



# Prosecuting with the Prevention of Organised Crime Act

## A review of South Africa's anti-gang provisions

Kim Thomas

### Summary

The Prevention of Organised Crime Act's anti-gang provisions are not meeting their objectives. They were originally meant to fill the gaps in common law and help prosecutors gain convictions for gang-related crimes. But the act is severely underutilised for these specific crimes. For this paper's recommendations to have a substantial effect on addressing organised crime, the various departments involved in South Africa's criminal justice process need to be cleaned up and resources improved.

### Key points

- Post-apartheid South Africa experienced an increase in organised crime and gang-related activity. The South African legislature responded with enacting the Prevention of Organised Crime Act in 1999 and specifically addressed criminal gang activity, money laundering and racketeering.
- Over 20 years later, very few gang-related cases have been prosecuted under this legislation. Most gang activity is still prosecuted under common law and other legislation.
- Interviews with key stakeholders reveal that the main cause for failed/limited implementation lies in the scarcity of human resources, skills and training across the South African Police Service, National Prosecuting Authority and Crime Intelligence, and the lack of meaningful cooperation among them.
- Further shortfalls of the act include a lack of provision for targeting gang leaders and weak sentencing.

## Introduction

More than 20 years since its adoption, the Prevention of Organised Crime Act (POCA) has not measured up to what was hoped it would be. The act was a response to the growing nature and extent of organised crime in South Africa's post-apartheid democracy.<sup>1</sup>

With the opening of borders came an increase in various forms of organised crime activity. This, along with the ongoing problem of gangsterism, particularly in the Western Cape, but also in Gauteng and the Eastern Cape, saw South Africa's legislature come together to create laws to address the problem.

POCA criminalises various activities including racketeering, money laundering and gang activities. It also provides for dealing with the proceeds of unlawful activities.

As South Africa was finalising its organised crime legislation, so too was the international community looking to address transnational organised crime. From 1998-2000, United Nations (UN) member states came together to work on creating what later became the UN Convention against Transnational Organized Crime (UNTOC). This convention required signatories to pass legislation specifically focused on organised crime.

South Africa's POCA filled that gap. But the question most valuable to ask about both the convention and South African law is: has this helped address organised crime? This paper will review the South African response, with a focus on gang activity.

This research analyses sections 9-11 of POCA criminalising gang activities. Although there are numerous national laws from around the world that address organised crime and gangsterism, section 9 was largely influenced by the California Street Terrorism Enforcement and Prevention Act.<sup>2</sup>

The global response to these different national laws is mixed regarding the effectiveness of the legal instruments in addressing gangsterism, the clumsiness of the legal definitions, and the potential human rights concerns regarding their implementation.

### More than 20 years since its adoption, POCA has not measured up to expectations

In South Africa, the underuse of section 9 of POCA is a key contributor to the act's limited efficacy. In a review of reported cases in the country since 2010, only 8% of cases in which the judgment referred to gang activity also included charges under section 9. Previous research on the act noted that there were no section 9 convictions before 2010.<sup>3</sup> Although not all cases are reported, this does show an underuse of the legislation.

To understand this better, this study focuses on a review of cases (both reported and unreported) from 2010-21 from the regional magistrate's and high courts located in Gqeberha in the Eastern Cape.<sup>4</sup> The research further includes interviews with those involved in investigating and prosecuting gang-related cases as well as those impacted by them. The interviews along with the case analysis reveal key findings regarding the rationale behind enacting section 9, how frequently and effectively these legislative provisions are being used, and the shortfalls and recommendations for improvement.

When reviewing the state's response to organised crime and gangs, it is important to also consider the context in which the criminal justice system operates. The capture of the state by former president Jacob Zuma and other high-ranking politicians has had a far-reaching impact on the country. As stated by President Cyril Ramaphosa, '[S]tate capture has damaged people's confidence in the rule of law, in public institutions, in law enforcement agencies and, even to some extent, in the democratic process.'<sup>5</sup>

In response to the growing evidence of state capture a Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud was set up in 2018. Named the Zondo Commission, after Acting Chief Justice Raymond Zondo who chaired it, it has shed light on the impact of politicisation, nepotism, and the general erosion of the rule of law in state circles.

A key concern for the commission was the impact of state capture on the criminal justice system. A submission to the commission revealed a clear relationship between the manipulation of criminal justice

agencies and state capture.<sup>6</sup> It is in this environment of a damaged and dysfunctional criminal justice system that the prosecution of gang-related activity is analysed.

## Methodology

This study adopted a mixed methods approach, making use of quantitative data gathered through the review of 135 court cases as well as the qualitative approach of interviewing 17 key stakeholders and three in-depth case studies.

A mixed methods approach was chosen in order to answer two key research questions. Firstly, to what extent is section 9 of POCA used to prosecute gang activity? This was answered through the data provided by the quantitative review of court cases. Second, what are the experiences of key stakeholders in working with section 9? This was answered through both the key stakeholder interviews as well as the in-depth cases studies. By using both these methods, a better understanding is provided of the use and effectiveness of section 9 of POCA.<sup>7</sup>

For the quantitative portion of the study, all reported South African high court judgments that referred to POCA and/or gangs were reviewed. In order to build a database of these cases, the study used the Southern African Legal Information Institute,<sup>8</sup> which is a comprehensive online database of reported judgments in Southern Africa.

Key search terms 'Prevention of Organised Crime Act' and 'gang' were used to find potential cases. These cases were then reviewed to isolate those in which the accused was either charged under POCA and/or the cases related to gang activity. The cases that met the criteria were recorded in a database for analysis. Since this methodology restricted the study to reported cases only, further on-the-ground research in a selected jurisdiction was conducted in order to get a better understanding of the cases and use of POCA.

The jurisdiction of Nelson Mandela Bay was selected and further unreported cases at both the regional magistrate's court and high court level were analysed. This jurisdiction was chosen for analysis due to its focus on gang-related cases as described in numerous National Prosecuting Authority (NPA) annual reports.<sup>9</sup> Furthermore, our ongoing extensive research on gangs in the areas<sup>10</sup> provided us with a good foundation for analysing the case studies, collecting data, and conducting key interviews.

For the qualitative portion of the study, interviews were conducted with magistrates, senior investigators from the Anti-Gang Unit,<sup>11</sup> senior public prosecutors, representatives from the municipal Department of Safety and Security, as well as academics, civil society members and gang members and leaders.<sup>12</sup>

In total 17 interviews were conducted. These interviews were primarily conducted in Nelson Mandela Bay although some interviewees were based in other parts of the country.<sup>13</sup>

## State capture has had a far-reaching impact on the rule of law in South Africa

Interviewees were selected based on their specific areas of expertise, experience and knowledge of gang-related cases. These interviews provided further context and understanding of the use of POCA in gang-related cases.

Lastly, this paper draws from desktop research and a literature review of documents including legislation, government reports, policy documents, academic articles and reports dealing with organised crime and gang-related legislation.

## From global to local: key legal provisions for criminalising organised crime groups

**Chart 1: Comparing terminology in POCA and the UNTOC**

Key terms	UNTOC	POCA
<b>Organised crime</b>	The convention does not define 'organised crime'. However the term appears several times therein as reference to the convention.  The definition given is one of a 'serious crime' which shall mean 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or more serious penalty.'	The act does not define 'organised crime' but the term appears several times therein. <sup>14</sup>
<b>Organised crime group</b>	'Organised crime group' - 'shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this [c]onvention, in order to obtain, directly or indirectly, a financial or other material benefit.'	The act does not give a definition of 'organised crime group'; instead it defines 'criminal gang' as stated below.
<b>Gang</b>	The term 'gang' is not defined in the convention.  The convention gives a definition for a 'structured group' which shall mean 'a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.'	'Criminal gang' is defined as including 'any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.'
<b>Racketeering</b>	The term 'racketeering' is not defined in the convention. The convention grants a definition for a 'predicate offence' which shall mean 'any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this [c]onvention.'  Article 6 deals with the criminalisation of the laundering of proceeds of crime and encourages states to adopt measures to criminalise such offences as well as offences as defined in article 2 of the convention.	'Pattern of racketeering activity' shall mean 'any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this [a]ct, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.'

Source: *Global Initiative Against Transnational Organized Crime*



## Laws on gangs and organised crime from around the world

International frameworks to combat organised crime are as complex as national laws. In 2000, the UNTOC – also known as the Palermo Convention – was enacted to promote cooperation to prevent and combat transnational organised crime more effectively.<sup>15</sup> The convention was built on the strategic and intellectual foundation of international cooperation against organised crime, as implemented by American and Italian law enforcement communities.<sup>16</sup>

A key part of the UNTOC was the criminalisation of participation in or contribution to a criminal group through article 5. The legislative guide<sup>17</sup> to the convention states that:

‘The main purpose of article 5 of the Convention, to be implemented by all States parties, is to establish an offence that creates criminal liability for persons who intentionally participate in or contribute to the criminal activities of organized criminal groups. The offence is aimed at tackling organized crime at its core by criminalizing acts that involve participation in or contributions to an organized criminal group.’

The way in which participation in a group is criminalised differs by country, with common law countries criminalising conspiracy and civil law countries relying on the offence of association.<sup>18</sup> South Africa has a hybrid legal system influenced by Dutch civil law, British common law and indigenous South African customary law.

However, which approach to adopt and how to comply with the UNTOC was not a consideration during the creation of POCA, as POCA predates the UNTOC, and its driving forces were based on national concerns regarding organised crime, money laundering and gangsterism.<sup>19</sup> As a result, the UNTOC discussions were in part influenced by POCA, as South Africa’s contribution to the discussions was based on its process of developing its already enacted organised crime legislation.<sup>20</sup>

UNTOC discussions  
were in part  
influenced by POCA

An examination of local laws from various other countries shows the different ways in which gangs or the participation in a criminal group have been criminalised. It is evident that there is a substantial difference in the treatment of organised crime, gangs, and gang violence in domestic legislation.

For example in India, the Maharashtra Control of Organised Crime Act of 1999 includes a definition of organised crime that is broad enough to also include insurgency. In Mexico, the Ley Federal contra la Delincuencia Organizada criminalises organised delinquency and explicitly includes terrorism in its definition for organised crime.<sup>21</sup>

In Austria, the Austrian Penal Act criminalises ‘criminal organisation’ and ‘criminal association’ – organisation being qualified as being business-like and comprising of large personnel. In Germany, the German Criminal Code punishes participation in ‘criminal’ and ‘terrorist association’ only because ‘organised crime’ is considered as an aggravated case of serious crimes of theft, robbery and dangerous bodily harm committed jointly. In Brazil, the Brazil Penal Code criminalises association of ‘quadrilhas e bandos’ with no distinction between gangs and criminal associations or organisations.<sup>22</sup>

In countries whose legal systems are based on or influenced by British common law, gangs and organised crime fulfil the requirements for the inchoate offence of conspiracy. The Public Order Act 1986 distinctively deals with ‘gang violence’ as a criminal offence affecting public order. In 1988 in the United States (US), the California Street Terrorism Enforcement and Prevention Act was enacted to deal with the gang crisis in California and criminalises active participation in ‘criminal street gangs’.<sup>23</sup>

Organised crime is also dealt with through the criminalisation of racketeering in the US. The US Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970 was enacted to criminalise organisations participating in patterns of racketeering and money laundering.

Analysing and critically underpinning Africa's response to the UNTOC reveals that the enactment of local laws on gangs or criminal groups on the continent is dwarfed and lacking. Although the convention was ratified by 52 of Africa's 54 countries, only 20 have passed legislation that meets the convention's definitions.<sup>24</sup> The continent ratified the UNTOC in three waves, as can be seen in the map below (Chart 1).

