigating Director*, and shall perform the powers, duties and functions of the Directorate subject to the control and directions of the *National Director*.

(4) *(a)* An *Investigating Director* shall be assisted in the exercise of his or her powers and the performance of his or her functions by—

(i) ne or more *Deputy Director*s, to perform, subject to the control and directions of the *Investigating Director*, any functions of the *Investigating Director*;

(ii) *rosecutor*s;

(iii) fficers of any Department of State seconded to the service of the Directorate in terms of the laws governing the public service;

(iv) ersons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the Directorate; and

(v) ny other person whose services are obtained by the *Investigating Director* for the purposes of a particular inquiry.

(b) For the purposes of subparagraphs (iv) and (v) of paragraph *(a)*—

(i) ny person or body requested by the *Investigating Director* in writing to do so, shall from time to time, after consultation with the *Investigating Director*, furnish him or her with a list of the names of persons, in the employ or under

the control of that person or body, who are fit and available to assist the *Investigating Director* as contemplated in the said subparagraph (iv) or (v), as the case may be; and

(ii) uch a person or body shall, at the request of the *Investigating Director* and after consultation with the *Investigating Director*, designate a person or persons mentioned in the list concerned so to assist the *Investigating Director*.

CHAPTER 3

Appointment, remuneration and conditions of service of members of the prosecuting authority

Prosecuting authority to be representative

8. he need for the *prosecuting authority* to reflect broadly the racial and gender composition of South Africa must be considered when members of the *prosecuting authority* are appointed.

Qualifications for appointment as National Director, Deputy National Director or Director

9. (1) Any person to be appointed as *National Director, Deputy National Director* or *Director* must—

(a) possess legal qualifications that would entitle him or her to practise in all courts in the *Republic*; and

(b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.

(2) Any person to be appointed as the *National Director* must be a South African citizen.

Appointment of National Director

10. The President must, in accordance with section 179 of the *Constitution*, appoint the National Director.

Appointment of Deputy National Directors

11. (1) The President may, after consultation with the *Minister* and the *National Director*, appoint not more than three persons, as Deputy National Directors of Public Prosecutions.

(2) *(a)* Whenever the *National Director* is absent or unable to perform his or

her functions, the *National Director* may appoint any *Deputy National Director* as acting *National Director*.

(b) Whenever the office of *National Director* is vacant, or the *National Director* is for any reason unable to make the appointment contemplated in paragraph *(a)*, the President may, after consultation with the *Minister*, appoint any *Deputy National Director* as acting *National Director*.

(3) Whenever a *Deputy National Director* is absent or unable to perform his or her functions, or an office of *Deputy National Director* is vacant, the *National Director* may, in consultation with the *Minister,* designate any other *Deputy National Director* or any *Director* to act as such *Deputy National Director*.

Term of office of National Director and Deputy National Directors

12. (1) The *National Director* shall hold office for a non-renewable term of 10 years, but must vacate his or her office on attaining the age of 65 years.

(2) A *Deputy National Director* shall vacate his or her office at the age of 65.

(3) If the *National Director* or a *Deputy National Director* attains the age of 65 years after the first day of any month, he or she shall be deemed to attain that age on the first day of the next succeeding month.

(4) If the President is of the opinion that it is in the public interest to retain a *National Director* or a *Deputy National Director* in his or her office beyond the age of 65 years, and—

(a) the *National Director* or *Deputy National Director* wishes to continue to serve in such office; and

(b) the mental and physical health of the person concerned enable him or her so to continue,the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a *National Director*'s term of office shall not exceed 10 years.

(5) The *National Director* or a *Deputy National Director* shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).

(6) *(a)* The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

(b) The removal of the *National Director* or a *Deputy National Director*, the reason therefor and the representations of the *National Director* or *Deputy National Director* (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph

(b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the *National Director* or *Deputy National Director* so removed, is recommended.

(d) The President shall restore the *National Director* or *Deputy National Director* to his or her office if Parliament so resolves.

(e) The *National Director* or a *Deputy National Director* provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.

(7) The President shall also remove the *National Director* or a *Deputy National Director* from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6)*(a)*, is presented to the President.

(8) *(a)* The President may allow the *National Director* or a *Deputy National Director* at his or her request, to vacate his or her office—

(i) on account of continued ill-health; or

(ii) for any other reason which the President deems sufficient.

(b) The request in terms of paragraph *(a)*(ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.

(c) If the *National Director* or a *Deputy National Director*—

(i) vacates his or her office in terms of paragraph *(a)*(i), he or she shall be entitled to such pension as he or she would have been entitled to under the pension

law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto; or

(ii) vacates his or her office in terms of paragraph *(a)*(ii), he or she shall be deemed to have been retired in terms of section 16(4) of the *Public Service Act*, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she had been so retired.

(9) If the *National Director* or a *Deputy National Director*, immediately prior to his or her appointment as such, was an officer or employee in the public service, and is appointed under an Act of Parliament with his or her consent to an office to which the provisions of *this Act* or the *Public Service Act* do not apply, he or she shall, as from the date on which he or she is so appointed, cease to be the *National Director*,or *aDeputy National Director* and if at that date he or she has not reached the age at which he or she would in terms of the *Public Service Act* have had the right to retire, he or she shall be deemed to have retired on that date and shall, subject to the said provisions, be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her had he or she been compelled to retire from the public service owing to the abolition of his or her post.

Appointment of Directors and Acting Directors

13. (1)The President, after consultation with the *Minister* and the *National Director*—

(a) may, subject to section 6(2), appoint a Director of Public Prosecutions in respect of an Office of the *prosecuting authority* established by section 6(1);

(b) shall, in respect of each *Investigating Directorate*, appoint a Director of Public Prosecutions as the head of such an *Investigating Directorate*; and

(c) may appoint one or more Directors of Public Prosecutions (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the ***Gazette***.

(2) If a vacancy occurs in the office of a *Director* the President shall, subject to section 9, as soon as possible, appoint another person to that office.

(3) The *Minister* may from time to time, but subject to the laws governing the public service and after consultation with the *National Director*, from the

ranks of the *Deputy Directors* or persons who qualify to be appointed as *Deputy Director* as contemplated in section 15 (2), appoint an acting *Director* to discharge the duties of a *Director* whenever the *Director* concerned is for any reason unable to perform the duties of his or her office, or while the appointment of a person to the office of *Director* is pending.

Term of office of Director

14. (1) Subject to subsection (2), a *Director* shall vacate his or her office on attaining the age of 65 years.

(2) A *Special Director* may be appointed for such fixed term as the President may determine at the time of such appointment, and the President may from time to time extend such term.

(3) The provisions of section 12(3), (4), (6), (7), (8) and (9), in respect of the vacation of office and discharge of the *National Director*, shall apply, with the necessary changes, with regard to the vacation of office and discharge of a *Director*.

Appointment of Deputy Directors

15 (1) The *Minister* may, subject to the laws governing the public service and section

16 (4) and after consultation with the *National Director*—

(a) in respect of an Office referred to in section 6(1), appoint a Deputy Director of Public Prosecutions as the head of such Office; and

(b) in respect of each office for which a *Director* has been appointed, appoint Deputy Directors of Public Prosecutions.

(2) A person shall only be appointed as a *Deputy Director* if he or she—

(a) has the right to appear in a High Court as contemplated in sections 2 and 3(4) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995); and

(b) possesses such experience as, in the opinion of the *Minister*, renders him or her suitable for appointment as a *Deputy Director*.

(3) If a vacancy occurs in the office of a *Deputy Director*, the *Minister* shall, after consultation with the *National Director*, as soon as possible appoint another person to that office.

Appointment of prosecutors

16. (1) *Prosecutors* shall be appointed on the recommendation of the *National Director* or a member of the *prosecuting authority* designated for that

purpose by the *National Director*, and subject to the laws governing the public service.

(2) *Prosecutors* may be appointed to—

(a) the *Office of the National Director*;

(b) Offices established by section 6(1);

(c) *Investigating Directorates*; and

(d) lower courts in the *Republic*.

(3) The *Minister* may from time to time, in consultation with the *National Director* and after consultation with the *Directors*, prescribe the appropriate legal qualifications for the appointment of a person as *prosecutor* in a lower court.

(4) In so far as any law governing the public service pertaining to *Deputy Directors* and *prosecutors* may be inconsistent with *this Act*, the provisions of *this Act* shall apply.

Conditions of service of National Director, Deputy National Directors and Directors

17. (1) The remuneration, allowances and other terms and conditions of service and service benefits of the *National Director*,*a Deputy National Director* and a *Director* shall be determined by the President: Provided that—

(a) the salary of the *National Director* shall not be less than the salary of a judge of a High Court, as determined by the President under section 2 (1) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989);

(b) the salary of a *Deputy National Director* shall not be less than 85 per cent of the salary of the *National Director*; and

(c) the salary of a *Director* shall not be less than 80 per cent of the salary of the *National Director*.

(2) If an officer or employee in the public service is appointed as the *National Director*,*a Deputy National Director* or a *Director*, the period of his or her service as *National Director, Deputy National Director* or *Director* shall be reckoned as part of and continuous with his or her employment in the public service, for purposes of leave, pension and any other conditions of service, and the provisions of any pension law applicable to him or her as such officer or employee, or in the event of his or her death, to his or her dependants and which are not inconsistent with this section, shall, with the necessary changes, continue so to apply.

(3) The *National Director* is entitled to pension provisioning and pension benefits determined and calculated under all circumstances, as if he or she is employed as a Director-General in the public service.

(4) The President may, whenever in his or her opinion it is necessary and after consultation with the *Minister* and the *National Director*, transfer and appoint any *Director* to any Office contemplated in section 6 (1) or *Investigating Directorate*,or as *aSpecial Director*.

Remuneration of Deputy Directors and prosecutors

18. (1) Subject to the provisions of this section, any *Deputy Director* or *prosecutor* shall be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the *Minister* after consultation with the *National Director* and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the ***Gazette***.

(2) Different categories of salaries and salary scales may be determined in respect of different categories of *Deputy Directors* and *prosecutors*.

(3) A notice in terms of subsection (1) or any provision thereof may commence with effect from a date which may not be more than one year before the date of publication thereof.

(4) The first notice in terms of subsection (1) shall be issued as soon as possible after the commencement of *this Act*, and thereafter such a notice shall be issued if circumstances, including any revision and adjustment of salaries and allowances of the *National Director* and magistrates since the latest revision and adjustment of salaries of *Deputy Directors* or *prosecutors*, so justify.

(5) *(a)* A notice issued in terms of subsection (1) shall be tabled in Parliament within 14 days after publication thereof, if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(b) If Parliament by resolution disapproves such a notice or any provision thereof, that notice or that provision, as the case may be, shall lapse to the extent to which it is so disapproved with effect from the date on which it is so disapproved.

(c) The lapsing of such a notice or provision shall not affect—

(i) the validity of anything done under the notice or provision up to the date on which it so lapsed; or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred as at that

date under or by virtue of the notice or provision.

(6) The salary payable to a *Deputy Director* or a *prosecutor* shall not be reduced except by an Act of Parliament: Provided that a disapproval contemplated in subsection

(5)*(b)* shall, for the purposes of this subsection, not be deemed to result in a reduction of such salary.

Conditions of service of Deputy Directors and prosecutors, except remuneration

19. Subject to the provisions of *this Act*, the other conditions of service of a *Deputy Director* or a *prosecutor* shall be determined in terms of the provisions of the *Public Service Act*.

CHAPTER 4

Powers, duties and functions of members of the prosecuting authority

Power to institute and conduct criminal proceedings

20. (1) The power, as contemplated in section 179 (2) and all other relevant sections of the *Constitution*, to—

(a) institute and conduct criminal proceedings on behalf of the State;

(b carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c) discontinue criminal proceedings,vests in the *prosecuting authority* and shall, for all purposes, be exercised on behalf of the *Republic*.

(2) Any *Deputy National Director* shall exercise the powers referred to in subsection

(1) subject to the control and directions of the *National Director*.

(3) Subject to the provisions of the *Constitution* and *this Act*, any *Director* shall, subject to the control and directions of the *National Director*, exercise the powers referred to in subsection (1) in respect of—

(a) the area of jurisdiction for which he or she has been appointed; and

(b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the *National Director*.

(4) ubject to the provisions of *this Act*, any *Deputy Director* shall, subject to the control and directions of the *Director* concerned, exercise the powers referred to in subsection (1) in respect of—

(a) the area of jurisdiction for which he or she has been appointed; and

(b) such offences and in such courts, as he or she has been authorised in

writing by the *National Director* or a person designated by the *National Director*.

(5) Any *prosecutor* shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the *National Director*, or by a person designated by the *National Director*.

(6) A written authorisation referred to in subsection (5) shall set out—

(a) the area of jurisdiction;

(b) the offences; and

(c) the court or courts, in respect of which such powers may be exercised.

(7) No member of the *prosecuting authority* who has been suspended from his or her office under *this Act* or any other law shall be competent to exercise any of the powers referred to in subsection (1) for the duration of such suspension.

Prosecution policy and issuing of policy directives

21. (1) The *National Director* shall, in accordance with section 179(5)*(a)* and *(b)* and any other relevant section of the *Constitution*—

(a) with the concurrence of the *Minister* and after consulting the *Directors*, determine prosecution policy; and

(b) issue policy directives, which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in *this Act* or any other law.

(2) The prosecution policy or amendments to such policy must be included in the report referred to in section 35(2)*(a)*: Provided that the first prosecution policy issued under *this Act* shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first *National Director*.

Powers, duties and functions of National Director

22. (1) The *National Director*, as the head of the *prosecuting authority*, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the *prosecuting authority* by the *Constitution*, *this Act* or any other law.

(2) In accordance with section 179 of the *Constitution*, the *National Director*—

(a) must determine prosecution policy and issue policy directives as contem-plated in section 21;

(b) may intervene in any prosecution process when policy directives are not complied with; and

(c) may review a decision to prosecute or not to prosecute, after consulting the

relevant *Director* and after taking representations, within the period specified by the *National Director*, of the accused person, the complainant and any other person or party whom the *National Director* considers to be relevant.

(3) Where the *National Director* or a *Deputy National Director* authorised thereto in writing by the *National Director* deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one *Director* be investigated and tried within the area of jurisdiction of another *Director*,he or she may, subject to the provisions of section 111 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other *Director*.

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to the *National Director* by section 179 or any other provision of the *Constitution*, *this Act* or any other law, the *National Director*, as the head of the *prosecuting authority*—

(a) with a view to exercising his or her powers in terms of subsection (2), may—

(i) conduct any investigation he or she may deem necessary in respect of a prosecution or a prosecution process, or directives, directions or guidelines given or issued by a *Director* in terms of *this Act*, or a case or matter relating to such a prosecution or a prosecution process, or directives, directions or guidelines;

(ii) direct the submission of and receive reports or interim reports from a *Director* in respect of a case, a matter, a prosecution or a prosecution process or directions or guidelines given or issued by a *Director* in terms of *this Act*; and

(iii) advise the *Minister* on all matters relating to the administration of criminal justice;

(b) shall maintain close liaison with the *Deputy National Directors*, the *Directors,* the *prosecutors*, the legal professions and legal institutions in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in respect of the *prosecuting authority*;

(c) may consider such recommendations, suggestions and requests concerning the *prosecuting authority* as he or she may receive from any source;

(d) shall assist the *Directors* and *prosecutors* in achieving the effective and fair administration of criminal justice;

(e) shall assist the *Deputy National Directors, Directors* and *prosecutors* in representing their professional interests;

(f) shall bring the United Nations Guidelines on the Role of Prosecutors to the attention of the *Directors* and *prosecutors* and promote their respect for and compliance with the above-mentioned principles within the framework of national legislation;

(g) shall prepare a comprehensive report in respect of the operations of the *prosecuting authority*, which shall include reporting on—

(i) the activities of the *National Director, Deputy National Directors*, *Directors* and the *prosecuting authority* as a whole;

(ii) the personnel position of the *prosecuting authority*;

(iii) the financial implications in respect of the administration and operation of the *prosecuting authority*;

(iv) any recommendations or suggestions in respect of the *prosecuting authority*;

(v) information relating to training programmes for *prosecutors*; and

(vi) any other information which the *National Director* deems necessary;

(h) may have the administrative work connected with the exercise of his or her powers, the performance of his or her functions or the carrying out of his or her duties, carried out by persons referred to in section 37 of *this Act*; and

(i) may make recommendations to the *Minister* with regard to the *prosecuting authority* or the administration of justice as a whole.

(5) The *National Director* shall, after consultation with the *Deputy National Directors* and the *Directors*, advise the *Minister* on creating a structure, by regulation, in terms of which any person may report to such structure any complaint or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice on the part of a member of the *prosecuting authority*, and determining the powers and functions of such structure.

(6) *(a)* The *National Director* shall, in consultation with the *Minister* and after consultation with the *Deputy National Directors* and the *Directors*, frame a code of conduct which shall be complied with by members of the *prosecuting authority*.

(b) The code of conduct may from time to time be amended, and must be published in the ***Gazette*** for general information.

(7) The *National Director* shall develop, in consultation with the *Minister* or a person authorised thereto by the *Minister*, and the *Directors*, training programmes for *prosecutors*.

(8) The *National Director* or a person designated by him or her in writing may—

(a) if no other member of the *prosecuting authority* is available, authorise in

writing any suitable person to act as a prosecutor for the purpose of postponing any criminal case or cases;

(b) authorise any competent person in the employ of the public service or any local authority to conduct prosecutions, subject to the control and directions of the *National Director* or a person designated by him or her, in respect of such statutory offences, including municipal laws, as the *National Director*,in consultation with the *Minister*, may determine.

(9) The *National Director* or any *Deputy National Director* designated by the *National Director* shall have the power to institute and conduct a prosecution in any court in the *Republic* in person.

Powers, duties and functions of Deputy National Directors

23. Any *Deputy National Director* may exercise or perform any of the powers, duties and functions of the *National Director* which he or she has been authorised by the *National Director* to exercise or perform.

Powers, duties and functions of Directors and Deputy Directors

24. (1) Subject to the provisions of section 179 and any other relevant section of the *Constitution*, *this Act* or any other law, a *Director* referred to in section 13(1)*(a)* has, in respect of the area for which he or she has been appointed, the power to—

(a) institute and conduct criminal proceedings and to carry out functions incidental thereto as contemplated in section 20(3);

(b) supervise, direct and co-ordinate the work and activities of all *DeputyDirectors* and *prosecutors* in the Office of which he or she is the head;

(c) supervise, direct and co-ordinate specific investigations; and

(d) carry out all duties and perform all functions, and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of *this Act*.

50.(2) In addition to the powers, duties and functions conferred or imposed on or assigned to an *Investigating Director*, such an *Investigating Director* or any person authorized thereto by him or her in writing may, for the purposes of criminal prosecution—

(a) institute an action in any court in the *Republic*; and

(b) prosecute an appeal in any court in the *Republic* emanating from criminal proceedings instituted by the *Investigating Director* or the person authorized thereto by him or her: Provided that an *Investigating Director*

or the person authorized thereto by him or her shall exercise the powers referred to in this subsection only after consultation with the *Director* of the area of jurisdiction concerned.

(3) A *Special Director* shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the *National Director*: Provided that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20(1), they shall be exercised, carried out and performed in consultation with the *Director* of the area of jurisdiction concerned.

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to him or her by section 179 of the Constitution, *this Act* or any other law, a *Director* referred to in section 13 (1)—

(a) shall, at the request of the *National Director*, submit reports to the *National Director* or assist the *National Director* in connection with a matter referred to in section 22(4)*(a)*(ii);

(b) shall submit annual reports to the *National Director* pertaining to matters referred to in section 22(4)*(g)*;

(c) may, in the case of a *Director* referred to in section 13(1)*(a)*, give written directions or furnish guidelines to—

(i) the Provincial Commissioner of the police service referred to in section 207(3) of the *Constitution* within his or her area of jurisdiction; or

(ii) any other person who within his or her area of jurisdiction—

(aa) conducts investigations in relation to offences; or

(bb) other than a private prosecutor, institutes or carries on prosecutions for offences; and

(d) shall, subject to the directions of the *National Director*, be responsible for the day to day management of the *Deputy Directors* and *prosecutors* under his or her control.

(5) Without limiting the generality of subsection (4)*(c)* and subject to the directions of the *National Director*, directions or guidelines under that subsection may be given or furnished in relation to particular cases and may determine that certain offences or classes of offences must be referred to the *Director* concerned for decisions on the institution or conducting of prosecutions in respect of such offences or classes of offences.

(6) The *Director* shall give to the *National Director* a copy of each direction given or guideline furnished under subsection (4)*(c)*.

(7) Where a *Director*—

(a) is considering the institution or conducting of a prosecution for an offence; and

(b) is of the opinion that a matter connected with or arising out of the offence requires further investigation, the *Director* may request the Provincial Commissioner of the police service referred to in subsection (4)*(c)*(i) for assistance in the investigation of that matter and where the *Director* so requests, the Provincial Commissioner concerned shall, so far as practicable, comply with the request.

(8) The powers conferred upon a *Director* under section 20(1) shall include the authority to prosecute in any court any appeal arising from any criminal proceedings.

(9) *(a)* Subject to section 20 (4) and the control and directions of a *Director*,*aDeputy Director* at the Office of a *Director* referred to in section 13(1), has all the powers, duties and functions of a *Director*.

(b) Apower, duty or function which is exercised, carried out or performed by a *Deputy Director* is construed, for the purposes of *this Act*, to have been exercised, carried out or performed by the *Director* concerned.

Powers, duties and functions of prosecutors

25. (1) A *prosecutor* shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her—

(a) under *this Act* and any other law of the *Republic*; and

(b) by the head of the Office or *Investigating Directorate* where he or she is employed or a person designated by such head; or

(c) if he or she is employed as a *prosecutor* in a lower court, by the *Director* in whose area of jurisdiction such court is situated or a person designated by such *Director*.

(2) Notwithstanding the provisions of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), or any other law, any *prosecutor* who—

(a) has obtained such legal qualifications as the *Minister* after consultation with the *National Director* may prescribe; and

(b) has at least three years' experience as a *prosecutor* of a magistrates' court of a regional division, shall, subject to section 20 (6), have the right to appear in any court in the *Republic*.

CHAPTER 5

Powers, duties and functions relating to Investigating Directorates

Definitions

26. (1) In this Chapter, unless the context otherwise indicates—

"inquiry" means an inquiry in terms of section 28 (1);

"specified offence" means any offence which in the opinion of the *Investigating Director* falls within the category of offences set out in the proclamation referred to in section 7(1) in respect of the *Investigating Directorate* concerned.

(2) This Chapter only relates to the *Investigating Directorates* established under section 7(1) of *this Act*.

Laying of certain matters before Investigating Director

27. If any person has reasonable grounds to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may lay the matter in question before the *Investigating Director* by means of an affidavit or affirmed declaration specifying—

(a) the nature of the suspicion;

(b) the grounds on which the suspicion is based; and

(c) all other relevant information known to the declarant.

Inquiries by Investigating Director

28. (1) *(a)* If the *Investigating Director* has reason to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may hold an inquiry on the matter in question, whether or not it has been laid before him or her in terms of section 27.

(b) If the *National Director* refers a matter in relation to the alleged commission or attempted commission of a specified offence to the *Investigating Director*, the *Investigating Director* shall hold an inquiry, or a preparatory investigation as referred to in subsection (13), on that matter.

(c) If the *Investigating Director*, at any time during the holding of an inquiry on a matter referred to in paragraph *(a)* or *(b)*, considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the inquiry so as to include any offence, whether or not it is a specified offence, which he or she suspects to be connected with the subject of the inquiry.

