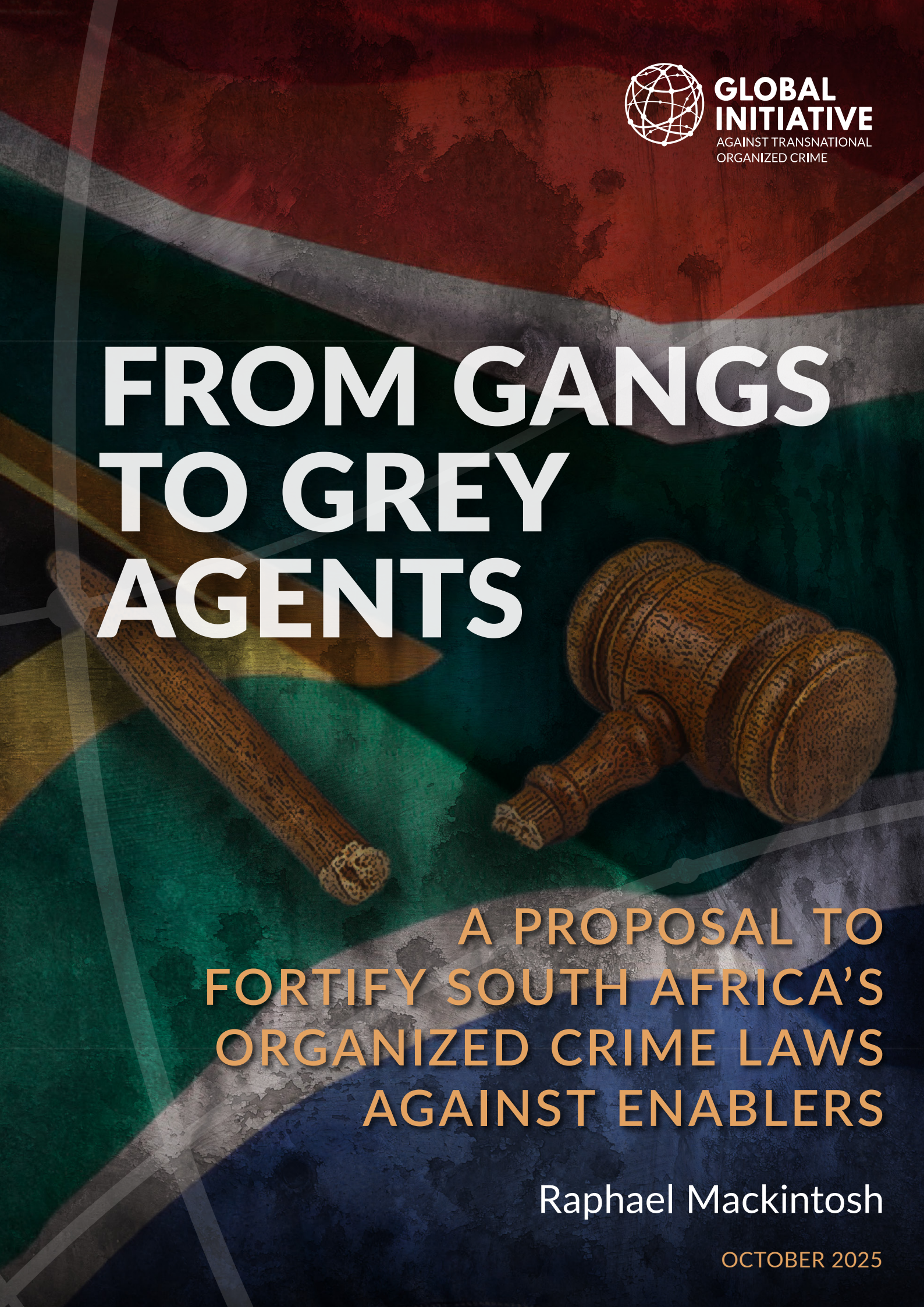

GLOBAL INITIATIVE
AGAINST TRANSNATIONAL ORGANIZED CRIME

FROM GANGS TO GREY AGENTS

A PROPOSAL TO FORTIFY SOUTH AFRICA'S ORGANIZED CRIME LAWS AGAINST ENABLERS

Raphael Mackintosh

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ABBREVIATIONS

APOC	Act on Punishment of Organized Crimes and Control of Crime Proceeds
CLCA	Criminal Law Consolidation Act 1935
GI-TOC	Global Initiative against Transnational Organized Crime
NSW	New South Wales
POCA	Prevention of Organized Crime Act
PSC	Public Safety Commission
RICO	Racketeer Influenced and Corrupt Organisations Act
SA	South Australia
SAPS	South African Police Service
SCA	Supreme Court of Appeal
STEP	Street Terrorism Enforcement and Prevention Act
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
USC	United States Code (Code of Laws of the United States of America)

EXECUTIVE SUMMARY: A PROPOSAL TO REFORM THE PREVENTION OF ORGANIZED CRIME ACT 121 OF 1998

To fathom the tenacity of organized crime in South Africa, one must look beyond the stereotypical figures of gang leaders and enterprise kingpins. Consider the mundane requirements of any commercial venture and the unpalatable truth becomes apparent: organized crime endures because it operates within the same professional ecosystem that sustains legitimate business – drawing upon lawyers, accountants, logistics firms and real estate companies that provide the quotidian services necessary to plan, execute and manage any complex enterprise. To service the unorthodox needs of criminal clientele, this ecosystem invariably includes a peripheral ring of complicit enablers who quietly supply the tools and services that make serious crimes easier to plan, carry out and conceal.

The Prevention of Organized Crime Act 121 of 1998 (POCA), designed to prosecute the core participants and members of criminal organizations, does not reach this outer ring of professional enablers. These actors never join a criminal group or intentionally facilitate specific crimes. Instead, they knowingly profit from demand in the broader criminal market by deliberately distancing themselves from its inner workings, shielding behind a cynical ignorance of the criminality their business models sustain. This report diagnoses this fundamental limitation in POCA's statutory design and proposes a set of amendments that would criminalize this form of complicity.

POCA's current limitation: The 'enabler' gap

POCA's offences address three pillars of organized crime: racketeering, money laundering and criminal gang activity. These offences succeed against those who personally commit successive crimes, manage criminal enterprises, participate in gang activity or launder illicit funds. POCA fails, however, to reach traders and professionals who knowingly furnish equipment, communications, premises or expertise that materially strengthen criminal groups, but without directly participating in crimes or handling tainted property. A landlord who knowingly leases and outfits a warehouse for an abalone syndicate operates beyond POCA's ambit. So does a telecommunications supplier who provides encrypted communication systems to a drug cartel. Even if prosecutors attempt to force existing offences to

cover such conduct, the doctrinal fit remains poor. Each POCA offence that might conceivably apply demands a specific form of criminal intent that commercial enablers rarely possess (or can be proven to possess). This conceptual mismatch, compounded by the Act's onerous evidentiary requirements, permits an indispensable layer of the criminal economy to peddle their wares with virtual impunity.

Methodology

The report proceeds in three stages. First, a close review and analysis of POCA's offences reveals why liability arises predominantly through direct participation or receipt and control of tainted proceeds. Second, a case study demonstrates precisely how peripheral enablers escape liability under the Act, absent an intent to commit, aid or incite specific crimes. Third, a comparative analysis of legislation from Canada, the UK, Australia, Japan and the US was undertaken to identify salient statutory models that have successfully criminalized the enabling conduct that POCA overlooks.

Key findings and proposed solution

The findings from the comparative analysis indicate that many foreign jurisdictions target enablers through specific 'participation' or 'material support' offences, sometimes anchored to procedures which empower courts formally to declare groups to be 'criminal organizations'. Drawing on these international precedents, this report proposes two sets of amendments to POCA. The first set creates new offences against knowingly providing 'strategic material support' to criminal organizations. Support is 'strategic' and 'material' if it meaningfully upgrades a criminal organization's ability to plan, commit or hide serious crimes. It covers specified categories of resources, services or systems designed or adapted to give criminals an operational edge, but excludes ordinary, open, market-rate transactions and essential services (healthcare, education, legal representation).

The second set introduces a judicial designation mechanism, permitting the state to apply to the court for an order declaring, or 'designating', a specific group as a 'criminal organization'. Designation does not criminalize membership in the relevant group and does not, of itself, impose liability on any

South Africa's Constitutional Court is the arbiter on the constitutionality of the Prevention of Organized Crime Act. © *Luba Lesolle/Gallo Images via Getty Images*

individual. Rather, a designation order provides formal notice to the public that knowingly providing strategic material support to the designated group may give rise to criminal liability. A designation order additionally relieves prosecutors of the requirement to prove, from scratch, in every subsequent prosecution concerning that group, that the group is criminal – the designation order itself constitutes prima facie proof of that fact unless the accused brings forward evidence to the contrary.

To ensure constitutional validity and avoid over-criminalization, the proposed offences require different fault standards depending on whether the support is provided to a designated or non-designated criminal group:

- for non-designated organizations, a higher fault standard applies. The prosecution must establish that the support was provided for the specific purpose of enhancing the group's ability to commit crimes. In short, these offences ask, 'Did you knowingly provide capacity-enhancing support to a criminal organization with the aim of helping its members to commit crimes?'
- for designated organizations, a lower standard of knowledge and/or recklessness suffices for liability. Anyone providing strategic support with knowledge of the group's designated status faces potential prosecution. In plain terms, these offences ask, 'Did you knowingly provide capacity-enhancing support to a designated criminal organization, despite their recognized criminal status, thereby accepting the manifest risk that your support will facilitate the group's capacity to commit crimes?'

Unlike existing POCA provisions, these offences require no proof that crimes were actually committed using the support provided, that the enabler possessed knowledge of specific planned offences, or that the enabler shared the organization's criminal objectives. Liability arises exclusively from the enabler's own conduct and mental state: what resources were provided, what knowledge did they possess and what risks did they consciously undertake?

The proposed amendments complement rather than supplant POCA's existing offence regime. Racketeering charges will continue to pierce criminal hierarchies and address interconnected patterns of predicate crimes. Money laundering provisions will continue targeting the handlers and concealers of criminal proceeds. Gang offences will continue to punish recruitment, incitement and wilful aiding and abetting of criminal gang activity. The new provisions rectify a crucial but overlooked gap, striking at those who knowingly supply the means and methods that enhance and sustain criminal organizations while diligently remaining at one remove from the central nervous system of organized criminal activity. With designation subject to transparent judicial oversight and offences carefully circumscribed to ensure constitutional compliance, these reforms establish a promising foundation for disrupting the complicit networks that render criminal groups both resilient and effective. The proposed amendments to POCA are set out in the appendix to this report.

INTRODUCTION: THE CHALLENGE OF ORGANIZED CRIMINALITY

South Africa's protracted struggle against organized crime has reached a tipping point. The state capture years cost the nation public confidence, trust and hope in state institutions. In July 2025, the provincial police commissioner of KwaZulu-Natal, Nhlanhla Mkhwanazi, exposed a fresh catastrophe, alleging that those charged with upholding the law have, for decades, worked actively to undermine it. His claims that a sophisticated criminal syndicate has infiltrated police and intelligence structures and that the police minister has colluded with criminal elements left a public already hollowed of hope with the prospect that the state is not merely captured by criminals but has itself become a criminal state.