The countries that ratified in the first wave did so before 2005. South Africa, a first-wave country, having enacted POCA even before the convention, was one of the first countries to deal with the complexities of criminalising organised crime and criminal groups. Over 20 years later, if South Africa is still dealing with the complexities of implementing these provisions (as will be seen in this report), then the rest of the continent still has a long way to go in both passing and implementing similar legislation.

**Chart 2: Waves of ratification of UNTOC in Africa**



Source: Global Initiative Against Transnational Organized Crime

The upcoming analysis of the South African experience can serve as a preview for other African countries, particularly second and third wave countries, as to what they can expect in their future legislative and implementation processes.

The UNTOC review mechanism is currently in progress<sup>25</sup> and the degree to which countries have adopted these provisions, particularly those regarding participation in a criminal group, is one of the important questions to be addressed by countries.<sup>26</sup> Further inquiries concerning how these provisions have been implemented and whether they have succeeded in improving the international response to organised crime are also crucial for this review.<sup>27</sup>

## Origins of POCA

When South Africa became a democratic state in 1994, there was an increase in organised crime. This was further affected by the transitional period of disbanding the apartheid oppressive security system and restructuring the South African Police Service (SAPS).<sup>28</sup> At the same time, South Africa's borders reopened to the world, which in turn created more opportunity for illegal transnational activity.

Gangsterism also increased. Different gangs joined forces and organised their operations in the mid to late 1990s to deal with the evolving state response to crime and the vigilante movement of People Against Gangsterism and Drugs (PAGAD).<sup>29</sup> These changing dynamics required a new and improved response.

There was also concern about the unrest caused by PAGAD and the threat that gang expansions posed to political stability.<sup>30</sup> The POCA preamble echoes a community-based reason for its enactment. It was to prevent the undermining of democracy by gang infiltration in local government. Community institutions and local business were negatively affected and brutalised by gangs, through extortion, violence and intimidation.<sup>31</sup> The act aimed to restore confidence in state security and introduce drastic measures in addressing gang activity.<sup>32</sup>



UNTOC was ratified  
by 52 of Africa's  
54 countries

POCA was enacted in 1998 to tackle the trinity of organised crime in South Africa (money laundering, racketeering and criminal gang activity) that increased in the 1990s.<sup>33</sup> It came into effect on 21 January 1999.

As previously mentioned, POCA was enacted before the UNTOC discussion. Therefore rather than the convention influencing POCA, POCA influenced South Africa's contribution to discussions in creating the convention.<sup>34</sup> When the convention was adopted and ratified in 2000, the provisions in POCA were sufficient to comply with the requirements for criminalising participation in a criminal group.

POCA did this in two ways. For ease of reference a table (Chart 1) has been included which compares the POCA and UNTOC definitions. First, participation in a criminal group is criminalised through section 2 which criminalises a pattern of racketeering activity. The act defines a pattern of racketeering activity as follows:

“Pattern of racketeering activity” means any property or any service advantage, benefit or reward which was derived, received, or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.”<sup>35</sup>

In addition to the section on racketeering, the South African legislature was driven by the community outcry against gangsterism in South Africa, particularly in the Western Cape.<sup>36</sup> Additional sections specifically criminalising gang-related activity as well as how to identify a gang or gang members were therefore also included in the act.<sup>37</sup>

Having both these sections has since been criticised by some academics and practitioners as unnecessary and confusing<sup>38</sup> as the conduct that's criminalised through the gang provisions is also covered under racketeering and other existing common law crimes on conspiracy.

However the motivation behind including these sections is found in the fact that South Africa has easily identifiable street gangs (as described in section 11).<sup>39</sup> These gangs often operate on a spectrum of organisation and complexity, and there was a need to distinguish between the gang leaders and ordinary members operating on the street level. It was thought that ordinary gang members (with identifying characteristics), who still cause significant harm to the community, would be targeted by additional sections.<sup>40</sup>

A further section to address the problem of intimidation by gangs was also included. Section 9(1)(b) criminalises threats of violence by gang members or for the gang's benefit. This clause was nicknamed the 'Staggie' clause after the notorious gang leader who was renowned for intimidation.<sup>41</sup>

For both the sections on racketeering and gang activity South Africa was influenced by best practices adopted in other countries. Although a global review of legislation was conducted, South Africa specifically looked to the US and Italy for examples on how to draft organised crime legislations.<sup>42</sup>

Section 2, which criminalised a pattern of racketeering activity, relied heavily on the US's RICO legislation. Similarly, section 9 of POCA, which criminalised gang-related activity, was influenced by the California Street Terrorism Enforcement and Prevention Act.<sup>43</sup> Although there was a lengthy debate among those drafting the bill as to whether South Africa should rely so heavily on American law, it was ultimately decided that these provisions were the best way to address the gap in organised crime legislation.<sup>44</sup>

POCA implemented three core ideas from RICO and the California Street Terrorism Enforcement and Prevention Act for combating organised crime and gangs.<sup>45</sup>

## Gangs often operate on a spectrum of organisation and complexity

First, the core idea of challenging the financial gain of gangs and uncovering illicit rewards: POCA has asset forfeiture measures against convicted gang members. Second, increasing the severity of penalties for gang members: POCA can increase sentencing where there are aggravating factors. These factors include being a member of a gang while committing a crime and committing a crime within the proximity of a school.

Third, overcoming the difficulty that crime members and leaders are difficult to prosecute under traditional criminal law: POCA doesn't have an express provision targeting gang leaders, but has an offence targeting anyone inciting another to commit a gang-related activity.<sup>46</sup>

The essence of sections 9-11 of POCA lies in two central ideas on how to hasten the demise of gangs. The first is based on the fact that *members of criminal organisations, and especially senior members, are difficult to prosecute under traditional criminal law*. It was therefore necessary to criminalise members of gangs as well as the recruitment process. Second, gangs had grown in threat and scope and the state wanted to increase the severity of punishments for members of such groups.

Since POCA's enactment, the Constitutional Court has also weighed in on its purpose in the *Mohunram and Another v NDPP and Another*<sup>47</sup> and *National Director of Public Prosecutions and Another v Mohamed NO and Others*<sup>48</sup> judgments.

In *Mohunram*, Judge Albie Sachs explained that the motivation behind POCA was to deal with two phenomena. First, it aimed to address the global problem of organised crime, criminal gang activities, money laundering and racketeering affecting South Africa.<sup>49</sup> Second, it was to address the failure of common law and statutory law in dealing with the former phenomena under international standards. This was echoed by Judge Laurie Ackerman in *Mohamed*, who stated that one of the purposes of POCA was to supplement common law and statutory law.<sup>50</sup>

The enactment of POCA was a clear sign that the state and the NPA in particular wanted to improve its response to gangsterism and the prosecution of gang-related crime, by means of improved anti-gang legislation. However since its enactment, the application of the act tells a different story.



## Key excerpts from the The Prevention of Organised Crime Act 121 of 1998

The introduction to the Act states that the purpose of the Act is:

- to introduce measures to combat organised crime, money laundering and criminal gang activities;
- to prohibit certain activities relating to racketeering activities;
- to provide for the prohibition of money laundering and for an obligation to report certain information;
- to criminalise certain activities associated with gangs;
- to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal assets that have been used to commit an offence or assets that are the proceeds of unlawful activity;
- to provide for the establishment of a Criminal Assets Recovery Account; and
- to amend various other pieces of legislation.

### Chapter 4: Offences relating to criminal gang activities

#### Gang-related offences

9. (1) Any person who actively participates in or is a member of a criminal gang and who
- (a) wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang;
  - (b) threatens to commit, bring about or perform any act of violence or any criminal activity by a criminal gang or with the assistance of a criminal gang; or
  - (c) threatens any specific person or persons in general, with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence, shall be guilty of an offence.
- (2) Any person who
- (a) performs any act which is aimed at causing bringing about, promoting or contributing towards a pattern of criminal gang activity;
  - (b) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about perform or participate in a pattern of criminal gang activity; or
  - (c) intentionally causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang, shall be guilty of any offence.

#### Penalties

10. (1) Any person convicted of an offence contemplated in
- (a) section 9(1) or (2)(a) shall be liable to a fine, or to imprisonment for a period not exceeding six years;

(b) section 9(2)(b) or (c), shall be liable to a fine, or to imprisonment for a period not exceeding three years;

(c) section 9(1) or (2)(a) and if the offence was committed under circumstances referred to in subsection (2) shall be liable to a fine, or to imprisonment for a period not exceeding eight years;

(d) section 9(2)(b) or (c), and if the offence was committed under circumstances referred to in subsection (2) shall be liable to a fine or to imprisonment for a period not exceeding five years.

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

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

#### Interpretation of member of criminal gang

11. In considering whether a person is a member of a criminal gang for purposes of this Chapter the court may, have regard to the following factors, namely that such person
- (a) admits to criminal gang membership;
  - (b) is identified as a member of a criminal gang by a parent or guardian;
  - (c) resides in or frequents a particular criminal gang's area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known members of a criminal gang;
  - (d) has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with usual criminal gang activity;
  - (e) is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.

## Implementation: NPA priorities and case law review

### NPA reports

A review of NPA annual reports from 2011-21 provides insight into the number of organised crime cases prosecuted each year, as well as the NPA's prosecution priorities. The reports show an increase in conviction rates of organised crime cases over time, from 89.1% in 2011/12 to 95.3% in 2019/20.

Although the conviction rates seem high, it must be noted that the annual crime statistics released by the SAPS<sup>51</sup> do not disaggregate organised or gang-related crime. It is therefore difficult to see how many of the arrests result in prosecution. These statistics would help determine the true prosecution success rate. The number of finalised cases peaked in 2014/15 with a total of 510.<sup>52</sup> This was down to 254 cases in 2019/20 and 172 in 2020/21.

### The decline of finalised organised crime cases is a point of concern

This downward trend in the past two years is partly due to the COVID-19 pandemic and resulting lockdowns. This data tells us that the organised crime cases that make it to court are likely to result in a conviction. However, the decline of finalised cases is a point of concern. A review of the NPA annual reports reveals that they don't disaggregate the cases further. It's therefore unclear how many of these cases are specifically gang-related. This makes monitoring the NPA's prioritisation and successful prosecution of gang-related cases difficult to monitor.

Further inspection of the reports shows that although they consistently reference organised crime and provide case statistics, there is remarkably less mention of gang-related crime specifically. Earlier reports (2011-16) don't even mention gangsterism or gang-related crimes.

In 2016 the NPA's Annual Performance Plan made specific reference to gang violence in the Eastern and Western Cape, with a multi-disciplinary task team to be formed to deal with gang violence in the northern areas of Nelson Mandela Bay.<sup>53</sup>

Later reports stated that, 'There have been notable successes in the fight against gangsterism with successful prosecutions in numerous gang-related trials, particularly in the Eastern Cape.'<sup>54</sup> It is however important to note that according to our research, very few, if any, of these cases used section 9 of POCA. Mention is also made of the difficulty in getting witnesses to testify as they are fearful of gang retaliation.

The 2018/19 and 2019/20 reports also state that combating gangsterism in the northern areas is a regional priority. The reports added that a dedicated team including advocates and regional court prosecutors had been tasked to attend to gang-related cases and conduct prosecution-guided investigations.

Although the team was reported to be dealing with 457 cases in 2019 and 150 in 2020, no mention is made of section 9 charges or convictions. The offences covered included murder, attempted murder, housebreaking with intent to rob and robbery, and unlawful possession of firearms and ammunition.<sup>55</sup> This is consistent with our review of cases during this time.