(2) *(a)* The *Investigating Director* may, if he or she decides to hold an inquiry, at any time prior to or during the holding of the inquiry designate any person referred to in section 7 (4) to conduct the inquiry, or any part thereof, on his or her behalf and to report to him or her.

(b) A person so designated shall for the purpose of the inquiry concerned have the same powers as those which the *Investigating Director* has in terms of this section and section 29 of *this Act*, and the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 (Act No. 66 of 1975), in respect of commissions of inquiry shall apply with the necessary changes in respect of such a person.

(3) All proceedings at an inquiry shall take place *in camera*.

(4) The procedure to be followed in conducting an inquiry shall be determined by the *Investigating Director* at his or her discretion, having regard to the circumstances of each case.

(5) The proceedings and evidence at an inquiry shall be recorded in such manner as the *Investigating Director* may deem fit.

(6) For the purposes of an inquiry—

(a) the *Investigating Director* may summon any person who is believed to be able to furnish any information on the subject of the inquiry or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the *Investigating Director* at a time and place specified in the summons, to be questioned or to produce that book, document or other object;

(b) the *Investigating Director* or a person designated by him or her may question that person, under oath or affirmation administered by the *Investigating Director*, and examine or retain for further examination or for safe custody such a book, document or other object.

(7) A summons referred to in subsection (6) shall—

(a) be in the prescribed form;

(b) contain particulars of the matter in connection with which the person concerned is required to appear before the *Investigating Director*;

(c) be signed by the *Investigating Director* or a person authorized by him or her; and

(d) be served in the prescribed manner.

(8) *(a)* The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of subsection (6): Provided that such a

person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers contemplated in paragraph *(a)* shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (10)*(b)* or *(c)*, or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(9) Aperson appearing before the *Investigating Director* by virtue of subsection (6)—

(a) may be assisted at his or her examination by an advocate or an attorney;

(b) shall be entitled to such witness fees as he or she would be entitled to if he or she were a witness for the State in criminal proceedings in a magistrate's court.

(10) Any person who has been summoned to appear before the *Investigating Director* and who—

(a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the *Investigating Director* from further attendance;

(b) at his or her appearance before the *Investigating Director*—

(i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce;

(ii) refuses to be sworn or to make an affirmation after he or she has been asked by the *Investigating Director* to do so;

(c) having been sworn or having made an affirmation—

(i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her;

(ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true, shall be guilty of an offence.

(11) The *Investigating Director* may, whether or not he or she holds an inquiry, and, if he or she does hold an inquiry, at any time prior to, during or after the holding of the inquiry, if he or she is of the opinion that the facts disclose the commission of an offence by any person, notify the *Director* of the area of jurisdiction concerned accordingly.

(12) Upon the completion of an inquiry, the *Investigating Director* shall furnish the *National Director* with a report on his or her findings and recommendations, if any, and send a copy of the report to the *Director* of the area of jurisdiction

concerned.

(13) If the *Investigating Director* considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1)*(a)*, the *Investigating Director* may hold a preparatory investigation.

(14) The provisions of subsections (2) to (10), inclusive, and of sections 27 and 29 shall, with the necessary changes, apply to a preparatory examination referred to in subsection (13).

Entering upon premises by Investigating Director

29. (1) The *Investigating Director* or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an inquiry at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that inquiry is or is suspected to be, and may—

(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;

(b) examine any object found on or in the premises which has a bearing or might have a bearing on the inquiry in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;

(c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the inquiry in question, and request from any person suspected of having the necessary information, an explanation of any entry therein;

(d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the inquiry in question, or if he or she wishes to retain it for further examination or for safe custody.

(2) Any entry upon or search of any premises in terms of this section shall be conducted with strict regard to decency and order, including—

(a) a person's right to, respect for and the protection of his or her dignity;

(b) the right of a person to freedom and security; and

(c) the right of a person to his or her personal privacy.

(3) No evidence regarding any questions and answers contemplated in subsection (1) shall be admissible in any subsequent criminal proceedings against a person from whom information in terms of that subsection is acquired if the answers incriminate him or her, except in criminal

proceedings where the person concerned stands trial on a charge contemplated in subsection (12).

(4) Subject to subsection (10), the premises referred to in subsection (1) may only be entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.

(5) A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating—

(a) the nature of the inquiry in terms of section 28;

(b) the suspicion which gave rise to the inquiry; and

(c) the need, in regard to the inquiry, for a search and seizure in terms of this section, that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.

(6) Awarrant issued in terms of this section may be issued on any day and shall be of force until—

(a) it has been executed;

(b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or

(c) the expiry of three months from the day of its issue, whichever may occur first.

(7) *(a)* Any person who acts on authority of a warrant issued in terms of this section may use such force as may be reasonably necessary to overcome any resistance against the entry and search of the premises, including the breaking of any door or window of such premises: Provided that such person shall first audibly demand admission to the premises and state the purpose for which he or she seeks to enter such premises.

(b) The proviso to paragraph *(a)* shall not apply where the person concerned is on reasonable grounds of the opinion that any object, book or document which is the subject of the search may be destroyed, tampered with or disposed of if the provisions of the said proviso are first complied with.

(8) Awarrant issued in terms of this section shall be executed by day unless the

person who issues the warrant authorises the execution thereof by night at times which shall be reasonable in the circumstances.

(9) Any person executing a warrant in terms of this section shall immediately before commencing with the execution—

(a) identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises;

(b) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

(10) *(a)* The *Investigating Director* or any person referred to in section 7(4)*(a)* may without a warrant enter upon any premises and perform the acts referred to in subsec-tion (1)—

(i) if the person who is competent to do so consents to such entry, search, seizure and removal; or

(ii) if he or she upon reasonable grounds believes that—

(aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and

*(bb)*the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

(b) Any entry and search in terms of paragraph *(a)* shall be executed by day, unless the execution thereof by night is justifiable and necessary, and the person exercising the powers referred to in the said paragraph shall identify himself or herself at the request of the owner or the person in control of the premises.

(11) If during the execution of a warrant or the conducting of a search in terms of this section, a person claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains information which is relevant to the inquiry and that such information is necessary for the inquiry, request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

(12)Any person who—

(a) obstructs or hinders the *Investigating Director* or any other person in the

performance of his or her functions in terms of this section;

(b) when he or she is asked in terms of subsection (1) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading, shall be guilty of an offence.

Preservation of secrecy and admissibility of evidence

30. (1) Notwithstanding any other law, but subject to subsection (3), no person shall without the permission of the *Investigating Director* disclose to any other person—

(a) any information which came to his or her knowledge in the performance of his or her functions in terms of *this Act* and relating to the business or affairs of any other person;

(b) the contents of any book or document or any other item in the possession of the *Investigating Director*;or

(c) the record of any evidence given at an inquiry, except—

(i) for the purpose of performing his or her functions in terms of *this Act*; or

(ii) when required to do so by order of a court of law.

(2) Any person who contravenes subsection (1) shall be guilty of an offence.

(3) A person from whom a book or document has been taken under section 28(6)*(b)* or 29(1)*(d)* shall, as long as it is in the possession of the *Investigating Director*, at his or her request be allowed, at his or her own expense and under the supervision of the *Investigating Director*, to make copies thereof or to take extracts therefrom at any reasonable time.

Compensation regarding expenses

31. The Director-General: Justice may in his or her discretion, on the recommendation of the *Investigating Director* and with the concurrence of the Minister of Finance, order that the expenses or any part of the expenses incurred by any person in the course of or in connection with an inquiry be paid from State funds to that person.

CHAPTER 6

General provisions

Impartiality of, and oath or affirmation by members of prosecuting authority

32. (1) *(a)* Amember of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law.

(b) Subject to the *Constitution* and *this Act*, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.

(2) *(a)* A *National Director* and any person referred to in section 4 must, before commencing to exercise, carry out or perform his or her powers, duties or functions in terms of *this Act*, take an oath or make an affirmation, which shall be subscribed by him or her, in the form set out below, namely—

"I .....

(full name) do hereby swear/solemnly affirm that I will in my capacity as *National Director/Deputy National Director* of Public Prosecutions/*Director/Deputy Direc-tor* of Public Prosecutions/*prosecutor*, uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the *Republic* without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law. (In the case of an oath: So help me God.)".

(b) Such an oath or affirmation shall—

(i) in the case of the *National Director*,or *aDeputy National Director, Director* or *Deputy Director*, be taken or made before the most senior available judge of the High Court within which area of jurisdiction the Office of the *National Director*, *Director* or *Deputy Director*, as the case may be, is situated; or (ii) in the case of a *prosecutor*, be taken or made before the *Director* in whose Office the *prosecutor* concerned has been appointed or before the most senior judge or magistrate at the court where the *prosecutor* is stationed, who shall at the bottom thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

Minister's final responsibility over prosecuting authority

33. (1) The *Minister* shall, for purposes of section 179 of the *Constitution, this Act* or any other law concerning the *prosecuting authority*, exercise final responsibility over the *prosecuting authority* in accordance with the provisions of *this Act*.

(2) To enable the *Minister* to exercise his or her final responsibility over the *prosecuting authority*, as contemplated in section 179 of the *Constitution*, the *National Director* shall, at the request of the *Minister*—

(a) furnish the *Minister* with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;

(b) provide the *Minister* with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;

(c) furnish the *Minister* with information with regard to the prosecution policy referred to in section 21(1)*(a)*;

(d) furnish the *Minister* with information with regard to the policy directives referred to in section 21(1)*(b)*;

(e) submit the reports contemplated in section 34 to the *Minister*; and

(f) arrange meetings between the *Minister* and members of the *prosecuting authority*.

Reports by Directors

34. (1) A *Director* must annually, not later than the first day of March, submit to the *National Director* a report on all his or her activities during the previous year.

(2) The *National Director* may at any time request a *Director* to submit a report with regard to a specific activity relating to his or her powers, duties or functions.

(3) A *Director* may, at any time, submit a report to the *National Director* with regard to any matter relating to the *prosecuting authority*, if he or she deems it necessary.

Accountability to Parliament

35. (1) The *prosecuting authority* shall be accountable to Parliament in respect of its powers, functions and duties under *this Act*, including decisions regarding the institution of prosecutions.

(2) *(a)* The *National Director* must submit annually, not later than the first day

of June, to the *Minister* a report referred to in section 22(4)*(g)*, which report must be tabled in Parliament by the *Minister* within 14 days, if Parliament is then in session, or if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(b) The *National Director* may, at any time, submit a report to the *Minister* or Parliament with regard to any matter relating to the *prosecuting authority*,if he or she deems it necessary.

Expenditure of prosecuting authority

36. (1) The expenses incurred in connection with—

(a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the *prosecuting authority*; and

(b) the remuneration and other conditions of service of members of the *prosecuting authority*, shall be defrayed out of monies appropriated by Parliament for that purpose.

(2) The Department of Justice must, in consultation with the *National Director*, prepare the necessary estimate of revenue and expenditure of the *prosecuting authority*.

(3) The Director-General: Justice shall, subject to the Exchequer Act, 1975 (Act No. 66 of 1975)—

(a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the *prosecuting authority*;

(b) cause the necessary accounting and other related records to be kept. (4) The records referred to in subsection (3)*(b)* shall be audited by the Auditor-General.

Administrative staff

37. The administrative staff of—

(a) the *Office of the National Director*;

(b) the Offices of the *Directors*, including *Investigating Directorates*; and

(c) the Offices of *prosecutors* as determined by the *National Director*, in consultation with the *Director* concerned, shall be persons appointed or employed under the *Public Service Act*.

Engagement of persons to perform services in specific cases

38. (1) The *National Director* may in consultation with the *Minister*, and a *Deputy National Director* or a *Director* may, in consultation with the *Minister* and the *National Director*, on behalf of the State, engage, under agreements in writing,

persons having suitable qualifications and experience to perform services in specific cases.

(2) The terms and conditions of service of a person engaged by the *National Director*, a *Deputy National Director* or a *Director* under subsection (1) shall be as determined from time to time by the *Minister* in concurrence with the Minister of Finance.

Disclosure of interest and non-performance of other paid work

39. (1) The *National Director,aDeputy National Director* and a *Director* shall give written notice to the *Minister* of all direct or indirect pecuniary interests that they have or acquire in any business whether in the *Republic* or elsewhere or in any body corporate carrying on any such business.

(2) The *National Director,aDeputy National Director* and a *Director* shall not, without the consent of the President, perform any paid work outside his or her duties of office.

Regulations

40.(1) The *Minister* may make regulations, not inconsistent with *this Act*, prescribing—

(a) matters required or permitted by *this Act* to be *prescribed*;

(b) the steps to be taken to ensure compliance with the code of conduct referred to in section 22(6); or

(c) matters necessary or convenient to be *prescribed* for carrying out or giving effect to *this Act*.

(2) Any regulation made in terms of subsection (1) which may result in the expenditure of State monies shall be made in consultation with the Minister of Finance.

Offences and penalties

41. (1) Any person who contravenes the provisions of section 32(1)*(b)* shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(2) Any person convicted of an offence referred to in section 28(10), 29(12) or 30(2) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

Limitation of liability

42. No person shall be liable in respect of anything done in good faith under *this Act*.

CHAPTER 7

Transitional arrangements

Transitional arrangements

43. (1) *(a)*Anyone holding office as an attorney-general in terms of the Attorney-General Act, 1992 (Act No. 92 of 1992), shall, subject to paragraph *(b)*,be deemed to have been appointed as a *Director* in terms of *this Act*, and shall continue to function in terms of the laws applicable to his or her Office.

(b) The President shall, as soon as reasonably possible after the commencement of this section, appoint each attorney-general referred to in paragraph *(a)* as a *Director* at the Office that, and for such term as the President, after consultation with the attorney-general concerned, may determine, but such term shall not extend beyond the date on which the attorney-general concerned will attain the age of 65 years.

(c) The provisions of section 12(4) shall apply with the necessary changes in respect of a *Director* referred to in paragraph *(b)*: Provided that the reference in section 12(4) to the age of 65 years shall be construed as a reference to the date on which the *Director*'s term of office as contemplated in paragraph *(b)* expires.

(d) If the term of office of a *Director* appointed under paragraph *(b)* expires before he or she has attained the age of 65 years, he or she shall be entitled to pension benefits determined and calculated under all circumstances as if he or she was employed as a Director-General in the public service, who served as a Director-General for five years.

(2) Anyone holding office as an attorney-general in terms of a law other than the Attorney-General Act, 1992, or holding an appointment as acting attorney-general, shall be deemed to have been appointed as an acting *Director* under *this Act* at the office where he or she holds such office or appointment, and shall continue to function in that capacity until otherwise determined under *this Act* or any other law.

(3) *(a)* Any person who immediately before the commencement of this section was employed by the State as a deputy attorney-general shall continue in such employment and shall be deemed to have been appointed as a *Deputy Director* in terms of section 15(1).

(b) Any person who immediately before the commencement of this section was employed by the State as a state advocate or prosecutor and who has been

delegated in terms of any law to institute criminal proceedings and to conduct any prosecution in criminal proceedings on behalf of the State—

(i) shall continue in such employment as a *prosecutor*; and

(ii) shall be deemed to have been authorised to exercise the powers referred to in section 20(1): Provided that no *prosecutor* shall, by virtue of this section, have more powers than he or she would have had under the delegation concerned.

(4) Criminal proceedings which have been instituted before the commencement of *this Act*, must be disposed of as if the decision to institute and prosecute in such criminal proceedings had been taken by a member of the *prosecuting authority* appointed in terms of *this Act*.

(5) Any attorney-general, deputy attorney-general, state advocate or prosecutor who continues in office in terms of this section must, within three months after the commencement of *this Act*, take the oath or make the affirmation referred to in section 32(2).

(6) As from the date of the commencement of this section, all offices of attorneys-general at the High Courts contemplated in item 16(4)*(a)* of Schedule 6 to the *Constitution*, shall become offices of the *prosecuting authority* as referred to in section 6(1) of *this Act*.

(7) *(a)* As from the date of the commencement of this section—

(i) the Office for Serious Economic Offences established by section 2 of the Investigation of Serious Economic Offences Act, 1991 (Act No. 117 of 1991), shall become an *Investigating Directorate*, which shall be deemed to have been established by the President under section 7 and which shall be known as the Investigating Directorate: Serious Economic Offences;

(ii) subject to the provisions of *this Act*, the Director and staff of the Office for Serious Economic Offences referred to in section 3 of the Investigation of Serious Economic Offences Act, 1991, shall remain in office and continue their functions under *this Act*; and

(iii) all pending matters pertaining to the Office for Serious Economic Offences shall be dealt with as if *this Act* had at all times been in force.

(b) Notwithstanding the repeal of the Investigation of Serious Economic Offences Act, 1991, the regulations made under section 10 of that Act shall remain in force pending the repeal or amendment thereof under section 40 of *this Act*.

(c) The President may, on the request of the *National Director* and by proclamation in the ***Gazette***, further specify the categories of offences in respect of which the Investigating Directorate: Serious Economic Offences

must exercise its functions.

(8) Subject to the *Constitution* and *this Act*, all measures which immediately before the commencement of this section were in operation and applied to attorneys-general, deputy attorneys-general, state advocates and prosecutors, including measures regard-ing remuneration, pension and pension benefits, leave gratuity and any other term and condition of service, shall continue in operation and to apply to the said attorneys-general, deputy attorneys-general, state advocates and prosecutors until amended or repealed by *this Act*: Provided that no such measure shall, except in accordance with an applicable law or agreement, be changed in a manner which affects such attorneys-general, deputy attorneys-general, state advocates and prosecutors to their detriment.

(9) Notwithstanding the commencement of *this Act*, all measures regulating the institution and conducting of prosecutions in any court shall remain in force until repealed or amended under *this Act* or by any competent authority.

Amendment or repeal of laws

44. The laws mentioned in the Schedule are hereby amended or repealed to the extent indicated in the third column thereof.

Interpretation of certain references in laws

45. Any reference in any law to an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a *Director* or *Deputy Director* appointed in terms of *this Act*, for the area of jurisdiction of that Court.

Short title and commencement

46. This Act shall be called the National Prosecuting Authority Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the ***Gazette***.

SCHEDULE

(Laws amended or repealed by section 44)

Number and year of law Title Extent of amendment or repeal Act No. 51 of 1977 Criminal Procedure Act, 1977 *(a)* Repeal of sections 2 and 5.

(b) Amendment of section 111 by the deletion of subsection (1) and the substitution for sub-sections (2), (3) and (4) of the following subsections:

"**[(2)]**(1) *(a)* The direction of the **[Minister]**

National Director of Public Prosecutions contem-plated in section 179(1)*(a)* of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), shall state the name of the accused, the relevant offence, the place at which (if known) and the **[attorney-general]** Director in whose area of jurisdiction **[the offence was committed and the attorney-general in whose area of jurisdiction]** the relevant investigation and criminal proceedings shall **[commence]** be conducted and commenced.

(b) A copy of the direction shall be served on the accused, and the original thereof shall, save as is provided in subsection **[(4)]**(3) be handed in at the court in which the proceedings are to commence.

[(3)](2) The court in which the proceedings

commence shall have jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court.

[(4)](3) Where the **[Minister]** National Director issues a direction **[under]** contemplated in subsec-tion

(1) after an accused has already appeared in a court, the original of such direction shall be handed in at the relevant proceedings and attached to the record of the proceedings, and the court in question shall—

(a) cause the accused to be brought before it, and when the accused is before it, adjourn the proceedings to a time and a date and to the court designated by the **[attorney-gen-eral]**

Director in whose area of jurisdiction the said criminal proceedings shall com-mence, whereupon such time and date and court shall be deemed to be the time and date and court appointed for the trial of the accused or to which the proceedings pending against the accused are adjourned;

(b) forward a copy of the record of the proceed-ings to the court in which the accused is to appear, and that court shall receive such copy and continue with the proceedings against the accused as if such proceedings had commenced before it."

Act No. 117 of 1991 Investigation of Serious Eco-nomic Offences Act, 1991 The whole

Act No. 92 of 1992 Attorney-General Act, 1992 The whole

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Reflections on Organised Crime,

International Debates and Local Developments

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CONTENTS:

1. INTRODUCTION

Judging by recent debates organised crime is currently considered an international threat; it is a transnational crime, disregarding the borders between countries. Organised criminal activity in one country will directly or indirectly affect the sovereignty of another country, by challenging its government policies and consequent law enforcement initiatives. It is more prevalent now than ever before and it is becoming increasingly diverse and sophisticated. Thereby it is continuously penetrating and affecting the sovereignty of states, worldwide.

It is also a complex phenomenon, at times utilising the opportunities obtained from globalisation by forming global networks. At the same time organised crime may be

composed of ethnic groups operating in their own or foreign countries but only forming cursory links with other groups. The global reach of most organised crime makes it difficult for emerging democracies to infiltrate its activities. Organised crime groups take advantage of states undergoing reformation or change and they benefit from the (temporary) lack of state resources and skills to confront the organised crime challenge. In this way organised crime is able to survive on a global scale, since global gaps in enforcement continuously arise which propel the growth of the phenomenon. Consequently high on the global agenda is the urgency to address these gaps or weaknesses in enforcement ability (of countries experiencing some sort of transition) so as to contain organised crime. There is a realisation that in order to facilitate a global marketplace whereby capital can move freely, standards and law enforcement intelligence mechanisms have to be created to contain the misuse of this free movement of capital by transnational criminal organisations (Winer, 1997).

In this research paper some attempt is made to explore the debate on organised crime (in both an international and local form) from a criminological angle. Part of the endeavour is to undertake a conceptual exploration with the view to confronting the essence of organised crime as well as the attempts, internationally, to define it. Furthermore this discussion will examine the kinds of factors that have encouraged the growth of organised crime. Organised crime' s influence on states will also be summarised so as to consider the level of influence that organised crime can and does have in particular contexts. A review will be made of the challenges that organised crime, and its related drug trafficking aspect, poses to governments and their law enforcement agencies worldwide. State responses to organised criminal activities will be examined with particular emphasis on three key international players who have developed means and strategies to confront the challenges. In the final section of the paper the organised crime debate moves to the South African context. Here the objective is to map the ways in which organised crime have come to enter into public debate, and the policy and law enforcement responses that have been evoked in the face of organised crime. In the discussion of recent developments the deliberations around the Prevention of Organised Crime Bill will receive particular attention. An evaluation of the content and merits of the Bill for South African law enforcement initiatives will conclude the discussion.

1.1. Methodology

On the subject of organised crime a literature survey was conducted. This included academic sources from criminological books, journals and reports. Furthermore a range

of documentary sources were considered which included key policy documents and reports from the South African Police Service as well as parliamentary papers and debates. Various Acts were reviewed and the Prevention of Organised Crime Bill and related submissions were also considered. An Internet search was conducted whereby various government documents and academic articles were found. Reviews were also made of various workshop and conference papers, and a briefing and discussion session on the Prevention of Organised Crime Bill was attended. Five interviews were also conducted involving a core group of individuals intimately involved in the drafting of legislative framework. These interviews were tape recorded, with the permission of the relevant interviewees, and transcribed into a question-answer format. The interviews intended to draw out the background processes to the drafting of the Prevention of Organised Crime Bill. This included the international and regional support given to South Africa to combat the organised crime problem - with respect to assisting with the drafting of the Bill specifically, and aiding with national organised crime problems, generally. Questions were also posed in regard to the possible obstacles and implementation problems the Bill was likely to face, as well as particular problem areas within the Bill itself. Interviewees were also asked to provide their opinions on the nature of the threat of organised crime in South Africa - they thus gave their opinions as to the degree of sophistication of the organised crime syndicates in South Africa.