Ranking seventh globally for criminality by the Global Initiative's 2023 Organized Crime Index,[1] the nation confronts a threat whose scale and gravity can no longer be ignored. Local gangs proliferate across townships and urban centres, while transnational criminal organizations quietly infiltrate legitimate commerce, blurring the line between the licit and illicit economies.[2] Extortion rackets have metastasized into a parallel taxation regime so pervasive that they have distorted the country's investment profile.[3] The socio-economic toll is dire: capital flight, businesses forced into closure and entire communities held captive. Institutionalized corruption has spawned an entrenched form of organized crime, most visible in gang-dominated enclaves such as the Cape Flats. These criminal formations operate as quasi-governmental systems, imposing their own violent prerogatives to monopolize illicit markets and extract levies from local industry where state authority has all but collapsed.

One estimate puts the overall economic cost of organized crime at 155 billion rands per year across sectors, of which 13.6 billion relates to illegal drugs and guns.[4] Violence linked to these criminal groups permeates the nation, manifesting in frequent brutal incidents that destabilize communities and overwhelm law enforcement. In the Western Cape, gang-related activities account for a substantial portion of homicides, with 675 gang-related murders recorded in the 2022/23 financial year, representing approximately 16 per cent of the province's 4 150 total murders.[5] Firearms and explosives, often smuggled across porous borders, are wielded in shoot-outs between rival gang factions and by extortion racketeers terrorizing businesses and residents.[6]

Modern legal systems were developed within the paradigm of individual wrongdoers held responsible for the harmful outcomes attributable to their own intentional conduct. However, the rise of organized criminal groups – comprising multiple actors involved to varying degrees in interconnected

and planned activities of a continuous nature, carried out for the purpose of material gain – quickly revealed the shortcomings of this individualized model. Such laws falter because they treat organized crime as an aggregation of individual crimes rather than as a distinct form of criminality requiring different theoretical foundations for attribution and liability. Tethered to the reductionist premise that only individuals can act, intend and bear moral responsibility, they struggle to theorize how groups can possess emergent properties – shared intentions, collective knowledge and perpetual existence – that transcend any single member.[7] Equally, their focus on individual blameworthiness is toothless against the hierarchical yet flexible design of criminal organizations that allow leaders to distance themselves, both physically and functionally, from the actions of lower-level members. This design deliberately diffuses responsibility: senior members can issue orders indirectly and claim credit for profitable outcomes while simultaneously distancing themselves from direct and culpable participation in criminal activity.

South Africa's legislative response

The United Nations Convention against Transnational Organized Crime (UNTOC), adopted in 2000 and in force since 2003, is the primary international instrument to combat transnational organized crime. It requires member states to criminalize activities such as participation in organized criminal groups, money laundering, corruption and obstruction of justice.[8] Among others, the UNTOC aims to facilitate international cooperation and enforcement by providing for mutual legal assistance and extradition.[9] In 1998, South Africa enacted the Prevention of Organized Crime Act (POCA) amid rising concerns that existing common and statutory laws were failing to deal effectively with gang violence and organized criminality.[10] Inspired by models like the United States' Racketeer Influenced and Corrupt Organizations Act (RICO) and California's Street Terrorism Enforcement and Prevention Act (STEP), POCA established offences targeting racketeering, money laundering and criminal gang activities.[11]

Like the foreign statutes on which it is based, POCA attempts to superimpose group-based liability onto individual models of criminality. Its Chapter 2 racketeering offences address the difficulty of proving liability for direct participation in specific crimes by linking seemingly disparate criminal acts

The Palace of Justice in Tshwane, a division of the Gauteng High Court, has heard many organized crime cases. *© Rawf8/Getty Images*

as elements of a unified pattern and by extending liability to enterprise leaders who profit from criminal activity while insulating themselves through layers of subordinates. Chapter 3 addresses money laundering, criminalising various dealings with the proceeds of unlawful activities, including self-laundering and assistance to third parties. Section 9 of Chapter 4 introduces six gang-related offences, some requiring gang membership or active participation,[12] and others applicable to any person involved in promoting a pattern of criminal gang activity or recruiting for gangs.[13]

Preliminary indications of enforcement challenges

Despite this seemingly comprehensive legislative and policy framework, significant obstacles continue to impede successful prosecutions under POCA. First, combating organized crime relies heavily on the ability of the police to gather intelligence on criminal groups, their activities and the wider network of associates and criminal contacts on which they rely. However, the South African Police Service (SAPS) lacks adequate staffing, resources and training, which compromises intelligence gathering and hinders investigations into complex POCA cases, as evidenced by the under-capacitated anti-gang units.[14]

Second, pervasive corruption within law enforcement, including high-profile cases of police collusion with criminal elements and gangs,[15] severely undermines prosecutorial efforts. Widely reported incidents, such as those documented in the 2022 Western Cape High Court case of *Adams and Another v S*,[16] highlight deep infiltration of police structures, witness intimidation and the leaking of sensitive information, directly impeding POCA prosecutions. This is further corroborated by the latest Independent Police Investigative Directorate report, which revealed serious incidents of police involvement in organized crime, including a high-profile case in Cape Town where four police officers were arrested on suspicion of collaborating with a syndicate that used SAPS uniforms and vehicles to commit robberies in affluent suburbs.[17]

Third, POCA offences, by their very nature, impose higher evidentiary burdens on the state than standard common law crimes. For example, one type of racketeering offence requires prosecutors to prove not only the POCA-specific conduct and *mens rea* elements (e.g. that the accused manages an enterprise and knows that another associated individual is involved in a pattern of racketeering activity), but also the underlying offences that constitute the pattern of racketeering activity.[18] Unlike common law crimes, which typically focus on specific acts at specific moments, POCA contains offences that require proof of an unfolding criminal storyline where prosecutors must demonstrate how seemingly disparate predicate offences, separated by months or years, are nevertheless connected to the affairs or goals of a single criminal enterprise.[19]

The Madlanga Commission – the Judicial Commission of Inquiry into Criminality, Political Interference, and Corruption in the Criminal Justice System – was established to investigate whether criminal syndicates have penetrated South Africa's criminal justice system.
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Lastly, systemic limitations create further barriers to POCA's effective implementation. These include community relations with gang structures, which are driven by both fear and economic factors, as well as a pervasive culture of witness intimidation. This is particularly pronounced in gang-related prosecutions where witnesses reside in the same communities as the accused on trial.[20] Such factors help to explain why, even when POCA's offences are within reach, prosecutors regularly resort to conventional common law charges as the path of least resistance to securing meaningful convictions, rather than POCA's theoretically powerful but practically cumbersome provisions.

Research aims and structure

This report emerges from a critical examination of how South African law confronts organized crime. Its central question is whether POCA provides an adequate framework for prosecuting those who strengthen and sustain criminal organizations. Accordingly, the sections that follow seek to determine whether POCA in its current form captures the full spectrum of culpable involvement in organized criminality. Drawing on foreign law, it then evaluates how POCA's offences compare to other jurisdictions in respect of criminalizing participation or involvement in criminal organizations to varying degrees.

POCA OFFENCES: AN ANALYSIS

POCA's primary objective is to dismantle organized crime by targeting its operational and economic foundations. The offences it sets out fall into three categories: racketeering (Chapter 2), money laundering (Chapter 3) and gang-related crimes (Chapter 4). The discussion provides an overview of each offence along with the key definitions and concepts that inform their meaning and interpretation in accordance with the relevant case law.

Racketeering

Section 2(1) outlines seven distinct racketeering offences, broadly categorized into property-related and participation-related offences. 'Property', as defined in POCA, includes money, all movable, immovable, tangible and intangible things, and any associated rights, claims, securities and proceeds.[21] These offences are underpinned by two pivotal definitions: 'enterprise' and 'pattern of racketeering activity'.

An 'enterprise' is defined to include 'any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity'.[22] For a group of individuals 'associated in fact' to constitute an enterprise, the association must be: conscious; held together by a common or shared purpose; ongoing; and such that the members function as a continuing unit.[23]

Each racketeering offence is characterized by a specific connection between the accused's conduct and the affairs of the enterprise. For instance, the property-related offences require the accused to use and administer property for or on behalf of an enterprise, knowing that such property was derived from a pattern of racketeering activity. By contrast, the core participation offences require the accused to have committed acts that are in themselves criminal (so-called predicate offences) and that jointly constitute the pattern of racketeering activity through which the accused participates in the enterprise's affairs.

A 'pattern of racketeering activity' means 'the planned, ongoing, continuous or repeated participation or involvement' in at least two predicate offences referred to in Schedule 1. One offence must have occurred after POCA's commencement (21 January 1999), and the last 'within ten years [...] after the commission of such prior offence'.[24] Schedule 1 includes theft, fraud and firearms-related offences, as well as any offence punishable by imprisonment exceeding one year without the option of a fine. According to the case law, the word 'planned' modifies the phrase 'ongoing, continuous or

repeated', meaning the accused must plan that their participation will be ongoing, continuous or repeated such that the individual offences form an interconnected sequence.[25] The commission of offences that are either unrelated or coincidentally related are therefore excluded from co-constituting a 'pattern' in the appropriate sense.[26]

A cache of seized firearms. The Act's primary objective is to dismantle organized crime. *Photo supplied*

The racketeering offences are separate and discrete from the pattern of predicate offences which they require. This is because a racketeering conviction often demands proof of more than just the predicate offences. In addition, the state must prove the accused's association with the enterprise and the relevant participatory link between the accused and that enterprise's affairs by way of a pattern of racketeering. Predicate offences may be established through proof of prior convictions or they may be proved for the first time within the proceedings for the substantive racketeering charge.[27]

Property-related racketeering offences

Section 2(1)(a): Receiving, retaining, and using property from racketeering activity

Section 2(1)(a) criminalizes receiving or retaining property that has come from a pattern of racketeering activity and subsequently using or investing it to acquire an interest in, establish or operate an enterprise. The offence therefore has two elements of *actus reus* (or conduct), namely the receipt or retention of tainted property and its investment in connection with an enterprise.[28] The *mens rea* (or fault) element of the offence requires either 'subjective knowledge' or 'negligent ignorance' of the illicit origins of the property. Subjective knowledge includes 'wilful blindness', such as suspecting that the property may be derived from racketeering but deliberately refraining from ascertaining whether this is true.[29] Negligent ignorance is being ignorant of the property's racketeering origins in circumstances where one 'ought reasonably to have known' this fact, as set out in the Act.[30]

As a general note, POCA sets a two-pronged test for the 'ought reasonably to have known' standard, which applies to several racketeering and money laundering offences. First, for an accused to be negligent, they must fail to reach the conclusions that would be reached by a reasonably diligent and vigilant person who has both the characteristics that could be reasonably expected of someone in the accused person's position (the 'objective standard') and those the accused actually possesses (the 'subjective standard'). Whereas the traditional test for negligence ignores the individual attributes of a person (e.g. level of education, background, personal beliefs) and asks solely whether their conduct was objectively reasonable,[31] the POCA test allows the court to take account of these attributes in the overall determination of whether they were negligent.[32]

Section 2(1)(b): Receiving or retaining property on behalf of an enterprise

The next section targets individuals who receive or retain property on behalf of an enterprise, knowing or being negligently ignorant that it derives from racketeering activity. The conduct element here does not require the further step of using or investing the property in connection with an enterprise.