In contrast to the Eastern Cape, the 2019/20 report notes how the Western Cape provided specific training on section 9 to prosecutors, members of the Anti-Gang Unit, and police officers at station level (including SAPS visible policing members) on investigations, bail opposition statements and data collection for expert gang statements. A key component of the training was to improve cooperation from witnesses.<sup>56</sup>

In conclusion, the review of NPA reports highlighted three key observations. First, although there's consistent mention of organised crime and some statistics are provided, there's no mention of what portion of these cases relates to gang activity, making the prosecution of gang cases difficult to track. Second, there's been a recent increased prioritisation in NPA circles of prosecuting gang-related crime, particularly in the Eastern Cape.

Finally, the recent reported increase in gang convictions in the Eastern Cape hasn't necessarily resulted in an increase in section 9 prosecutions. To better understand how gang cases are prosecuted, a review of South African case law is required.

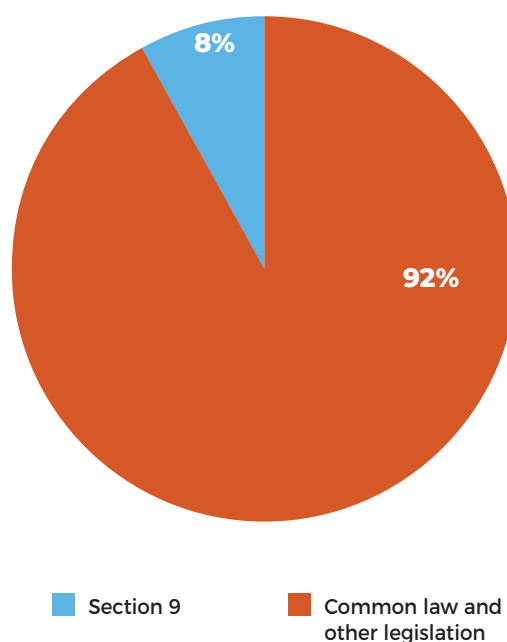
## Case law review

### Overview of reported cases in South Africa 2010-21

A helpful way to assess the use of legislation is through the review of cases. In order to do this, data was obtained from the Southern African Legal Information Institute.<sup>57</sup> High court cases were used to get a better idea on how POCA is used to prosecute gangs and gang-related crimes.<sup>58</sup>

The institute search revealed 135 cases, for the period 2010-21, that either included gang activity or charges or applications under POCA.<sup>59</sup> These cases were then recorded in a database and sorted by charges. The graphs below represent our findings and give us a window into how South African prosecutors use legislation to secure criminal gang convictions.

**Chart 3: Gang activity prosecutions – POCA Section 9 compared to the common law and other legislation high court cases, 2010-2021**

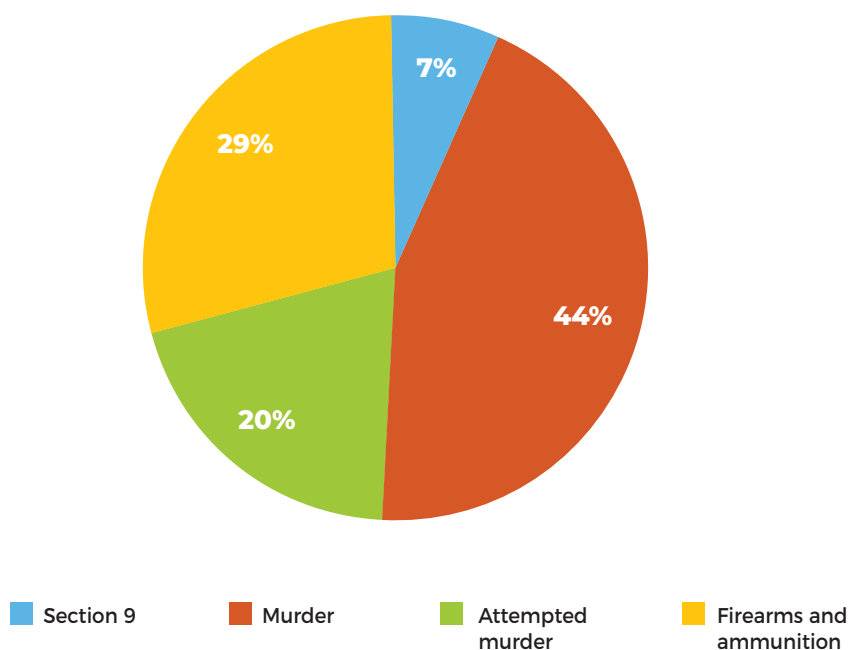


Source: Global Initiative Against Transnational Organized Crime

The above chart indicates the percentage of criminal gang activity that is prosecuted under section 9 of POCA. Only 8% of reported gang-related cases prosecuted at the high court include charges under section 9. Most gang-related crime, 92%, is prosecuted under common law or other legislation.<sup>60</sup> Common law crimes include among others murder, attempted murder and assault. Gang-related crime is also prosecuted through other legislation like the Drugs and Drug Trafficking Act<sup>61</sup> and the Firearms Control Act.<sup>62</sup>

Heavier reliance is placed on common law to secure convictions for gang-related offences. This creates the impression that either the state is reluctant to charge people for participating in criminal gang activity, or they'd prefer to focus on the other offences where a conviction is guaranteed, as more evidence is required in proving gang membership under POCA.

**Chart 4: National convictions of various gang related incidents – high court cases, 2010–2021**



Source: Global Initiative Against Transnational Organized Crime

Further inspection of the prosecution of gang-related crime shows us that 64% of the charges in which gangs are involved are prosecuted under the common law for murder or attempted murder. If these murders and attempted murders are gang-related, which a review of the cases shows they are, then the accused in these cases can also be charged under section 9 of POCA in addition to the common law charges (see case study examples for more).

However the prosecutors in these cases decided to only charge the accused for the common law crimes. This again confirms the underuse of section 9 of POCA. It is also possible that due to South Africa's high murder rate and 'culture of violence', a significant portion of gang-related activity is accompanied by murder and attempted murder.

Therefore it is not necessary for investigators and prosecutors to build cases based on section 9 in order to convict and sentence gang members as they can more easily be convicted under the common law crimes of murder and attempted murder.

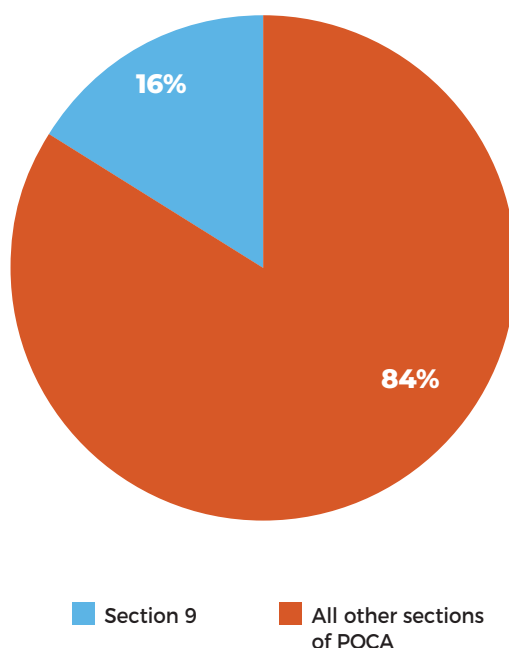
It is important to note that POCA as a whole is not an underused act. In fact, only 16% of reported high court POCA cases are for gang-related crimes (see Chart 5). The remaining 84% of cases include charges for racketeering and money laundering and applications and processes for asset forfeiture. This indicates that it's only the gang-related provisions that are yet to prove their value as an addition to South African law.

A further review of cases at the Gqeberha magistrate's and high courts shows that out of 27 gang-related cases, only four (14% of cases) included section 9 POCA charges. Although this is higher than the national rate of 8%, it is still surprisingly low as there has been a push and prioritisation for prosecuting gang-related crime in the city.<sup>63</sup>

It seems that prosecutors and investigators are still not using section 9 to achieve this. As can be seen in the three case studies from the city, it is possible to have multiple charges, and section 9 charges can also be brought alongside common law and other legislative charges. In fact section 9 of POCA requires that the accused is convicted of a 'pattern of criminal gang activity' which is defined in section 1 of POCA to include the commission of two or more criminal offences referred to in schedule 1 of the act.<sup>64</sup>



**Chart 5: Court cases under POCA**



Source: Global Initiative Against Transnational Organized Crime

## Case studies

Case	<b>S v Walter Williams<sup>65</sup></b>	<b>S v Revaldo Klaas<sup>66</sup></b>	<b>S v Mitchell and others<sup>67</sup></b>
Date of incident/s	9 and 10 December 2018	16 May 2019	14 September 2015
Date of judgment	15 June 2020	19 January 2021	8 June 2021

The following three case studies provide insight into the facts, law and successful application of section 9 POCA convictions. Although there were some notable differences, there were also some key similarities. Across the cases, all the accused were charged and convicted for murder and charges stemming from their criminal gang activity, under POCA.

### Factual background in *S v Williams*, *S v Klaas* and *S v Mitchell*

It will be seen in the case studies below that the facts in the three cases are similar. All the crimes took place in Gqeberha, all cases included murder or attempted murder charges, and firearms were the main weapons used. Last, all the accused were members of gangs.

In *S v Williams*, Benito Bosch (the victim) was in Helenvale, Gqeberha, and was on his way to buy cigarettes on the afternoon of 9 December 2018 when he noticed two suspicious people walking behind him. One was Walter Williams, who shot at Bosch and missed. However, two teenagers were injured in the gunfire. Bosch believed he had been targeted by Williams because he was a witness in a murder charge against a member of the Nice Time Bozzas (NTBs).

The next morning, Williams arrived at a house in Helenvale where the second victim, Richard Marius Stuurman, and three others were playing cards. Williams said, ‘Forgive me for what I will do now,’ to one of the players, took out a firearm and fired a shot at Stuurman. Williams then left the house and Stuurman died a few days after the shooting.

## Evidence for proving gang-related charges under POCA require the application of sections 9 and 11

In *S v Klaas*, the deceased, Enrico Kasterivier, was shot in Gqeberha on 26 May 2019. He had been sent to the local shop and his friend, Levandre Louw (the primary witness), went looking for him because he was taking long to return. Before reaching the store, the primary witness saw Revaldo Klaas shoot Kasterivier. Klaas, a member of the Honde Koppe gang, also went by the gang alias 'Baba'. The deceased suffered multiple gunshot wounds and died because of these injuries.

A few weeks before this, there had been a shooting incident in the Honde Koppe gang area, and the deceased, who was a member of the G-Stars gang, was said to have been involved in shooting somebody known as 'Kakker'. The deceased's shooting was believed to have been in retaliation for this incident.

In *S v Mitchell*, Theodore 'Tupac' Matthews, Ranjen Naidoo and Jermain 'Jabilo' Essau were all killed on 14 September 2015 in Gqeberha within a matter of hours of each other. Matthews was shot at noon in a taxi and died from gunshot wounds to the chest. Naidoo was shot in the afternoon outside his workplace. He died from multiple gunshot wounds. Essau was shot around 6pm outside his home. He was shot several times and died shortly after arriving at the hospital. His shooting was witnessed by his neighbour who testified that he heard gunshots and saw him being shot by two suspects but could not see who the suspects were.

The accused in the case are allegedly members of the Spotbouer, Dustlifes or Sestien Hond gangs. These gangs are friendly to one another and are known to work together under a gang alliance. All the accused were known under various aliases, e.g. Dolf, Holland, Eier etc. One of the accused (Mr Nel) turned state witness in the case and testified to being the gang leader of Sestien Hond and an accomplice to the murders.

Mr Nel turned state witness while awaiting trial out of fear that his life was in danger from the co-accused. He was moved to a different holding prison to await trial. The case was built on the evidence of Mr Nel and the phone calls the SAPS investigators intercepted of one of the accused. The accused appeared before the Eastern Cape high court in Gqeberha and Mr Nel was the state witness.