Thus the intention was to draw out key issues in relation to organised crime in general, and to the Prevention of Organised Crime Bill, specifically. The personal perspectives of the interviewees were encouraged and these opinions were based on their particular contexts within the drafting and evaluation process. These interviews were conducted in the hope of arriving at a more nuanced understanding of policy-making processes and legal drafting, with regards to the Bill.

2. DEFINING ORGANISED CRIME

"Organised crime is the single biggest threat facing the world since the end of the Cold War..." says Sydney Mufamadi, Minister of Safety and Security. Organised crime particularly in South Africa) is "complex organised activity involving any crimes generating large sums of cash", a definition by Charles Evans, an American embassy official.

Organised crime is complex and it is a relatively new universal threat, yet it has still not been debated or properly understood by those outside of State organisations, such as academics, analysts and the public. Those inside the State, too, have had to come to

terms with a new threat, in a short period of time - their understanding of organised crime is thus also limited. It is precisely due to the covert activities of organised crime syndicates that the public, in particular, is not aware of the destructive and corroding impact that it has on society. Not only does it contribute to the high crime rate but also corrupts law enforcement officials and threatens the very legitimacy of the state and its efforts to defeat organised crime.

The economy, too, is severely damaged by the covert operations of organised rime syndicates. Since organised crime encompasses a large array of illicit operations such as gold and diamond smuggling, vehicle theft, commercial crime, arms smuggling, money laundering and drug trade to name a few, it has become a "scourge of international magnitude" (Institute of Security Studies (ISS) Bulletin, 1994:1). And therefore it needs to be understood and dealt with accordingly, particularly on an international scale.

Due to the amorphous nature of organised crime, pinpointing its existence and functioning is one of the problems international law enforcement agencies face. Since organised crime has to be addressed on an international scale, an international definition of it is necessary so as to clarify what efforts can be used to counter the phenomenon. In other words, a coherent understanding of organised crime, or at least a definitional consensus, has to be reached so that an operational strategy can be developed to counter it. Various characteristics of organised crime syndicates have been noted, such as, for example, crime syndicates being "extremely well financed and superbly armed" (Camerer, 1997:40) and " hav[ing] well established contacts with national and international criminal organisations, cartels or mafia groupings" (Shaw, 1998:1). Criminal organisations take advantage of opportunities that have been created due to the globalisation of the market economy, particularly when involved in illicit drugs. The fact of the matter is that organised crime manifests itself both in violent and non-violent ways. And so "…the exact impact of organised crime on society is difficult to assess, due to the fact that this form of crime is not always easily visible" (ISS Report, 1998:32). For example, many manifestations of organised crime such as fraud, money laundering, counterfeiting and illicit weapon smuggling do not affect the average citizen (yet they do affect South Africa' s economy). However the side-effect of violence of organised crime and, in particular drug trafficking, manifests itself in the form of armed robbery, vehicle-related crimes and even murder. In other words the illicit drug trade in South Africa, for example, may be the root motivation of these types of crime. Thus it is apparent that organised crime is a nebulous concept that incorporates many forms of non-violent and violent crimes in South Africa, the problem lies in the fact that its

covert existence downplays its damaging effect on societies - economically and otherwise. The problem of defining organised crime is thus clearly evident.

Many attempted definitions of organised crime only touch on its complexity and pervasiveness. For example many of South Africa' s organised crime syndicates consist of networks of criminals rather than rigid structures of authority. South African crime syndicates thus seem to prefer loose shifting alliances with other syndicates. Gastrow (1998) has formulated particular characteristics of the syndicates in South Africa, based on six case studies of different types of syndicates operating in South Africa. From this a number of observations were made. These are that the syndicates operate on various levels of sophistication, and a broad gap exists between street gangs and syndicates (in terms of level of sophistication). The author also noted the lack of specialisation within the syndicates in that they engaged in a number of criminal activities. The police play a large role in the syndicates by assisting criminal activity or perhaps ignoring known criminal activities. As a consequence of such police complicity syndicates are able to operate in a risk-free environment with little or no fear of police infiltration.These features may be in contrast to, for example, some international syndicates (either operating within South Africa or solely in their own countries) who may consist of tightly-knit, rigid structures avoiding contact with other syndicates and relying on their own resources, but perhaps on a higher level of sophistication. Thus it is clear that relying on a structural definition of organised crime syndicates is difficult given the reality of gross structural dissimilarities between countries. In fact a comprehensive definition of organised crime still has not been formulated (even though definitions now mostly rely on describing the functioning rather than the structure of crime syndicates). Gastrow (1998:5) points out that the South African Police Service (SAPS) uses the definition employed by Interpol' s Organised Crime Unit:"Any group of criminals that have a corporate structure, whose primary objective is to obtain money and power through illegal activities often surviving on fear and corruption." The problem with this definition lies in the nature of many organised crime syndicates in South Africa being loose coalitions, as mentioned already, thus 'corporate structure' becomes a problematic term. However many international attempts have been made to create an all-ecompassing definition of organised crime, particularly by the United Nations and the European Union (Gastrow, 1998). However these definitions may not adequately reflect every aspect of the nature of organised crime, with each definition there seems to be something lacking to aptly refer to all known types of organised crime. Thus attempts at creating a suitable definition are difficult.

3. ORGANISED CRIME - CONCEPTUAL ISSUES AND THEORETICAL APPROACHES

What follows is an analysis of the possible ways that states can respond to organised crime, theories of organised crime' s influence on states will also be dealt with as well as the intricate role that corruption plays in the entire interaction process between states and organised crime syndicates.

3.1. Possible State Responses to Organised Crime

Williams (1997) points out a number of ways in which states can respond to organised crime. These approaches can be divided into five levels of interaction. Ranging from minimal involvement with organised crime syndicates to maximum involvement in the form of collusion:

Confrontation - states adopting this approach will employ law enforcement methods to destroy criminal organisations. It is a thorough attempt to eradicate all forms of organised criminal activity.

Reluctant Acquiescence - many states do not have the capacity to adopt a confrontational strategy, they are then forced to accept the continuation of organised criminal activity within their borders.

Tacit Connivance - this is a level of collusion with organised crime syndicates in that state structures, even though having the power to confront organised criminal activity, will rather take advantage of the benefits from their operations (these benefits could be advantageous to the economy, to society, or to the state officials themselves). Government policy in states adopting this approach will entail a symbolic denunciation of organised crime rather than the adoption of concrete methods to combat it, thus disguising the passivity of law enforcement.

Active Encouragemen - key members of the state who benefit directly from organised criminal operations will prevent or even sabotage strategies to counter the activities that they stand to benefit from. This is related to the degree of corruption within state structures resulting from the efforts of organised crime members.

Collusion - this is the highest degree of involvement a state may adopt. A state may become completely enmeshed with organised crime groups in a symbiotic relationship. The state structure becomes a full partner and state representatives may work closely with organised crime syndicates. This collusion may be covert or overt depending on whether the state is advanced or underdeveloped. Advanced industrialised or post-industrialised states are usually less overt in their collusion with the syndicates than poorer states that rely more heavily on illicit goods being exported.

These approaches that may be adopted by governments are enmeshed with the manner in which organised crime syndicates may attempt to penetrate these governments.

The methods they may employ range from outright violence to a strategy of co-option. What follows is an analysis of the other side of the coin - whereas the state responses to organised crime have been dealt with the following section will discuss the manners in which organised crime syndicates may penetrate governments. Thus the interaction between organised crime with the state and legitimate industries will be discussed, as well as the importance of corruption to these criminal organisations.

A phenomenon which organised crime has a huge part in is corruption and the blurring of the boundaries between the upperworld and the underworld. That is, between legitimate activities and activities on the wrong side of the law. There is a range of interaction between organised crime syndicates and legitimate industry. Organised crime penetrates legitimate trade and industry (the upperworld) and systematically causes the development of "rotten apples" in the upperworld (Van Duyne, 1996:370). In fact organised crime' s pervasive character results in many respectable entrepreneurs becoming leading crime entrepreneurs. As Van Duyne (ibid.) puts it "organised crime is not a matter of the needy but of the greedy".

It must however be noted that, in this case, one is referring to a level of organised crime that is quite sophisticated. Consequently matters in South Africa may as yet not have developed to this level of sophistication, as many involved in organised crime originate from poor, marginalised areas. And larger syndicates tend to draw in young recruits (as hitmen or runners) from poorer sections of the community where youth street gangs are prevalent. Thus the level of organised crime discussed here involves a

continuous and symbiotic connection between organised crime syndicates and law enforcement officials and/or politicians specifically.

3.2. Theories of Organised Crime' s Influence

Three current criminological theories of organised crime ' s influence on governments will be discussed. These will entail a look at the influence of syndicates on governments, law enforcement officials (such as the police) and those involved in the criminal justice system arena. The theories aptly reflect the vulnerability of states to the corrupting influence of organised crime, and the degrees to which organised crime syndicates can infiltrate legitimate government practice and policy-making enterprise. On the basis of this it is evident that weak states are even more prone to the adverse effects of organised crime, the need for improved resistant to this is thus crucial. Van Duyne (1996) and Anechiarico (1991) aptly reflect these issues and thus reference will be made to them.

Official Protection Theory:

This criminological theory focuses on the manner in which organised crime obtains a political foothold within legitimate politics. Official protection theory thus views the relationship between organised crime syndicates and corrupt politicians as a mutually enabling relationship in that:

> "The criminal group relies on a network of corrupt officials to protect the group from the criminal justice system. Protectors use the influence and prestige of their office to protect members of the criminal group from effective prosecution." (Quoted in Anechiarico, 1991:89).

The mutual enabling interaction aspect is evident in the fact that organised crime syndicates may fund elections in exchange for those politicians ensuring protection.

However, this theory only focuses on a type of conjunctive relationship, in other words it does not account for extremes of involvement with organised crime. For example, it does not provide an explanation of an incidental encounter by an official with organised crime on the one hand, and total absorption of political authority into the organised crime syndicate on the other hand. Thus the extremes of political involvement into organised crime activity is not accounted for by this theory. (Anechiarico, 1991).

Government Replacement Theory:

As the name suggests this theory looks at the almost complete influence of organised crime over political authority and all involved in government initiatives (such as law enforcement agencies and criminal justice personnel). It holds that, over time, organised crime could actually replace a political jurisdiction, by systematically influencing not only public officials but also significant individuals and agencies in the highest ranks of the official governing structure. This can progress to the point of legitimate government authority being completely replaced and thus being rendered legally void by the rule of organised crime members. However, once again this context-specific theory only covers one level of the range of levels of involvement with organised crime.

Political Expediency Theory:

This theory, according to Anechiarico (1991) is best applied to everyday interaction between organised crime syndicates and the political system (as mentioned before this does not necessarily only include the government). It best explains the connections between the two, in that various levels of organised crime and government interaction can be incorporated into this theory. Political Expediency Theory focuses on the complex give-and-take relations between organised crime syndicates and policy makers by way of careful and planned criminal involvement in legitimate businesses. In this case "criminal activity is a way to make money" not necessarily involving a mutual enabling aspect. Thus "political corruption occurs only to gain and maintain the economic benefits and not as an end in itself." (Anechiarico, 1991:93).

In this case the upperworld (of legitimate business) necessarily has to be susceptible to underworld influences (particularly when these influences are non-violent means involving bribery and corruption). In other words:

> "…organised crime never gets into the upperworld if the upperworld has not yet grown a little bit into an underworld." (Van Duyne, 1996:371).

Consequently by virtue of the purely economic incentive of it, one of the fears of organised crime is its possible moral degradation of society because of its potential infiltration of the upperworld. The worst case scenario is that organised crime may obtain what Van Duyne (1997:201) calls "a foothold in the "decent" world of legitimate entrepreneurs, civil servants and politicians". Thus a culmination of corruption and violence would result. Organised crime syndicates are, thus, concerned with illegal as

well as legal business - however a part of their business is the bribery of public officials and the engagement in criminal activity. The fact of the matter is that organised crime syndicates may operate as normal enterprises whereby the members are entrepreneurs trying to survive in a hostile and unpredictable world. However they may not necessarily employ violence as a means of trying to control their environments. In other words the management of their enterprises may very well be on "normal interpersonal lines" (Ibid. p372). So drug syndicates, for example, may operate just like any legitimate business with criminals viewing themselves as managers and the leaders of the syndicates treating their personnel like employees.

In these types of enterprises, the main aim may not be to intentionally subvert society, but simply enjoy the profits of their business. (However inadvertently their activities may have adverse effects on societies.) Their thorough involvement with legitimate industry is so blurred that "…there is no reason to believe that organized crime should be any more effective in influencing outcomes than other large economic organizations" (Quoted in Anechiarico, 1991:93).

Society' s possible response to this threat could be in the direction of not only targeting resources (that is civil forfeiture of assets) but also discouraging those susceptible to being taken in by the short-term benefits that organised crime may offer them. Those susceptible may include public officials as well as entire orthodox businesses. The above holds the assumption that corruption is a necessary tool for the effective running of organised crime syndicates, despite the risk that is involved in the exchange of information to new corrupted individuals or businesses. However organised crime syndicates usually engage in corrupting individuals or businesses if the risks are outweighed by positive results.

As far as police interference is concerned, organised crime syndicates are willing to pay the price to be left to their own devices. Thus the core of organised crime is crime trade, the means of organising this trade - unlike legitimate business - is based more on members' upbringing and cultural background, than on economic laws and enterprise (even though they may operate in the manner of legitimate enterprises). These factors may predict whether a syndicate uses violence, co-operates with other syndicates and/or co-operates with the upperworld. Once again the theme of interaction between the upperworld and underworld emerges, and this interaction is facilitated by corruption (Beare, 1997). However, there are varying degrees of corruption, but essentially

corruption is an instrument enabling organised crime syndicates to obtain protection from the police; remove competition; and build up capital.

The interesting point to note is that not all criminal groups have the level of sophistication to corrupt. Thus without corruption as an option they may resort to using violence. Violence becomes a commodity, a valuable asset for the success of this type of syndicate. For example, violence can be applied to extortion, diminishing competition through threats and thus amassing capital. Thus these types of organised crime syndicates may be less sophisticated but they achieve similar goals to that of more sophisticated syndicates. Only the means of obtaining these goals differ.

Consequently one can gauge the level of sophistication of organised crime syndicates in South Africa when one assesses whether they employ a high level of violence or use less visible but more intrusive forms of corruption. Growing syndicates increasingly need to corrupt, but this corrupting ability is also dependent on how integrated the syndicate is in the upperworld. The more integrated the syndicate, the more invisible it becomes, as corruption may become masked by normal, legitimate operations.

> "In its most advanced form organised crime is so thoroughly integrated into the economic, political and social institutions of legitimate society that it may no longer be recognizable as a criminal enterprise. Such integration represents the most serious potential for social harm that can be caused by racketeers. However the criminal justice system is least effective in dealing with organised crime when it reaches this level of maturity." (Stier & Richards, 1987 in Beare, 1997:158).

Here reference is made to a very high level of organised crime integration - this is a move more to a Socio-Political Regulatory Theory of crime, in that organised crime may develop to such an extent that its involvement with officials becomes more subtle and indirect. In other words, organised crime syndicates may create a stable market whereby it may not be recognisable as illegal due to the efficient and effective political ordering and economic relations employed by the syndicates. Thus it extends even more into the political economy of a country than the Government Replacement Theory predicts. The greatest threat of organised crime is where it can conceal its illegal and harmful activities in the guise of legitimate industry.

> "The challenge of certain forms of organised crime is greatest where its possibilities to cloak its real nature are biggest." (Van Duyne, 1996:374).

This analysis points to the need for a different or added approach to dealing with organised crime, and that is to strengthen society' s integrity by focussing on improving professional business ethics. The infiltration of sophisticated syndicates depends more on moral absenteeism or toleration of the underworld. It is a point aptly captured by Van Duyne (1997) when he comments as follows:

> "There is no organised crime corruption without preceding upperworld decay of morals and a door ajar to corruption." (p233).
>
> "Indeed, corruption, also by organised crime, is not a threat by "them" but a defect of "us"". (Ibid. p234).

This may be a valid point considering the fact that some syndicate leaders are role models for marginalised youth in South Africa. Also, even though many are intimidated, the majority of police officers working with syndicates are in it for the money as it were, thus giving in to a gradual, all-encompassing, moral 'lowering' of society, and effective demoralisation of the services meant to counter the organised crime threat.

The above analysis of the corrupting effects of organised crime is worthwhile in that subsequent state reactions to it can be formulated, these theoretical approaches thus add to the law enforcement agenda by reflecting on the possible level of infiltration of syndicates.

4. NEW CHALLENGES FACING THE INTERNATIONAL LAW ENFOR CEMENT ARENA

The challenges facing international law enforcement agencies and organisations concerned with organised crime, range from the effects of a globalised economy to simple lack of co-operation between policing agencies confronting the same enemy. A discussion will follow whereby these new challenges are highlighted (as well as how they came about) and then it will be shown how international key players have developed means of confronting these new challenges. Three key players have been selected to demonstrate the advance in strategies against organised crime, internationally; they are the United States of America (USA), the United Nations Organisation (UNO), and the European Union.

One of the main challenges international players' face is the rapidity of the growth of organised crime and its pervasive character. Thus there is an urgency to develop

policing strategies and criminal justice initiatives to counter organised crime' s growing and increasingly harmful nature. Organised crime is essentially a transnational crime - it is due to this that the international arena is concerned with containing it. The term transnationalism implies the transcendance of international boundaries, or the disregarding of these boundaries when one considers the activities of organised crime syndicates. In other words, its transnational character causes it to disregard borders between states and consequently the jurisdictions of such states. Crossing national borders has often provided international criminals the means of avoiding the legal doctrine of particular countries. Also, organised crime is becoming more prevalent and has become more serious over the years. So, international players are forced to confront this ever-growing problem but, as will be discussed, the challenges to be faced are formidable. But first perhaps a brief account should be made of why organised crime has flourished so recently despite international counter-strategies to contain it.

4.1. Recent factors that have contributed to the increasing threat of organised crime.

Phil William' s (1991) writing has reflected a focussed consideration of the range of structural factors that seem to have contributed to the creation of a socio-political environment in which organised crime has gained a foothold. Consequently Williams will be used substantially in the following sections due to his comprehensive understanding of this.

Over the last 25 years, global developments have contributed to an increase in organised criminal activity, more than ever before. These global developments include the dramatic advances in transportation systems facilitating organised crime activities, especially the movement of drugs and weapons in and out of countries.

Communication and information systems, too, have been developed to such an extent that organised crime syndicates are able to network their activities to a greater extent than before. Information warfare entails the sabotage of national and global information systems. In this way organised crime moves into the arena of white-collar crime, as financial fraud and embezzlement become added to the list of organised criminal activity. The advancements in information infrastructures also allows organised criminal groups to engage in extortion, their capacity to harm information and communication infrastructures (through hacking) can be used as a potential bargaining tool for extortion or act as a deterrence to inhibit law enforcement successes. (Williams, 1997).

Past trade and travel restrictions have been lifted as a result of the collapse of the Soviet Union. Not only has the high level of social control diminished but organised crime syndicates within and without the former Soviet Union are able to diversify and expand their activities - since many Cold War policies have been rendered obsolete. Lower tariffs, free trade arrangements and the integration of former Soviet Bloc countries into the global trading arena have all contributed to the rise in global trade. Thus world trade has reached an all time high since Middle Eastern, Third World and Eastern European countries are participating more actively in global trade. In fact world economic interdependence is a feature of this. Organised crime syndicates have more opportunities to take advantage of the global trade and financial system. Globalisation is the key to the increasing threat of transnational organised crime. The world is, in effect, shrinking due to technological advances, the world' s population is also rising - more social problems are the result (such as disease, poverty, the huge influx of people across borders), and so too possible increase in the opportunities and reasons for engaging in criminal activity. Especially when that activity guarantees profit, which most organised criminal activity does. (Balzer, 1996).

Due to the relative ease of travel and migration (which governments find increasingly difficult to monitor and control due to the permeability of national borders), ethnic networks have gradually been created, resulting from diasporas. Ethnic networks are an important resource for transnational criminal organisations in that they provide foreign cover; recruits and transnational linkages. Law enforcement agencies have difficulty in penetrating immigrant communities, thus they have an in-built security mechanism against police interference. So Chinese, Nigerian, Italian and Russian diasporas have resulted in global networks whereby criminal contacts and foundations for criminal activity have been created in countries world-wide (Williams, 1997).

The development of the world' s financial infrastructure has also led to a linking of countries, banks and other financial systems, not necessarily under state control. This offers many opportunities for transnational criminal organisations, since the increase in financial business has not been matched by parallel regulatory measures. The global financial market has a large number of access points, trade can be conducted anonymously and rapidly. Origin and ownership is obscured and so too the distinction between 'dirty' and 'clean' money - as the global financial system provides safe havens for 'dirty' money. Not only is regulation lagging but there are also divergent levels of regulation. Thus there are always opportunities for transnational criminal organisations to take advantage of zones which are unregulated (such as in former

Soviet Bloc countries, and in developing countries). Transnational criminal organisations merely move their activities from areas where they are illegal and strict regulation is prevalent, to areas where regulation is lapse and the origin of the source of money is irrelevant. Global efforts to counter this is thwarted by the countries without the means and power to engage with the problem (Williams, 1997).

Large, cosmopolitan global cities, connected to one another by telecommunications and transportation links are a haven for criminal organisations. Within many mega-cities are areas in which inhabitants live in terrible conditions. In these alienating circumstances inhabitants may be forced to form criminal social organisations in the form of street gangs, in order to survive. Global cities become the incubators for these gangs to develop into powerful transnational criminal organisations. Global cities not only cause transnational crime development but also maintain them by becoming congenial environments providing anonymity, encouraging survival skills and promoting bonding mechanisms. Thereby facilitating the success of criminal organisations and increasing the opportunities for the establishment of connections among criminal groups (Williams, 1997).

The above factors create an ideal environment for organised crime syndicates to engage in illegal activities and, at times, without the constant threat of police interference. State authority has become contracted as states have lost control of markets. The rise of grey and black markets; the undisturbed flow of illicit goods across various borders; the rise of illegal migration; as well as the development of informal economies all profess to this loss of state control. The more the state attempts to take control over these parallel markets (through law enforcement strategies), the more incentive transnational organisations have to step up their operations. They stand to profit from their ability "to circumvent national and international regulations and supply illicit goods and services with some degree of predictability" (Williams, 1997:18). Concerted state responses are vital, but not always obtainable. The challenges facing law enforcement agencies and organisations are thus formidable, some of these challenges, briefly stated, are as follows:

4.2. Transnational challenges facing law enforcement agencies and organisations

4.2.1. The global nature of organised crime

Organised crime syndicates have largely taken advantage of the process of globalisation. Globalisation, in effect, has contributed to the rise of transnational

organised crime. Advances in technology, transportation, information, communication and financial systems has led to transnational criminal organisations making use of these innovations to facilitate their activities. Drugs can be more easily transported, as well as weapons, 'dirty' money and any form of contraband. The very developments that have contributed to the transnational functioning of modern (legitimate) corporations have also contributed to the rise of the black market and emergence of transnational criminal organisations. The effects of globalisation and the proliferation of advanced communications and, for example, the development of cyberspace have resulted in states not being able to maintain a high level of authority. The advances in technology have largely diminished state authority as many more avenues have been created to facilitate illegal activities, at times, largely beyond the control of state authority (Williams, 1997).

The challenge to law enforcement is to keep pace with the increasing sophistication of transnational criminal organisations. There is also a need to develop ways of eliminating or containing illegal cyberspace activities. Law enforcement agencies and organisations have to decrease the gap in sophistication between them and organised crime syndicates, not only through advances in technology but through concerted efforts and state co-operation.