Instead, it criminalizes the bare act of custodianship, extending liability to intermediaries who knowingly handle tainted property on behalf of an enterprise without actively investing or managing the underlying assets.

In *Prinsloo v S*,[33] the accused were all directors of various companies involved in a Ponzi scheme enterprise on whose behalf they handled illicit funds. The Supreme Court of Appeal (SCA) held that, as directors, each had a duty under company law to acquire and maintain a sufficient degree of knowledge and understanding of their company's business to enable them to discharge their official responsibilities.[34] Accordingly, the accused could not shield behind ignorance: in terms of the general knowledge, skill, training and experience expected of a director in their position, the accused 'ought reasonably to have known' of the illicit origins of the property retained. In the circumstances, the court confirmed their convictions in terms of s1(3) of POCA.[35]

Section 2(1)(c): Using or investing property in an enterprise

This similarly criminalizes the use or investment of property on behalf of an enterprise but does not require the receipt or retention of such property. This offence therefore focuses exclusively on the deployment of illicit funds to sustain or expand an enterprise. While there is no reported case law on this offence, its interpretation is likely to accord with the emerging jurisprudence on money laundering and racketeering offences in general.

Participation-related racketeering offences

Section 2(1)(d): Acquiring or maintaining control through racketeering

Any person who acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity is guilty of an offence in terms of s2(1)(d). This offence addresses the use of criminal means to dominate or sustain power within an enterprise, whether by infiltrating legitimate businesses or establishing illicit ones. It reflects POCA's aim to dismantle the structural integrity of criminal organizations by penalizing those who leverage racketeering for control.

Section 2(1)(e): Participating in enterprise affairs through racketeering

This is POCA's most frequently litigated racketeering offence. It criminalizes persons who, while managing, being employed by or associated with an enterprise, conduct or participate in its affairs through a pattern of racketeering activity. The offence targets participants at all levels, from leaders to foot soldiers, provided the form of their participation in enterprise affairs is 'through' the commission of offences that jointly constitute a 'pattern of racketeering activity'. Here, a person is 'associated' with an enterprise if they 'meet or have dealings with, or allow [themselves] to be connected […] or involved with' such enterprise. An accused 'associated with' an enterprise does not need to know about all its activities – it is sufficient to prove that they knew of the general criminal nature of the enterprise.[36]

The essence of s2(1)(e) lies in actual participation, whether direct or indirect, in the enterprise's affairs.[37] It is therefore important for the state to identify what those affairs are and to establish that the relevant criminal acts of the accused constituted participation in such affairs.[38] In other words, it must be shown that those acts are sufficiently connected to the enterprise's affairs such that they constitute the accused's participation in it, and not a divergent and unrelated course of criminal conduct. In *Eyssen v S*, the court overturned the appellant's conviction because the state had failed to prove that the robberies of which the appellant was convicted were part of the affairs of the Fancy Boys gang.[39] Similarly, in *Tiry and others v S*,[40] the SCA set aside the s2(1)(e) convictions of four drivers who, in the

course of transporting petroleum products, diverted onto a tank farm to decant their product in return for payment by the first appellant (who ran a criminal enterprise through which he purchased stolen petroleum products for resale at discounted rates). The court found that, although drivers were generally aware that the first appellant was willing to purchase stolen petroleum products in transit, the evidence did not establish that the drivers formed an organized network that functioned as a continuing unit in respect of the enterprise.[41] Instead, the court found their involvement akin to random acts of dishonesty, rather than conscious association with the criminal enterprise.[42]

A crime scene following a shoot-out between illegal miners and police in Johannesburg, June 2025. *© Luba Lesolle/Gallo Images*

Section 2(1)(e) imposes no additional *mens rea* beyond that required by the predicate offences themselves.[43] In other words, a contravention is proved if the state shows that the accused committed two or more predicate offences (such as murder, robbery or assault) with whatever fault element each such offence requires. The section does not have an independent fault requirement in relation to the other elements it prescribes.[44]

Section 2(1)(f): Managing an enterprise with knowledge of racketeering

This section criminalizes managing an enterprise's operations or activities in circumstances where one knows or ought reasonably to have known that another person associated with the enterprise participates in its affairs through a pattern of racketeering activity. The word 'manage' bears its ordinary meaning: 'to be in charge of; run; supervise'.[45] While the previous section targets direct participation, s2(1)(f) criminalizes 'the manager who removes themself from the actual conduct of the enterprise' but who knows, or ought reasonably to know, of another's direct participation.[46] Accordingly, the *mens rea* is either intention or negligence.[47]

In *S v Blignault and Others*,[48] the court convicted an accused of managing abalone procurement and transport under the authority and direction of someone more senior within the enterprise hierarchy.[49] Drawing on US RICO jurisprudence, the court held that the managerial control contemplated by s2(1)(f) is not confined to the upper or highest levels of authority within an enterprise.[50] The offence captures the leaders who orchestrate racketeering indirectly as well as mid-level managers, such as the accused, who knowingly facilitate and execute their instructions.

Section 2(1)(g): Conspiracy or attempt

This extends criminal liability to those who conspire or attempt to violate any of the above s2(1) offences. It aims to disrupt racketeering activity before it materializes, though it remains underutilized in the reported case law.

Money laundering offences

Organized criminality is characterized by the goal of committing offences to generate a profit for the perpetrators. Money laundering is the process by which organized criminals conceal assets to avoid any discovery of the unlawful activity that fashioned them.[51] Chapter 3 of POCA creates three money laundering offences that criminalize various forms of conduct in connection with these 'proceeds of unlawful activities': the general money laundering offence; assisting another to benefit from proceeds of unlawful activities; and the acquisition, possession or use of proceeds of unlawful activities. Together, they embrace a wide spectrum of activities through which the nature, source, ownership or movement of property derived from criminal activity is disguised or concealed for the purposes of making or retaining a proprietary benefit. Both intention and negligence are sufficient forms of *mens rea* for all three offences. Moreover, the offences may be committed with the proceeds derived from any predicate offence,[52] regardless of where or when it was committed. While the main laundering offence can be committed by the original perpetrator of the predicate offence – that is, by a person in respect of the proceeds of their own crimes, or 'self-laundering' – the other two can only be committed by a third party in respect of the proceeds of crimes committed by others.[53]

Proceeds of unlawful activities

POCA defines the 'proceeds of unlawful activities' as 'any property [...] or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in connection with or as a result of any unlawful activity carried on by any person, whether in the Republic or elsewhere [...] and includes any property representing property so derived'.[54]

In *National Director of Public Prosecutions v Seevnarayan*,[55] one of the questions was whether funds which had been legitimately earned by the respondent but were subsequently 'retained' by him through tax evasion constituted the 'proceeds of unlawful activities'. The High Court held that only the portion of income which would otherwise have been subject to income tax could conceivably represent property retained 'as a result of unlawful activity' and therefore amount to the proceeds of unlawful activities.[56] On appeal, the SCA clarified that the act of fraudulently retaining the funds through tax evasion did not taint the character of the funds themselves, which therefore could not be said to have been retained 'in connection with or as a result of unlawful activities'.[57]

Chapter 3 of POCA creates offences that criminalize various forms of laundering the proceeds of unlawful activities. *Photo: SAPS Facebook*

In *Thales South Africa (Pty) Ltd v NDPP*,[58] the question was whether the disguised payment of a bribe to Jacob Zuma constituted money laundering. The court held that it did: the bribe was the proceeds of the crime of corruption, which was complete 'after the offer had been made or there was an agreement to pay'.[59] Also, the manner in which it was paid to Zuma – through a contrived service provider agreement between the implicated companies – was clearly designed to conceal the true nature of the payment and accordingly amounted to a laundering offence.[60]

Section 4: General money laundering

Section 4 establishes the broadest money laundering offence. It criminalizes conduct by a person who knows or ought reasonably to have known that property forms part of the proceeds of unlawful activities, and who

(a) enters into any agreement, arrangement or transaction (whether legally enforceable or not) in connection with the property; or
(b) performs any other act in connection with the property (whether independently or in concert with another);

which has the effect, or is likely to have the effect, of either:

(i) concealing or disguising the nature, source, location, disposition or movement of the property or the ownership of the property or any interest in the property; or
(ii) enabling or assisting any person who committed an offence in South Africa or elsewhere to avoid prosecution; or to remove or diminish any property acquired directly or indirectly as a result of an offence.[61]

This is the offence that covers acts of self-laundering, where individuals attempt to conceal the proceeds of their own crimes. The scope of the prohibited conduct captures virtually any dealing with tainted property, provided that it has, or is likely to have, either of the prescribed effects. The mere spending of proceeds of unlawful activities may not necessarily have these effects, but it is arguable that actions 'such as using the bank account of a legal person instead of one's own to receive and disburse those proceeds' are at least likely to conceal their source as well as who owns or has interests in them.[62]

In *S v de Vries*, the appellant had received stolen cigarettes knowing they were stolen (which made him guilty of theft as a continuing crime) and used them as part of his stock in trade as a wholesaler. The SCA held that his conduct had the effect of 'disguising or concealing the source, movement and ownership of the cigarettes and enabling and assisting the robbers to either avoid prosecution or to remove property acquired in the robberies',[63] which made the appellant guilty of a contravention of Section 4.

Section 5: Assisting another to benefit from proceeds of unlawful activities

Section 5 targets those who assist others in retaining or benefiting from criminal proceeds. Specifically, it criminalizes any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any transaction or agreement that facilitates the retention or control of those proceeds, or uses them to make funds available, acquire property or otherwise benefit that person.[64] While the person accused of contravening Section 5 must assist the person who obtained the proceeds of unlawful activities, they may do so by concluding an

'agreement [...] with anyone'. This could include the criminal who committed the predicate offence or any other person involved in providing that assistance.

This offence holds particular significance for members of regulated professions, including financial advisers, attorneys, accountants and estate agents. In the organized crime context, these professionals generally operate at arm's length from predicate criminality and may be provided with limited information about the ultimate source of their clients' funds. The offence's 'ought reasonably to have known' standard is therefore a powerful deterrent, reinforcing the duties of care and due diligence which require such professionals to verify the legitimate origins of client funds.

Section 6: Acquisition, possession or use of proceeds of unlawful activities

This section targets the recipients of criminal proceeds by criminalizing the act of acquiring, using, or possessing property while knowing (or disregarding the reasonable possibility) that it forms part of the proceeds of unlawful activities.[65] The offence applies only to third parties dealing with the criminal proceeds of others.[66] As with sections 4 and 5, the requisite *mens rea* includes both knowledge (as a form of intention) and negligence in accordance with the mixed objective-subjective standard set out above.