### Legal issues in *S v Williams*, *S v Klaas* and *S v Mitchell*

The legal issues were similar in all three cases. In all of them, the accused denied the charges of unlawful possession of firearms, murder and where applicable, attempted murder. They also denied being gang members, being in the crime area and having personal affiliations with gangs in the area.

In *Williams*, the accused denied being a member of the NTB gang and being in the vicinity of the crime scene. In *Klaas*, the accused acknowledged associating and sitting with some of the Honde Koppe gang members because they were his soccer friends, but denied being a gang member. In

*Mitchell*, the accused vehemently denied having any personal relationship with any of the co-accused or being gang members. They said they only knew the co-accused through friends or from seeing them in the neighbourhood.

The state in *Mitchell* had to determine whether the accused were gang members, and acted together to kill members of rival gangs, and communicated on the number used for the intercepted communication belonging to one of the accused.

## Analysis and application of the law

To secure convictions for the charges brought, the prosecutions had to provide the required evidence. These charges have been grouped together below as 'Other charges' and 'Gang-related charges':

### Other charges

Relevant evidence for convicting under the common law crimes of murder and attempted murder, as well as charges under the Firearms Control Act:

In *Williams*, relying on the evidence presented, the judge found that Williams intended to kill Bosch and had foreseen that the bullets he fired might strike the other people in the street. Based on an eyewitness account, the judge found that Williams's killing of Stuurman was planned and that he had entered the home with the intent of killing him.

He concluded that Williams was in possession of a firearm and ammunition at both locations that were used to intentionally kill Stuurman and Bosch and that he fired the shots that injured the two teenagers in the street. He was found guilty of murder, attempted murder and unlawful possession of a firearm and ammunition.

In *Klaas*, citing section 208 of the Criminal Procedure Act (CPA) and case law, the judge noted that the evidence of a single witness had to be treated with caution. But the primary witness was a competent witness whose version that Klaas was a member of the Honde Koppe gang and had intentionally shot and killed the deceased was truthful when considered together with evidence from the SAPS investigative Anti-Gang Unit. Klaas was found guilty of murder and the unlawful possession of a firearm and ammunition.

In *Mitchell*, the judge found that the turning of Mr Nel from accused to state witness under protection was not because of a bribe for immunity or coercion from the police; instead, it was at Mr Nel's own accord and fear for his life. The court found that Mr Nel was a competent single witness whose evidence could be used to secure a conviction in terms of s208 of the CPA. Based on his evidence of how the murders of the deceased were planned and executed, the court found the accused guilty of murder and unlawful possession of a firearm and ammunition.

### Gang-related charges

Evidence for proving gang-related charges under POCA require the application of both section 11 (elements for proving gang membership) and section 9 (gang-related activities). An accused ought to be identified or admit to being a gang member for purposes of being charged with offences relating to criminal gang activities.

In the *Williams* case, the judge stated that if the accused's membership and association with the NTB gang could be established, then an inference could be made that Williams was instructed to eliminate Bosch because he was a witness in a forthcoming criminal trial.

Williams was identified as a gang member of the NTBs through evidence from the SAPS Anti-Gang Unit. The evidence included maps identifying the various territories occupied by gangs. It showed that the NTBs occupied the biggest territory in Helenvale and identified the place where the NTBs pack their drugs and store their firearms.

Importantly, POCA as a whole is not an underused act

There was an area where the NTBs frequently spent their days, known as 'the Stoep' in Kobus Road. A state witness testified that 'the Stoep' was where he regularly saw Williams with NTB members. The crime scenes, the house in Helenvale and the street where Williams shot at Bosch, were both located within the NTB territory. Further evidence and testimonies from the Anti-Gang Unit showed that during patrols in the NTB area, Williams had been seen standing in the company of fellow NTB members and photographs showed Williams having spent the night in a house suspected to be an NTB drug and firearm hideout.

When questioned by the investigator about why he was sleeping at that house, Williams replied that he couldn't sleep at his house because it was located within the jurisdiction of a rival gang, whom he feared would kill him.

Williams was found to be an active member of the NTB criminal gang and was involved in the commission of the alleged gang-related offences.

## Section 9 of POCA is underutilised nationally and in Nelson Mandela Bay

In *Klaas*, the evidence provided by the SAPS Anti-Gang Unit identified Klaas as a member of the Honde Koppe. Photographic evidence showed that Klaas frequented the Honde Koppe gang's area and drug posts and had a tattoo associated closely with this gang. This tattoo of the letters 'NBA' signified the phrase 'Never Broke Again' which indicated the gang's intention to make money.

Several other alleged gang members were shown with the same tattoo and social media posts related to the Honde Koppe gang were provided showing their 'hand insignia' when communicating or posting messages on social media.

Photographs of graffiti inscriptions of 'NBA' on walls and small buildings were also provided, marking the territory of the Honde Koppe gang. The judge stated that when considering the provisions of POCA, Klaas must be found to be a member of the Honde Koppe criminal gang at the time of the offences for which he was charged.

In *Mitchell*, the state relied on the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA)<sup>68</sup> and the evidence of Mr Nel to identify the accused as members of criminal gangs. Police evidence contained the intercepted calls, and nicknames and aliases were used in the calls, which were translated into English from a slang Afrikaans unique to Gqeberha's northern areas.

The evidence of informers and registered sources proved that the cellphone number used in the intercepted calls belonged to one of the accused despite the phone being registered to someone else. Mr Nel's evidence identified the accused as participants in the calls, and he testified that the aliases and nicknames used belonged to the accused. The intercepted calls proved the accused were members of the gangs and detailed how they executed the crimes for the benefit of the gangs.

### Judgment and sentencing

Having identified the accused in all three cases as criminal gang members, the court convicted them in terms of gang-related offences. The judges dealt with the POCA charges differently.

In *Williams*, the court found that the accused was guilty of performing an act aimed at contributing towards a pattern of criminal gang activity under section 9(2)(a) and for aiding and abetting criminal activity committed for the benefit of a criminal gang under section 9(1)(a). The accused was sentenced to life imprisonment for murder, 36 years for attempted murder and 30 years for the unlawful possession of a firearm. Although the judge found him guilty of the charges filed under both section 9(1)(a) and 9(2)(a) of POCA, there was no mention of the specific sentences for these charges. The judge further ordered that all sentences were to run concurrently.



In *Klaas* the court, citing *S v Jordaan*, removed the s 9(1) charge and stated that the accused, as a principal actor, could not be charged for 'aiding and abetting'. Such a charge, the court stated, would only apply to someone assisting the principal actor. However, the court found that the accused was guilty under section 9(2) for performing an act aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity for his murder of a rival gang member and unlawful possession of a firearm, and he was convicted on these charges.<sup>69</sup>

The accused was sentenced to 15 years in prison for the murder of the deceased, three years for the gang-related charges under POCA, and a total of 16 years for the unlawful possession of a firearm and ammunition. The sentences were to run concurrently, and he was to spend 17 years in prison.

In *Mitchell*, the accused were found to have acted as a gang in the execution of the murders. The combination of Mr Nel's testimony, the evidence of the SAPS investigators from the intercepted calls and witness statements were sufficient to grant a conviction for gang-related crimes under POCA. The sentencing judgment has not been delivered.

## Case study analysis

The three case studies provide insight into the facts, law and successful application of section 9 of the POCA convictions. Although there were some notable differences, there were also some key similarities. Across the cases, all the accused were charged and convicted for murder and charges stemming from their criminal gang activity, under POCA.

All the cases relied on the profiling of gangs by investigators and crime intelligence units whose evidence met the section 11 requirements for establishing criminal gang membership. The evidence presented included ballistic evidence, photographic evidence, maps of gang territories and intercepted calls under RICA. Eyewitness accounts also played a vital supplementary role to the evidence gathered, the witnesses included gang members, and in the *Mitchell* case, a co-accused and accomplice to the crime turned state witness.

The judges dealt with the POCA charges differently. In *Klaas* the section 9(1)(a) charge was removed and the court stated that the accused, as a principal actor, could not be charged for 'aiding and abetting'. Such a charge would only apply to someone assisting the principal actor. This was a different outcome from *Williams* who was a principal actor but convicted under the charge. In *Mitchell*, the aiding and abetting charge was not an issue because there were several accused people. The accused were also convicted for working as a criminal gang under sections 9(1)(b) and 9(2)(b). This indicates that the number of accused people does not limit getting a conviction under POCA for gang-related crimes.

In sum, the national review of high court cases that refer to gangs or POCA, along with the more in-depth look at cases in the Nelson Mandela Bay Municipality, reveals five key findings. First, section 9 of POCA is underutilised nationally and in Nelson Mandela Bay. Second, the rest of POCA,<sup>70</sup> and asset forfeiture in particular, has a more prominent role in South African case law. Third, prosecutors are more inclined to bring charges under common law or other legislation than under section 9 of POCA for gang-related crimes.

Fourth, witnesses play a key role in obtaining gang-related convictions and their safety is paramount to a successful prosecution. Finally, it must be noted that the four section 9 convictions in the Gqeberha high court were delivered in the past few years with one judgment in 2020 and two more in 2021. This is perhaps a sign that section 9 charges and convictions are on the rise. However, with such low case numbers it is still too early to tell.

Witnesses play a key role in obtaining gang-related convictions and their safety is paramount

## Evaluating POCA

Further evaluation of the act and interviews with key stakeholders provide insight into why section 9 is underutilised. Such underuse is due to legislative shortfalls and implementation difficulties.

### Legislative shortfalls

#### Legal ambiguity

The first legislative shortfall is the legal ambiguity concerning definitions. The act is not specific on gang-related crimes because the definitions are flexible, which casts the criminal net too wide, making people who don't strictly meet the definitional requirements susceptible to prosecution.<sup>71</sup> This endangers individual liberty because citizens are denied forewarning or knowledge of the possible criminal sanctions and applications thereof.

This ambiguity essentially challenges the principle of legality. The principle of legality is a fundamental rule that an activity must constitute a criminal offence when it is committed in order for a person to be charged with a crime.<sup>72</sup> The principle finds expression in five distinct facets, two of which are important to us.<sup>73</sup>

The first principle requires legislation to be drafted or phrased in certain and clear terms, which are capable of reasonable interpretation and application. This is known as the *ius certum* principle. The second requires courts not to strain or stretch the words and definitions within a statute to bring the conduct of the accused within the ambit of those words and definitions or extend the scope of crimes by way of analogy. This is known as the *ius strictum* principle. These two principles are arguably at odds with chapter 4 (sections 9-11), read with chapter 1 (definitions) of POCA.

#### A universal definition of 'criminal gang' would be close to impossible

Regarding the *ius certum* principle, it has been argued that a strict interpretation of the POCA definition of 'criminal gang' is aimed at a very specific species of criminal gangs and ignores their inherently complex and flexible nature. An all-encompassing and universal definition of 'criminal gang' would be near impossible. POCA's fluid and flexible definitions are extremely useful, albeit constitutionally problematic and contravening the *ius certum* principle.<sup>74</sup> As a result, the prosecution and presiding officers need to be careful not to interpret the act in such a way as to infringe on the rights of the accused.

Courts have also had difficulty in applying the *ius strictum* principle.<sup>75</sup> The following case law provides a brief overview of how the courts determine whether a strict or ordinary statutory definition must be used for POCA definitions. In *S v Jordaan*,<sup>76</sup> the court left the question open to other courts to interpret and resolve but appeared to accept that both an ordinary as well as strict statutory definition would be acceptable. The court held that the state successfully adduced the requisite 'pattern of criminal activity' either in terms of the definition or in a non-technical sense.