4.2.2. International police co-operation

There is a widening gap between law enforcement and organised crime syndicates. Syndicates are developing at a higher rate, technologically and otherwise, than law enforcement agencies and organisations. Red tape and bureaucracy could be the inhibiting factors preventing effective police co-operation on a global scale. In order to fulfil their primary goal of social ordering, state justice has to protect citizens, agencies and the state from transnational crime. However, state justice is also beholden to the values and customs of its specific society. Thus many societies will adopt their own laws, styles of enforcement and policing priorities according to their understanding of 'justice' This is a factor that complicates and hampers international police co-operation. Yet global police co-operation may be a strategy that could assist in the containment of organised crime. It is the very factors that ensure ethnic independence and state sovereignty that hamper the effective containment of the global enemy – that is organised transnational crime.

4.2.3. Jurisdictional problems

This brings one to the issue of state jurisdiction. The very nature of transnational crime necessitates co-operation between the countries in which organised crime syndicates move and operate. That is, syndicates will cross borders and consequently move from state to state wherein different states employ different strategies. The main problem lies in the fact that the jurisdiction of police officers from one state ends at the borders of other states. Thus the means to solve this problem is through governmental co-operation, perhaps through the signing of treaties and the like.

4.2.4. Drug trafficking - a threat in its own right

The movement of illicit drugs, internationally, is almost completely controlled by transnational organised crime groups. Drugs, for these groups or syndicates, are an important source of revenue; thus even though illicit drug trafficking is a serious threat in its own right it is interdependent with organised crime per se. Drug trafficking and organised crime in general are "only part of an array of unresolved economic and social development problems" from which they also largely originate (ISS Bulletin, 1994:1). Also a large number of criminals are now extending their activities from crimes such as robbery, extortion and such, to national and international drug trafficking due to its huge profit margin.

It is no surprise that many countries are now devoting attention particularly to the growing drug trafficking problem. Narco-terrorism is considered a real threat to government power and the efficient functioning of democracy even in the most established countries. Narco-terrorism is "the real or potential ability of drug trafficking cartels to impair a government' s ability to enforce and maintain its authority, be it to attain financial gain and/or to further ideologically inspired aims" (Ibid. p4). "Narco-democracy" is a term used to describe those countries affected by the political influence of drug traffickers. Governmental institutions may become completely dependent on criminal enterprises infiltrating legitimate business, diminishing national resources and disregarding law. (Winer, 1997). These terms are, however, laden with meaning - they are complex phenomenon. Narco-terrorism is just one dimension of the drug trafficking problem. The use of these terms is perhaps to touch on the complexity and degrees of pervasiveness that drug cartels may have on state structures - democratic or otherwise.

Countries with weak social and institutional structures are particularly vulnerable to drug abuse and trafficking. Some of these countries have collapsed state structures (due

to perhaps political events and/or transition from authoritarian to democratic rule); thus institutional vacuums are left and exploited by drug trafficking organisations. These vacuums are delays in the establishment of effective police systems and financial and commercial regulatory mechanisms, thus, in particular, advantage is taken of lax border controls and trade barriers (Gelbard, 1996).

The emphasis is thus on the globalisation of the drug trade and the need to address this international drug trafficking problem by establishing and enforcing globalised strategies of law enforcement and policing. The international drug trade is complex and resilient - it consists of a global web of traffic routes and methods to counter what Gelbard (1996:6) calls "traditional drug interdiction efforts" (emphasis own). There is a need to evolve traditional drug enforcement methods to methods suited for this complexity and resiliency. At the forefront of this is the need for international co-operation - a global problem needs a global solution. At present, there seems to be a trend towards the globalisation of law enforcement and internationalisation of policing strategies to best cope with the illicit drug trafficking phenomenon but the same problems are faced as with the pursuit of organised crime syndicates, in general. Because of the serious nature of illicit drug trafficking, reference will, at times, be made specifically to how the three key players are addressing this problem as one of the many criminal activities organised crime syndicates engage in.

5. STRATEGIES EMPLOYED BY THE USA, UN AND EUROPEAN UNION TO COUNTER ORGANISED CRIME

The following section will be devoted to the strategies adopted by the law enforcement arena to contain the organised crime and related drug trafficking threat and so the methods adopted to face the new challenges that organised crime has to offer. The USA, UN and European Union will be used to represent international efforts to do this.

Organised crime syndicates in general weaken institutions concerned with public security (such as the police and judiciary) due to their capacity to corrupt officials and/or intimidate those who are as yet, not corrupted. Their activities have far-reaching consequences, domestically and internationally - they may block legislation and treaties and weaken economies due to the vast sums of money moved in and out of countries, uncontrolled. The emphasis once again is on the damage that organised syndicates cause - globally. It is of no use to address a global problem without the co-operation of

the countries involved. The drug problem, too, is of major concern, as the UN World Drug Report (1997:9) aptly states:

> "No nation, however remote a corner of the globe, is immune to the adverse consequences of drug abuse and trafficking..."

The drug problem as one instance of organised crime, really is a worldwide phenomenon and worldwide problem. Even though specific countries may not have, for example, drug trafficking problems per se, other countries directly involved in the problem will suffer economic distortions and possibly effect the worldwide economic situation and hamper international drug enforcement treaties.

5.1. The USA

The USA has by far emphasised the international security threat that organised crime poses, it has also realised the serious threat it has to US security in particular, reflected by the current American President, Bill Clinton:

> "We have to combat those who would destroy democratic societies, including ours, through terrorism, organized crime and drug trafficking···organized crime now plagu[es] the former Soviet Union, so much that one of the first requests we get in every one of these countries is, send in the FBI···the drug cartels···threaten the open societies and fragile democracies there – all these things we know can emerge from without our borders and from within our borders." (Quoted in Winer, 1997:44).

As far as the drug trade is concerned the USA is the leader in international drug enforcement. Nadelmann (1993) points out that this is but one area in which the USA has declared its leadership (other areas of leaderships include providing intelligence, military and economic support as well as providing financial aid to countries in need, also in the struggle against remaining communism and terrorism). In fact US government activities include involving anything that has a political or regulatory interest. For example, the Drug Enforcement Agency (DEA) and Federal Bureau of Investigation (FBI) have increased their transnational responsibilities by opening offices in many countries, the US Customs Service has conducted courses in border, air and seaport control for various countries, including South Africa and the Southern African region. The US Marshals service has offered technical assistance, specifically to South Africa, in terms of the witness protection programme, and the DEA has held drug

enforcement seminars and, in South Africa, helped SANAB (South African Narcotics Bureau) establish a database in this field (Callahan, 1997). The FBI has also been responsible for training foreign police. Thus, the DEA and FBI are seen to be the most prolific in the fight against drug trafficking specifically and organised crime more generally. As Nadelmann (1993:129) states:

> "The DEA' s principal objective, broadly stated, is to stem the flow of drugs to the United States, yet it has devoted considerable efforts to assisting foreign law enforcement agencies in countering drug trafficking that has little or no impact on the United States."

A unique feature of the DEA is that its agents are beholden to the US and responsible to the US ambassador, when abroad, yet its instruction and mission are authorised by the UN and international conventions. The main role that the DEA plays is that of liaison. The DEA was in actual fact the first transnational and nonimperial police organisation ever (after being the successor of the Bureau of Narcotics and Dangerous Drugs in the 1970' s).

Since the late nineteenth century the USA has promulgated transnational controls. Factors, (besides the explosion in international drug trafficking in the early 1960's), which have led to a globalisation of US law enforcement are economic and security responsibilities that the USA adopted after World War II. During the 1940s and 1950s military criminal investigative agents were sent abroad to police the many American military personnel stationed overseas. A police training programme was created and the Customs Service, the FBI and Secret Service all asserted their efforts overseas during this time. During the 1960s, the rapid nationalisation of American law enforcement took place parallel to crime attaining a national political status (Nadelmann, 1997). In the early 1970s political policies were adopted by the likes of American presidents such as Richard Nixon - and his extension of the war on drugs to other countries - in the beginning of the 1970's (Ronald Reagan and George Bush following suit in the 1980's).

The late 1970s 1980s and 1990s saw a rise in extradition and mutual legal assistance relations with foreign governments. The Office of International Affairs (OIA) and the Office of Law Enforcement and Intelligence (LEI) (both created in 1979), in this regard, assumed leading roles. Treaties with foreign countries were signed as a result of these efforts and improved co-operation in drug and securities law enforcement was at the top of the agenda. After the 1980's US jurisdiction was spread to terrorist acts against

American citizens overseas. But it has been the real threat of drug trafficking by organised crime syndicates and the American engagement with this threat that has led to a substantial internationalisation of American organised crime and drug enforcement policies, laws, treaties and the like. A few decades ago this need for a globalised approach was non-existent - the nature of the drug trafficking problem today is such that a globalised approach is necessary. Not only a globalised approach but an adapted globalised approach - adapted to keep ahead with evolving drug syndicates and organised crime technology with regard to drug trafficking, but also smuggling in general, money laundering and computer fraud. Other developments that have taken place in the last few decades of US international criminal law enforcement include the creation of an office devoted to international enforcement matters (handled by the Securities and Exchange Commission). The US national central bureau of Interpol and federal police agencies have expanded their extraterritorial activities. US military forces have become increasingly involved in international criminal law enforcement. Congressional hearings have stimulated incentives to confront the transnational drug trafficking problem and other criminal problems. (Nadelmann, 1997).

US law enforcement agencies such as the Drug Enforcement Agency (DEA), Federal Bureau of Investigation (FBI), Internal Revenue Service (IRS), Immigration and Naturalization Service (INS) US Customs Service, US Marshals Service and the Secret Service to name a few, have become increasingly involved in the international activities of syndicates specifically involved in the drug trade.

However the enforcement of internationalised organised crime and drug enforcement activities are beset with problems, particularly with regard to the state sovereignty of foreign countries. US agencies working abroad may not have authorisation from foreign agencies to effectively promote their strategies. Foreign countries may inadvertently harbour criminals, in virtue of their policing inadequacies and economic opportunities. American enforcers' efforts may, too, be thwarted by political problems. The USA is faced with challenges, which include more specifically, factors such as the following:

Governments that are hostile, politically, may not be co-operative, even those governments that do co-operate may nevertheless hamper progress by virtue of conflicting viewpoints. There is a need to work out the fundamental differences in the styles of law enforcement as well as convince foreign governments that change is necessary if any effective containment of organised crime is to occur. These and other problems related to procedural, cultural and institutional differences slow co-operation

between governments. Consequently the US agencies, confronting organised crime and drug trafficking, have had to evolve their means of creating co-operation and infiltrating drug syndicates.

Nadelmann mentions that the USA has achieved this by adopting unilateral measures such as enforcing laws extraterritorially through domestic legal processes; keeping track of foreigners within American borders; compiling records of domestic transactions, and so forth. Despite this, unilateral measures are fraught with difficulties particularly with regard to tense foreign relations and lack of sovereign powers. Therefore, bilateral and multilateral agreements are necessary. Bilateral agreements between two states or multilateral agreements globally, facilitate co-operation against transnational crime. However multilateral agreements promote harmonisation. Part and parcel of this harmonisation is:

> *Regularisation of relations between law enforcement officials of different countries.*
>
> *Accommodation among law enforcement systems that retain essential differences.*
>
> *Homogenisation of law enforcement systems towards a common norm (Nadelmann, 1993).*

Due to American efforts, a global Americanisation of foreign systems has occurred:

> "The internationalisation of US law enforcement during the twentieth century has shaped the evolution of criminal justice systems in dozens of other countries". (Nadelmann, 1993:11).

Foreign countries in response, have signed extradition and law enforcement treaties, hosted American agents, adopted American approaches and basically, followed in America' s footsteps.

Gerber and Jensen (1998) point out that although America has not solely spread the war on drugs and transnational crime it has taken the lead - its approaches are dominant. The transnational nature of the drug trafficking business makes its unavoidable for countries not to establish some control mechanisms. A helping hand in this regard is that of the American mass media - cultural diffusion of the American drug control policy has thus exposed the world to the American manner of interpretation.

But it' s interesting to note why America has been relatively successful in the promotion of its policies. In this regard Gerber & Jensen, (1998) mention three possible reasons:

> Firstly, they point out that state managers will attack enemies that are politically safer to attack. Illicit drugs and organised crime, in general, is a useful "enemy" - even though there is a kernel of truth to the claims made about drugs and other organised criminal activities, the issue is nevertheless sufficiently ambiguous to attack without leading to political losses.
>
> Secondly, the collapse of the Soviet Union led to the American military being available for new missions (that is, combating drugs) and more importantly, left the USA as the only superpower - thus able to enforce its ideology on other countries without interference from Soviet expansionism. Thirdly, the USA has become the police force of the world, due to the necessity of the transnational co-ordination of law enforcement against drug trafficking and transnational organised crime.

The US has law enforcement representatives in the most foreign countries, it also has a multitude of law enforcement agencies, more so than any other country. The US has demonstrated the most powerful influence on criminal laws, procedures and investigatory tactics - it is the first country to create a global police presence and thus its role in the containment of transnational organised crime has been invaluable (Nadelmann, 1997).

The strategies employed by American agencies and organisations have been directed at global co-operation and the sharing of initiatives to combat organised crime. The United Nations, too, has attempted to establish mutual agreements between countries so as to unite them in the struggle against organised crime.

5.2. The United Nations

The UN is a key player in the fight against organised transnational crime and drug trafficking, it is a global body incorporating many countries, thus perpetuating state co-operation. On the policing level its Security Forces also reflect a new world consensus in terms of policing strategies. Its tireless efforts in the fight against organised crime have led to the establishment of bilateral, co-operative agreements based on mutual

respect between foreign countries thus actively attempting to globalise international efforts against organised crime.

The UN approves funds, accepts resolutions, conventions, protocols and such, through the UN General Assembly. Governments relate their opinions or views through this UN body. For example, in the Economic and Social Councils Commission on Crime Prevention and Criminal Justice (International Co-operation in Combating Transnational Crime, 1998) it is stated that the General Assembly approved a Global Action Plea against Organised Transnational Crime and that it urged countries to implement the plan. The General Assembly also asked the Commission to consider an international convention against organised transnational crime. Thus the General Assembly forms a vital function within the UN, generally and specifically in terms of organised crime prevention and co-ordinating global activities in this regard.

The Economic and Social Council (ECOSOC) is a key structure - this body is concerned with policies regarding drug abuse control and co-ordination, and it also makes recommendations to governments. From this, the International Narcotics Control Board (INCB) is responsible for implementing and monitoring UN Drug Conventions. It is an independent body and is also responsible for ensuring government compliance and assisting governments where necessary (particularly with regard to treaties). Thus it corrects weaknesses and boosts capacity in national and international control of illicit drugs. The Commission on Narcotic Drugs (CND) is a functional commission of ECOSOC and aids ECOSOC in the supervision of international conventions and agreements (that is, ensuring their application). New conventions may also be prepared by the CND, and it is the central policy making body of the UN (World Drug Report, 1997).

From these two bodies (the INCB and CND) one derives the United Nations Drug Control Programme or UNDCP which was established in 1991. The UNDCP promotes change and assists the progress of international co-operation with regard to drug control. Thus advising and aiding governments and agencies on the issue of the international drug control treaty system. Some of the functions of this system are: To be prepared for phenomenon which could worsen illicit drug production and trafficking, and so deal with it timeously; to aid the INCB and CND; to offer technical assistance and co-operation to governments so as to aid governments with regard to plans of action in a joint operations venture (World Drug Report, 1997). Also, the UNDCP may actively provide collaboration between two or more parties, particularly when these

countries need an independent collaborator due to political tension. The result of such collaborations could be the establishment of bilateral agreements and multi-faceted, sub-regional or regional co-operation arrangements (World Drug Report, 1997).

The UN also facilitates MoUs (Memorandums of Understanding). Such memorandums may be intergovernmental, or between governments and agencies (such as police or customs agencies) or between governments or agencies and commercial organisations (such as airlines). Such MoUs are not legally binding and not necessarily ratified by national parliaments. A MoU:

> "…derives from the existence of convergent interests between two countries with similar problems and the political will to deal with them."(World Drug Report, 1997: 176).

Other technical assistance and resolutions offered by the UN and outlined by the Commission on Crime Prevention and Criminal Justice is that of the implementation of the Political Declaration and Global Action Plan against Organised Transnational Crime which was adopted by the World Ministerial Conference on Organised Transnational Crime in Italy in 1994; also (in 1990' s) the UN Crime Prevention and Crime Justice Programme and its contribution to the implementation of the UN New Agenda for the Development of Africa.

The Conventions on Mutual Legal Assistance and on Extradition of the Economy Community of West African States also provide for forms of international co-operation. The Declaration and Plan of Action on Drug Abuse and Illicit Trafficking in Africa was adopted at Cameroon in 1996 by the Organization of African Unity (OAU). But most importantly the Crime Prevention and Criminal Justice has provided advisory services and technical aid to African States. Due to efforts of the UN, a proliferation of extradition and mutual legal assistance treaties has resulted, thus improving and encouraging global co-operation in the war against drug production trafficking and abuse (Nadelmann, 1993). Also the World Drug Report (1997) itself has clarified many blurred areas of the drugs issue by analysing exactly what is and is not known, and by giving an overview of the global drug situation. It has, in this regard pointed out the major organised crime groups (involved with production and distribution) throughout the world and also their connections across the globe. These syndicates consist of Cocaine Cartels in Columbia and Mexico; Triads - worldwide; Yakuza, mainly operating in Asia; Cosa Nostra - worldwide; La Cosa Nostra in New York and the USA;

and Mafia groups in former Eastern Bloc countries. (World Drug Report, 1997). More recently (1998) the UN Draft Convention for the Suppression of Transnational Organised Crime, attended by approximately 50 countries, has made attempts to create an international convention against organised crime.

5.3. The European Union

Along with the 'Americanisation' of law enforcement is the 'Europeanisation' of policing (Van der Spuy, 1997). This is a complex and ambitious goal as European countries are largely diverse in their organisational structures and attitudes or viewpoints (van Dijk, 1991).

The UN is engaged with the attempted collaboration of different European countries - but due to different needs different countries want different kinds of reaties (from bilateral to multilateral treaties) - thus despite British and American encouragemen - progress in the area of negotiation has been slow. (Dorn & South, 1991)

The UN points out two important international agencies in drug control - Interpol (International Criminal Police Organisation) and the World Customs Organisation. Interpol comprises 175 member states and encourages co-operation and the exchange of information and the heightening of abilities to control organised crime and specifically drug trafficking. Interpol also has a responsibility to increase the difficulty for fugitives to find haven in Europe, so an international wanted notice issued by Interpol, alerts (or should alert) police agencies in the countries wherein it operates. Interpol also holds annual meetings and regional conferences, as it is an international professional association for police. In these conferences information exchange is possible and thus provision is made for the spread of new police methods and techniques. Consequently, through Interpol, the US government has access to the means to internationalise law enforcement against organised crime syndicates (Nadelmann, 1993)However more specific to Europe, is Europol created in 1995 as a result of the Trevi agreement in 1975 between European states, and the Schengen Convention in 1985 (Van der Spuy, 1997). The International Criminal Police Review of 1989 aptly summarises the history of European Unity in terms of police co-operation: the European Economic Community was founded in 1957 and composed of 6 countries, its goal was to create a common market. A treaty was made in 1957 for this purpose and revised by the Single European Act of 1987 that had its main objective, politically, of recommending the creation of a European Union (however at the time no account was made for international police co-operation). The Trevi groups came about before the Single European Act came into

force and it accounted for the lack of mention of international police co-operation as not only was it the first intergovernmental counterpart of Interpol but it directly addressed the need for collaboration. Thus, for example, toplevel FBI officials have attended Trevi sessions in which improved cooperation against (amongst others) drug trafficking and organised crime is arranged. Five European Community Countries with a view to facilitating police cooperation and mutual assistance, cooperation and communication by abolishing border controls and harmonising drug-related laws and regulations created the Schengen Agreement. The Schengen group countries (forming the European Union) have consequently made contributions to police cooperation of external and internal borders of the European Union.

Extradition arrangements also exist in the European Union with most states being part of the European Convention on Extradition (Benyon, Turnbull, Willis, Woodward & Beck, 1993). Consequently the ideology of a European identity seems to be what is striven for with the attempted introduction of a single market and political economy and specifically legal integration. This has had an effect on policing strategies:

> "…one of the key public rationales for intensified police co-operation has been the prospect of abolition of border controls between member states of the Union… [which] will undermine the traditional filter function of frontiers, and remove a major impediment to cross-border criminality…" (Helsenton & Thomas, 1995:190).

The European experience is similar to that of the obstacles faced by the Americans. In that a standardisation of criminal justice systems and co-operation among the policing institutions is difficult, the sovereignty of state could be threatened by a law enforcement system independent of the political sphere of the state. Thus 'police independence' and 'professionalism' might mask a police system characterised by a resistance to democratic control - alike to an emerging power bloc (Van der Spuy, 1997:48). Also Europe is much more diverse, culturally, in that attitudes towards 'crime' differ from state to state:

> "…states remain infused by different cultures sensibilities and criminal justice policies." (Ibid. p47).

So not only is it difficult for US specialised agencies (like the DEA) to effectively gather intelligence on drug trafficking in alien systems, but European states themselves are struggling for a consensus (Nadelmann, 1993).

However, this is an evolving situation and consequently new areas of development are occurring, such as an increase in contact due to the consolidation of police networks and an exchange of policing artifacts. The joint forces and social interaction of international and regional policing areas may prove beneficial considering what they may have to offer each other (Van der Spuy, 1997).

In summary, the strategies employed by the USA, UN and European Union have been both on the level of politics and policing in an attempt to develop strategies to confront and contain organised crime. Consequently these strategies have ranged from attempts at public relations to practical developments, such as increased policing co-operation by means of shared intelligence and databases. All these strategies have been made in an attempt to confront the challenges organised crime has to offer. And by doing so, increased effort has been made to expose the activities and priorities of organised crime syndicates; to create unfavourable environments and comprehensive strategies to curb these activities; and, in general, to globalise these attempts so that a concerted effort can be made to normalise these approaches. The best means to contain organised crime would be to simultaneously address the issue on a political and policing level, and thus it has been shown that attempts have been made in this regard - to expose the organised crime phenomenon as a global problem and common enemy to all countries.

The following sections will look at the South African engagement with the organised crime problem and its means to effectively employ strategies - both on a legal and policing level - to contain it.

6. A BRIEF HISTORY OF SOUTH AFRICAN RESPONSES TO THE ORGANISED CRIME PROBLEM

Organised crime' s rapid growth in South Africa in the 1990s has its roots in the 1980s, during which time organised crime began to manifest. During the 1980s regional cross-border crime proliferated and crime syndicates (both national and regional) were ready to take advantage of the favourable conditions promoted by the political transition of South Africa in the early 1990s (Gastrow, 1998). Nowadays South Africa is an essential co-ordinating or linchpin country for international crime syndicates. Callahan (1997) points out that foreign governments are well aware of South Africa' s emerging status and the consequent threat that syndicates may extend their operations into their own countries. This is a particular international concern.

It is interesting to briefly review the past few years of South Africa' s gradual efforts to address the organised crime problem and means to counter it with or without direct international assistance. These efforts must be viewed as parallel to the steady increase of organised crime activities in South Africa.

In the early 1990s organised crime was not recognised by the South African government as a policing concern, in fact, for example, it was only in 1991 that the term 'organised crime' was used in policing vocabulary at all despite the existence of organised crime in South Africa well before 1991 (Gastrow, 1998). With the advent of democracy in 1994 one has witnessed the enhancement of opportunities for organised crime syndicates. Transitions to democracy are often accompanied by an increase in crime due to changes in society, replacing authoritarian governance with weaker state and social controls. International examples have shown that states in transition to democracy rarely counter crime immediately, due to the delay in the implementation of policing and legislation initiatives (amongst other problems such as being compelled to use the same instruments of the authoritarian rule to govern the new democratic society). In South Africa, only from 1994 onwards, did major legislative and policy changes in the safety and security environment begin to take place.