Gang-related offences

In the late 1990s, SAPS officers, inspired by their exposure to US anti-gang strategies during a training expedition, advocated the adoption of distinct anti-gang legislation modelled on the California STEP Act of 1988. When POCA was being drafted, the minister of justice proposed to integrate these anti-gang provisions within the broader RICO-inspired legislation. This was broadly accepted by the panel of experts tasked with crafting the Act. POCA's Chapter 4 was introduced to counter rising gang criminality in South Africa, reflecting the consensus that existing common law offences were inadequate. It bears a striking resemblance to the STEP Act, with the substitution of 'criminal gang' for 'street gang' standing as the sole significant alteration.[67]

Section 9 creates six offences targeting criminal gang activity. These fall into two categories, distinguished by the nature of the offender's relationship with the criminal gang. The s9(1) offences apply exclusively to anyone who 'actively participates in or is a member of a criminal gang'. Those under s9(2) extend liability to 'any person' who promotes or contributes to criminal gang activity, incites others to participate in such conduct or recruits for criminal gangs.

Similar to the racketeering offences, these offences rely on the concept of a 'pattern of activity'.[68] Where the racketeering pattern allows for up to ten years between qualifying offences, the pattern of criminal gang activity requires that at least two predicate gang-related offences have been committed within a three-year window.

Both racketeering and gang offences require prosecutors to establish the existence of organizational structures – an 'enterprise' and a 'criminal gang' respectively – as preconditions for conviction. However, the definition of 'enterprise' encompasses virtually any association, from legitimate corporations to informal groupings, making no mention of a criminal element. The definition of 'criminal gang' directly incorporates criminality, mandating that the gang have 'as one of its activities the commission of one or more criminal offences', and that its members engage in a 'pattern of criminal

POCA's Chapter 4 was designed to counter rising gang crime in South Africa. © *Shaun Swingler*

gang activity'.[69] This difference has practical consequences. Prosecutors can establish an 'enterprise' with relative ease, given its definition's breadth, but proving the existence of a 'criminal gang' demands evidence of both structural features and criminal orientation.

Also in contrast to the racketeering and money laundering offences, POCA's gang offences exclude negligent ignorance as a sufficient form of *mens rea*, restricting criminal liability to those who intentionally participate in or advance criminal activity tied to a criminal gang. This stricter *mens rea* threshold probably reflects concerns that, in communities where gang presence is pervasive and inadvertent interaction unavoidable, an offence requiring anything less than intentional conduct would drastically increase the risk of over-criminalization.

The definition of 'criminal gang'

According to Section 1 of POCA, a 'criminal gang' includes:

> 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.[70]

POCA's definition of a 'criminal gang' comprises four essential elements: an ongoing organizational structure (formal or informal); numerical composition (three or more persons); activity (includes commission of criminal offences); and identifiability (through name, sign or symbol). Gangs are known to engage in varied activities ranging from the overtly criminal to the ostensibly legitimate and philanthropic, which may explain the requirement that the commission of offences need only be 'one of its activities', rather than 'one of its primary activities'.[71]

Unlike the definitional elements that capture the objective features of a gang, the insignia criterion reflects the perspective of gang members towards their own identity and place within the group. Criminal gangs are groups of criminals, but they also involve, and are partly constituted by, the attitude of their members towards themselves and others, and the norms binding their collective behaviour. The insignia requirement is therefore a sociological rule of thumb intended to identify criminal groups more generally. More specifically, gang signs, symbols and names count as reasons for gang members to take one action over another. In *S v Mafahle*, the High Court compared the insignia of two rival gangs, the Born To Kills (BTKs) and the Maroma (Romans):

> Members of the BTK gang adhere to a code, they have specific hand signs [...] The members have tattoos [...] on their arms, legs or even their faces where these tattoos are clearly visible and are indicative of their rank and membership to the BTK gang [...] The members of the Romans are generally much younger [...] wearing clothing with certain labels such as K-way, Nike, Adidas and Puma. They also wear Rosaries normally used by members of the Roman Catholic Church.[72]

Section 9(1) offences

Gang membership or active participation

The offences set out in Section 9(1) require proof that the accused 'actively participates in or is a member of a criminal gang'. Section 11 provides a list of factors that a court may consider in determining gang membership, including admission of membership, identification by a parent or guardian, adoption of gang-specific styles or symbols, repeated arrests in the company of identified gang members and physical evidence of membership depicted in photographs or documentation. Courts can decide how, or whether, to use these factors to determine membership in any case. While POCA does not define 'active participation', the Supreme Court of California held that the phrase, as it appears in California's STEP Act, means involvement in a gang that is more than nominal, passive or merely associational, but need not entail devoting substantial time to the gang.[73]

Section 9(1)(a): Aiding and abetting criminal gang activity

This section makes it an offence for a gang member or active participant to wilfully aid and abet any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang. The crux of this offence lies in the phrase 'aids and abets'. In *S v Jordaan and Others*, the court observed that 'to aid and abet' means 'to assist in or facilitate the doing of something or to give counsel or encouragement in respect of its doing'.[74] In *Canterbury and another v S*, the court noted that 'aiding typically involves providing tangible assistance, such as supplying tools or resources for the

POCA's definition of a 'criminal gang' comprises various elements, one of which is identifiability, often conveyed by gang members' signs and symbols. © *Shaun Swingler*

commission of a crime', while 'abetting entails offering lesser assistance, such as acting as a lookout or driving a car to the crime scene'.[75]

These are the acts of an accomplice, someone 'someone who is not a perpetrator of the offence with which he or she associates him or herself, but who in some way assists the perpetrator in the commission of the latter's offence'. The offence does not apply if the person is principally responsible for the crime. In *S v Solomon*, two accused were acquitted precisely because they were liable as principal offenders and therefore could not also be convicted under s9(1)(a).[76]

Section 9(1)(a) explicitly requires 'wilful' aiding and abetting. To be liable as an accomplice, the accused must knowingly, voluntarily and intentionally act to facilitate the gang-related criminal activity.[77] It has also been held that the accomplice must know, at the time of assisting, all the essential or material facts which constitute the principal offence, even if he does not actually realize that those facts amount to an offence in law.[78]

Furthermore, the criminal activity that is aided and abetted must be committed for the gang's benefit, at its direction, or in association with it. In *S v Thomas*, one of the accused was acquitted on an s9(1)(a) charge because the murder he facilitated was committed for his own benefit, as an act of revenge, rather than for or on behalf of a criminal gang.[79]

Section 9(1)(b): Threats of violence by or with the assistance of a criminal gang

Section 9(1)(b) criminalizes threats to commit violence or criminal activity by, or with the assistance of, a criminal gang. By punishing those who use their gang affiliation to inspire fear of future gang violence, it affords a preventive measure against gang-related harm. The threats may concern a wide array of hostile activities, from physical harm and property damage to non-violent criminal acts, such as theft. As with other s9(1) offences, the *mens rea* required is intention. The accused must intend to act in a way that could reasonably be taken as threatening violence or criminal activity involving a criminal gang.

Section 9(1)(c): Threats of retaliation in response to violence

In terms of s9(1)(c), it is an offence for a gang member or active participant to threaten any person with retaliation in response to an actual or alleged act of violence. Where s9(1)(b) criminalises threats to initiate criminal violence, this offence criminalises a specific form of intimidation, namely threats of retaliation. It targets the cycles of retribution common in inter-gang conflict. These retaliatory threats may concern any 'alleged act' of violence, which speaks to the reality that gang criminality is often fuelled by rumour and misinformation.

Section 9(2) offences

The offences under s9(2) of POCA extend liability to any person, regardless of the nature of their association with a criminal gang.

Section 9(2)(a): Bringing about a pattern of criminal gang activity

Section 9(2)(a) criminalizes any act which is aimed at causing, promoting or contributing towards a pattern of criminal gang activity. The phrase 'aimed at' establishes a subjective test: the accused must perform the act with that intention, regardless of its objective effect.[80] The conduct may take any form and need not itself amount to an offence.

Section 9(2)(b): Inducement to participate in a pattern of criminal gang activity

This aims at any person who 'incites, instigates, commands, aids, advises, encourages or procures' any other person to commit, perform or participate in a pattern of criminal gang activity. This cascade of verbs captures virtually every form of malign influence that one person might exert to prompt another towards gang criminality. Whether they are successful is irrelevant. Equally irrelevant is whether the inciter and incited are members of, or affiliated with, a criminal gang – the parties may be 'any person' and 'any other person'. In *S. v Thomas*, a leader of the '28s' criminal gang was convicted under s9(2)(b) based on evidence that he had directed subordinates to execute numerous criminal activities.[81]

Section 9(2)(c): Gang recruitment

By penalizing any person who intentionally causes, encourages or recruits another person to join a criminal gang, this offence addresses the core mechanism by which criminal gangs sustain themselves over time. Unlike the offences that directly target gang activity that poses an imminent risk of harm, this is a preventive measure to disrupt the recruitment pipeline before additional crimes materialize. Again, the consequences of attempted recruitment do not matter; liability may arise even if the person targeted does not join a criminal gang. Nevertheless, because gang membership per se is not an offence, it seems doctrinally and conceptually odd to criminalize what is effectively the incitement to perform a lawful act.[82]

THE HYDRA GANG: A HYPOTHETICAL CASE STUDY

The following is a hypothetical case study that seeks to apply POCA's offences to a range of organized criminal conduct. The narrative revolves around the criminal affairs of the fictional 'Hydra gang' in Cape Town. Their conduct includes both straightforward cases of liability under POCA and more penumbral cases where the scope and applicability of the Act's provisions remain debatable.

The overarching purpose of this exercise is to evaluate whether, and to what extent, POCA's current offence scheme adequately captures the range of conduct associated with organized crime. In so doing, this section sets the stage for a reappraisal of the Act and potential areas for reform.

Narrative and *dramatis personae*

Cape Town's Hydra Gang has approximately 45 members, identifiable by a distinctive multi-headed snake tattoo. Their activities include drug trafficking, extortion, robbery, hijacking and money laundering.

The gang has a hierarchical internal structure and is jointly led by twins Malik and Zara Raza. Over eight years, they systematically displaced rival groups through violence and strategic alliances. Rarely participating directly in criminal activities, they issue directives through senior gang members. The twins own Prime Maritime Logistics, a shipping company; Phoenix Properties, a real estate firm; and Guardian Security, a private security company. Between 2023 and 2024, they orchestrated six violent takeovers of competing businesses in the maritime and real estate sectors, which consolidated their control over smuggling routes and narcotics distribution channels across Cape Town's harbours and central business district. Through these criminal ventures, the siblings have methodically accumulated property, businesses and territory.

Liam O'Shea, the operations manager at the ostensibly legitimate Prime Maritime Logistics, facilitates smuggling operations and regularly arranges the importation of unregistered firearms, synthetic drugs and counterfeit goods. Each operation involves detailed planning, the coordination of gang members, and the distribution of proceeds to the Raza siblings.

The Hydra gang would meet the statutory definition of a 'criminal gang' under the Act.
Photo supplied

Yasmin Patel, fleet manager for Prime Maritime Logistics, is responsible for maintaining detailed vehicle records and transport schedules. When company vehicles are used at unusual hours and returned with unexplained alterations, mileage and traces of contraband, she refrains from making further enquiries and rectifies maintenance records to account for any irregularities. During an audit, she stated: 'My job is to ensure operational efficiency, not to police the drivers.'

Gordon Snape, an auditor overseeing the Razas' companies, manages the gang's financial infrastructure. In October 2024, he orchestrated Phoenix Properties' acquisition of the Blue Horizon Hotel, using R15 million from extortion operations, which he routed through three separate corporate entities to disguise its origins. When Snape receives funds in cash, he deposits them directly into the bank account of Phoenix Properties.