In *S v Thomas*,<sup>77</sup> the court accepted that several of the accused formed part of the 28s gang, with no submission that they were gang members under POCA or subsequent substantive analysis of whether said gang adhered to the chapter 1 requirements. The court took judicial notice of the fact that 28s was a gang and submitted that the large number of charges constituted a pattern with no substantive analysis under the act. Similar approaches were followed in the *S v Mafahle*<sup>78</sup> and *Solomons v S*<sup>79</sup> judgments. In other cases, the court was strict on the state for not providing an analysis under the chapter 1 requirements.<sup>80</sup>

The court in *Thomas*, *Solomons*, *Mafahle* and even *Jordaan* adopted a flexible approach which disregards *ius strictum* because of the overly generous interpretation and disregard of the chapter 1 requirements.<sup>81</sup> It must be noted that it is the directory nature of the definitions that exacerbates this issue and violates the *ius certum* principle. However, *ius strictum* is the saving grace of the definitions in chapter 1 because a strict interpretation of these definitions would not violate the fundamental constitutional values.

## Limited deterrent effect

Criminal law should not only provide a means by which to criminalise and prosecute certain actions which are harmful to society, but should also provide a deterrent effect. It should warn society and potential criminals that there will be consequences for criminal activity and thereby deter them from such activity.

POCA does not seem to have this effect.<sup>82</sup> Gang-related violence and crime has increased since the promulgation of POCA. As has been pointed out above, there have also been very few convictions under section 9 of POCA.

Further, interviews with gang members and gang leaders in both Cape Town and Nelson Mandela Bay confirm that the act doesn't have a strong deterrent effect. Most have not heard of the law and those who have don't understand or care about its impact.<sup>83</sup>

Finally, as argued by Delano van der Linde, 'The deterrent effect of ... POCA is further undermined by its relatively short sentences for gang-related offences, which range between three and eight years.'<sup>84</sup>

## Low sentencing

Following on from the act's lack of deterrent effect, POCA lacks the ability to disrupt the gang's structure and capabilities. This is owing to both the lack of certainty of conviction and low sentencing.<sup>85</sup> Sentences range between three and eight years, mostly with an option of a fine. These sentences are too short to have an effective disruption on the gang's organisational structure.<sup>86</sup> Four interviewees, including a magistrate, prosecutors and an investigator, all explained how section 9 convictions almost always run concurrently with other sentences and therefore don't add extra deterrence.

As a result, some prosecutors choose to focus on the more serious offences, those carrying 15 years to life sentences, and omit or neglect to include section 9 POCA charges. The reason is that section 9 charges are more complex than other charges, and such penalties, if found guilty, result in very short imprisonment. A magistrate explained that, 'Where an offender is sentenced on multiple charges to lengthy imprisonment terms, the presiding officer [magistrate/judge] normally orders that all the sentences or the majority thereof run concurrently with any life sentence.'<sup>87</sup> This was confirmed by two senior prosecutors working in the organised crime unit.<sup>88</sup>

Simply put it doesn't seem worth the effort for prosecutors to bring a section 9 charge, as it will considerably increase the evidentiary burden without increasing the sentence.

## No offences for gang leaders

Under common law, liability for a gang leader can only arise where the accused's active involvement as a defined type of

POCA's fluid and flexible definitions are extremely useful, albeit constitutionally problematic

leader (as leader-cum-instigator, leader-cum-conspirator, or common purpose doctrine’s criminal endeavour party) can be proven.<sup>89</sup> The act doesn’t have provisions for gang leaders (bosses or high-ranking members) which results in gang leaders receiving low sentences targeted at gang membership.

However, section 9(2)(c) states: ‘Any person who intentionally causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang, shall be guilty of an offence.’<sup>90</sup> This is seen as the provision that could be used to convict members in the gang who hold more power beyond being a gang member.

However, proving that it was on the instruction of gang leaders that a crime was committed is difficult and the act doesn’t address such difficulties. Van der Linde explains: ‘The problem in holding leaders of criminal organisations or criminal gangs liable lies in proving their direct involvement with the crimes committed by subordinates lower in the chain of command or even in the absence of such a “formal” chain of command. The leader is too far removed from the actual perpetration of the crime.’<sup>91</sup>

A promising improvement in this regard is seen in *S v Mitchell* (case study above) where cellphone records were used to connect gang leaders. However, in that case, it is yet to be seen if the gang leader received a harsher sentence, although this is unlikely.

## Implementation challenges

Previous research on South Africa’s response to organised crime has noted that, ‘Although the state has been active in changing legislation to combat organised crime, it has often been its own worst enemy where enforcement is concerned, and has consequently lost some important tools in the fight against organised crime.’<sup>92</sup>

This sentiment is confirmed by interviews with key stakeholders including prosecutors, presiding officers, SAPS representatives and others working with gang-related issues, as they show that although there are shortfalls with the legislation, the main problem lies not in the law itself but in its implementation.

Section 9 of POCA is implemented by various role players making use of different investigation and prosecution approaches. Section 9 is implemented by four essential groups of professionals: criminal investigators (detectives), crime intelligence officers, prosecutors and presiding officers (judges and magistrates). A summary of the roles, responsibilities and relationships between those involved in building a criminal case for gang-related activity is laid out in Chart 6 below.

**Chart 6: Key role players in criminal investigations**

	Criminal investigators	Crime intelligence officers	Prosecutors
<b>Primary role</b>	To determine whether a crime has been committed.	To prevent crime or assist investigation and prosecution units through criminal investigations.	Responsible for pre-senting a criminal case against an accused who allegedly com-mitted a crime.
<b>Tasks/respon-sibilities</b>	Locate and arrest the suspect and recover stolen property. Obtain legally sufficient information and evidence to identify the person responsible for the crime.	Gather, collate, analyse and coordinate crime-related intelligence. Provide intelligence-related services such as security screening, lifestyle audits and vetting to the SAPS.	Assist the court in arriving at a just verdict and a fair sentence based on the evidence presented. Have discretion to decide what charges should be brought before the court, based on the available evidence.
<b>Relationship with role players</b>	Present a docket with the best possible case to the prosecutor to gain a conviction.	Prepare evidence for criminal investigators and prosecutors for the purpose of law enforcement and the prosecution of criminal offenders.	Guide the investiga-tion done by criminal investigators until the case is brought to court.

Source: Global Initiative Against Transnational Organized Crime



The goal of the investigator is to determine whether a crime has been committed, to legally obtain sufficient information and evidence to identify the person responsible for the crime, to locate and arrest the suspect, to recover stolen property, to present the best possible case to the prosecutor, and ultimately to gain a conviction. SAPS investigating officers are not procedurally compelled to seek guidance from prosecutors at the onset of their investigations, but will finalise the investigation and then submit the case docket to the prosecutors for a decision to prosecute or not.

In most instances, the prosecutors, after studying the case content, would simply refer the case docket back to the investigation officers for further investigation, or would decline to prosecute.

Crime intelligence officers are responsible for the 'gathering, collation, analysis and coordination of intelligence' to assist investigations and prosecutions and to prevent crime.<sup>93</sup> The role of the prosecutor is to help the court arrive at a just verdict and a fair sentence based on the evidence presented. It is at the prosecutor's discretion to decide what charges should be brought before the court, based on the available evidence.<sup>94</sup>

In investigating and prosecuting gang-related crimes and section 9 offences, there are different approaches that can be followed. In the prosecution-led model the prosecutor allocated to the case contributes his or her analytical skills, and his or her assessment of the elements of the offence and evidence.<sup>95</sup> Thus the prosecutor is involved in the early stage of the investigation with the intention to guide the investigation process from when the crime is reported until when the case is brought to court. In this regard, the involvement of the prosecutor should be understood in the context of guiding the investigation and not literally conducting the investigation per se.<sup>96</sup> The intelligence-led model focuses on data gathering and analysis to disrupt and prevent crime through strategic management and enforcement strategies that target prolific and serious offenders.<sup>97</sup> Doctoral research on policing in South Africa explains the models as follows:

[T]he intelligence-led investigation model provides answers to the questions such as how, who, where and when the crime was committed, the prosecutor-led investigation model is focused more on obtaining the specific and admissible evidence for successful prosecution of the offender(s). Whilst the intelligence-led investigation model can be developed within the structures of the police, the prosecutor-led investigation model requires departmental cooperation between the police and the NPA in order to be successful.<sup>98</sup>

Lastly, the national Anti-Gang Strategy (2019) cites that the criminal justice sector departments in conjunction with other relevant departments should be effectively coordinated to ensure a holistic approach to combating gangsterism.

Bearing the above role players and approaches in mind, numerous challenges regarding investigations and prosecutions were raised during our interviews. These challenges have been grouped into three key focus areas: training, case load management and interdepartmental cooperation.

## Training

The underutilisation of POCA against gangs is partly owing to the lack of training provided to prosecutors in the technicalities of the act, making it hard to rely on the act and easier to rely on traditional methods to criminalise gangs and gang-related activities.<sup>99</sup>

Interviews with prosecutors and presiding officers confirm that prosecutors, in general, are unable to apply POCA due to a serious lack of skills and training or even willingness.

A section commander in the Anti-Gang Unit stated that:

[I]t is in theory possible to act proactively in combating gangsterism by focusing the investigation on individual gangsters through a project-driven investigate approach in appose to the current ongoing

Prosecutors are unable to apply POCA due to a serious lack of training

(and reactively) response to gang-related crimes by focusing on crime scenes after the fact and securing arrests. The only reason why this approach is not realising relates to training and skills development needs within the Anti-Gang Unit in especially project-driven investigation methodology.<sup>100</sup>

The above statement was also confirmed by a representative from the Nelson Mandela Bay Municipality's Department of Safety and Security.<sup>101</sup> Further interviews revealed that the Anti-Gang Unit was understaffed in terms of experienced or well-trained gang-related investigators. According to a representative from the unit, it is not formally structured and has no official mandate for its establishment or existence within the SAPS. The investigators attached to the unit are general investigators and none were specifically trained to embark on or initiate project-driven investigations.<sup>102</sup>

The lack of training is not limited to the detectives of the Anti-Gang Unit but also extends to Crime Intelligence. Some interviewees explained that the Crime Intelligence unit at the district level seriously lacked skilled and experienced operatives in the field of gangsterism.<sup>103</sup> The unit is often unable or unwilling to provide the necessary intelligence in support of investigations and often evades responsibility or accountability.<sup>104</sup>

The NPA also lacks specialised skills for the implementation of POCA. A senior state prosecutor explained how, '[T]he legislator drafted POCA by copying legislation portions from other countries without applying proper thought to the process, and after the implementation of POCA expected the NPA to use this tool in combating organised crime and gangs without providing the necessary and most needed continuous training or skill[s] development [programmes].'<sup>105</sup>

## Overburdened workforce

A further implementation challenge, which also relates to training, is the lack of staff and resources dedicated to prosecuting gang-related cases. It must be noted though that this is not limited to gang-related cases – the NPA and SAPS are overburdened and under-resourced to tackle South African crime in general. However if progress is to be made in the prosecution of gang-related crime, it is necessary for this priority to also be reflected in resource allocation, particularly personnel.

A magistrate explained that the exceptionally high volume of cases on the court roll inhibits prosecutors from fulfilling a professional and effective service.<sup>106</sup> Prosecutors are performance-driven and certain set targets need to be achieved. If they are not, lengthy explanations must be provided. This sometimes leads to offenders being offered plea bargains instead of processing the case through the trial system. One of the most impeding factors within the NPA relates to its quest for reaching targets and performance orientation – it's a case of 'quantity supersedes quality.'<sup>107</sup>

## There is a lack of staff and resources dedicated to prosecuting gang-related cases

When there are multiple possible charges, prosecutors can choose what charges to bring or omit, and because section 9 charges are complex, prosecutors are more inclined to focus on simpler charges with higher prison sentences. Omitting section 9 charges is also based on the fact that the sentences often run concurrently.<sup>108</sup>

Thus gang-related murders and attempted murders normally attract gang-related POCA charges almost as an afterthought. This is echoed in the sentencing procedure which, following the section 9 convictions, attracts sentences that run concurrently with the main offence.