6.1. Organised Crime in South African Crime Debates

6.1.1. The conditions which provide a fertile ground for organised crime networks to flourish

From 1995 onwards, on the academic front, an increase in Institute of Security Studies (ISS) and African Review articles on the subject of organised crime in South Africa may reflect the increased concern with this problem. For example, in 1995, an article by Simon Baynham highlights the social state of South Africa in 1995 as connected to the increase of drug abuse. For example, South Africa' s increase in lawlessness (a feature of a state in transition), as well as sophisticated banking systems facilitated drug trade and money laundering problems.

South Africa has developed a 'profile' as having an inadequate bureaucracy and experiencing an increase in the numbers of people crossing South African borders, as well as experiencing a boom in free trade. Baynham, in effect, points out the features of the "new" South Africa, which have led to exploitation by organised crime syndicates, Williams (1997:19) supports this point:

"Criminal organisations tend to develop and flourish amidst the conditions that almost invariably accompany transitions to democracy and the free market."

Other features include a general breakdown of political authority and of social control structures. Law enforcement departments and agencies also face legitimacy problems as the legacy of the old regime renders a general societal distrust for these departments. Resource constraints worsen the problem of lack of capacity to rebuild the same level of effective policing reminiscent of the old regime. At the same time an appropriate balance has to be maintained between respecting human rights and the capacity for effective action against organised crime syndicates. Thus avoiding regression to the repressive strategies used by the old regime. The state is also incapable of addressing the needs of its citizens - citizens are exposed to pressures and incentives to become involved in criminal activity. Consequently extra-legal means of survival may be the result of economic hardships, unemployment and hyperinflation (Williams, 1997). A sudden openness to the outside world results in the opening of borders and the increased permeability of states. South Africa' s economic dislocation, too, along with the above features of its transition has been an opening for organised syndicates to effectively conduct their illegal activities. These factors have provided a fertile ground for networks to operate, also for those involved in drug trafficking specifically. Transnational criminal organisations deliberately take advantage of the vulnerabilities experienced by states undergoing transition. Efforts are made by these criminal groups to maintain the conditions of the weakened states to ensure that they continually provide refuge. As long as they can accomplish this, these criminal enterprises are likely to continue with a high level of immunity (Williams, 1997). Thus South Africa' s transition has inadvertently opened the doors to organised crime syndicates.

6.1.2. Mapping trends in organised crime patterns

One of the trends of organised crime syndicates in South Africa is their increasing engagement with drug trafficking. Drug traffickers, specifically are becoming powerful enough to terrorise and corrupt high-profile officials as well as infiltrate all levels of society. Another related factor is the association of drugs with weapons smuggling and, in particular, the increase of violence:

'One serious result of the presence of illicit drugs in a country is the violence that usually accompanies it. The relationship between illicit drugs and violence has been documented in countries throughout the world. The level of violence ranges

from fighting between rival drug dealing gangs to traffickers intimidating the highest levels of national governments". (Ryan, 1997:1).

Thus not only is the illicit drug phenomenon (its use and abuse) a threat in itself but the related violent crimes are causing the possible escalation of crimes in general. Violence is associated with the supply and demand of drugs and an increase in violence could be due to an increase in illicit drug trafficking and dealing. So at this time, early 1997, there seems to be a greater realisation in South Africa of the adverse effects of illicit drug production even though the issue of illicit drugs and violence is not new. The threat of organised crime becoming powerful enough to infiltrate Southern African governments is ever present. Drug dealers may have already infiltrated the South African Police Service (SAPS) and government institutions, and by so doing have been able to assist syndicates by providing legal documents and permits. At this stage of debate (1997) the inadequacies of dealing with organised crime and illicit drug trafficking seem to pave the way for the establishment of the Prevention of Organised Crime Bill, recently established. This will be discussed at a later stage.

1998, in particular, has seen an increase in the growing concern with organised crime. The proliferation of newspaper articles on this subject is evidence of this. In earlier newspaper articles one witnesses the emergence of organised crime in public debate, but more recent articles emphasise the strength that criminal syndicates are gaining. There also seems to be frustration with the government' s intelligence agencies established over the past few years. This is reflected by President Nelson Mandela ' s denouncement of the services. Thus increased engagement with the problem is occurring.

The Institute for Security Studies has also started a three year monograph series on organised crime to attempt to better understand organised crime syndicates operating in South Africa and so to propose countermeasures to effectively deal with them (Gastrow, 1998)

6.1.3. Developing state capacity to deal with organised crime

One of the problems with South Africa' s handling of organised crime, despite all efforts in the past, are its weak institutions within the criminal justice system. There is also the possibility that an increase in policing activity could actually consolidate criminal groups and strengthen linkages between international and local groups. Over the next three years ("the window period") critical intervention is crucial (Shaw,

1998:8). The state has responded inadequately over the years, and especially demonstrated a lack of co-ordination and information sharing - a factor that has been emphasised by almost all reports already mentioned. A "single national specialised investigative agency to pool resources and skills" should be developed due to the low success rate in actually bring offenders to trial, despite successful monitoring of offender activities (Ibid.). The problem lies in the fact that South Africa has limited resources, which also limits specialised policing units and SAPS efforts to create an experienced and skilled core of detectives. Falling morale in the SAPS and lack of political direction have led to an accentuation of the above problems, so, despite any legislation being drafted, political leaders, do not drive the implementation process. So, the effectiveness of policing and the institutional strength of the state are integral factors in the fight against organised crime.

> "The weaker the state becomes over time, the more likely that criminal organizations will form parallel and competing points of power which will be difficult to displace". (Ibid. p9).

In the light of this, when one reviews the Department of Safety and Security' s Draft White Paper in South Africa (1998) similar themes recur - co-ordination, co-operation, effective law enforcement, effective social crime prevention and institutional reform, and it remains to be seen to what extent reform is possible. However with the increasing concern of international players, perhaps reform is more accessible. Importing 'best practices' from abroad may well aid processes of reform. There are many lessons that South Africa can learn from the United States of America with regard to anti - crime laws.

6.2. Criminal Justice Initiatives

Various policing initiatives, specifically, and law enforcement strategies, generally, have been directed at the organised crime problem. A review of these attempts to contain organised crime will be made.

The political transition of South Africa in the early 1990s brought about a redirecting of police resources to the policing of election campaigns and the like - especially the April 1994 election. The Organised Crime Unit was created as a specialised unit to deal with organised crime but due to transitional factors, crime prevention was generally not at the forefront of policing activities. The specialised units of the police force did not receive attention as to possible enhancement or development. Even though some

initiatives were made in the direction of investigating crime syndicates after the April elections and the following year, members of the police were more concerned with the changes within the police force taking place and experiencing anxiety about their future careers in the force. As a result police morale dropped and a resistance to the changes occurred. A focus on the legitimisation of the visible police force took place rather than on its effectiveness.In August 1995, a significant policing development did take place with the formation of the Southern African Regional Police Chiefs Co-ordinating Organisation or SARPCCO. This was not formed in response to organised crime but today it has proved to be the only concrete regional policing organisation employed to address organised crime amongst its other crime concerns. Its main objective is to address all cross-border and related crimes with the goal of co-operation and joint strategies with those states involved. Thus this would include information exchange and the joint management of criminal records for instance, while simultaneously respecting the national sovereignty of other states and equality of police services (Van der Spuy, 1997). In recent months, SARPCCO has set up electronic links with policing agencies and initiated heads of police meetings. However SARPCCO, along with the Inter-State Defence and Security Committee (ISDSC) are largely perpetuating co-operation at the "level of rhetoric" (Shaw, 1998: 8). Thus they are not effectively addressing organised crime in South Africa and are not equipped to do so. However regional co-operation in this regard is vital due to the cross-border nature of organised crime, thus efforts need to be made in this area of policing - and efforts are being made. However some of the obstacles faced are simply due to South Africa' s bordering countries, for example, not having the same level of resources, skills and expertise as South Africa.

The Department of Safety and Security demonstrate the need for increased strategies to counter organised crime in the SAP Annual Report. In this report the Police Service Act states, that the matter of responsibility for the SAPS, is:

> "...investigation and prevention of organised crime or crime that requires national investigation and prevention or specialized skills" (SAP Annual Report 1996/97:8).

The issue of organised crime has been identified as one of the national crime priorities around which resources need to be mobilised.

There are also references to police corruption, illicit weapons trafficking and narcotic related offences. The importance of crime intelligence as a means of infiltrating organised crime syndicates through an intelligence cycle - of identifying investigation

subjects, gathering and collecting intelligence and research - is vital. Key role players in this intelligence cycle are, for example, SARPCCO, National Crime Investigation Service (NCIS), South African Secret Service (SASS), Safety Services, South African National Defence Force (SANDF) and others. It also lists the means of restricting organised crime by identifying and neutralising syndicates; utilising crime intelligence; reinforcing policing of borders and ports of entry (with the assistance of the South Africa Revenue Service, SANDF and SASS to name a few); optimising regional and international co-operation; and promoting the blacklisting of stolen goods.

1997/1998 Policing Priorities and Objectives:

The focus on co-operation and communication is seen in the SAPS Policing Priorities and Objectives. This document lists the focus areas of the SAPS and uses the crime prevention framework established by the NCPS. Thus, as with the NCPS, one of the categories of crime, which is of the highest concern, is that of the investigation of criminal organisations. Mention should be made of the document' s focus on the control of illicit firearm trade:

> "The operational strategy for the Priority: Firearms, forms part of the broader strategy directed against criminal organizations". (Policing Priorities and Objectives, 1997:8).

Once again decreasing criminal syndicate' s activities is on the main agenda, but in particular: by establishing 'Reaction Forces' to assist in combating crime initiated by syndicates; by increasing co-ordination between intelligence services; and between other departments as well as between the SAPS and foreign police agencies. The SAPS' identification and infiltration of syndicates is a three-fold strategy:

Prevention through patrols and roadblocks.

Response through 'Reaction Forces' .

Investigation through specialised units and tracing teams.

The SAPS document also mentions that the operational strategy will impact on organised crime related crimes, such as illicit drug trading, illegal firearm trading, vehicle-related crimes, fraud and counterfeit currency and contraband circulation, also

acts of terrorism and sabotage. The illicit drug phenomenon is also linked, in itself, to various forms of violence.

The Incidence of Serious Crime Quarterly Report of 1998 (by the SAPS) mentions the Organised Crime Threat Analysis or OCTA. Thus no longer are there merely policies and strategies posed to deal with crime (from a policing perspective) but now a scientific endeavour to holistically view the threats associated with organised crime. OCTA is aimed at finding out the intricate ways in which organised crime operates - its structures and activities - thus a better reaction to this phenomenon can take place. The need for more effective legislation to contain organised crime is recognised in recent policy documents.

6.3. Legislative Frameworks

Perhaps the most important document is the National Crime Prevention Strategy or NCPS, prepared by an Inter-departmental Strategy Team, (composed of the Department of Correctional Services, Defence, Intelligence, Justice, Safety and Security, and Welfare). In 1996 the NCPS was the backdrop for discussions on crime in parliament as Sydney Mufamadi, the Minister of Safety and Security, mentioned the need for the analysis of the root causes of high crime rates. The NCPS became the means of this analysis and so too it clarified crime categories and priority crimes for the police plan of 1996 (Hansard, 1996). The NCPS also played (and does play) a role in legislation. Justice Minister Dullah Omar mentioned the need for this legislation in the criminal justice system in terms of drug trafficking in South Africa:

> "Our policy is that our courts must play their role in stamping out serious crime, particularly crimes involving violence, gangster-related crime [and] drug trafficking…" (Hansard, 1996:2841).

The NCPS (1996) was initiated by the Cabinet in 1995 and launched in May 1996 after thorough research contributed by international players, non-governmental organisations, Business Against Crime and particularly involvement of all security agencies and departments concerned with the prevention of crime - the government' s national priority. The NCPS' main focus is to shift from reactive 'crime control' to proactive 'crime prevention' - thus shifting from responding after crimes have been committed, to preventing crime from occurring. This new approach, according to the NCPS, is supported by certain objectives involving a co-ordinated, focussed policy framework, shared understanding and a common vision. Also the development of

national programmes to deliver quality service, the increase of community participation in crime initiatives, as well as the creation of a crime prevention capacity to conduct research and evaluate campaigns - both departmental and public - thus, too, facilitating crime prevention programmes at a provincial and local level. The NCPS (1996) emphasises a co-ordinated and focussed approach to crime and an involvement in the crime problems from all angles (Cachalia, 1997). The NCPS also outlines factors that have affected crime levels in South Africa. Such as for example the indication from research that states in political transition may experience an increase in crime, South Africa' s violent history is a factor that has left what the NCPS calls a "culture of violence" (NCPS, 1996: 4) - violence perceived in South Africa as acceptable. Another factor is the ease of obtaining firearms. These are but three of a number of factors that the NCPS refers to and thus the emphasis is on the multiple causation of crime - necessitating multiple/multifaceted approaches as opposed to simplistic, ineffective solutions. The NCPS then prioritises seven crime categories of concern, namely:

1. crimes involving fire-arms;
2. organised crime;
3. white collar crime;
4. gender violence and crimes against children;
5. violence associated with inter-group conflict;
6. vehicle theft and hijacking; and
7. corruption within criminal justice systems.

Organised crime includes illegal immigrants and narcotic smuggling as well as gangsterism - which according to this document is rapidly growing in South Africa. The NCPS also mentions that organised crime be targeted through intelligence gathering, close co-operation between departments, implementing a community collaboration approach and adopting strategies specifically to deal with gangs.

In general, the NCPS' Four Pillar approach to crime prevention consists of four main areas of work:

8. The criminal justice process - aiming to make criminal justice system efficient, effective and a clear deterrent for criminals.
9. Environmental design - designing systems to reduce opportunities for crime (by detection and identification).

10. Changing public values and education - in order to facilitate citizen participation in crime prevention.
11. Trans-national crime - this Pillar of the NCPS is responsible for regulating ports of entry and co-ordinating border policing so as to restrict smuggling in Southern Africa. Also improving co-ordination between South African agencies with regard to border regulation, and immigration policy (NCPS, 1996: 18). The Ministry of Safety and Security is the key agency spearheading this need for addressing transnational crime (that is, organised crime). Other key players are, for example, the Justice Department, South African Secret Service (SASS) and the Inter-State Defence and Security Committee (ISDSC).

6.3.1. The Legislative Framework for Transnational Co-operation

Three acts were enacted in 1996 to aid the SAPS, and they relate to the problems of organised crime in a transnational sense, in that the statutes provide for co-operation, information sharing and enhancement of judicial legislation in
this regard. They are as follows:

The International Co-operation in Criminal Matters Act (Act no. 75 of 1996:1)was enacted:

> "To facilitate the provision of evidence and the execution of sentence in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic and Foreign States, and to provide for matters connected therewith".

On the same day the Proceeds of Crime Act (Act 77 of 1996:1) was enacted with the view

> "[T]o provide for the recovery of the proceeds of crime, for the prohibition of money laundering and for an obligation to report certain information and to provide for matters connected therewith"

The Extradition Amendment Act is an amendment of the Extradition Act of 1962, and in terms of Section three of the Amended Act:

> "Any person accused or convicted of an extraditable offence committed within the jurisdiction of a designated State shall be liable to be surrendered to such a

designated State, whether or not a court in the Republic has jurisdiction to try such a person for such offence".

In April 1997 the Deputy Minister of Safety and Security, VJ Matthews made an important statement regarding the threat of international crime syndicates, the statement fully addresses the root of the organised crime problem in terms of the threat to the sovereignty of states:

> "Internationally we now have a threat to government. The International syndicates want to control governments and more and more it is becoming a struggle for power between governments and the criminal organisations···These are the sorts of people we are getting in our country··· We therefore have to start discussing criminals and their operations···" (Hansard, 1997:1467).

And since then discussions have proliferated on this topic and culminated in the drafting of the Prevention of Organised Crime Bill.

6.3.2. Framework for a Drug Master Plan

The Drug Master Plan deals specifically with drug trafficking, however it cannot be exclusively dealt with when one considers the interdependence drug trafficking has with organised crime, in general. As drug trafficking is a major aspect of organised crime, the Drug Master Plan' s main strategies to counter drug trafficking will be highlighted.

The Drug Master Plan for South Africa was developed by request from the Minister for Welfare and Population Development. The United Nations Committee on Narcotic Drugs too, requested the formulation on a National Drug Master Plan by various States. And, furthermore, the United Nations Drug Control programme has increased assistance to States in this regard. The Drug Master Plan is mostly concerned with specific abuse of drugs, however there has been pressure from the international community to adapt an anti-drug strategy so as to combat drug trafficking as well.

The Drug Master Plan outlines the measures applied with respect to drug trafficking in South Africa up to 1997 - it mentions the three acts approved by parliament in 1996 on asset forfeiture, extradition and international co-operation, and the fact that South Africa had entered formal and informal agreements with the USA and its DEA, as well as Great Britain and Interpol. These informal/formal agreements range from gaining mutual assistance, intelligence sharing, co-operation and training. The Drug Master Plan

also mentions the Southern African Development Community' s (SADC) facilitation of the Protocol on Combating Illicit Drug Trafficking - which was signed by 12 Southern African countries (mention of this is made in the section on Southern Africa). However the actual prosecutions of illicit substances are conducted under the Drugs and Drug Trafficking Act of 1992 (Act 140 of 1992) (Drug Master Plan, 1997).

The Plan comprises four broad elements: supply reduction initiatives; reduction in drug demand; reducing harm from narcotic use and trade; and co-ordination, strategic resource deployment and management (Cachalia, 1997)

Supply reduction initiatives involve law enforcement, introduction of legislation and international collaboration. The reduction in number of ports of entry and international airports may allow for an increase of control over what is allowed into the country. Once again crime intelligence is an area of focus specifically with regard to organised crime syndicates. There is also the possibility for the decriminalisation of drug use as an option for alleviating the clogged up criminal justice system and also, in so doing, targeting organised crime syndicates with the aid of the resources that would then be made available. Reduction in drug demand is mainly aimed at habitual users and those most susceptible to drugs - that is, schoolchildren. By reducing drug supplies, a subsequent increase in price will result and a possible change in user patterns may occur. Reducing the harm of narcotic use and trade also focuses on individual use. However, co-ordination, strategic resource deployment and management emphasise a more departmental approach, particularly the co-ordination of departments and non-governmental organizations. A much higher level of co-operation is needed than what is presently the case, in order for successful policy formation and implementation. (Cachalia, 1997). However reducing the drug trafficking problem will not necessarily defeat organised crime due to the array of activities organised crime syndicates engage in other than drug trafficking. Drug trafficking, specifically is linked to other criminal activities in that stolen vehicles and drugs may be exchanged. So, drugs are brought into South Africa from neighbouring countries in exchange for stolen vehicles taken out of South Africa. (Interview 3). Also the drug phenomenon is linked to weapons smuggling, in that managing drug trafficking on an international scale necessitates forms of protection of the merchandise being smuggled (that is, the drugs). Weapons become a necessity and may then become useful products to sell in their own right. Thus there is a close link between drugs and guns, as well as a link between what is exchanged for drugs - such as stolen vehicles

On evaluating the Drug Master Plan, it would seem to be an important document in that it addresses, specifically, the drug trafficking (and drug abuse) problem in its own right; a necessity, considering the possibility that legislation aimed at organised crime in general may not effectively counter the drug trafficking problem in all its complexity. Thus a separate emphasis on illicit drugs (notwithstanding its close link to organised crime) is as important as addressing organised crime in general.

7. SOUTH AFRICA AS A USER COUNTRY

Another debate or theme has also emerged in the past couple of years and that is the threat that South Africa has become a user country. In other words, South Africa' s growing drug trafficking market has led to South Africa becoming not only a transit country but also a user country - thus increasing drug abuse problems and associated violence. A strategy employed by organised crime members to market their drugs is to supply a free sample of a type of drug along with the purchase of another type of drug. For example in some shebeens in the Western Cape, with the purchase of Mandrax tablets, free 'crack' is upplied. Also gang members, at nightclubs, invite select numbers of people to sample free drugs, thus creating an interest and establishing a growing market (Interview 3). South Africa, as a drug transit country, also has a fluctuating currency - the main trend internationally seems to be that drug transit countries become drug user countries. When a fluctuating currency influences or even causes traffickers (those controlling/monitoring the drug trade from within South Africa) to want their payment to be the product itself rather than the unstable currency. They are thus paid with illicit drugs and illicit drugs do not lose their value in an unpredictable manner as the local Rand does. Traffickers stand to gain more as they then sell their product to domestic buyers and due to the nature of their array of techniques to generate demand, an increase of drug dependency results. Thus they create a market and the increasing number of buyers leads to a growing demand in the drug trade:

> "Transit zone countries become user zone countries and it can happen real fast." (Quoted in Callahan, 1997:10).

8. RGANISED CRIME ND SOUTHERN AFRICA-EGIONAL EVELOPMENTS

Since South Africa is but one state of the African continent, it seems inevitable that interaction would need to take place between South Africa and Southern African states with respect to organised crime syndicates - particularly when organised crime syndicates are known to operate from for example Nigeria and then infiltrate other

African states or at least make use of African states as transit points. (ISSUP Bulletin, 1994). According to Gelbard (1996) these transit points/centres include Angola, Mozambique, Zambia and Zimbabwe. A brief assessment of the major interactions between South Africa and Southern African States follows:

Organised crime syndicates are focussing on Africa as a transit facility for the trade in illicit drugs, in fact drug trafficking occurs in most African states. Mozambique and Tanzania are the countries most used as entrance routes for Middle Eastern, South East Asian and South American drug traffickers. Africa is a magnet for organised crime syndicates due to ineffective or insufficient border controls possibly because of many countries experiencing structural problems, and far-reaching socio-economic changes. Also many African countries have an internal capital flow which makes drug smuggling even more profitable (ISSUP Bulletin, 1994).

Some form of regional agreement is needed in terms of policing, so as to ensure co-operation between South Africa and other African countries. In fact such an agreement is already underway as the South African Parliament has realised the necessity for ratifying a SADC agreement on crime. This agreement is meant to enhance African co-operation (that is, exchange of information and arranged visits) with regard to transnational crimes (such as illicit drug and weapon smuggling), so as to encourage rather than hamper cross border police investigations. In other words police will be permitted to enter and travel throughout states involved in the agreement, as well as question witnesses; however accompaniment by the host country' s police service will take place. Representatives of governments of the SARPCCO have as yet signed the agreement. All 14 SADC countries are now participating in a uniformalisation of databases and customs documents and the like to address the organised crime problem.

The ISDSC is a structure within the Southern African Development Community (SADC) - formed in 1992 and increasingly concerned with security issues. The ISDSC at the level of SADC is concerned with security co-operation and receives input from three subcommittees: Defence, Public Security and State Security. The Public Security subcommittee is in the area of policing - usually concerned with cross border crime, drug trafficking, and illicit weapon smuggling amongst others (such as illegal immigration and vehicle theft). The Public Security Subcommittee is supported by SARPCCO, as it, and the ISDSC in general encourages egional co-operation and co-ordination in the move towards a collective regional security approach (Van der Spuy, 1997).