Nazeem Khan manages the gang's drug distribution network. He supervises 15 street-level dealers, collects profits, enforces territorial boundaries and resolves disputes. Khan carries an unlicensed firearm and has committed multiple acts of violence to protect the gang's interests. When a dealer named Jacobs was reluctant to participate in a turf war, Khan told him, 'You are either with us or against us. And those against us don't last long in this neighbourhood.' Intimidated, Jacobs subsequently took part in an ambush against a rival gang, stabbing and killing two people in the process. Khan supplied weapons, instructions and transportation to the gang members involved with the ambush. The resulting violence claimed four lives and injured 11 others.

Tiago Ferreira, an active gang member, identifies and recruits vulnerable youth. In 2023, Ferreira recruited Jamal Abrahams, a sixteen-year-old who is the sole breadwinner in his family. To date, Ferreira has successfully recruited eight youths into the gang.

Detective Sergeant Marcus Coetzee, a police officer in the Western Cape Organized Crime Unit, regularly provides the Hydra Gang with intelligence about planned operations, intended arrests and informants. When the Unit planned a raid on a gang storage facility, Coetzee's information allowed the gang to remove drug evidence in advance.

Marcus Hendricks is the owner of Secure Communications Solutions, a company that provides specialized encrypted communication devices. Hendricks supplies these devices to members of the Hydra Gang on request. While he knows that the gang is involved in widespread criminality, he wishes to remain ignorant about the specific activities of its members, including those facilitated by his technology. He claims that he merely 'offers legal privacy solutions for all clients'. Hendricks never explicitly markets his services to criminals; clients find him through word of mouth. He maintains impeccable corporate records, pays his taxes and conducts business through formal channels.

Grace Mwangi owns Swift Connect Rentals, a legitimate vehicle rental business serving a clientele that includes Hydra Gang members. On one occasion, Mwangi noticed that two vehicles rented by gang members were returned with modifications to their storage compartments, traces of powder in the trunk linings and unusual wear patterns indicative of overloading. Rather than dispute the vehicles' condition or report suspicions, Mwangi implemented a bespoke 'premium rentals' service category with enhanced 'privacy features'. Priced at triple the standard rate, the service became a regular resource for Hydra Gang distribution and transport operations. Mwangi never witnesses contraband directly and deliberately avoids acquiring specific knowledge about the purpose of these rentals.

Analysis in terms of POCA

Hydra Gang as enterprise and criminal gang

The Hydra Gang clearly constitutes an 'enterprise' as defined in POCA: the association between its members is – following *Eyssen* – conscious, ongoing, unified and held together by the common purpose of profit-making through criminal activity.[83] The gang also satisfies the statutory definition of a 'criminal gang': an ongoing group of more than three persons whose activities include the commission of offences, which is distinguished by a hydra tattoo as its identifying symbol, and whose members collectively engage in a pattern of criminal gang activity.

Malik and Zara Raza: Leadership

The Raza siblings contravene at least two racketeering-related offences. Their systematic acquisition and maintenance of control over the enterprise through violent business takeovers constitute a 'pattern of racketeering activity' under s2(1)(d) of POCA. As managers of the enterprise who know that their subordinates participate in these affairs through a pattern of racketeering, they may also be charged under s2(1)(f).

Liam O'Shea and Yasmin Patel: Middle management

O'Shea may be prosecuted under s2(1)(e) for participating in the enterprise's affairs through a pattern of racketeering activity, such as customs fraud, smuggling, illegal importation of firearms and conspiracy to deal in drugs. Alternatively, he may face charges under s2(1)(f) as a mid-level manager, as

in *Blignault*.[84] He could also be liable under s9(2)(a) for performing acts which are subjectively 'aimed at' promoting or contributing to a pattern of criminal gang activity.

Patel's failure to investigate suspicious activity, coupled with her active rectification of vehicle maintenance records, satisfies the 'ought reasonably to have known' *mens rea* standard of negligence in terms of s(1)(3). If she believed there was a reasonable possibility that the vehicles were being used for criminal purposes and failed to obtain information to confirm this fact, she could also be deemed to know of the racketeering activity taking place under her watch, in terms of s(1)(2). Either way, she faces liability under s2(1)(f) for managing enterprise operations while knowing or negligently ignoring the fact that drivers participate in the enterprise's affairs through a pattern of racketeering activity.

Gordon Snape: Financial operations

Snape's conduct triggers several offences under POCA. First, he is liable for the main money laundering offence in terms of Section 4 of POCA: he enters into an agreement to purchase the Blue Horizon Hotel using funds whose illegal origins he attempts to disguise by routing them through separate corporate entities. This conduct equally gives rise to liability in terms of Section 5 (he enters into an agreement whereby the proceeds are used to acquire property on behalf of the Raza siblings/one of their companies) and Section 6 (by the simple fact of knowingly using the proceeds of unlawful activities). Lastly, if the cash deposits received by Snape on behalf of the gang as an enterprise come from a pattern of racketeering activity, and Snape knows or ought reasonably to know as much, then his handling of these funds constitutes a further, alternative offence in terms of s2(1)(b).

Nazeem Khan, Tiago Ferreira and Detective Sergeant Marcus Coetzee: Core operations

Khan's threat to Jacobs, leveraging his gang affiliation to inspire fear, is criminalized by s9(1)(b). Since the threat was also effective, in that it convinced Jacobs to participate in the ambush against a rival gang, Khan may likewise be charged for contravening s9(2)(b). Furthermore, by supplying weapons, instructions and transportation for the ambush, his acts were 'aimed at' bringing about a pattern of criminal gang activity, making him liable under s9(2)(a).

Ferreira intentionally recruits another person to join a criminal gang, committing the offence set out under s9(2)(c).

Coetzee, though not a gang member, is an active participant in the affairs of the Hydra Gang, providing confidential intelligence about planned police operations. In so doing, he wilfully aids and abets the gang's criminal activity (e.g. drug dealing), making him liable under s9(1)(a).

Marcus Hendricks and Grace Mwangi: Enablers

Hendricks' conduct does not readily fit POCA's existing offences. A charge under s2(1)(e) fails because providing encrypted communications devices, however specialized, is not inherently criminal.

What about Section 9(1)(a) liability? Leaving aside the fact that Hendricks is neither an active participant nor a gang member, the offence requires the accused to wilfully aid and abet criminal activity for the benefit or at the direction of a criminal gang, which necessitates having an intent to further particular crimes that somebody else commits. While he knows the gang intends to use the devices to commit or facilitate the commission of crimes, Hendricks does not expressly intend that his devices be so used. In any event, because there is no evidence that crimes have been committed or even attempted with the use of the devices sold, he cannot be liable as an accomplice.

For Hendricks to be liable under s9(2)(a), it would have to be shown that he provided the communication devices with the intention of ('aimed at') 'promoting' or 'contributing towards' a pattern of criminal gang activity. The difficulty is that Hendricks' primary aim appears to be commercial: he seeks profit from selling privacy technology. The gang may well possess the relevant intention to bring about patterned criminality, but it does not follow that Hendricks' knowledge of such intention means that he shares or approves of it.

Mwangi's liability under POCA faces similar difficulties. Without evidence of her personally committing offences, she cannot be charged under s2(1)(e). Section 2(1)(f) does not appear applicable either, for Mwangi manages her own business, never the operations or activities of the Hydra Gang. She deliberately avoids asking questions and, though her ignorance may be contrived, this is enough to deprive her of the requisite intention to aid and abet criminal activity in terms of s9(1)(a), as she cannot wilfully assist crimes about which she deliberately remains ignorant.

What about the offence under s9(2)(a)? Her premium rental service, with its enhanced privacy features and tacit promise to look the other way, could be characterized as an act 'aimed at' contributing to criminal gang patterns. After all, her knowledge of the gang's unique transportation and privacy needs is the reason she structured a premium service to satisfy them.

However, Mwangi's subjective aim is to maximize profit by serving a high-risk client base, not to contribute to criminal activity per se. According to the case law dealing with the offence, the form of intention required by the phrase 'aimed at' does not appear to include what is known as *dolus eventualis*,[85] where the accused foresees the possibility of an unlawful consequence and is reckless as to its occurrence. In practice, convictions have been reserved for those with a clear, direct purpose to promote or contribute to criminality (known as *dolus directus*).[86] Mwangi's business model is designed precisely to avoid this direct intent.

Since her sole subjective aim is commercial, she exploits the law's conceptual dependence on a clear subjective criminal purpose. The difficulty in prosecuting her for s9(2)(a) is therefore due to a fundamental weakness in the offence's design, which relies on a form of intent that enablers can deliberately and successfully evade.

FROM CORE TO PERIPHERY: THE LIMITS OF POCA'S REACH

As the Hydra Gang case study shows, POCA's offences are nimble enough to reach individuals operating within the core layers of organized criminality. Its provisions deftly ensnare those who command, supervise and execute – from leaders and masterminds through mid-tier managers and down to the murderous foot soldiers who commit the necessary crimes. Take foot soldiers as a group. Those who personally participate through 'ongoing, continuous or repeated' criminal conduct contravene s2(1)(e). Alternatively, if such persons are shown to belong to a 'criminal gang' and they threaten retaliation or otherwise aid and abet any crime at the direction of the gang, they incur liability under s9(1). As for the senior and middle managers, their role in knowingly overseeing criminal subordinates is aptly criminalized by s2(1)(f).

On the next rung of wrongdoing are the money men, those who knowingly possess and disguise criminal proceeds or facilitate their retention and collateralization. Although perched at one remove from the original scene of the predicate crime, POCA criminalizes them through the money laundering and related offences under sections 4 through 6. Adjacent to the money men are persons who are not formally affiliated with any criminal gang, but intentionally bring about criminal gang activity, incite others to do the same and/or recruit fresh blood for gangs. For the most part, s9(2) ably captures them, too. In short, POCA's current offence structure appears reasonably comprehensive, reflecting an appreciation that effective measures against organized criminality required a firm departure from the individualistic premises upon which common law offences were historically constructed.

But now consider the cases of Marcus Hendricks and Grace Mwangi from the Hydra Gang case study. Recall that Hendricks supplies devices capable of encrypted communication to the Hydra Gang, knowing they are needed to coordinate criminal activity beyond the range of police surveillance.[87] Similarly, Mwangi structures vehicle rentals to eliminate paper trails, understanding precisely why her criminal clients value this service. Both design their businesses around criminal needs; both profit handsomely from criminal demand. Yet it seems neither faces liability under POCA. Why not?

The answer reveals something curious about POCA's conceptual and doctrinal commitments. The Act operates through two distinct modes of liability. The first, Mode 1, criminalizes active and direct involvement in criminality, targeting those who deliberately carry out, manage or identify with various forms of criminal activity. Mode 1 animates the racketeering and gang offences, which demand the

personal commission of predicate crimes, management over those who commit them, aiding and abetting specific crimes, or the performance of acts 'aimed at' bringing about patterns of criminality.

The second, Mode 2, criminalizes knowingly dealing with or handling criminal proceeds, regardless of the accused's functional relationship to the criminal entity and/or the predicate crimes from which those proceeds arose. The money laundering offences exemplify this approach in that they do not ask whether the accused endorsed the criminal project that generated the proceeds, but whether they knowingly handled property already tainted by crime.[88] If Mode 1 liability arises from one's role in engendering criminality, Mode 2 liability arises from one's role in processing its fruits.