At the SAPS there is also a capacity shortage. As a commander from the Anti-Gang Unit explained, investigators at the unit or at any other detective service can't cope with both normal criminal investigations and project-driven investigations.<sup>109</sup> Investigation units should therefore be divided into two sections. One section should carry normal day-to-day case dockets (focusing on crime scenes or crimes committed). The other should comprise a team solely focusing on individuals (like gangsters) in the build-up to formulating admissible charges and arresting offenders by applying project-driven investigation methods.

## Lack of interdepartmental cooperation

Key to the successful prosecution of section 9 cases is the cooperation of all SAPS units and the NPA. Unfortunately, as explained during an interview, units or components within the SAPS are compartmentalised and operate in isolation with some degree of antagonism. For example, antagonism exists between South Africa's Directorate for Priority Crime Investigation (the Hawks) and Crime Intelligence (Covert), and between the Anti-Gang Unit and Crime Intelligence (District).<sup>110</sup> There are further issues with the continuity of these teams and cooperation among the different departments as seen in the example below.

A member of the Anti-Gang Unit explained how in 2016 there was a team of investigators and prosecutors all focusing on gang-related crime. The team secured successful convictions and harsh sentences. Their focus was not limited to section 9 POCA offences, but included all gang-related serious offences ranging from murders to attempted murders, aggravating robberies, intimidation and unlawful possession of firearms and ammunition.

The memorandum of understanding between the NPA and SAPS collapsed during 2017 due to internal NPA reshuffling of prosecutors that caused the end of the established team as an effective unit. Also, experienced investigators and intelligence operatives from the Anti-Gang Unit were transferred due to internal problems.<sup>111</sup>

In another example of failed cooperation, four prosecutors and investigators formed a team to investigate and prosecute gang cases. This team initially achieved various successes. However, as time progressed, certain threats were levelled against the four prosecutors as an intimidation strategy. The necessary security and risk assessments were done by Crime Intelligence and security guards were appointed to protect the four prosecutors.

With time the need to protect the prosecutors on a continuous basis was assessed by Crime Intelligence and resulted in the removal of the security guards. This move caused some animosity between the four prosecutors and the SAPS (Crime Intelligence branch) resulting in the Deputy Public Prosecutor redeploying the four prosecutors.

The animosity between the four prosecutors and the Anti-Gang Unit resulted in a full breakdown of a working relationship and progressed to a point where the Anti-Gang Unit had to use other prosecutors at the NPA.

This example shows the importance of well-maintained working relationships, particularly between the SAPS and NPA.<sup>112</sup> The above-mentioned team could have achieved more successful gang prosecutions had their working relationship continued unabated.

Units or components within the SAPS are compartmentalised and operate in isolation

## Conclusion

When assessing the effect of organised crime legislation, it's important to keep in mind the words of the late Italian Judge Giovanni Falcone. When asked about legal instruments to address organised crime and corruption, he said: 'If we believe we can solve the problem – in my opinion – through a better regulatory instrument than the one adopted in the past, we will not solve the problem. In my opinion, the problem can be facilitated by the regulatory instrument but not solved.'<sup>113</sup>

The purpose of this paper was to determine if POCA has facilitated South Africa's response to organised crime and in particular gang-related activity. The original purpose of the anti-gang provisions of POCA was to fill the gaps in common law and assist prosecutors in gaining convictions for gang-related crime. It was hoped that the improved prosecution of gang crime would help in the state's battle against the rise of gangsterism.

However, these sections of POCA are not meeting these objectives. Despite the fact that gang crime has increased since its enactment, the act is severely underutilised for gang-related crime. This was evident in the national overview of case law as well as the more in-depth look into Nelson Mandela Bay.

### POCA is severely underutilised for gang-related crime

Interviews with stakeholders revealed that the primary legislative reason for the act's underutilisation was that the charges carried a high evidentiary burden and low sentencing, providing little motivation for pursuing these convictions. This is understandable from a resource management and capacity perspective as the sentencing doesn't weigh up the effort and prosecutors can convict gang members for longer sentences with significantly less evidential burden if they focus on common law crimes.

Interviews further revealed that successful implementation of the provisions was negatively affected by limited training and resources as well as a lack of interdepartmental cooperation.

To address these shortfalls, recommendations are provided. It is however important to note that for the recommendations below to have a substantial effect on addressing organised crime, the various departments involved in the South African criminal justice process need to be cleaned up and held accountable for their role in state capture. A promising first step is the NPA's move to set up a task force to focus on the Zondo Commission cases.<sup>114</sup>

## Recommendations

- An independent assessment into the success and usefulness of POCA and each of its individual provisions should be conducted.
- Based on the outcome of this assessment, POCA should be amended to increase sentencing so that section 9 sentences don't automatically run concurrently with other charges. Alternatively consider removing section 9 and prosecute gang activity under section 2. This assessment could also include research into the use of specific charges for gang leaders with appropriate sentencing structures. Consider the difficulties in proving that gang leaders commission the crimes that they seem so far removed from.
- There should be specific charges for gang leaders with appropriate sentencing provisions.
- Provide more training and resources so cases can be built by specialised intelligence operatives, investigators and prosecutors.
- Focus on a project-driven model, combining intelligence-led and prosecution-led models. This would also require improved interdepartmental cooperation. The team investigating gang-related cases should have an experienced, skilled and specialised lead criminal investigator assisted by other specialised criminal investigators, crime and intelligence analysts and dedicated intelligence operatives. The team should be guided by a senior prosecutor attached to the NPA's organised crime section.
- Improve witness protection mechanisms in order to encourage better witness cooperation.<sup>115</sup>

## Appendix: Case comparison table

	<i>S v Williams</i> (2020)	<i>S v Klaas</i> (2021)	<i>S v Mitchell</i> (2021)
<b># of accused</b>	One	One	Six – four convicted
<b># of victims</b>	Four – one deceased, three survivors (two injured)	One – deceased	Three – all deceased
<b>Evidence</b>	<p>Eyewitness accounts</p> <p>Photographic evidence showing gang-affiliated tattoos, a map of the gang territory, pictures of the accused and his gang associates</p> <p>Ballistics report of gun used in commission of the crimes</p> <p>Post-mortem report for the murder victim</p>	<p>Eyewitness account</p> <p>Photographic evidence of tattoos, gang members, hand insignia and emojis used in social media posts by gang members, graffiti marking gang territory, maps of gang territories and drug posts</p> <p>Ballistics report</p>	<p>Intercepted cellphone calls</p> <p>Crime Intelligence evidence</p> <p>State witness account (accomplice) on planning and execution of the murders</p> <p>Verification of gang nicknames and/or aliases</p>
<b>State witnesses</b>	<p>Anti-Gang Unit investigators</p> <p>Eyewitnesses</p> <p>Crime scene investigators</p> <p>Forensic fieldworkers and analysts</p> <p>Expert witness (doctor)</p>	<p>SAPS officer from the ballistics section</p> <p>SAPS Anti-Gang Unit investigators</p> <p>Eyewitness</p> <p>SAPS captain</p>	<p>Witness in state protection (co-accused)</p> <p>SAPS investigators</p> <p>Eyewitness</p> <p>Medical personnel</p>
<b>POCA charges</b>	<p>Section 9(1)(a) – guilty</p> <p>Section 9(2)(a) – guilty</p>	<p>Section 9(1)(a) – not guilty, discharged</p> <p>Section 9(2)(a) – guilty</p>	<p>Section 9(1)(a) – guilty</p> <p>Section 9(1)(b) – guilty</p> <p>Section 9(2)(a) – guilty</p> <p>Section 9(2)(b) – guilty</p>
<b>Sentence</b>	<p>Life imprisonment for murder</p> <p>Thirty-six years for attempted murder</p> <p>Thirty years for the unlawful possession of a firearm</p> <p>Three years for the unlawful possession of ammunition</p> <p>* Sentences run concurrently</p>	<p>Fifteen years for murder</p> <p>Ten years for the unlawful possession of a firearm</p> <p>Six years for the unlawful possession of ammunition</p> <p>Three years on POCA charge</p> <p>* Sentences run concurrently</p>	Sentence – judgment pending
<b>POCA sentence</b>	Unknown	Three years	Sentence – judgment pending

Source: Global Initiative Against Transnational Organized Crime

## Notes

- 1 For more on the growth of organised crime in post-apartheid South Africa see M Shaw, Organised Crime in Post-Apartheid South Africa, Institute for Security Studies (ISS) *Paper*, 28, 1998.; G Kynoch, Crime, conflict and politics in transition-Era South Africa, *African Affairs*, Vol. 104, No. 416, 2005.; K Goga, Taking stock of the last 20 years: Responses to organised crime in a democratic South Africa, *SA Crime Quarterly*, No. 48, 2014.; M Shaw, Organised and cross-border crime in post-apartheid South Africa, *South African Journal of International Affairs*, Vol. 6, No. 1, 1998.
- 2 The definition for 'pattern of criminal gang activity' in POCA and s186.22(a) of the California Street Terrorism Enforcement and Prevention Act of 1988 differ slightly in wording but also have the same key elements. Some commentators go as far as to say that it is a copy and paste of the act. For more see A Standing as quoted in SG Lebeza, 'Defining Organised Crime: A comparative analysis', unpublished PhD dissertation, University of South Africa, September 2012.
- 3 K Goga, Taking Stock of the last 20 years: Responses to organised crime in a democratic South Africa, *SA Crime Quarterly*, 48, 63-73.
- 4 Qqeberha was renamed from Port Elizabeth after the name the Xhosa and Southern Khoe use for the Baakens River in the Eastern Cape. Qqeberha is a major city in the Eastern Cape falling under the Nelson Mandela Bay Municipality. This is one of eight metropolitan municipalities in South Africa and comprises of Qqeberha, Uitenhage, Despatch and surrounding rural areas. The gang-ridden northern areas of Nelson Mandela Bay are located on the outskirts of Qqeberha and fall within the jurisdiction of the magistrate and high courts of the city. The name change from Port Elizabeth to Qqeberha has not affected the names of the courts in the region. This is because the name change of statutory bodies such as courts does not happen automatically after a new geographical name has been placed in the Government Gazette. A court application will have to be filed to change the names of courts and such an application has not been initiated in Qqeberha. Therefore the courts in the region are still referred to as Port Elizabeth. For ease of reading in the report we mainly refer to the northern areas and the Nelson Mandela Bay Municipality as whole and to avoid confusion only make limited reference to the city of Qqeberha or Port Elizabeth.
- 5 For the full speech see: Statement by President Cyril Ramaphosa at the handover of the first part of State Capture Commission report, 4 January 2022, [www.thepresidency.gov.za/press-statements/statement-president-cyril-ramaphosa-handover-first-part-state-capture-commission-report](http://www.thepresidency.gov.za/press-statements/statement-president-cyril-ramaphosa-handover-first-part-state-capture-commission-report).
- 6 For more on the impact of state capture on the South African criminal justice system see: The Institute of Security Studies and Corruption Watch, State capture and the political manipulation of criminal justice agencies: A joint submission to the Judicial Commission of Inquiry into Allegations of State Capture, April 2019, <https://issafrica.org/research/books-and-other-publications/state-capture-and-the-political-manipulation-of-criminal-justice-agencies>.
- 7 For more on the benefits of using a mixed methods approach in criminal justice and criminology research see: JJ Brent and PB Kraska, Moving Beyond our Methodological Default: A Case for Mixed Methods, *Journal of Criminal Justice Education*, Vol. 21, No. 4, 2010.; A Trahan and DM Stewart, Toward a Pragmatic Framework for Mixed-Methods Research in Criminal Justice and Criminology, *Applied Psychology in Criminal Justice*, 9 (1), 2013.
- 8 Southern African Legal Information Institute, [www.saflii.org/](http://www.saflii.org/).
- 9 National Prosecuting Authority (NPA) Annual Reports, 2016-2020.
- 10 K Thomas, M Shaw and M Ronan, A city under siege: Gang violence and criminal governance in Nelson Mandela Bay, Global Initiative Against Transnational Organized Crime, November 2020.
- 11 As part of the SAPS's Anti-Gang Strategy, the Anti-Gang Units were established to investigate gangs and gang-related activity with a focus on dismantling the economic profits generated by gangs. For more on the Anti-Gang Strategy see: <https://pmg.org.za/committee-meeting/27859/>.
- 12 Based on a previous paper published on gangs in Nelson Mandela Bay (K Thomas, M Shaw and M Ronan, A city under siege: Gang violence and criminal governance in Nelson Mandela Bay, Global Initiative Against Transnational Organized Crime, November 2020), a roundtable discussion was hosted with key stakeholders from the SAPS, the NPA and the city's Safety and Security Department. At this roundtable, issues regarding the investigation and prosecution of gangs were raised and further research on the topic was recommended. Following this, a local field researcher arranged individual interviews with these stakeholders to form part of this study. Due to sensitivities and in order to encourage openness in the discussion, a general principle of confidentiality was applied regarding the interview process.
- 13 One of these interviews was conducted in person in Cape Town. The remainder were conducted by phone or email.
- 14 Note - 'organised crime' under section 16(a) of the South African Police Service Act 68 of 1995 refers to 'criminal conduct or endeavour by a person, group of persons or syndicate acting in an organised fashion or in a manner which could result in substantial financial gain for the person, group of persons or syndicate involved.
- 15 P Hauck and S Peterke, Organised crime and gang violence in national and international law, *International Review of the Red Cross*, 420. In addition to the UNTOC, 2014, the African Union Assembly enacted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, known as the Malabo Protocol. The protocol was enacted to deal with international law jurisdiction (crimes against humanity, genocide etc.) but also transnational economic crimes and other crimes (terrorism, piracy,