Legislation too, with respect to African co-operation is necessary for police co-operation to be effective. The South African Department of Justice presented a brief chronological account of (African) legislation in The First 1000 Days (1997). It begins with drug trafficking regulations and states that the Drug Trafficking (Mutual Assistance) Regulations of 1995 (under section 61 of Drugs and Drug Trafficking Act, 1992 - Act 140 of 1992) came into being and operation on 1 November 1995. In this regulations were provided for mutual assistance with certain designated countries with respect to the confiscation of the proceeds of drug trafficking. Also a framework and procedure for processing and executing mutual assistance requests was established (Department of Justice, 1997). This mutual assistance agreement was concluded with the United Kingdom, Northern Ireland, as well as Argentina, Brazil, Chile and Paraguay. With regard to the African agreement, South Africa agreed to designate Zimbabwe in terms of the 1992 Act; and Namibia launched a joint investigation into the promotion of legislation.

At the SADC meeting in Mmbatho in November 1995 and in Maseru in March 1996 the finalisation of the Draft Protocol on Combating Illicit Drugs took place. This Protocol included accession to the Vienna Convention (or United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December, 1998) and thus adoption of domestic legislation in accordance with the Convention. Also, in this regard, the United Nations sponsored a Southern African Legal Workshop on Subregional Co-operation with respect to Drug Investigation and Prosecution.Thus efforts have been made and are being made in terms of establishing and promoting African co-operation in the fight against drug trafficking. However, these are legislative initiatives in terms of combating the drug trade, specifically - defeat of organised crime initiatives are as yet very much on a practical level in so far as policing strategies are concerned. Legislation on the issue of organised crime has not been regionally harmonised, although, as mentioned, policing initiatives are underway (Interview 1). In fact this brings to the fore a whole new agenda especially when one exposes the concept of an 'African Renaissance' and the need to find 'African solutions to African problems' (Malan, 1998:1). The issue becomes that of more than just organised crime, but the maintenance of peace in Africa and this maintenance without necessarily having international assistance. Thus there emerges a new trend for the enhancing of Africa' s capabilities. Secretary General for the Organization of African Unity (OAU) addressed the Second meeting of the Chiefs of Defence Staff of Member States of the OAU by stating that:

"...OAU Member States can no longer afford to stand aloof and expect the International Community to care more for our problems than we do, or indeed to find solutions to those problems which in many instances have been of our own making..." (Malan, 1998:1).

The above perhaps highlights the African situation as unique: Africa as not merely another passive receptor for international policing and legislative initiatives. Lastly and more to the point, it should be noted that regional initiatives throughout Southern Africa are integral to organised crime management, especially when it is clear that South Africa cannot hope to operate in isolation from the rest of Southern Africa. However many Southern African countries are not as well equipped to deal with organised crime as compared to South Africa. South African law enforcement agencies are far more skilled and resourced than regional agencies. This necessarily exemplifies the organised crime problem, as border control is a necessary initiative. Only long-term solutions can confront this problem and so far only short-term initiatives have come into play. The differing capacities of South Africa and its neighbours will only limit the extent to which South Africa can counter organised crime (Shaw, 1998).

9. SOUTH AFRICA ' S RECENT ENGAGEMENT WITH ORGANISED CRIME

The preceding years have repeatedly shown the need for legislation to undercut policing strategies to deal with organised crime. All academic comments and public debate have culminated in a South African engagement with organised crime, more so than ever before. The result has been the recent creation of the Prevention of Organised Crime Bill.

9.1. International Assistance with Regard to the Bill

The USA has been at the forefront of pressurising countries to address the organised crime problem, in virtue of the fact that uniformity of law enforcement strategies are necessary for the successful joint international venture against organised crime. South Africa has, consequently increasingly been approached by the USA in terms of introducing American-style laws to deal with street violence and drugs (Interview 3). Experts from the USA and Britain were sent to South Africa specifically to assist in the drafting process. Funds were also provided by the British High Committee through the Department of International Development Funds (Interview 1). However it is not easy to simply introduce American legislation into a unique South African environment.

Some American laws are criticised for violating human rights and have consequently been thrown out by US courts. For example anti-street gang laws are considered unconstitutional by some in the US due to the practice of identifying gang members according to dress, talk and places where they congregate, yet some innocents are accused of belonging to gangs because they might fall in this criteria. In South Africa, too, this could pose a similar problem. The US RICO laws (Racketeering Influenced Corrupt Organization) criminalises membership of a group participating in racketeering, and are especially directed to drug or Mafia-related crime syndicates. The RICO laws are thus useful for organised crime syndicates as opposed to street gangs and local drug dealing, as they may effectively spearhead the leadership of organised crime syndicates.

However the prosecutions of organised crime members through the use of the RICO laws are complicated and involve long-term investigations. In South Africa therefore extensive investigation and co-operation between SAPS and prosecutors is necessary. However South Africa, at present, may not be equipped to effectively administer RICO laws, considering the state of the oppressive criminal justice system. Yet legislation has been drafted to deal with organised crime syndicates and gangs in South Africa. The Prevention of Organised Crime Bill is the culmination of international pressure and South African concerns with organised crime. As far as implementation is concerned, many countries are aiding South Africa in its policing system. For example, the Federal Bureau of Investigations, the Drug Enforcement Agency, Customs and Immigration Services as well as Interpol, have all set up offices in South Africa.

9.2. The Prevention of Organised Crime Bill

9.2.1. Background to the drafting of the Bill

In April 1998 the ISS was approached by the Minister of Justice and requested to draft a Bill enabling the government to address organised crime more effectively. It was also requested that three issues be accommodated – these three issues being that of Rico-type legislation in the USA; civil forfeiture of assets; and street gang legislation. The deadline for the drafting of the Bill was August. Peter Gastrow was set the task of gathering experts in the field of organised crime to deal with specific areas, such as the criminal law aspects; money laundering; criminal civil forfeiture and constitutional issues. Various role players (approximately 25 individuals) from Universities, the Departments of Justice, and Safety and Security, and the Secretariat for Safety and Security, as well as from the Attorney General' s Office in the Western Cape, the SAPS amongst others, were also identified and notified of the request. Thus experts,

representatives of departments and interest groups were notified and incorporated into the drafting process so as to handle specific areas of the Bill, requiring expertise. After the gathering of experts, a whole day workshop commenced whereby assessment and understanding of the brief for the Bill took place. For instance questions were asked as to what a reasonable time frame would be, what the brief would involve, who would be involved in what, whether the brief would be feasible and similar questions. The first workshop brought together all participants and areas of research were identified, such as the need to conduct research on civil forfeiture, criminal law, implementation issues, international implications and the like. Research teams were created to confront the various research aspects mentioned above. These aspects had to be formulated before the drafting could start. The teams, under a convener, were given the brief so that research could be conducted on these aspects. While research was being conducted, an expert draftsman was commissioned to begin work on the first draft of the Bill. In this respect Rico and Californian state legislation and specifically street gang legislation from Florida was looked at, as well as the procedural implication of the draft.A second whole day workshop was held whereby, at that time, all the documents that were worked on, as well as the first working draft were distributed amongst all the participants. Issues discussed included the possibility of incorporating Rico legislation into the Bill; also the matters of civil forfeiture and constitutional issues were dealt with. In this way the draftsman was given the points that had to be included into the second working draft of the Bill.By the third workshop, the re-worked draft began to take shape, and the research teams were then tasked to focus on specific aspects of the draft Bill. For example, one research team focussed on criminal law aspects and the resulting position paper (along with the papers from the other teams) was submitted to the draftsman. Consequently the Bill was created, updated and revamped throughout the duration of the workshops. In August the final draft was presented to the Minister of Justice. It is expected that parliament will meet in the first week of November (1998) to address the Bill (Interview 1).

9.2.2. Summary of the Contents of the Bill

The Bill introduces what it calls "extra -ordinary measures" to combat organised crime and gang activities. This will entail prohibiting specific activities of organisations that have committed specific serious offences. The Bill also incorporates the civil forfeiture of criminal assets (that is, assets that have been used to commit an offence or that are the proceeds of crime). A Criminal Assets Recovery Fund is also mentioned in the Bill so as to provide financial assistance to law enforcement agencies involved particularly in combating organised crime. The Bill also criminalises certain gang

activities as well as amends the Drugs and Drug Trafficking Act (1992), the Proceeds of Crime Act

(1996) and the International Co-operation in Criminal Matters Act (1996).

Chapter 1:

This incorporates a list of definitions of various terms. For example the Bill defines a criminal gang as:

> "…a formal or informal ongoing organisation, association, or group that has as one of its primary activities, the commission of criminal acts and that consists of three or more persons who have two or more members who individually or collectively engage in or have engaged in a pattern of criminal gang activity…" (Prevention of Organised Crime Bill, chapter 1, 1998:3).

For evaluation purposes the definition of criminal gang member should also be noted. In this definition courts are advised on how to identify a gang member through a number of factors that are listed in the first chapter. For example a criminal gang member may be identified if s/he adopts a particular style of dress, use of hand signs, language and similar associated gang styles. Other factors include physical evidence of gang membership through photographs or documentation; or being arrested at least once in the company of criminal gang members identified as such.

Chapter 2:

This section deals with the offences and penalties relating to organised crime. The offences, punishable by a maximum period of 30 years imprisonment, include, for example, managing an enterprise that conducts or participates in illegal conduct or, simply put, being involved in such an enterprise. The essence of this chapter is that those participating in organised criminal activities as well as those not directly involved but nevertheless leading the organised crime syndicate can be convicted. Chapter 2 also includes a brief section on criminal forfeiture. However it is in chapter 3 that restraint and forfeiture of assets are fully addressed.

Chapter 3:

This chapter includes a vast and complex section on the forfeiture of assets. In essence the main thrust of the Bill, regarding this, is that the forfeiture and seizure of assets can now be conducted without the individual(s) involved being convicted first.

This is an amendment of the Proceeds of Crime Act (1996) whereby those involved in the criminal conduct are to be convicted before the assets can be forfeited. According to the Bill, if a senior police officer has reasonable suspicion that assets are involved in the proceeds of crime, s/he may then approach a judge in chambers to give his/her evidence. If the judge is satisfied with the evidence s/he may grant a restraint order whereby the assets are temporarily frozen. That is, they cannot be used or sold by the suspect. All parties involved (that is, those who have an interest in the assets) are notified, and, importantly, possible innocent owners of the assets are also notified. Within 90 days a hearing should be held whereby all involved may attend, an appeal is then made to the judge to rescind the order (whereby the judge has the power to amend the order). If the order is not rescinded, the assets are translated into cash and transferred into the State coffers. There is still debate on the exact placing of the funds, but use of the funds may include assisting the protection of witnesses. In terms of the above, then, the civil forfeiture approach adopted attempts to keep within the constitution by avoiding problems experienced in the USA. More will be discussed on this, once this section is evaluated in more detail.

Chapter 4:

This section is devoted to the establishment and inner working of the Criminal Assets Recovery Fund. A board that is to be appointed by the Minister of Justice in consultation with the Minister of Finance will manage this Fund, in terms of the Bill. Essentially the Fund is to be managed to financially assist law enforcement agencies involved with the combat of organised crime, also to provide assistance (medical or rehabilitative) to the victims of criminal gang activities and the like.

Chapter 5:

This is the so-called street gang section of the Bill, whereby a list of gang related offences are described, essentially prohibiting knowing membership of a gang involved in criminal activities. Also there seems to be a distinction between the more sophisticated syndicate referred to in chapter 2 and the street gang in this chapter which may incur convictions of a far less number of years - approximately three years as opposed to thirty years.

9.2.3. Evaluation

What follows is an evaluation of the content of the Bill as well as the Bill' s purpose within the criminal justice and policing context.

Conceptual/definitional themes:

Organised crime, as a nebulous concept is very difficult to define; however in chapter 1 at least an attempt has been made to define it. The definition employed in the Bill may very well influence the effectiveness of it. Courts will have to interpret the definition; in fact it has been suggested that a definition of 'organised crime' be introduced rather than it being derived from a collection of other definitions such as 'illegal conduct' or 'pattern of illegal conduct' This seems to be a reasonable suggestion since the Bill is focussed on the issue of organised crime, consequently a coherent, specific definition or at least an attempt at a definition should be made. The definition is also necessary due to the fact that the procedures, offences and penalties introduced in the Bill at times infringe on procedural principles and rights. It is realised that these erosions may be justifiable considering the nature of organised crime, but a linkage should occur between the procedures and the problems to be addressed so as to avoid vague provisions and overly wide application. (Submission by the South African Human Rights Commission, 1998)

The wording may also be too foreign due to the use of legal terms (particularly since it employs American and New South Wales wording) which may not be user-friendly to the South African Courts. Courts will have to interpret terms like 'pattern of illegal conduct' or 'ought reasonably to have known' The definitions are thus identified by various submissions as being too vague or open ended and thus challenging the Constitution, particularly the terms 'criminal gang' and 'criminal gang member' as related to chapter 5. These definitions are open to abuse and discretion in relation to whom is a suspect. The constitutionality of the Bill is thus questionable and may have no jurisprudence in the South African context. The Bill, once becoming an Act, may, as a consequence, spend a large amount of time in the Constitutional Court. For example the Constitutional Court may criticise the fact that the National Director (of Public Prosecutions) has to be satisfied that organised crime has been committed (in section 2 (3)(b) of the Bill). But since there is no definition of 'organised crime' per se the National Director' s decision comes into question, particularly when there is no basis on which to challenge his/her decision.

So chapter 1 does run into constitutional problems; however many point out the fact that the process of drafting the Bill was limited to a very short period of time, thus not allowing for absolute perfection in terms of the contents of the Bill. Many of the interviewees were concerned about the limited period of time and the fact that certain problem areas needed to be identified. However, the Bill was not intended to be the

final refined product, merely a draft to be delivered to the Minister of Justice. The Minister of Justice would then take it further - that is, Cabinet approving the Bill, and state law advisors assessing technical aspects as well as the Portfolio Committee approving the Bill. (Interview 1). However, despite this the Bill does have problems within its contents that cannot be ignored.

Civil Forfeiture:

The issue of civil forfeiture is a controversial and, until recently, uncharted area of law in South Africa. Civil forfeiture laws pose problems - particularly their openness to abuse. In the US these laws have been abused because of their nature - the government is allowed to seize property without convicting the owner of the property. So only probable cause is necessary to believe that property was used/gained illegally. The onus is then on the owners of the property to fight the seizure; however, due to the expense involved many do not.

> "In theory, civil forfeiture of assets is aimed at confiscating the illicit gains that are the result of proceeds of illegal drug transactions". (Gerber and Jensen, 1998--) (Italics added).

Due to the lower standard of proof that is met (only requiring probable cause instead of beyond a reasonable doubt) due process protections of the accused are not considered - the property becomes the defendant and is the object of the proceedings. The guilt/innocence of the owner of the property is irrelevant. Two consequences of civil forfeiture are that law enforcement officials shift from pursuing crime to pursuing assets - it becomes a profit-making enterprise. Also law enforcement agencies become more autonomous, policing for profit results in the police having resources independent of political control:

> "...as the ability of the police to generate external resources increases, the capacity of the elected officials to maintain control of the agencies decreases". (Holden, 1993: 24 in Jensen & Gerber, 1998).

In South Africa plans to prevent abuse have included only allowing national/ provincial attorney generals to initiate proceedings. However civil forfeiture laws may still face constitutional challenges simply due to the deprivation of property involved. Nevertheless safeguards have been introduced and various interested parties have forwarded further suggestions. The submission by the Human Rights Commission

suggests a limitation of procedures in this chapter so as to make it more applicable to organised crime and associated cases. Thus they propose the removal of the section (section 6(1)(a)) which could extend civil forfeiture to cases where it may not be appropriate. Also the shift from criminal forfeiture to civil forfeiture denies the checks and balances that a criminal case would maintain (Interview 2). Civil law cases would not afford the same safeguards thus diluting a citizen' s rights. In other words the Committee' s submission notes that the Bill has taken legal matters from within criminal law and shifted them to a civil arena. Forfeiture becomes a civil matter and those safeguards guaranteed to the suspects in criminal matters will no longer apply. Other problems with civil forfeiture also relate to the problems suffered under American jurisprudence. For example, innocent persons may suffer losses merely due to a suspicion of a committed offence. However an important aspect of the Bill is that convictions are no longer necessary to forfeit assets. In the past the Proceeds of Crime Act required that a conviction take place beforehand. However it was usually the case that convictions were few and far between. In fact, the Proceeds of Crime Act has been a white elephant due to its clumsy and complex nature (Interviews 4 and 5). So the Bill makes provision for halting or hampering organised crime activities and then convicting organised crime members and leaders. The Bill is designed to provide the tools for legislation to address organised crime in South Africa. And one of these tools would be to target organised crime syndicates without limiting the civil liberties of the accused to such an extent that it violates the constitution. Thus the civil forfeiture aspect of the Bill attempts to balance the crime control and due process aspects of South Africa' s jurisprudence by learning from foreign mistakes and building in safeguards.

Street gangs:

The submissions from the Human Rights Committee and Commission both suggest either a massive redefinition of this section or outright exclusion of it from the Bill, respectively. The Committee once again highlights the problem with vague, open-ended definitions:

> "The definitions are much too sweeping, and a pair of tackies, Levis jeans and a handshake can potentially incriminate a young person." (Submission by the Human Rights Committee, 1998: 8)

They conclude that Chapter 5 does not fit into the rest of the Bill based on the primary message of the Government: to address organised crime - an international problem involving the attempted conviction of the "untouchables" (p5). They reason

that the section on street gangs is misplaced and instead a prioritisation of street gang crime and organised crime should take place separately. The Committee also raises issues as to what the section on street gangs may provoke. For example the section may re-victimise marginalised youth and catch numerous youngsters into the web of the law, thereby necessitating the imprisonment of many young people. However in contrast to this perception, others would maintain that the street gang section is merely to elucidate the differences between gang activity and syndicate enterprise. The gang section may very well be "more bark than bite", however it does aim to target the street gangs of today which may evolve into syndicates if left to develop. Thus even though street gangs offences consist of sporadic, spontaneous violence it could worsen. In fact many street gang members become hitmen and runners for the syndicates and for drug lords. (Interview 5). The inclusion of the gang section was to stem street gang formation before the hardening of its members, and perhaps to curb the effect those syndicates have on the street gangs (by for example providing role models for street children). There is a possibility that local magistrates' courts will rarely use the street gang section, if at all, due to its soft definitions and the fact that outright banning of gang membership is not included.However only time can tell to what extent this section is used and more importantly to what extent it may be abused. If abused, Human Rights suggestions for a separate bill on street gangs may curb constitutional infringements.

Concerns about the Drafting Process:

A main criticism of the entire drafting process is the speed under which it was conducted. This may have hampered effective investigation of organised crime in South Africa. For instance the Human Rights Committee has not had the opportunity to conduct comparative research and effectively investigate the implications of the Bill' s measures. There is the possibility that the Government has created the Bill as a means of short-term solutions and to create the perception that it is tackling the crime problem. A more realistic approach would be to avoid rushing the Bill through parliament and thus avoid lengthy Constitutional Court evaluation. Rather a more thorough process of debate and evaluation should take place. (Interview 2). Despite this criticism most academics agree on the serious nature of organised crime in South Africa and the necessity to tackle the problem timeously. However most agree, too, that the Bill cannot be effective without at least some infrastructure amendments - more specifically the improvement of the criminal justice system.Blockages within the Criminal Justice System:Presently criminal courts may not be ready to deal with the legislation contained in the Bill. The criminal justice system needs to be equipped by training police and prosecutors - a task that in America took a couple of years to achieve. The danger of

applying a Bill to a justice system not equipped to deal with it is that the legislation could become counterproductive and possibly heighten abuse (Interview 1). Thus from a criminal law perspective, merely applying the laws of the Bill cannot effectively confront organised crime in South Africa. The Human Rights Committee' s submission calls this "legislation in isolation" (p7) whereby the Bill is not part of any holistic plan, but rather a "quick-fix" (p8) to the organised crime problem. Presently prosecutors, magistrates and judges need extra infrastructure to implement the complex Bill as well as specialised skills. The criminal justice system requires a back up, for example training, modern database and information systems, police remuneration and resources, and the like. Another problem with outright application of the Bill is lack of resources - especially when one considers the vast resources necessary for the implementation of the Rico laws in the USA. The only proviso for this seems to be the attempt to redirect the Criminal Assets Recovery Fund to the justice system so as to invest in development. (Interview 4).

Police Enforcement of the Bill.

One of the reasons for the creation of the Bill was to enable police to target entire organisations, not just the individuals within the syndicates. Tracking sophisticated syndicates requires sophisticated methods - such as extraordinary legislation and innovative policing and investigation. As far as investigation is concerned, methods of surveillance involving undercover agents, electronic listening devices and information from informers would be required. Not only that but effective detective work is needed and unfortunately South Africa does not have enough skilled investigators. Generally, knowledge and implementation resources are very real constraints to the effective enforcing of the Bill. South Africa' s resources are also very limited, thus equipping the police with, for example, electronic up-to-date equipment may not be possible. The SAPS may very well not be able to heighten its level of sophistication to challenge the shrewd methods of syndicates. (Interview 1).

Another serious problem is the threat of corruption within the SAPS in particular collusion between police and syndicate members. In virtue of this, the types of advantage the efforts of covert operations can achieve are minimal due to the information passed by corrupt police officers to the syndicates under surveillance. Corrupt police officers may thus not only pass secret information in advance but also supply legal dockets to suspects on trial so as they can prepare their defense. The fact of the matter is that due to the nature of their investigations, police officers engaged with organised crime activities, involving high finance crime issues, are more vulnerable to

being corrupted. The SAPS at the moment is in a state of division due to the fact Å police investigating each other and thus not being able to operate as a coherent unit. The extent to which the police are involved in assisting syndicates is indicative of the extent to which organised crime is extending its influences in South Africa. In light of this it seems that the Bill my be subject to abuse due to the lack of facilities to track police so as to determine to what extent their discretion may discriminate investigations and thereby render the Bill obsolete.

In conclusion, the effectiveness of the Prevention of Organised Crime Bill can only take place within a broader spectrum of changes - not only within the criminal justice system, but also within the police service especially. Probably the most effective manner to threaten organised crime syndicates in South Africa is to weaken them simultaneously; however this is not a realistic solution. The reality is that attempts will be made to prosecute the most publicly known syndicates - one again emphasizing visible police success rather than on actual organised syndicate penetration (Interview 3).

In the light of the above the Bill may very well be an election strategy as the Bill was prepared in a vacuum in that no other state departments were allowed substantial developmental inputs. Consequently the political urgency of the Bill may hamper substantial reform - reform that is definitely necessary in a Bill full of loopholes and in a very raw form.However considering the serious challenges that organised crime creates, worldwide, some would argue that South Africa is on the right track as far as challenging organised crime is concerned. Countries worldwide with far better resources and expertise are not necessarily succeeding more than South Africa at the moment. This is simply due to the ever-changing and increasing adaptations of international crime syndicates - thereby seriously challenging policy initiatives and policing strategies, globally. The consolation to South Africa is that organised crime syndicates are not, as yet, up to the level of sophistication to directly challenge South Africa' s sovereignty. However the urgency of addressing the problem cannot be downplayed as organised syndicates are increasingly taking advantage of criminal justice and policing weaknesses.

10. CONCLUSION

International co-operation is the key to combating organised crime a simultaneous global criminal justice and police confrontation of organised crime will eliminate or at least reduce the possibilities for organised crime syndicates to escape law enforcement

strategies by moving from country to country. However the harmonisation of global strategies is an ambitious undertaking, the constant threat of syndicates corrupting key policy-making officials also has to be taken into account. Constant effort in the direction of global relations is a key incentive that needs to be maintained: The current international concern with organised crime and the attempts to assist weakened states is a noteworthy occurrence that should be maintained.