Both modes share a common requirement: a direct connection to either criminal conduct or its proceeds. By contrast, modern criminal organizations rely on a class of specialists who fit neither mode neatly.

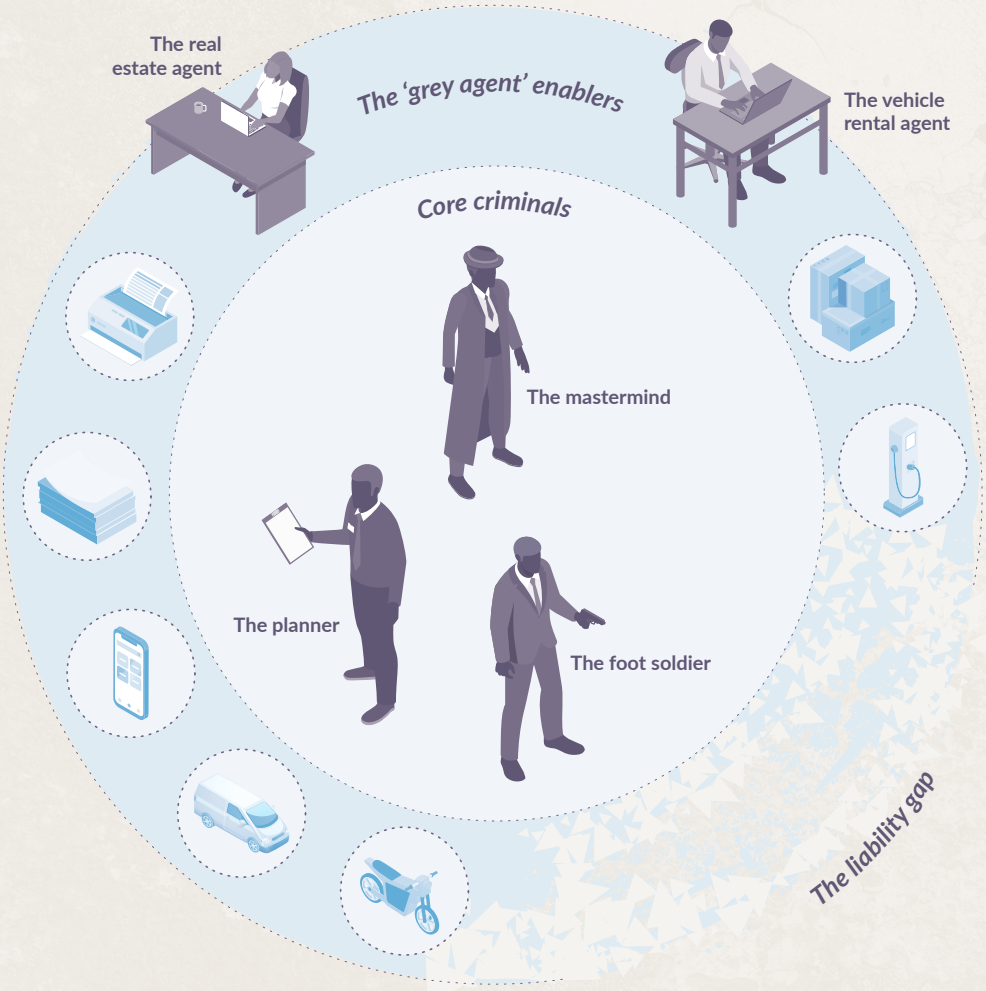

FIGURE 1 From core to periphery: POCA fails to reach a grey class of professionals who enable criminal organizations to operate.

While criminal groups have always had to interface with the legitimate economy to achieve their goals, a key feature of contemporary organized crime is the emergence of a class of independent contractors who shape their services to meet criminal demand. Hendricks and Mwangi epitomize this shift. They provide the systems and services that enhance the group's collective capacity to engage in criminality, one by designing and implementing covert communications devices and the other by fashioning the means used to move and conceal the proceeds of crime. Unlike those caught by Mode 1, they did not actively and directly involve themselves in criminality. Their own purposes remain exclusively commercial, even as they know and understand the implications of catering to their clients' irregular needs. Indeed, neither Mwangi nor Hendricks perform any act which is subjectively 'aimed at' contributing to patterned criminality, contrary to the capacious ambit of POCA's s9(2)(a) offence. Unlike those caught by Mode 2, they did not handle criminal proceeds but dealt in products that would serve to create the infrastructure through which such proceeds will eventually flow.

In the final analysis, POCA's dual modes of liability arguably cannot reach those who knowingly supply goods and services to criminal organizations for profit, without intending thereby to facilitate the commission of specific offences by one or more of their members. To be sure, Hendricks and Mwangi are not merely innocent traders who happen to serve criminal customers. That would be a different case entirely. Rather, the difficulty is that their conduct belongs to a category that POCA cannot presently name. Even if we recognize their conduct as morally wrongful, we cannot reliably squeeze it into the existing offence categories and ignore its more shapeless character as conduct which enables the criminal apparatus writ large.

These are the 'grey agents'. Neither fish nor fowl, they enable without participating, facilitate without joining.

Is this a problem requiring solution? More precisely, is it one that the criminal law should be called upon to solve? Perhaps selling phones should not become criminal merely because criminals buy them. Fair enough. But Hendricks does not merely sell phones. He provides technology explicitly that is designed to evade law enforcement to those he knows will use it for criminal coordination. And he profits from this knowledge. The moral distance between his conduct and that of the innocent phone retailer seems significant. So too with Mwangi, whose 'premium rental service' strips away the evidence that might assist police investigations. The question is whether such knowing and consciously structured facilitation constitutes a wrong deserving of criminal sanction or whether it creeps perilously close to punishing those guilty by commercial association only. After all, coercive state intervention should not be made against such persons unless there was a reasonable suspicion that they had caused a wrongful harm or were on the brink of doing so. Otherwise, their punishment would be unjustified, notwithstanding the social benefits, such as public protection or general deterrence, that may flow from its imposition.[89]

Assuming that punishment may be justified, there is good reason to think that laws should be fine-tuned and adapted to recognize the harms brought about by those who, even if not the material perpetrators of crimes, and even if seemingly far removed from those crimes, nevertheless knowingly render their commission possible or easier in the course of carrying on their 'ordinary' work or trade.

Of course, not all activities that enable crime should be considered criminal. Some may be too indirectly linked to the harm caused; others may be morally wrong but unsuitable for criminalization if, on balance, the good achieved is outweighed by the social and institutional costs of doing so.

COMPARATIVE LAW ANALYSIS

This section examines how other countries have criminalized participation in organized criminal groups (hereafter 'criminal organizations'). These participation offences target the 'grey agent' enablers who currently fall outside of POCA's reach. In general, they share four key elements.

First, the offences criminalize participation in both criminal and non-criminal activities of the organization. This is consistent with Article 5(1)(a)(ii) of the UNTOC, which requires state parties to establish liability for persons who, knowing either the aim and general criminal activity of an organized criminal group or their intention to particular crimes, take an active part in either the criminal or 'other activities' of the group.[90]

The other activities are not themselves illegal. They may include 'bookkeeping for an organized criminal group, chauffeuring the leader of an organized criminal group, or cleaning a firearm. Provided the participant knows the group's criminal aims or activities, and knows that their participation will likely further or advance such aims or activities, their conduct becomes criminal.[91] Here, culpability lies not in the act's intrinsic illegality but in the participant's knowledge that such act is likely to contribute to the achievement of the groups' criminal aims.[92] This reflects the UNTOC's Article 5, which is meant to reach those who actively support criminal organizations 'but who themselves do not commit, or have not yet committed, a specific criminal offence'.[93]

Second, the offences broaden criminal liability beyond the existing doctrines of inchoate and secondary liability, both of which are already considered extensions of traditional criminal liability, as depicted in Figure 1 below.

'Inchoate liability' extends criminal responsibility temporally by reaching backwards in time to catch those who attempt, incite or conspire to offend. For instance, inchoate liability for attempt requires both a *mens rea* of intention and a physical element of 'proximity', meaning the accused must have moved beyond mere preparation to conduct sufficiently proximate to the contemplated offence.[94] Conspiracy, by contrast, requires an agreement to commit a crime but, unlike attempt, does not require the accused to have progressed any further towards completing the substantive offence.

The doctrine of 'secondary liability' extends responsibility to individuals who, though not principal offenders, are parties to the principal offence. It broadens the net of liability along a group dimension, reaching sideways to capture those who flank the perpetrator and intentionally contribute to or assist

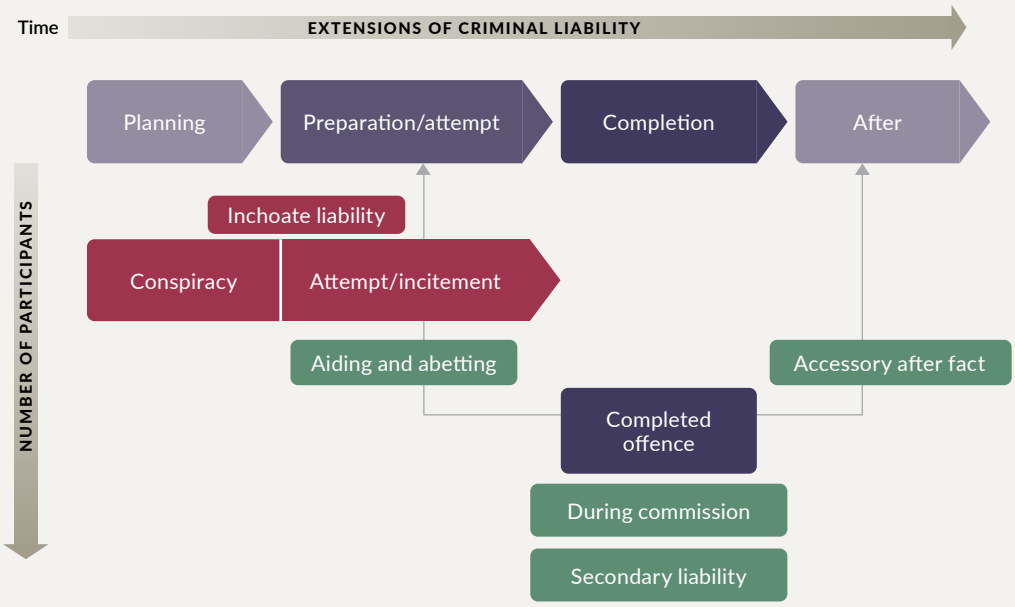

FIGURE 2 Extensions of criminal liability.

him (by enabling, counselling, aiding and/or abetting) in the commission of the principal offence.[95] Generally, forms of secondary liability require that the accused both knew the essential facts constituting the principal offence and intentionally contributed to its commission.

However, in relation to organised crime, these doctrines have discernible limitations. While conspiracy obviates proximity constraints, it cannot touch those who are not privy to the essential, incriminating agreement. Similarly, because accomplice liability – a form of secondary liability – requires knowledge of and an intentional contribution to a particular offence, it fails to reach those who aid or support criminal organisations in a general fashion, but who are unaware of specific crimes being contemplated.