- unconstitutional change in government). For more on this see: DC van der Linde, *Criminal Gang Activities: A Critical and Comparative Analysis of the Statutory Framework under South African Criminal Law* (published PhD dissertation, Stellenbosch University), 270–271.
- 16 Like the UNTOC, South Africa's organised crime legislation was also largely influenced by the American and Italian response. For more on the history of the UNTOC see: I Tennant, *The promise of Palermo: A political history of the UN Convention against Transnational Organized Crime*, Global Initiative Against Transnational Organized Crime, October 2020.
  - 17 Following the completion of the UNTOC, the United Nations Office on Drugs and Crime created a legislative guide to assist states in creating local laws in compliance with the convention. For more information on the legislative guide and other supporting documentation see <https://sherloc.unodc.org/cld/v3/sherloc/legislative-guide/>.
  - 18 United Nations Office on Drugs and Crime Legislative Guide to the United Nations Convention on Transnational Organized Crime available at: <https://sherloc.unodc.org/cld/v3/sherloc/legislative-guide/>; Working Group of Government Experts on Technical Assistance, Background Paper by the Secretariat, Criminalization of Participation in an Organized Criminal Group, COP to the United Nations Convention Against Transnational Organized Crime Vienna, 2014.
  - 19 Interview with Peter Gastrow (involved in the original drafting of POCA as well as Special Rapporteur to the United Nations during the UNTOC negotiations), Cape Town, November 2021.
  - 20 Interview with Peter Gastrow (involved in the original drafting of POCA as well as Special Rapporteur to the United Nations during the UNTOC negotiations), Cape Town, November 2021.
  - 21 P Hauck and S Peterke, Organized crime and gang violence in national and international law, *International Review of the Red Cross*, Vol. 92, no. 878, June 2010.
  - 22 P Hauck and S Peterke, Organized crime and gang violence in national and international law, *International Review of the Red Cross*, Vol. 92, no. 878, June 2010.
  - 23 DC van der Linde, *Criminal Gang Activities: A Critical and Comparative Analysis of the Statutory Framework under South African Criminal Law* (published PhD dissertation, Stellenbosch University, 2018), 113.
  - 24 L Adal, Organised Crime in Africa / Weak laws make targeting organised crime harder, *Enact Africa blog*, <https://enactafrica.org/enact-observer/weak-laws-make-tackling-organised-crime-harder>, November 2018.
  - 25 The UNTOC Review Mechanism was launched in October 2020 and will be conducted in stages with a multi-year workplan. The UNTOC Review Mechanism is a peer review process that will support state parties to the convention and the protocols in the effective implementation of these instruments, as well as help state parties to identify and substantiate specific needs for technical assistance and to promote international cooperation. For more information on the progress and stages of the review mechanism see: [www.unodc.org/unodc/en/organized-crime/intro/review-mechanism-untoc/home.html](http://www.unodc.org/unodc/en/organized-crime/intro/review-mechanism-untoc/home.html).
  - 26 For more information on the UNTOC Review Mechanism see: [www.unodc.org/unodc/en/organized-crime/intro/review-mechanism-untoc/home.html](http://www.unodc.org/unodc/en/organized-crime/intro/review-mechanism-untoc/home.html).
  - 27 A Standing, *Transnational Organized Crime and the Palermo Convention: A reality Check*, December 2010.
  - 28 M Shaw, *Organised Crime in Post-Apartheid South Africa*, *ISS Paper*, 28, 1998.; G Kynoch, *Crime, conflict and politics in transition-Era South Africa*, *African Affairs*, Vol. 104, No. 416, 2005.; K Goga, *Taking stock of the last 20 years: Responses to organised crime in a democratic South Africa*, *SA Crime Quarterly*, No. 48, 2014.; M Shaw, *Organised and cross-border crime in post-apartheid South Africa*, *South African Journal of International Affairs*, Vol. 6, No. 1, 1998.
  - 29 A Standing, *The Threat of gangs and anti-gangs policy*, *ISS Paper* 116, South Africa, 1, 2005., *The People Against Gangsterism and Drugs (PAGAD)* is a an organisation founded in the mid-1990s in Cape Town to address violence and gangsterism in crime-ridden mainly Muslim and Coloured townships in Cape Town. What started as a community-based anti-crime movement became notoriously know as a vigilante group associated with the killings of gang leaders and bombings in Cape Town. The group was responsible for the public lynching of Rashaad Staggie, a notorious gang leader of the Hard Livings gang.
  - 30 Introduction paragraph to the Prevention of Organised Crime Act 121 of 1998. Also see Andre Standing, *The threat of gangs and anti-gangs policy*, *ISS Paper* 116, South Africa, 5, 2005. See Delano van der Linde, *The criminalisation of gang activity in South Africa*, *SA Crime Quarterly*, 2.
  - 31 POCA Preamble [... AND WHEREAS the pervasive presence of criminal gangs in many communities is harmful to the well-being of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities;] and [...AND WHEREAS it is the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals.]
  - 32 A Standing, *The threat of gangs and anti-gangs policy*, *ISS Paper* 116, South Africa, 5, 2005.
  - 33 DC van der Linde, *Considering the constitutionality of South Africa's anti-gang legislation in light of principle of legality*, *South African Journal on Human Rights*, 221–241.
  - 34 Interview with Peter Gastrow (involved in the original drafting of POCA as well as Special Rapporteur to the United Nations during the UNTOC negotiations), Cape Town, November 2021.
  - 35 POCA section 1(1)(xii).
  - 36 POCA Preamble [... AND WHEREAS the pervasive presence of criminal gangs in many communities is harmful to the well-being of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities;] and [...AND WHEREAS it is the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals.]
  - 37 POCA s 9-11.

- 38 A Standing as quoted in Lebeya states that chapter 4 of POCA, which relates to criminal gangs, was originally planned to be a piece of legislation called the Gangsterism Prevention Act. He says this chapter is a carbon copy of the California law called the California Street Terrorism Enforcement and Prevention (STEP) Act of 1988. He concludes that in merging the RICO and the California STEP Act to produce POCA, the drafters did not distinguish 'criminal gang' and 'organised criminal group'. SG Lebeya, 'Defining Organised Crime: A comparative analysis', unpublished PhD dissertation, University of South Africa, September 2012.
- 39 Interview with Peter Gastrow (involved in the original drafting of POCA as well as Special Rapporteur to the United Nations during the UNTOC negotiations), Cape Town, November 2021.
- 40 For more information on gangs operating in South Africa see: K Thomas, M Shaw and M Ronan, A city under siege: Gang violence and criminal governance in Nelson Mandela Bay, Global Initiative Against Transnational Organized Crime, November 2020.; J Irish-Qhobosheane, M Shaw and K Thomas, Ending the cycles of violence: Gangs, protest and response in Western Johannesburg, 1994-2019, Global Initiative Against Transnational Organized Crime, July 2019.
- 41 Justice Portfolio Committee meeting on the Prevention of Organised Crime Bill [B118-98] Discussion, <https://pmg.org.za/committee-meeting/6539/>, 3 November 1998.
- 42 Interview with Peter Gastrow (involved in the original drafting of POCA as well as Special Rapporteur to the United Nations during the UNTOC negotiations), Cape Town, November 2021.
- 43 A review of all three pieces of legislation reveals that the definition for 'pattern of racketeering' under POCA, although not identical to s1961(5) of RICO, has the same key elements. Likewise, the definition for 'pattern of criminal gang activity' in POCA and s186.22(a) of STEP differ slightly in wording but have the same key elements.
- 44 Interview with Peter Gastrow (involved in the original drafting of POCA as well as Special Rapporteur to the United Nations during the UNTOC negotiations), Cape Town, November 2021.
- 45 A Standing, The threat of gangs and anti-gangs policy, *ISS Paper* 116, South Africa, 5, 2005.
- 46 A Standing, The threat of gangs and anti-gangs policy, *ISS Paper* 116, South Africa, 5, 2005.
- 47 *Mohunram and Another v NDPP and Another* 2007 (2) SACR 145.
- 48 *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 at 14-15.
- 49 DC van der Linde, Criminal Gang Activities: A Critical and Comparative Analysis of the Statutory Framework under South African Criminal Law, published PhD dissertation, Stellenbosch University, 2018, 111. See *Mohunram and Another v NDPP and Another* 2007 (2) SACR 145.
- 50 DC van der Linde, Criminal Gang Activities: A Critical and Comparative Analysis of the Statutory Framework under South African Criminal Law, published PhD dissertation, Stellenbosch University, 2018, 111. See *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 at 14-15. See POCA Preamble [... AND WHEREAS the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities.]
- 51 SAPS crime statistics, [www.saps.gov.za/services/crimestats.php](http://www.saps.gov.za/services/crimestats.php).
- 52 NPA Annual Reports 2011-21.
- 53 NPA Annual Reports 2016-7.
- 54 NPA Annual Reports 2017-8.
- 55 NPA Annual Reports 2018-19.
- 56 NPA Annual Reports 2019-20.
- 57 Southern African Legal Information Institute, [www.saflii.org/](http://www.saflii.org/).
- 58 POCA-related convictions that were secured in the magistrate's courts, Supreme Court of Appeal and Constitutional Court do not form part of the data set.
- 59 These cases also include civil recovery applications under Chapter 6 of POCA. Previous research (2010) on POCA cases also noted that since the coming into force of POCA 'no accused has been successfully prosecuted for an offence relating to criminal gang activities under sections 9 and 10 of POCA.' JD Mujuzi, Ten years of the South African Prevention of Organised Crime Act (1999-2009), *Criminal Justice Initiative*, 6, 1-10.
- 60 Common law offences are crimes referred to under English criminal law and the related criminal law of other countries in the Commonwealth. Such offences are punishable under common law, which is developed entirely by the courts, and not under statutory law. Examples include murder, assault, *crimen injuria*, defeating or obstructing the course of justice, etc.
- 61 Drugs and Drug Trafficking Act 140 of 1992.
- 62 Firearms Control Act 60 of 2000.
- 63 NPA Annual Reports, 2016-2020.
- 64 Schedule 1 offences are offences under the Criminal Procedures Act 51 of 1977, and include a wide range of common law and statutory law offences. These are minor offences that are non-arrestable and do not permit imprisonment when awaiting trial. The list includes common assault, trespassing, contempt of court, public indecency, etc. They also includes offences valued at a certain minimum value e.g. for theft, receiving stolen property up to R1 500 is a schedule 1 offence. For schedule 1 offences, the investigating officer can grant police bail instead of the accused appearing in court for bail.
- 65 *S v Williams* (CC 22/2019) [2020] ZACPEHC 18, [www.saflii.org/za/cases/ZACPEHC/2020/18.html](http://www.saflii.org/za/cases/ZACPEHC/2020/18.html), 15 June 2020.
- 66 *S v Klaas* (CC16/2020) [2021] ZACPEHC 12, [www.saflii.org/za/cases/ZACPEHC/2021/12.html](http://www.saflii.org/za/cases/ZACPEHC/2021/12.html), 29 January 2021.
- 67 *S v Mitchell and others* (unreported) case number 04/2018 of 8 June 2021.
- 68 The Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 allows an investigating officer to intercept