Societal engagement with the problem is minimal, organised criminal activities are largely unseen and unheard of by average citizens. Organised crime operates so successfully due to its hidden agenda and covert operation. Perhaps an awareness of the threat of organised crime (potential or real) could better arm society with the sense to confront it. In this way, perhaps, inhospitable environments would be created so as to deter would-be organised criminal activity. The increased involvement of the public could support failing law enforcement strategies.

From the above description alone, organised crime tends to be portrayed as a malignant tumour spreading in the face of moral decay - an image not altogether discouraged by state authorities. It must be remembered that organised crime syndicates may involve ordinary people - the opportunities and reasons for committing crime are increasing due to the growth of global hardships. More and more countries are experiencing social and environmental problems. One of the ways to reduce the opportunities and incentives for participating in organised crime would be to build society from the inside out. To establish welfare and diversion projects aimed at targeting would-be organised criminals. Perhaps attempts at education development would better enable society to avoid the pitfalls of tolerating and even colluding with organised crime syndicates. At present, attempts have been directed at the criminal justice systems and policing agencies - a hard-core retributive approach is being opted for. This can only be effective if substantial preventive measures at a societal level are made. Perhaps this is a not too distant future prospect and possibility in strong democratic as well as weakened states, worldwide.

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CANADA'S FIRST
DRUG TREATMENT COURT

Prepared by
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Ontario Court of Justice – Toronto

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INTRODUCTION

"The establishment of drug courts, coupled with their judicial leadership, constitutes one of the most monumental changes in social justice in this country since World War II.[1] The emergence of Drug Treatment Courts (DTCs) as a key component of a revised criminal justice strategy, grew out of a recognition that the traditional approach of incarceration for drug addicts was a failure.[2] "Criminal justice practitioners have come to realize that incarceration alone does little to break the cycle of drugs and crime and that prison is a scarce resource, best used for individuals who are genuine threats to public safety."[3] "Policy makers and practitioners responsible for creating drug courts recognize that substance abuse and related criminal behavior is a complex, multi-faceted problem that involves major issues of criminal justice, public health, substance abuse treatment, and utilization of community resources."[4] The result has been a proliferation of DTCs; at last count numbering close to five hundred. This rate of growth reflects the belief of many in the American justice system that DTCs, provide an effective alternative to jail for non-violent drug dependent offenders.

In this article I propose to provide a brief history of DTCs, describe how they operate, and why they are growing so dynamically in the United States. I will then review the Toronto DTC and provide brief and very preliminary data on its progress. The article will conclude by discussing concerns with the DTC model, and how "success" is measured in Drug Treatment Court.

WHAT IS A DRUG TREATMENT COURT?

A Drug Treatment Court is a court specifically designed to supervise cases of drug dependant offenders who have agreed to accept treatment for their substance abuse. These courts force the offender to deal with and accept responsibility for his or her

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1 General Barry McCaffrey, Director, Office of National Drug Control Policy. DRUG COURTS, A REVOLUTION IN CRIMINAL JUSTICE, published by the National Drug Court Institute 1999 p.5

2 In this article I use the term "Drug Court" and "Drug Treatment Court" interchangeably because in the United States the term "drug court" is often used to describe a drug treatment court. In Toronto we only use the term "Drug Treatment Court."

3 Notre Dame Law Review, Volume 74, #2, THERAPEUTIC JURISPRUDENCE AND DTCS, P. 449. January 1999 The Honorable Peggy Fulton Hora and the Honorable William G. Schma, John T.A. Rosenthal.

4 Experiential Learning: Implications for Drug Court Leadership and Management Volume 14 Number 3 (1999), Patricia H. Murrel and Susan P. Murrel p.1.

addictions. A DTC is premised on the belief that drug dependency is not simply a law enforcement/criminal justice problem, but an overriding public health and societal concern.[5] The uniqueness of DTCs lies in their ability and willingness to combine the traditional processes of the criminal justice system with those of the drug treatment community. The result has been a peculiar blend of treatment and judicial supervision, which stands as the essence of the DTC concept.

"Drug abusers do not commit crimes *in order to* use drugs so much as they commit crimes *because* they use drugs."[6] (emphasis added) DTCs start with the understanding that increased and harsher penalties will not prevent or decrease substance abuse behaviour. Addiction, not a predisposition to criminal behaviour, explains why a large group of core drug users persevere in their behaviour despite tougher criminal sanctions.[7] The traditional court process, with its emphasis on incarceration, does nothing to address the drug user's addiction.[8] Jail merely provides another venue for drug use and drug dealing. There is a scarcity of drug treatment programmes for those incarcerated; in addition, the effectiveness of such treatment is problematical given that it does nothing to assist in reintegrating the offender into the community.

Probation, with overworked and under resourced officers, is often unable to offer immediate and effective treatment. The offender in such a system will re-offend because the system has not recognized that treatment is the only viable option to address what is essentially a public health problem.

DTCs shift the emphasis of the court from legal to therapeutic. Judicial supervision of treatment, combined with immediate sanctions for non-compliance and incentives for reduced drug use, are the cornerstones of the new approach. Instead of immediately revoking a drug offender's release and putting him or her in jail when there has been a relapse, a DTC will utilise a form of "smart punishment." Smart punishment by DTCs involves, "the imposition of the minimum amount of punishment necessary to achieve

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5. Center for Substance Abuse Treatment, US Dep't of Health and Human Services, Treatment Improvement Protocol series No. 23. (1998)

6 Mitchell S. Rosenthal, THE LOGIC OF LEGALIZATION: A MATTER OF PERSPECTIVE, IN SEARCHING FOR ALTERNATIVES: Drug Control Policy in the United States p.227. Melvyn B. Krauss & Edward P. Lazear eds., 1991

7 Notre Dame Law Review, supra, p.465.

8 One of the distinguishing features of DTC concerns the voluntariness of the programme. In the traditional system, the Court makes the decision whether treatment is appropriate. In DTC it is the offender that decides whether to choose treatment.

the twin sentencing goals of reduced criminality and drug usage."[9] The emphasis is on correcting behaviour to stop the offender from using drugs. Through accountability and accepting responsibility for his or her own actions, offenders learn that they can indeed stop or at least reduce their substance abuse.[10]

THE RECORD OF AMERICAN DRUG TREATMENT COURTS

Over the last ten years US DTCs have recorded substantial success in retaining participants, reducing recidivism rates and reducing costs to the criminal justice system. In June of 1998, Columbia University's National Center on Addiction and Substance Abuse (CASA), released the first national review of Drug Courts. The study reviewed 30 evaluations pertaining to 24 drug courts across the U.S. CASA examined the effectiveness of the drug court model on offenders when they are participating in the drug court program, and compared the model to other forms of community supervision. The study found "(1) drug courts have been successful in engaging and retaining ...offenders in treatment services, (2)drug courts provide more comprehensive and closer supervision of the drug-using offender than other forms of community supervision, (3) drug use and criminal behaviour are substantially reduced while clients are participating in drug court, (4) criminal behaviour is lower after programme participation, especially for graduates, although few studies have tracked recidivism for more than one year, (5) drug courts generate cost savings, and (6) drug courts have been quite successful in bridging the gap between the court and the treatment/public health systems..."[11] The American University's Office of Justice Programmes Drug Court Clearinghouse estimates that some 45,000 individuals have enrolled in Drug Court treatment programmes, and of these 31,500 have either graduated or are current participants.[12] According to a study by the National Centre on Addiction and Substance Abuse, 70% of those who enter drug court programmes are still in treatment after one year, and 50% actually graduate from drug court. By contrast recent studies have

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9 Judge Jeffrey .S. Tauber, California Center for Judicial Education and Research, DRUG COURTS; A JUDICIAL MANUAL. (1997)

10 There is a wide variance among US Drug Courts in the imposition of sanctions. Some Courts employ a zero tolerance towards any drug use. Other courts utilize a harm reduction approach, involving sanctions, which increase in their severity for repeated drug use.

11 The National Center on Addiction and Substance Abuse at Columbia University, RESEARCH ON DRUG COURTS, Steven Belenko. National Drug Court Institute Review, Summer 1998 p. 35

12 Drug Court Clearinghouse and Technical Assistance Project , US Department of Justice, Drug Court Activity: Summary Information 1 (May 1997). Notre Dame Law Review Volume 74 #2 p.502.

indicated that half of the participants enrolled in non-coercive programmes stay less than three months.[13] While further studies are required, including studies tracking DTC graduates over a three to five year span, the early success of United States DTCs is encouraging.

THE MOTIVATION FOR THE TORONTO DRUG TREATMENT COURT

By the mid 1990's a number of players in the criminal justice community in Toronto realized that the traditional methods of dealing with drug dependant criminality in Canada, were a failure. What was needed was a new and innovative alternative. In the summer of 1997, a committee of representatives from the Federal Department of Justice, the defence bar, duty counsel, Public Health, the Centre for Addiction and Mental Health, Community Corrections, Court Services and the judiciary commenced meeting on a monthly basis. After many months of discussions with representatives of the community and the National Crime Prevention Centre, the Federal government agreed to fund a four-year pilot project. This project is targeted at prostitutes, youth and visible minorities, although other offenders with drug related offences, are eligible to enter the programme. On December 1st 1998, the country's first Drug Treatment Court commenced operation in Toronto.

HOW DOES THE TORONTO DRUG TREATMENT COURT WORK?

Eligibility Criteria

Non-violent offenders who meet certain eligibility criteria and are found to be drug dependent, and who are charged with possession or trafficking in small quantities of crack/cocaine or heroin, will be given the option of entering DTC. Depending on their past criminality and whether the charge is possession or trafficking will usually determine whether they will be eligible to enter Track 1 or Track 2. Those offenders who have little or no criminal record and are charged with simple possession of crack/cocaine or heroin will be eligible to enter DTC prior to plea, (Track 1). If they complete the programme, the charge will be withdrawn or stayed. Those offenders with more serious records or who are charged with trafficking, will be required to plead guilty to the charges as a condition of entering the programme, (Track 2). Upon

[13] The National Center on Addiction and Substance Abuse at Columbia University. supra p.21

successful completion of Phase I of the programme, (a process that could take from eight to fifteen months), the offender will receive a non-custodial sentence and placed on probation for a further period of twelve to twenty-four months (Phase II). Failure to finish Phase I will result in the offender being expelled and sentenced (if they have plead guilty), or returned to the regular court process if no plea has been entered.

Track I - Pre Plea Alternative:

Acceptance into a treatment programme is available for those offenders charged with simple possession of cocaine or heroin who have a demonstrable drug addiction. Candidates will be screened and assessed by the treatment provider to determine whether a drug addiction exists. Participation in Track I is conditional upon the approval of the Crown prosecutor.[14]

The following factors will be relevant in determining whether an offender is a suitable candidate for entry:

- whether the offender has previously violated the criminal law (including convictions, discharges, or diversions) and if so, the date and nature of previous violations. A prior conviction or discharge may preclude entry into Track I. An offender who has previously been diverted to some form of alternative measures, may be precluded from Track I;
- whether the offender is facing other criminal charges;
- whether the offender poses a risk to the community;
- the seriousness of the offence, if the offence is one ordinarily punishable by more than three months imprisonment, the offender will be precluded from entering Track I;
- the circumstances of the offence, entry will generally be precluded if the commission of the offence involved a young person under the age of 18 years, or the offence was committed in or near a school, on or near a playground, or at any other place ordinarily frequented by young persons under the age of 18 years. Entry will generally be precluded if the offence involved consumption of a drug in a motor vehicle, or the possession of a drug in open display within the confines of a motor vehicle;[15]

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[14] The Judge retains the ultimate discretion of granting or refusing entry to applicants.

[15] s.718 of the Criminal Code was the genesis for these criteria.

- acceptance of the candidate by the treatment provider and agreement of the candidate to abide by the terms of the treatment contract.[16]
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An Offender precluded from Track I may nonetheless be eligible for Track II:

Track II- Post Plea Alternative:

Any offender with a demonstrable drug addiction charged with the offences of simple possession, possession for the purpose of trafficking, or trafficking will be eligible for Track II. Candidates will be screened and assessed by the treatment provider to determine whether a drug addiction exists. Participation in Track II is conditional upon the approval of the Crown prosecutor.

The following criteria will be relevant in determining whether an offender is a suitable candidate:

whether the offender has previously violated the criminal law (including convictions, discharges, or diversions) and, if so, the date and nature of previous violations. A previous history that indicates the offender is unlikely to be amenable to supervision will preclude admission. Similarly, a record of previous convictions for drug offences may preclude admission if the record is such that a prison sentence is the only appropriate sanction. Unsuccessful completion of a Drug Treatment Court program on a previous occasion will ordinarily preclude admission to Track II;

- whether the offender is facing other criminal charges;[17]
- whether the offender poses a risk to the community;
- the seriousness of the offence: participation in Track II will generally be available to those offenders charged with an offence that would attract a custodial sentence in the range of nine months or less. Any drug offender who committed a drug offence solely for commercial gain will not be eligible;
- the circumstances of the offence: an offender will be precluded if the commission of the offence involved a young person under the age of 18 years, or the offence was committed in or near a school, on or near a playground, or at any other place ordinarily frequented by young persons under the age of 18 years. An offender will

[16] The above criteria may be varied in individual cases, at the discretion of the Crown prosecutor.

[17] If the offender is facing other minor non-drug charges and wishes to enter DTC, he/she will be required to plead guilty to those charges prior to entering the programme. Acceptance is conditional on delegation of the charges by the provincial Crown to the DTC prosecutor.

generally be precluded if the offence involved consumption of a drug in a motor vehicle, or the possession of a drug in open display within the confines of a motor vehicle;[18]

- acceptance of the candidate by the treatment provider and agreement of the candidate to abide by the terms of the treatment contract.

AN OVERVIEW OF THE MEDICAL/HEALTH COMPONENT OF DTC

The Centre for Addiction and Mental Health (CAMH) where much of the primary counselling is located, employs a cognitive behavioural approach to reducing drug use. The treatment services at CAMH are offered in conjunction with a number of clinical supports and resources that link the offender to identified programmes at the Centre and in the community. This can include health care, social stability, employment, housing, education, and addressing relationship issues.

Each participant in DTC is supported by a Case Manager, who meets with the offender on a regular basis, to plan, discuss and implement mutually agreed upon treatment goals. In addition, issues surrounding housing, vocation, education and personal concerns are discussed with the Case Manager.

Participants with a significant addiction to cocaine enter into a competency based treatment programme at CAMH that consists of five phases. The Assessment Phase is comprised of a structured face-to face interview, objective testing and feedback and motivational interviewing. The Stabilization Phase is comprised of psycho-educational groups such as motivational counselling, preparation for change, coping with cravings and stabilization of substance use, and development of social support networks. The Intensive Treatment Phase consists of an exploration of the functions of the substance use, including examining triggers and consequences, goal setting, developing and practising alternative coping strategies. The Maintenance Phase focuses on maintaining positive lifestyle changes made as well as relapse prevention strategies and developing future goals. The final phase, Continuing Care provides the client with on-going support to maintain change and continue to focus on preventing relapse.

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[18] See footnote 15 supra.

For individuals addicted to heroin, psychosocial counselling services and a Methadone Maintenance programme are offered at the CAMH and through various community agencies. The Centre follows provincial guidelines for Methadone Maintenance and monitors individuals progress accordingly. Many of the DTC participants who use heroin also have a co-occurring problem with cocaine that requires the offender to maintain the appropriate pharmaceutical intervention and to comply with programme requirements from the cocaine service.

WHAT HAPPENS TO AN OFFENDER WHO ENTERS DRUG TREATMENT COURT?

Every drug charge in Toronto is initially reviewed by the Drug Treatment Court prosecutor who advises the accused (or his lawyer/duty counsel), that he/she may be eligible for DTC. Those offenders who wish to make a formal application, must complete a one page form for review by the federal prosecutor. An offender who is deemed eligible by the Crown has one week to arrange for her/his appearance in DTC. On the morning of her first appearance in DTC, the offender is interviewed in the Courthouse by one of the two Court Liaison staff (who are attached to both the DTC and CAMH). An initial screen is performed at that time to determine if the person is drug dependent. Once drug dependency is confirmed, the offender is brought to DTC, and released on a DTC bail in order that she can attend an intensive assessment at CAMH the following day. The offender is ordered to return to DTC the next day that DTC sits, (every Tuesdays and Thursdays) to advise the judge if she wishes to enter the programme. Those offenders who are determined by the federal prosecutor to be eligible for Track 2, must plead guilty as a condition of entering the programme. Further pre-conditions of entry include the signing of a consent to dispense with Crown disclosure, and an agreement that the imposition of a sentence will be delayed..[19]. These forms, which include a consent that information concerning matters necessary for treatment be shared between the court and treatment teams, are signed in the presence of counsel and after receiving legal advise. Treatment starts immediately after acceptance and the offender returns to court on a regular basis (twice a week initially), in order to ensure compliance. Regular but random urinalysis, (at least once a week), are performed at CAMH and the results are placed before the DTC judge at every court appearance.

[19] See s.720 of the Criminal Code.

Every offender who enters DTC is released on a bail that is specifically tailored for the programme.[20] These conditions which include attending all treatment sessions, and providing urine samples as required by the Court, are the authority which allows the DTC to impose sanctions for non-compliance with court and treatment requirements.

A DTC team meeting takes place prior to every sitting of the Court. The team includes the judge, prosecutor, defence lawyer/duty counsel, probation officer and court liaison members.At this pre court meeting the file of every offender who will be appearing that day, is reviewed and the team makes a decision on future treatment and judicial involvement. [21] Initially treatment will consist of counselling sessions (both group and individual), random urinalysis and twice weekly court appearances. However certain offenders may require more intensive residential treatment and this is arranged as needed and when beds are available.

Abstinence and/or reduction in drug use, together with positive lifestyle changes are commented upon in Court by the Court liaison staff, duty counsel, Crown, probation and the Judge. This level of positive reinforcement is unique to DTC and affords many offenders their first opportunity to hear words of commendation, particularly from the bench. Many participants have advised that this reinforcement has a powerful effect on their ongoing efforts to remain drug free. [22]

The DTC requires honesty and accountability from each offender. Relapse is an anticipated part of the recovery process and so continued drug use will not lead to expulsion. If participants admit to use and the DTC team believes that they are committed to work towards abstinence, then such use will not be a impediment to continued involvement in the programme.

Non-attendance at Court or CAMH, or failure to provide a urine screen, may result in sanctions, which will be imposed on the offender at their next court attendance. These

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[20] S.515 of the Criminal Code provides the legislative framework for the bail conditions imposed on DTC participants.

[21] Consistency in team members, particularly the Judge, Crown and treatment providers are essential to the success of the DTC. The offenders identify with the Judge and develop a personal relationship that is an important component of the dynamic of DTC. Seeing the same offender week after week and commending them for their progress (or addressing relapses) is an important component of their treatment.

[22] Laura Luedtke, 1999. Drug Treatment Court Case Studies. Unpublished paper, CAMH, Toronto.

sanctions range from admonishment by the judge to increased court attendance, counselling,

performing community service hours or revocation of bail. In the latter case offenders will be remanded into custody for a period not exceeding five days. Awareness by the participants that immediate consequences will flow from a contravention of the rules of the Court (and/or their bail conditions), act as a powerful incentive in ensuring compliance and a reduction in illegal drug use.

If the offender refuses to admit to ongoing drug use notwithstanding "dirty" urine screens and/or refuses to accept responsibility for continued substance abuse, or tampers with urinalysis integrity, then it is unlikely that they would be permitted to continue in DTC. Those offenders who have plead guilty as a condition of entering into DTC will be expelled from the programme and sentenced. Those offenders who entered DTC prior to plea, will be returned to the normal court stream for adjudication.

WHAT ABOUT COMMUNITY INVOLVEMENT?

The DTC is fortunate to have the strong support of approximately forty community agencies ranging from the John Howard Society, to the Salvation Army and from groups representing hostels to front line treatment providers. A significant component of the provision of treatment services is the development of a community networking strategy. This allows participants of the DTC to access community based resources and services that help address the complexity of needs identified for this population. In addition, many of the agencies have a strong linkage to the offender population and are able to assist in the fundamental "life-style" changes required to ensure long-term abstinence from substance abuse. Continued support and input from the community is essential to the ongoing success of the Toronto DTC.

CONCERNS ABOUT DRUG TREATMENT COURT

Perhaps the most pervasive criticism of DTC is that it is too soft on offenders and consequently puts the safety of the community at risk. Release of dangerous drug addicts by DTCs, can result in an increase in criminal activity and a concomitant reduction in respect for the criminal justice system. However the American experience demonstrates exactly the opposite result. Only three percent of violent offenders in state prisons were under the influence of cocaine or crack alone when they committed

their crime and only one percent were under the influence of heroin alone.[23] Such statistics would suggest that there is little or no link between the commission of violent crime and substance dependency. We would argue that DTC participants do not pose an unreasonable threat to public safety while undergoing treatment. In fact, DTC's employ far greater control over the offender than the probation system. In the regular criminal justice process an offender may receive a sentence of jail and probation for a drug offence or simply jail. In the latter case, there is no supervision once the offender is released. In those cases where probation is ordered, the amount of supervision received is often minimal and treatment may take weeks or months to arrange. Contrast this to the DTC offender, who begins treatment, often within seventy-two hours of arrest and who is required initially to return twice weekly to court. Once a breach is brought to the attention of the Court (by probation, the police or the treatment provider), the DTC judge immediately addresses the issue with the offender and the appropriate sanction is imposed, usually the same day.

The question of judicial coercion has been expressed as a concern by some in the treatment community. If a drug addict does not have the motivation to stop using drugs, the justice system should not force them to begin treatment. This view ignores the reality of the life of someone who is drug dependent. "Just say no," a slogan of the Drug War in the United States in the 1980's under the Reagan administration, failed because it lacked an understanding of the effects of drugs on the bodies of the users. Addicts are not helpless victims of a brain disease. They have options and one of the options is to become motivated to end their addiction. However, for many addicts motivation alone is not sufficient. While ending substance abuse is a matter of personal responsibility, judicial intervention may create the necessary motivation to foster a desire to stop substance abuse.

Certain members of the defence bar have expressed the concern about the revocation of an offender's bail for short periods (up to five days) for non-compliance with terms of their release. Such judicial action after a very brief hearing is unusual (in our courts) and may at first glance raise "fair trial" issues. We believe that the authority to vacate a previous release order, arises from s 523(2) of the Criminal Code as a consequence of a trial judge's ability, upon cause being shown, to modify the terms of an offender's release, In addition, all DTC participants are advised in writing prior to entering the

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[23] The National Center on Addiction and Substance Abuse at Columbia University, BEHIND BARS; SUBTANCE ABUSE AND AMERICA'S PRISON POPULATION (1998).

programme that their bail may be revoked for failure to comply with terms of their release.[24]

The DTC model represents a radical departure from the traditional role of a judge. In DTC the judge becomes an active player, engaging in personal and direct dialogue with each drug court participant. "Working proactively with a team that includes probation officers, drug treatment specialists, and other community service providers demands skills of collaboration and co-operation in addition to the repertoire of traditional judicial competencies. It demands that the judge listen with a " non-rebutting" mind and employ both verbal and non-verbal communications skills that convey positive regard."[25] Unless the judge is considering a revocation of bail or expulsion from the programme, defence counsel does not attend court and duty counsel contributes simply as a member of the team. For the proponents of DTC, the activist judge is essential, and removing this element would severely hamper the effectiveness of the model. Those that have reservations about this approach point out that the historical role of the judge in our common law has been as a neutral observer, removed from the "arena" and therefore able to maintain his or her impartiality. The DTC judge model is seen as an inappropriate incursion into a role that was formerly reserved only for counsel. Perhaps more importantly the expansion of the DTC model is viewed by some with alarm, as possibly eroding the traditional impartiality of the judiciary . The debate over this issue will undoubtedly intensify with the move to expand DTC's to other communities.