In comparison, the participation offences reviewed below remedy some of these shortcomings by establishing a third extension of liability, namely 'tertiary liability' (See Figure 3), which criminalises contributions to criminal organisations without requiring an agreement or attempt to commit specific crimes (unlike inchoate liability) or knowledge of which particular offence might be facilitated (unlike secondary liability).

Third, most of the participation offences reviewed below are non-constitutive in nature. Constitutive offences, like murder, are defined and constituted by the harm they punish: in this case, death. Without the harm that constitutes murder, the offence of murder cannot be committed. In contrast, non-constitutive offences aim to prevent future harm and do not require that the person has caused actual harm, directly or at all.[96] Instead, they pre-emptively criminalize certain conduct (X) that, in combination with some further, independent act (Y), is likely to cause harm, even if doing X is harmless on its own.[97]

Consider the offence of possessing an unlicensed firearm. Mere possession (X) may be harmless, but it unacceptably increases the risk of future harm caused, for example, by someone who later, in a subsequent and independent act (Y), fires the gun while committing a crime.

The inchoate offences mentioned above – conspiracy, attempt and incitement – are examples of non-constitutive offences since they operate to prevent harm. But several of the participation offences

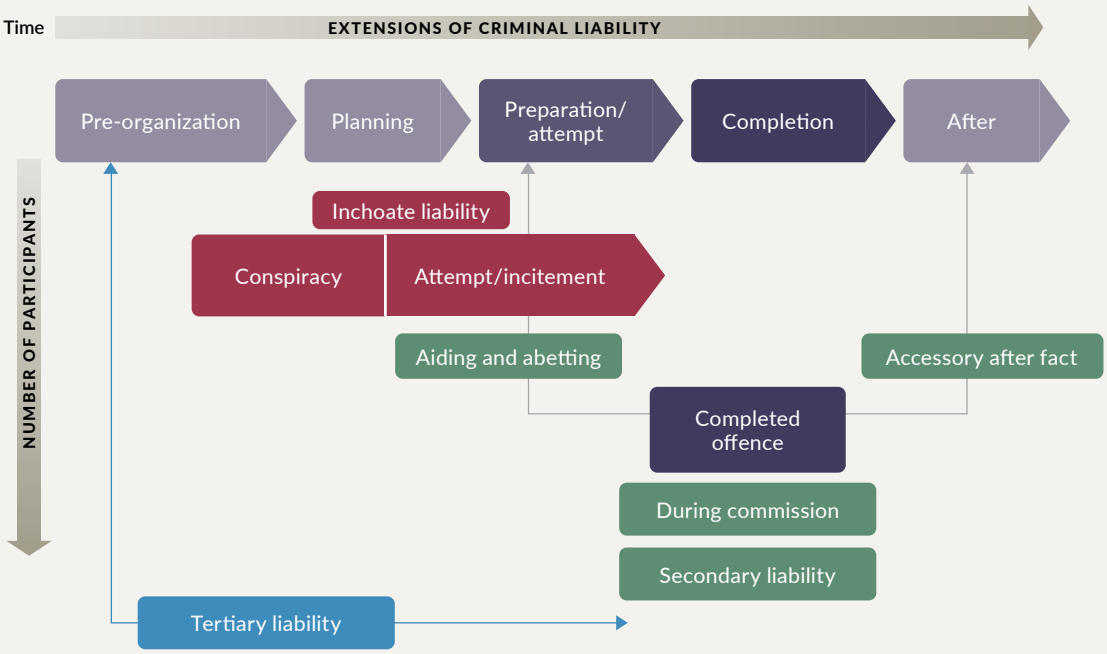

FIGURE 3 Extensions of criminal liability: tertiary liability.

NOTE: Tertiary liability (Article 5 UNTOC) criminalizes participation in organized criminal groups before specific crimes are planned, covering involvement that enables future crimes without knowledge of particular offenses.

reviewed below push this logic even further. While they criminalize involvement with criminal organizations that creates a risk, or heightens an existing risk, of future harm, they do not require the participant to have intended, planned or even been aware of specific future offences.

Fourth, many jurisdictions have enacted participation offences that establish graduated levels of criminal liability corresponding to the degree of the accused's control, authority or involvement in the criminal organization.

These laws distinguish between those who establish, lead or direct criminal organizations and those who merely participate or provide support. The severity of the penalties imposed reflects these hierarchical roles: organizers and leaders face harsher punishment than ordinary members, who in turn suffer longer sentences than peripheral supporters or facilitators. Such scales do not track the harm caused or the specific crimes committed, but rather the nature and extent of a person's relationship to the organizational structure. This introduces a form of role-based liability more familiar to the likes of company law, where directors bear greater responsibility than employees, regardless of their individual actions. But it is less familiar to domestic criminal law, where guilt traditionally depends on what one does and intends. The participation offences therefore sensitize the criminal law to organizational dynamics beyond its individualistic heritage.

Canada

Canada's legislative response to organized crime has evolved over time, driven by persistent challenges posed by criminal networks and a desire to enhance law enforcement capabilities. The country's first major legislative attempt to combat organized crime was Bill C-95, An Act to amend the Criminal Code (criminal organizations) in 1997. It was a direct response to ongoing warfare between rival motorcycle gangs in Quebec.[98]

Bill C-95 introduced a definition of 'criminal organization' and created a new offence of participating in or substantially contributing to the activities of such an organization. However, this initial framework had 'very limited effect in fighting organized crime',[99] resulting in few charges and fewer convictions. Prosecutors and police criticized the definition in Bill C-95 as 'too complex and too narrow in scope'.[100] Its stringent requirements included proving a group of five or more persons, with a primary activity being a serious indictable offence and members committing a series of such offences within five years. These proved difficult to meet in practice, hindering effective prosecution.

Recognizing these limitations, the government brought in Bill C-24, An Act to Amend the Criminal Code (organized crime and law enforcement), in 2002. This legislation replaced the single participation offence with three new distinct offences, targeting 'enhancers', 'soldiers' and 'leaders' of criminal organizations. In a deliberate policy choice influenced by the Canadian Charter of Rights and Freedoms and international norms, particularly the UNTOC, the Bill also clarified that membership in a criminal organization is not itself a crime.[101]

Bill C-24 defined a 'criminal organization' as a group composed of three or more persons, in or outside Canada, that has as one of its main goals or activities the facilitation or commission of one or more serious offences that, if committed, would likely afford a direct or indirect benefit to the group or any of its members. It specifically excludes groups that might gather randomly to commit a single offence.[102]

The exclusion of randomly formed groups underscores the requirement that criminal organizations need a degree of continuity and structure in order to satisfy the definition. Even a small amount of organization and continuity can be enough for criminal organizations to gain advantages over time that collectively pose 'an enhanced threat to the surrounding community'.[103] Canadian case law has established that courts should adopt a flexible approach to the definition: one that is not constrained by the stereotypical sophisticated, hierarchical and monopolistic model of organized crime, but able to capture these organizations in all their forms.[104]

The definition includes two types of action. The first involves the 'facilitation' of crimes – a concept which is broader than the actual commission of an offence by members of the group.[105] The second type is where members commit offences themselves. Either way, what matters is that the facilitation or commission of offences is "one of [the] main purposes or main activities" of the group, even if not the only one.

In *R. v. Beauchamp*,[106] the Court of Appeal for Ontario explicitly rejected the need for a quantitative comparison between a group's legitimate and illegal activities to determine whether criminal activity constitutes a 'main purpose or activity'. Instead, the court held that the term 'main' should be interpreted in a qualitative sense, meaning that the criminal purpose or activity has to be important to the perpetrators, as shown by the nature and degree of effort invested by the members, individually or collectively.[107] In respect of the requirement of a 'material benefit', the courts have held that it must be 'tangible or concrete' but need not be financial. For example, 'turf in the illicit drug market' may constitute a material benefit.[108]

The participation offence: Section 467.11 (Enhancers)

While Bill C-24 introduced three offences targeting a range of offenders involved with criminal organisations, the relevant participation offence examined here – that is, the one which satisfies the inclusion criteria for enquiry in this section by *inter alia* falling outside the scope of POCA's two modes of liability – is found in section 467.11 of the Canadian Criminal Code. It specifically targets

individuals who facilitate the criminal activities of an organised group, often referred to as 'enhancers'. The offence reads as follows:

> Every person who, for the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence under this Act or any Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organisation is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

To secure a conviction under this section, the prosecution must prove each of the following essential elements beyond a reasonable doubt: the existence of a criminal organization, as defined in the Code; the accused's knowledge that the group had the characteristics that make it a criminal organization; the accused's knowledge that their conduct constituted participation in or contribution to an activity of the group (*actus reus*);[109] and the accused's intent to enhance the organization's ability to commit, or facilitate the commission of, offences (*mens rea*). It is not enough that the accused merely knew their conduct would have that effect; that effect must have been their goal.[110]

For the sake of clarity, and to alleviate the prosecution's evidentiary burden, the legislation also specifies that the Crown does not have to prove that:

- the criminal organization actually committed, or facilitated the commission of, an offence
- the participation or contribution of the accused actually enhanced the ability of the criminal organization (the intent is enough)
- the accused knew the specific details of the offence that may have been committed or facilitated by the criminal organization
- the accused knew the identity of any of the persons who constitute the criminal organization.[111]

This is a prime example of a 'non-constitutive' offence because the accused's conduct does not have to be inherently blameworthy or amount to an offence. Rather, the conduct is wrongful and blameworthy only when, and because, it is performed with subjective knowledge of the criminal organization and with the subjective intention to enhance its ability to commit an indictable offence. Thus, the imposition of criminal liability is justified primarily by the unique *mens rea* features of the offence.

This contrasts with the 'soldier' offence under Section 467.12, which requires the accused to have personally committed an indictable offence.[112] However, neither offence requires the accused to be a member of the criminal organization.[113] This in turn distinguishes both offences from the 'leadership' offence under Section 467.13, which explicitly restricts its application to members of the criminal organization.

Consider this example of the enhancer offence.[114] A landlord rents a space to a criminal organization that uses it to commit, or plan the commission of, offences. To secure a conviction under Section 467.11, the Crown must establish that the landlord both knew of the organization's criminal nature and rented the premises for the purpose of enhancing the organization's ability to commit offences. Proving that the landlord knowingly rented a building to a criminal organization would not be enough, since he could simply and successfully argue that he only did so to make a profit. But if the Crown can establish that the landlord acted 'for the purpose of' enhancing the organization's criminal capacity, he is liable to be convicted as an enhancer regardless of whether he knew the specific details of planned crimes, could identify individual members, or whether the premises were ultimately used for criminal purposes.

In *R v Beauchamp*, the accused were convicted of selling devices for forging bank cards. *Photo: Washington State Department of Financial Institutions*

In *R. v. Beauchamp*, the trial court found Robert Cattral, Catherine Brunet and Henry Beauchamp guilty of the enhancer offence under Section 467.11, concluding that their conduct constituted participation in the activities of a criminal organization, a company called Canadian Barcode, for the purpose of enhancing its ability to facilitate or commit indictable offences.[115] Its findings are good examples of how the enhancer offence has been prosecuted in practice.