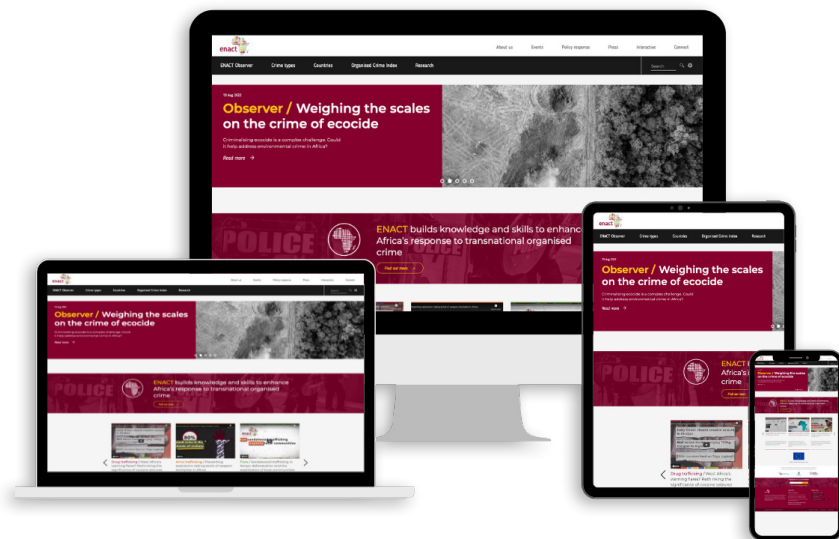
- telephone and cellphone communication of any specific person of interest.
- 69 S9(2) of POCA.
- 70 The rest of the act includes sections on racketeering, money laundering, the proceeds of unlawful activities and the realisation and civil recovery of property.
- 71 DC van der Linde. Considering the constitutionality of South Africa's anti-gang legislation in light of principle of legality, *South African Journal on Human Rights*, 221.
- 72 Jonathan Burchell, *Principles of Criminal Law*, 3<sup>rd</sup> Edition, JUTA, 2007.
- 73 The five facets are namely the *ius acceptum* principle, the *ius praevium*, the *ius strictum* principle, the *ius certum* principle and the principle of compliance. See DC van der Linde. Considering the constitutionality of South Africa's anti-gang legislation in light of principle of legality, *South African Journal on Human Rights*, 226, 231, 236.; CR Snyman, *Criminal Law*, 4<sup>th</sup> Edition, LexisNexis, 2007.
- 74 DC van der Linde. Considering the constitutionality of South Africa's anti-gang legislation in light of principle of legality, *South African Journal on Human Rights*, 228. See *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 (SCC) (Supreme Court of Canada).
- 75 DC van der Linde. Considering the constitutionality of South Africa's anti-gang legislation in light of principle of legality, *South African Journal on Human Rights*, 231-236.
- 76 *S v Jordaan* (unreported case number CC20/2017) [2017] ZAWCHC 131, 16 November 2017.
- 77 *S v Thomas* 2015 JDR 1932 (WCC).
- 78 In *S v Mafahle and Others* (unreported case number 4/2018) [2019] ZAFSHC 266 (5 July 2019), three accused were found guilty of contravening POCA. There reference was made to the fact that they were gang members. However no reference was made to the POCA statutory requirements nor a substantive analysis of where said gang complied with chapter 1 requirements of a gang and pattern of criminal gang activity.
- 79 *Solomons v S* [2019] 2 All SA 833 (WCC). The accused was charged with contravention of POCA, but no reference was made by the state or court to the actual chapter 1 requirements (gang member or contribution to a pattern of criminal activity), yet the court concluded the state had a strong case against the accused.
- 80 *S v Ceaser* (unreported case number SS29/2009) [2010] ZAWCHC 580, 29 November 2010. The accused were charged with crimes contravening s9(1)(a)-(b) of POCA. The court held that there was strong suspicion that the accused's activities were gang-related but held that the state's evidence did not prove this beyond reasonable doubt.
- 81 DC van der Linde. Considering the constitutionality of South Africa's anti-gang legislation in light of principle of legality, *South African Journal on Human Rights*, 236.
- 82 DC van der Linde. The criminalisation of gang activity in South Africa: reassessing the rationale, *SA Crime Quarterly*, no.69, 2020.
- 83 Various in-person and telephonic interviews with gang members, May to October 2021.
- 84 DC van der Linde. The criminalisation of gang activity in South Africa: reassessing the rationale, *SA Crime Quarterly*, no.69, 2020.
- 85 Valerie Wright explains that, '[W]hile the criminal justice system as a whole provides some deterrent effect, a key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits. Research to date generally indicates that increases in the certainty of punishment, as opposed to the severity of punishment, are more likely to produce deterrent benefits.' For more on the impact of certainty of conviction see: V Wright, Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment, The Sentencing Project, [www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf](http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf), November 2010.
- 86 DC van der Linde. Why a law designed to fight gang violence in South Africa can't do the job, *The Conversation*, 19 February 2019.
- 87 This is in accordance with section 39(2)(a)(i) of the Correctional Services Act, No 111 of 1998. Interview with magistrate, Nelson Mandela Bay, 21 May 2021.
- 88 Interviews with senior prosecutors, Nelson Mandela Bay, May 2021.
- 89 DC van der Linde. The criminalisation of gang activity in South Africa, *SA Crime Quarterly*, 40.
- 90 Section 9(2)(c) of Prevention of Organised Crime Act 121 of 1998.
- 91 DC van der Linde. The criminalisation of gang activity in South Africa, *SA Crime Quarterly*, 40.
- 92 K Goga. Taking stock of the last 20 years: Responses to organised crime in a democratic South Africa, *SA Crime Quarterly*, 48, 63-73.
- 93 South African government, Police and defence, [www.gov.za/about-sa/police-and-defence](http://www.gov.za/about-sa/police-and-defence).
- 94 National Prosecution Policy, <https://static.pmg.org.za/docs/1999/990301policy.htm>, 2013.
- 95 M Schönteich, Lawyers for the people. The South African Prosecution Service, *SA Crime Quarterly*, No. 50, 2014.
- 96 M Schönteich, Lawyers for the people. The South African Prosecution Service, *SA Crime Quarterly*, No. 50, 2014.
- 97 JH Ratcliffe, *Intelligence-led policing*, Cullompton: Willan Publishing, 2008.
- 98 NW Myeza. An analysis of the prosecution-led investigation model in murder cases, PhD thesis, University of South Africa, 2019.
- 99 A Standing. The threat of gangs and anti-gangs policy, *ISS Paper* 116, South Africa, 4, 2005.
- 100 Interview with a section commander from the Anti-Gang Unit, SAPS, Nelson Mandela Bay, May 2021.
- 101 Interview with a representative of the Nelson Mandela Bay Municipality Department of Safety and Security, May 2021.
- 102 Interview with a representative of the Anti-Gang Unit, SAPS, Nelson Mandela Bay, May 2021.

- 103** Interview with a representative of the Anti-Gang Unit, SAPS, Nelson Mandela Bay, May 2021.
- 104** Interview with a representative of the Anti-Gang Unit, SAPS, Nelson Mandela Bay, May 2021.
- 105** Interview with a senior state prosecutor, May 2021.
- 106** Interview with a magistrate, Nelson Mandela Bay, May 2021.
- 107** Interview with a senior state prosecutor, May 2021.
- 108** Various interviews with a magistrate and prosecutors, May 2021.
- 109** Interview with a commander from the Anti-Gang Unit, Nelson Mandela Bay, May 2021.
- 110** Interview with a representative of the Anti-Gang Unit, SAPS, Nelson Mandela Bay, May 2021.
- 111** Interview with a section commander from the Anti-Gang Unit, Nelson Mandela Bay, May 2021.
- 112** Despite the difficult working relationships, most interviewees agreed that in complex gang-related investigations, especially in terms of POCA, it would be more effective to apply both the intelligence-led investigation model and prosecution-led investigation model by means of applying a project-driven investigative approach.
- 113** Dr G Falcone, Parliamentary commission of inquiry on the phenomenon of the mafia and on other similar criminal associations, 22 June 1990. Declassified in July 2021 and translated in November 2021.
- 114** K Maughan, NPA creates state capture 'task force' after Zondo finds it failed to prosecute corruption, *News24*, [www.news24.com/news24/southafrica/news/just-in-mpa-creates-state-capture-task-force-after-zondo-finds-it-failed-to-prosecute-corruption-20220112](http://www.news24.com/news24/southafrica/news/just-in-mpa-creates-state-capture-task-force-after-zondo-finds-it-failed-to-prosecute-corruption-20220112), 12 January 2022.
- 115** For more on the experiences of witnesses and the witness protection programme see: LN Mphaphuli and P Botha, Experiences and Coping Strategies of Protected Witnesses in South Africa: A Social Work Perspective, *Acta Criminologica: African Journal of Criminology & Victimology*, Vol. 34, No. 2, 2021.



## **ENACT** builds knowledge and skills to enhance Africa's response to transnational organised crime

Visit our website for the latest analysis, insight and news  
[www.enactafrica.org](http://www.enactafrica.org)



**Step 1** Go to [www.enactafrica.org](http://www.enactafrica.org)

**Step 2** Go to bottom of the ENACT home page and  
provide your subscription details



This project is funded by the European Union

## About the author

Kim Thomas is an analyst at the Global Initiative Against Transnational Organized Crime. She holds an MPhil in Public Law from the University of Cape Town and an LLB from Stellenbosch University. She has worked as a researcher on organised crime in South Africa and is also an admitted South African attorney with experience in the legal aid sector, working on issues relating to socio-economic rights.

## About ENACT

ENACT builds knowledge and skills to enhance Africa's response to transnational organised crime. ENACT analyses how organised crime affects stability, governance, the rule of law and development in Africa, and works to mitigate its impact. ENACT is implemented by the ISS in partnership with INTERPOL and the Global Initiative Against Transnational Organized Crime.

## Acknowledgements

ENACT is funded by the European Union (EU). This publication has been produced with the assistance of the EU.



Cover image © Amelia Broodryk/ISS

The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views or position of the European Union, or the ENACT partnership. Authors contribute to ENACT publications in their personal capacity. © 2022, ENACT. Copyright in the volume as a whole is vested in ENACT, its partners, the EU and the author, and no part may be reproduced in whole or in part without the express permission, in writing, of the author and the ENACT partnership.