The federal prosecutor presently has exclusive jurisdiction to determine initial eligibility into the Toronto Drug Treatment Court. While the judge has ultimate decision making power to exclude an individual that the federal Crown (and treatment providers) deem to be eligible, if the Crown decides to deny an application, that decision can not be reviewed by the judge. Defence counsel in particular has expressed concerns about this practice. They argue that since it is the judge who makes the final decision about expulsion from the programme, why should an individual denied entry by the Crown not be able appeal that decision in open court? One further point might be added to this position. During the pre-court meeting, each participant's case is discussed by the members of the DTC team. Except for issues of expulsion, and sentence (which are always decided in open court), all other issues are determined by the team. If seems

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[24] Participants sign an acknowledgement which details the circumstances under which their bail may be revoked.

[25] Experiential Learning: supra p.1

incongruous to some that the question of eligibility for the programme is excluded from that discussion.

The Department of Justice supports the present procedure of leaving the question of eligibility exclusively with the federal prosecutor. They argue that the same discretion given to prosecutors to decide whether to proceed with a charge should apply in DTC. In many jurisdictions it is the Crown alone that decides whether a charge should be diverted out of the criminal justice system. The decision to admit or deny entry into DTC, should fall within the same prosecutorial authority. In addition goes the argument, the federal Crown must be able to respond to issues of public safety. Many of the applicants for DTC would, (if not admitted into the programme) be denied bail and if convicted, sentenced to significant periods of incarceration. Consequently the prosecution, as representative of the state is in the best position to weigh the risks to public safety when deciding whether to admit a particular applicant into the programme.

Another concern expressed by some critics of American drug courts is that they "widen the net" by including drug offenders who would otherwise had been diverted out of the criminal justice system and receive minimal sanctions. The experience of the Toronto DTC has been quite the contrary. Unlike many US drug courts, the Toronto DTC accepts traffickers and other offenders for whom jail would be the likely outcome of a guilty plea. For those offenders the DTC provides an additional option, an opportunity to deal with their substance addiction within the criminal justice system.

The issue that most troubles those that work in drug courts, both here and in the United States, is the argument that scarce funds for treatment are being diverted to those who have been arrested at the expense of those who have not. While this position has a certain appeal, there is no evidence that if the funds spent on the Toronto DTC were withdrawn, more treatment spaces would emerge for those addicts not involved in the justice system. In any event, this debate should not focus on an either or option. While DTC is acknowledged to be less expensive than incarceration for drug addicts and on those grounds alone should receive funding, money must also be spent on other treatment programmes. It is simply a question of priorities.

INTERNATIONAL INTEREST

When the Toronto Drug Treatment Court commenced operation in December 1998, it was the first court of its kind outside the United States. Since that time similar courts

have been established in Australia, and the United Kingdom. In addition, an Irish drug court will commence operation in September 2000. Other jurisdictions that have expressed an interest in starting drug courts include Scotland, Bermuda, Mauritius and Jamaica. The international interest in the drug court model is evidenced by the formation in June of 1999 of an international association of drug courts (I.A.D.C.P.). The goal of this organization is to educate governments about the drug court concept and to provide assistance to those countries that are starting their own courts.

In December of 1999 the United Nations Office for Drug Control and Crime Prevention, (U.N.D.C.P.) convened an "Expert Working Group," to examine the concept of "court directed treatment and rehabilitation programmes." The interest that has been expressed in this report by member nations is indicative on the increased awareness in the international community that when dealing with drug addicted offenders, it is necessary to consider a variety of options.

PRELIMINARY RESULTS

The Toronto Drug Treatment Court has been in operation for only eighteen months and so any statistical data must be read in that context. The number of offenders in the programme is presently too few for a scientific assessment of the efficacy of the Court. Issues such as whether participation in DTC reduces recidivism and long-term substance use, can only be addressed when there is a larger enrolment.[26]

The evaluation team has indicated that during the period December 1st 1998- May 31st 2000, approximately 50% of the 168 participants who have entered the programme were still participating or had graduated. While the data is still very preliminary, almost three-quarter of those individuals have not re-offended while in DTC. This compares favourably with drug courts in the US (where offenders charged with serious offences such as trafficking) are not usually admitted. The retention rate should also be measured against the client population of the Toronto DTC. Most of the participants are repeat offenders with long standing substance abuse problems and significant criminal records. Retention rates in treatment programmes where there is no judicial supervision are lower than corresponding rates in the Toronto DTC.[27] The retention of offenders in

[26] The DTC Evaluation Team has been funded by the National Crime Prevention Centre to conduct an in depth evaluation of the Toronto Drug Treatment Court. The research component will examine inter alia, cost-effectiveness, recidivism rates, and the impact on long –term substance abuse.

[27] Centre For Addiction and Mental Health; Drug Treatment Court Team.

DTC, indicates a reduction in illegal drug use and is an encouraging early step suggesting that the Court is more successful in retaining and treating these offenders than traditional treatment programmes. Effective June 22, 2000, twenty –two offenders have completed the first stage of the programme and their charges have either been withdrawn or they have received a suspended sentence and have been placed on probation.

Of course as the retention rates indicate, a number of the participants are unable to complete the programme. Some voluntarily ask to be returned to the regular court stream, citing as an impediment the difficulty of adhering to the requirements of DTC. Others breach court orders and/or re-offend and are expelled from the programme. However even in these cases most offenders acknowledge that the DTC provided them with strategies to reduce their drug use, should they again attempt to stop abusing drugs.

American drug courts emerged in part as a reaction to the " zero tolerance" policy of many US jurisdictions in which possession of even a relatively small quantity of cocaine resulted in mandatory minimum sentences.[28] The "Drug War," as it has come to be known, resulted in a 56% increase in drug arrests between 1985 and 1991.[29] Many in the US justice system believe that the increased penalties coupled with a crack down by police forces, has proven ineffective and a waste of financial and human resources. "Measures aimed at getting tough on drug users, such as mandatory minimum sentencing, increased jail time and intensive probation and parole, have proved ineffective in rehabilitating drug users because they ignore the fact that drug addiction cannot be eliminated without effective treatment.[30]

The Toronto Drug Treatment Court is a product of a Canadian environment where mandatory minimum sentences for drug offences do not exist. In addition unlike many US drug courts, which are based on abstinence from all drugs, the Toronto DTC requires that participants work towards abstinence from all illegal drugs. The programme demands that participants be free of crack/cocaine and/or heroin before completion. Where participants have achieved a positive life-style change, have

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[28] For example in New York State possession of a half a gram of cocaine or 16 ounces of marijuana requires a minimum sentence of 1-3 years.

[29] Peter Finn & Andrea K. Newlyn, U.S. Dept't of Justice, Pub. No. NCJ-142412 Miami's Drug Court: a Different Approach 3 (1993)

[30] Hon. William D. Hunter, Drug Treatment Courts: An Innovative Approach to the Drug Problem in Louisiana, 44 La. Bar. J. 418, 419 (1997).

stopped crack/cocaine and/or heroin use, but occasionally use marijuana and/or alcohol, they may be permitted to complete Phase I of the programme at the discretion of the DTC. During a ceremony held at the beginning of Court, these individuals receive recognition of their accomplishments from the DTC team and fellow participants. Each Track II offender is then sentenced, usually to a period of probation (combined with a suspended sentence). The period of probation is considered Phase II of the programme. During this phase (which lasts between 6-12 months) the offenders must continue to attend substance abuse counselling as directed by the treatment provider and attend DTC at least once per month. Those offenders who were not required to plead in order to enter the programme, and have successfully completed Phase I, will have their charges withdrawn.

It is also noteworthy that unlike most US drug courts, the Toronto DTC incorporates methadone maintenance as part of its treatment arsenal for heroin addicts. The abstinence model of most US courts does not permit the use of methadone. In Toronto it is felt that methadone is an effective treatment option that should not excluded simply because it does not fit the model of complete abstinence. These differences in approach reflect a Canadian view of treatment for substance abuse that has been incorporated into the Toronto DTC.

The DTC model is only one approach for dealing with substance dependent offenders. It is offered as one alternative to the traditional criminal justice approach of incarceration, while recognizing that for some addicts, intensive long-term residential treatment may be more appropriate. The opposing view that jail may be more appropriate, is reflected in the recent British Columbia Court of Appeal decision of R.v. Couto 12 C.R. (5^{th}) at 324. The Court of Appeal allowed an appeal against a conditional sentence imposed on a drug addict with a long criminal record who had planned to enter a residential treatment facility. The court stated that given the seriousness of the offences, and the lengthy record for related offences, a penitentiary sentence was appropriate. The appeal court substituted a sentence of imprisonment notwithstanding that by the time of the appeal the appellant been in a recovery programme for about one month and had been doing well. In answering the question of whether jail was appropriate for this drug-addicted offender, the Court of Appeal replied in the affirmative. While that is a understandable response to the commission of a serious offence, the question might also be asked whether incarceration will do anything to stop or even reduce that offender's drug dependency. The debate around issues of public safety, deterrence and denunciation versus rehabilitation can not be viewed

simply as one of jail versus no jail. In should be examined within the context of the most effective way of reducing the drug dependency of those individuals who commit crimes because of their addictions.

HOW IS SUCCESS MEASURED IN A DTC?

"Our experience with drug courts over the last decade is a shining testimonial to the ability of our justice system to deal with this aspect of the most complex health, social and legal issues of our time."[31] Before drug courts appeared in the United States, recidivism rates for drug addicted offenders of 60% after imprisonment, were common.[32] The American University's Drug Court Clearinghouse and Technical Assistance Project, reports that nationally 45% of drug defendants later commit crimes, compared to a 5% to 28% recidivism rate for graduates from the various Drug Courts.[33] In the United States, the cost of treatment in drug courts is estimated at $3500 per offender, while the cost of incarcerating the same offender runs between $18000 and $25000 per year.[34] These cost savings when combined with lower recidivism rates, has led the US government to expand its financial support to drug courts from $27 million in 1997 to over $40 million during the current fiscal year.[35]

Beyond the financial implications, DTCs measure success in very concrete and practical ways. An offender who has not used crack/cocaine and /or heroin for an extended period of time, (at least four months) will be eligible to complete the programme. However abstinence from substance abuse is only one of a number of preconditions that must be fulfilled before the offender will be allowed to end his or her participation in DTC. Participants are also required to demonstrate a fundamental life-style change involving improved interpersonal skill development, stable and appropriate housing, and educational and vocational success. It is the belief of the Toronto Drug

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[31] Philip S. Anderson President, American Bar Association. As quoted in DRUG COURTS :A REVOLUTION IN CRIMINAL JUSTICE, National Drug Court Institute, 1999.

[32] Martin I. Reisig, REDISCOVERING REHABILITATION; DRUG COURTS COMMMUNITY CORRECTIONS AND RESTORATIVE JUSTICE. Working Draft October 1997 p.3

[33] Martin I. Reisig. REDISCOVERING REHABILITATION. supra. P.3

[34] The cost of treatment at the Toronto Drug Treatment Court is estimated at $4500.00 per offender; the cost of incarcerating that same inmate for a year is approximately $46,720, or $128.00 a day.

[35] NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS as stated by Judge Jeffrey Tauber to the author.

Treatment Court that these requirements are necessary to improve the likelihood that offenders will remain drug and crime free.

[i]CONCLUSION

The encouraging preliminary results of the Toronto DTC raises the question of whether this option should be offered to addicts who are charged with criminal code as well as drug offences. Such a shift in eligibility would have a dramatic effect on the number of individuals that would be applying and require a concomitant expansion of both the court and treatment portions of the programme. Drug dependency is at the root of much of the criminal behaviour that plagues our communities. We understand now that offenders commit such offences because of their drug addiction. If the DTC model is effective, why should only those offenders who are charged with cocaine/heroin offences be offered this unique programme when it is the addiction rather than the criminal behaviour to which society should be devoting its resources?

While Drug Treatment Court is not a magic bullet that will solve all substance abuse problems in our communities, it appears to offer an effective alternative to the traditional approach of incarceration, for many individuals who are drug dependant. The reduction in crime ensuing from the utilization of DTCs, may result in both cost savings for the community and increased public safety. These courts can provide necessary drug treatment to a portion of society that is the most in need of treatment and yet the least likely to receive it. The combination of judicial supervision and immediate and intensive drug treatment, offers the best hope for many drug addicts to achieve a sustained reduction and an eventual elimination of their drug habit. Study after study has demonstrated that the longer an individual remains in treatment the greater the probability that he or she will abstain from drug use. The Drug Treatment Court is a model that may provide success at lower cost than the traditional justice system and may prove to be the most cost-efficient method to reduce substance abuse and the criminality it breeds. If the programme evaluations bear out this optimism, then continued public and government support will be required to ensure the permanence of this unique and effective criminal justice alternative.

[i] On a personal note I wish to acknowledge the dedication and professionalism of each and every member of the Drug Treatment Court Team and the treatment staff at the CAMH. In addition I wish to thank the members of the Steering Committee whose countless hours of meetings and discussions were integral to whatever modest success the Drug Treatment Court has enjoyed. Finally I wish to thank the members of the Community Advisory Committee whose dedication to the goal of breaking the cycle of drugs and crime, has been central in the launching of this pilot project.

APPENDIX

TWO CASE STUDIES

Reduction of substance abuse during the currency of the programme is indeed an achievement for many of the DTC participants. They often will not have experienced a prolonged drug free episode for many years and so their first experience may be quite dramatic. What follows are case studies of two participants in the Toronto Drug Treatment Court as related by research assistant Laura Luedtke. Reading about their experiences both before and during their time in the Court, is at once profoundly moving and at the same time a confirmation of the necessity of such courts in our communities.

MAT NORWAY

Mat Norway,(not his real name), is a quiet, easy going, likeable individual in his twenties who has achieved incredible success as a client in the Toronto Drug Treatment Court. Mat, born in Jamaica, moved to Canada with his family when he was 12 years old. He is very close with his family and currently lives with his girlfriend whom he often refers to as his motivation to stay clean of drugs.

Mat was accepted into the Drug Treatment Court at the end of February 1999. He has a fairly lengthy criminal record that extends back into the early 1990's consisting of mostly drug-related offences. Mat was considered to be an active participant in his group therapy sessions from early on in the program. He presented urine screens clean from hard drugs shortly after beginning the program but struggled a great deal with cutting back and cutting out his long time use of cannabis. This has been recognised as a common experience for many of the clients participating in the Drug Treatment Court Programme.

After almost three months of participation in the program Mat began to re-think his use of cannabis, he was beginning to recognise the negative effects it was having on him. He experienced great difficulty and anxiety giving up cannabis, his last "security" but came back with his first totally clean urine screen a few weeks later. This is, and has been acknowledged by the Court as a big achievement for which Mat has been commended for by both court and treatment staff. Since this time Mat has continued to

remain clean, with the exception of one urine screen in June of 1999 that came back positive for cannabis. This positive urine screen is not considered a set back or a failure, it is considered to be a normal part of recovery that can offer many important lessons about triggers for drug use and how to avoid these in the future.

When asked what his life was like as an addict, Mat answers simply, "It was like living in hell." Unlike many other addicts, when asked if there were any positive aspects to his drug use, he states surely, "Nope - nothing."

Mat reveals that a friend instigated his drug use when he was 16 years old. He tells his story like this, "I was started by a friend, I was over at his house, I was smoking a joint and drinking a beer in his basement. He was smoking crack, I didn't know what it was but he seemed so relaxed lying on his bed. He asked me if I wanted to try it - it was my choice to say yes or no. I tried. At first I didn't get a buzz so I tried and tried. I wanted to know exactly what this stuff did to you. It took about a week for me to get a buzz. I began to like it and continued for many years. I went to jail for it."

In the beginning, Mat tells, there were times when he used and times when he didn't. For a while he continued to go to school but soon starting skipping classes to use drugs. Eventually he dropped out of school permanently to hang out with his friends. He says, "I didn't listen to my Mom. I didn't learn until the fire got hotter. That was when I started to lose things in my life that were important. I didn't figure it out until it was too late."

When asked if he had ever tried to get help for his addiction before entering the Drug Treatment Court, Mat cites an experience common to many addicts, "I tried to quit on my own and could go for a few days but as soon as I saw my friends, I started doing drugs again." He adds, "I never tried another treatment - I only tried on my own." When asked why he decided to enter DTC, Mat replies, "It was my idea to either do my time or get treatment. I was tired of jail and wanted to see my life straight."

Like most drug addicts, the costs of Mat's addiction were high. Aside from very serious effects to his physical health, Mat states, "I lost the trust of my family and friends. It was because of the drugs." This happened mainly, Mat tells, because of the way the drugs changed him, "I never listened to my parents, I was dirty, I didn't care to go home and shower. I would get so violent - nothing bad ever happened but I was in the motion of doing things that I did not want to do. Drugs take away everything - you

know?" Mat also tells how his addiction cost him his relationship with his girlfriend, "She lost trust in me - we were always up in a fuss - we split-up. This was one of the reasons I was motivated in recovery - drugs cost me my relationship but now I have been able to fix that."

Unlike many addicts, Mat insists that, "I never did anything bad to get the drugs - friends sold to me and I tried to sell to continue using - I turned the money over so I could continue using. What made him finally want to become clean? Mat tells that, "I needed a change of life - you know? I was tired of the dumpster (crack house) - when I went there, I just could not leave, it's like something is drawing you, you want to leave but can't." Aside from his girlfriend, Mat was very motivated to change for his family, he says, shaking his head, "My mom wanted too much from me, I couldn't stand seeing her worry."

Now that he is clean from drugs, Mat can reflect on how much his life has changed. He says, "Now my mind is clear. I have the trust of my Mom now. She does not have to worry anymore. I can now communicate better with others. I am doing things much better now. I can concentrate much better on my life."

When asked what his life is like now, clean from drugs he admits, "It is still hard". About staying clean he adds, "This is it - I have too much to lose now. I have put in so much hope now - I would feel so ashamed if I started (using drugs) again. My family would disown me, I come from a very good family."

What does Mat have to say about the DTC? He smiles, "The drug treatment court is the greatest thing that ever happened to me - you know?" When asked what about the drug treatment has helped him to become and stay clean, Mat says, "Judge Bentley's compliments make me want to do better every day - that strive - makes me want to push more."

When asked how he feels about sitting through regular afternoon court appearances, Mat replies, "At first I thought that the court was too much. Then you get used to it, if you are really interested in it, it doesn't bother you anymore. At first, you just sit there and listen to these people, then you put 1and 1 together and realise that these people are trying to help you. You need to help yourself."

Now that his life is on track and he has been clean from drugs for several months, Mat replies modestly, when asked what he sees in his future, "I just want to continue doing good. I'm getting older, not younger - I want to make something of my life before I get to a certain age - right?"

KERRIE CONNOLY :

Kerrie Connoly,(not her real name), a recovering drug addict, upon sitting down to begin our interview states, "Use my real name, I have nothing to hide - nothing to be ashamed of." Kerrie, a strong young woman with long blonde hair exudes a strength and energy that has obviously brought her to this point in her life. Kerrie, like many of the other initial drug treatment court clients who have become clean of drugs are sought out by many of the newer clients for advice, support and encouragement. Kerrie certainly has a lot to offer these other clients; she understands what it takes, and all that it does take to turn your life around. She also knows first hand that it isn't easy.

Kerrie was first admitted as a client into DTC in March of 1999. For her first several court appearances, she arrived heavily drugged and clearly unaware of herself or surroundings - there was not much hope in many of the staff that she would be able to turn herself around. Upon beginning treatment she was immediately placed on a methadone program which proved to be very difficult for Kerrie and she continued to use heroin. During the first several weeks in the programme, Kerrie's urine screens came back indicating uses of heroin, cocaine, opiates and on occasion, benzodiazepenes.

By the beginning of April 1999, Kerrie was beginning to show some improvement - her urine screens indicated only the use of opiates. Kerrie suffers from advanced hepatitis B and C and was, at this time in her treatment, warned about the necessity for her to remain drug free. As Kerrie began to withdraw from all the drugs she had been using, she became very ill. As she slowly began to stabalize on her methadone her physical health improved. She made it though this painful and difficult time drug free and has remained drug free since. She has, since becoming clean of drugs, developed a reputation as an excellent and active participant in group therapy sessions.

When asked how she was introduced to drugs, Kerrie answers matter-of-factly, like she has told the story many times since, "I was turning 16, a boyfriend of mine blindfolded me and said that he had a birthday present for me. He told me to hold out my hand and he stuck a syringe in my arm. The heroin made me feel so romantic - we

made love for hours. At first I would do it once a month, then once every 3 weeks, 2 weeks, then once per week until I was addicted". What lead her to use? She says "It was the romantic feeling that was leading me to it". Other drugs quickly followed suit, and soon Kerrie was addicted to both heroin and cocaine and would use them simultaneously.

To answer the question, what was life like as an addict, Kerrie, immediately starts searching in her purse for a list she had previously completed for the DTC programme. She reads, "I was always running for the cocaine and the dealers. I was always running away from myself, my family, including my daughter. I was not there for my daughter and my family." She sighs, re-folds the list and returns it to her purse.

Kerrie, during most of her drug using years, continued to have a family to support her. "I was living with my parents, I continued to live with them throughout my drug use. I was only living on the streets the last few years starting when I had my daughter - I went out of control when I had her."

Kerrie's drug use cost her the things most important to her, she recalls, and "The drug use cost me everything, my daughter, my health, my love for my family I disappeared - it made me lose everything in life. I stopped bonding with my daughter; my family kicked me out... Every time I used it got worse. I lost myself, it (the drugs) just killed me more and more."

During this time Kerrie's parents tried unsuccessfully to help her into recovery, she explains, "My parents tried to help, they put me in rehab. I would go but I continued my use. I knew that I wasn't ready. I just went to please my parents."

What was it that kept her using drugs - what made her turn so many times from help that was offered to her? She says, "I couldn't stop. I enjoyed it (drugs) too much. I loved it - every minute of it. It was my sex, my food - my life. I wasn't ready to stop."

About the drug treatment court she adds, "This program made me realise that I wanted to stop. At first I was just doing it (the programme) to stay out of jail. As I became sober, I started to like it - I started to respect myself. I was ready to become a mother to my child." Her family helped her during this crucial time in deciding that she finally wanted to become clean, she explains, "My parents gave me another chance to reunite with my daughter." Also, as her health began to deteriorate she realised that it

was time to get off the drugs, "I was diagnosed with hepatitis and got really sick - I knew then that the party was over. I either stopped or died. I knew that God and my family were giving me another chance - I took the chance."

How did the drug treatment court help? She replies, "Attending the program during the day and giving the urines helped me. Going to court (regularly) got me into a structured life and made me motivated to attend court and to present myself. Hearing the people and the judge compliment me made me more motivated everyday. Just hearing the judge compliment me made me feel so good about myself - it kept me motivated. He's (Judge) a great person. I really like him."

What does she feel that her future holds for her now that she is in recovery? Kerrie replies with confidence, "I think that my future holds a lot for me. Me and my daughter will be mother and daughter like life intended. I'll be responsible, have a job, build a foundation for my daughter and even have a nice place to live. I will continue to enjoy life and the company of my family and my daughter."

When asked if there is anything that she would like to add about the drug treatment court she answers sincerely, "I found that the drug treatment court has really made the real me come back. I compliment the judge so much for helping me to find myself again and to become a part of society. I hope that the drug treatment court can help everybody the way it has helped me."

After some thought she adds, "Really and truly, I hope that this program never fails. I really believe that this program can help a lot of people. I hope it continues with the same judge. It can save a lot of people in the future."

Lastly, she says something that many others feel, "I hope that it (drug treatment court) stays in the system so it can help others like myself. To help them bring their lives back on track."