First, the court determined that Canadian Barcode, operated by Cattral, Brunet and Beauchamp, met the definition of a criminal organization, including the numerical threshold of 'three or more persons'. As to the 'main purpose or activity' requirement, the court found that the company's primary purpose was the sale of devices and materials for use in forging credit cards, a serious offence under Section 342.01(1)(b) of the Criminal Code. The revenue generated from the sale of illicit devices was substantial. Furthermore, the sale of these devices directly resulted in 'material benefits' for all three individuals: profits for Cattral and Brunet as owners, and salary for Beauchamp as an employee.

Second, the court found that the accused, all of whom knew that Canadian Barcode was a criminal organization, performed acts that constituted participation in its criminal activities:

- Cattral developed the RenCode software used for forging credit cards, provided customers with direct technical assistance regarding its application, and was involved in the development of new and improved devices for financial card crime.[116]
- Brunet pleaded guilty to three charges for managing Canadian Barcode's finances and selling card-forging devices. She warned customers of police raids, fraudulently facilitated the use of aliases for customers in financial records and participated in the marketing of illicit devices.[117]
- Beauchamp was a key seller of card-forging devices (pleading guilty to two counts) and provided technical support for the company's products, including concealing buyers' identities.[118]

Finally, the court found that their activities – specifically their provision of technical expertise to help customers commit financial card fraud and the sale of devices to be used to forge credit cards – were intended to enhance Canadian Barcode's ability to commit the serious offence of buying and selling devices intended to be used for credit card fraud.[119]

The 'enhancer' offence represents a significant broadening of criminal liability beyond traditional concepts of aiding and abetting or conspiracy. By dispensing with proof of actual enhancement

or knowledge of specific offences, the Canadian Parliament aimed to target the 'outsiders' who provide crucial services (e.g. money laundering, weapons, safe houses) without directly participating in the core criminal acts. This appears to be a direct response to the difficulty of prosecuting these ancillary actors under older frameworks. However, the strict *mens rea* requirement ('purpose' versus mere 'knowledge') is intended to act as a safeguard against legislative overreach, preventing the criminalization of innocent or socially useful conduct. The result is a diplomatic if somewhat crude balance: a broad *actus reus* (participation/contribution, even indirect) coupled with a precise *mens rea* (specific purpose to enhance).

United Kingdom

Serious and organized crime in the UK represents one of the gravest threats to British national security and economic stability, inflicting annual losses of approximately £47 billion.[120] It is primarily driven by the illicit trade in commodities such as drugs, firearms and waste, and through the exploitation of people, including the facilitation of illegal immigration and human trafficking.

In response to this transnational challenge, the UK ratified the UNTOC in 2006, which obliges it to enact domestic law criminalizing participation in organized criminal groups. In terms of its Article 5, participation offences may conform to either or both of two pathways. The first is the conspiracy-based model that is familiar to common law systems. The second is a participation-based model characteristic of civil law jurisdictions.[121] The UK's Criminal Law Act 1977 takes the first pathway with a conspiracy offence that criminalizes any agreement between two or more persons who conspire to commit a crime, even if they have not taken steps to implement their plan.[122]

Yet conspiracy law has its limits. As previously discussed, it requires proof that the accused is a party to the agreement on which the conspiracy is based.[123] Conspiracy charges therefore fail against persons who are not part of the original agreement or of committing the crime. For example, peripheral actors (those maintaining distance from overtly criminal acts) provide essential logistical support, financial services and technical expertise without entering any agreement to commit crimes.[124] These actors escape liability under traditional doctrines of criminal liability, including aiding and abetting, and conspiracy, precisely because they stay away from direct participation in core criminal conduct.[125]

The participation offence: Section 45 of the Serious Crime Act 2015

For nearly a decade after ratifying the UNTOC, the UK lacked legislation to address the second participation offence pathway under Article 5. However, the current Serious and Organised Crime Strategy (2023–2028) does address it, with a comprehensive multi-agency approach to disrupt and dismantle organized crime groups and 'those who enable them'.[126] Its legal basis is Section 45 of the Serious Crime Act 2015 (the 2015 Act).[127] The new participation offence was specifically designed to tackle individuals who provide professional and non-professional services to support organized crime groups, such as 'the provision of materials, services, infrastructure and information that contribute to the overall criminal capacity and capability of the organized crime group',[128] but who operate at arm's length and deliberately ask no questions.

Section 45(1) of the 2015 Act provides that 'a person who participates in the criminal activities of an organized crime group commits an offence'.[129] Section 45(6) of the 2015 Act defines an 'organized crime group' as a group that:[130]

Serious and organized crime, including the activities of human smuggling cartels, poses a major threat to UK security and stability. *Photo: INTERPOL National Central Bureau, UK*

a. has as its purpose, or as one of its purposes, the carrying on of criminal activities, and,
b. consists of three or more persons who act, or agree to act, together to further that purpose.

This is broader than Canada's definition in that it doesn't require criminal activities to be one of the group's 'main purposes'. The 2015 Act defines 'criminal activities' as those that, if carried on in England and Wales, would constitute an offence punishable on conviction with imprisonment for a minimum term of seven years, and that are carried on with a view to obtaining, directly or indirectly, any gain or benefit.[131] Notably, the seven-year imprisonment threshold exceeds the UNTOC's four-year requirement, potentially excluding some serious crimes covered by the Convention. The 'gain or benefit' requirement includes tangible but non-monetary objectives.

The mental (*mens rea*) and conduct (*actus reus*) elements of the participation offence are set out in Section 45(2) of the Act. To be liable, the *mens rea* requires that the person 'knows or reasonably suspects' that they are taking part in activities that '(a) are criminal activities of an organized crime group, or (b) will help an organized crime group to carry on criminal activities.'[132]

The *actus reus* requires that the accused 'take part in any activities' that are either 'criminal activities' (as defined) or other activities which will assist an organized crime group to carry on criminal activities. Although 'takes part' is not defined, it is clear that the offence criminalizes two modes of participation. The first is through the direct commission of crimes *simpliciter*. This is similar to POCA's Section 2(1)(e) racketeering provision for the commission of predicate offences that jointly constitute a pattern. The second is through otherwise lawful conduct which becomes criminal where it 'will help an organized crime group to carry on criminal activities'.

The *mens rea* element is more controversial. First, it requires that the accused 'knows or reasonably suspects' that they were engaging in the prohibited activities, but not that they 'intend to encourage or assist its commission', as set out in the 2007 Serious Crime Act.[133] Second, the 'reasonably suspects' standard is also a lower threshold than the 2007 Act's 'believes that the offence will be committed'.[134] According to the UK government, 'reasonably suspects' would require the prosecution to prove both the fact that the accused genuinely (i.e. subjectively) suspected they were engaging in the prohibited activities, and that this suspicion was objectively reasonable.[135] Moreover, it is not necessary to prove that the accused knew any of the members of the organized crime group.[136] A statutory defence is available where it can be proven that 'the person's participation was necessary for a purpose related to the prevention or detection of crime'.[137]

Proposed new offences concerning 'relevant articles'

The Criminal Justice Bill 2023–24 (now largely carried forward into the Crime and Policing Bill 2024–25) introduces two new and noteworthy offences that specifically target objects that are used in serious crime.[138] The proposed offences criminalize the possession and supply of 'relevant articles' in circumstances that give rise to a reasonable suspicion of their use in connection with any serious offence. A 'relevant article' refers to any of the following: a 3D printer firearms template (a digital or physical document that may be used in conjunction with a 3D printer to produce any part of a firearm); an encapsulator (any device that may be used to produce capsules); a tablet press (any device that may be used to produce tablets); a vehicle concealment (compartment forming part of or attaching to a vehicle which facilitates the concealment of things or people).[139] Moreover, the Bill empowers the secretary of state to make regulations amending or adding to the list of relevant articles.[140]

The Bill creates two principal offences concerning these articles. In terms of Section 1(1), a person commits an offence if they possess 'a relevant article in circumstances which give rise to a reasonable suspicion that the relevant article will be used in connection with any serious offence'.

Section 1(2) extends this scope to actors in the criminal supply chain, making it an offence for anyone to import, make, adapt, supply or offer to supply such articles in similar circumstances. The *mens rea* of these offences is objective: the prosecution needs to prove the existence of circumstances giving rise to 'reasonable suspicion' of criminal use, not that the accused subjectively suspected or knew of such circumstances.

The offences exemplify non-constitutive crimes: they criminalize conduct that, while not inherently harmful, significantly increases the likelihood of future harm. But why is it fair or just to prohibit harmless conduct – and punish the possessor or the manufacturer or supplier – merely because there is a risk that it may lead to further harm occasioned by a separate, subsequent course of causally independent behaviour? Stated plainly, is it justified to punish the supply of a thing merely because others might later use it to misbehave?

The UK's Crime and Policing Bill 2024-25 introduces offences involving objects that are used in serious crime, including possession or supply of vehicle concealment compartments. *Photo: Ukrainian National News*

Simester and Von Hirsch argue that supplying a product implicitly affirms its 'core function', that is, its socially understood primary purpose.[141] When a product's core function is illegitimate or harmful (e.g. military flamethrowers, vehicle concealments designed to evade law enforcement), its supplier is regarded as implicitly condoning its use for that core illegitimate function, or at least cannot credibly deny knowledge of its likely harmful use. In these cases, the criminal law is justified in punishing suppliers of purpose-built harmful tools by linking them to the wrongdoing

they facilitate, regardless of whether the supplier intends to use the tool in connection with a relevant offence.

These sentiments are echoed, at least tacitly, by the UK government's approach to the new 'relevant article' offences. While it acknowledges the risk that these may inadvertently criminalize individuals who are not aware that their possession or use is illegal, the government believes that the relevant articles are

> so closely associated with serious crime that it is appropriate to expect that those who are involved in making, modifying, supplying or offering to supply, or who are found in possession of such articles have at least a reasonable standard of awareness of the signs of criminal activity.[142]

Accordingly, 'the measure is justified as it is intended to tackle individuals who produce such articles but are currently able to keep sufficient distance from crimes to avoid prosecution'.[143]

What about articles that have both legitimate and illegitimate uses? The arguments in favour of criminalizing the possession and supply of vehicle concealments or 3D printer firearms templates are straightforward enough. But what about tablet presses and encapsulators, both of which have legitimate uses in pharmaceutical manufacturing? The Bill's approach accounts for the moral ambiguity in such mixed-use cases by adopting the 'reasonable suspicion' standard, criminalizing supply only where circumstances objectively and reasonably suggest intended criminal use.

A supplier selling a tablet press to a registered pharmaceutical manufacturer operates in one context. But a supplier selling an identical machine to a person who pays cash, provides no business credentials and requests the transaction remain confidential, operates in quite another. In unregulated individual sales, these machines' primary contemporary association is with illegal drug manufacture, not legitimate pharmaceutical production. Unlike the supply of 3D printer firearms templates and vehicle concealments, where the supplier's culpability is presumptively implied by the articles' core function, the legality of the supply of such dual-use items is determined by the specific circumstances of the transaction.

Australia: Federal, New South Wales and South Australia

Australian criminal laws operate under a hybrid federal, state and territory model.[144] The scope of Commonwealth (federal) criminal laws is generally limited, with most criminal laws being enacted and enforced at the state level.[145] The differences across these jurisdictions reflect different policy priorities and local crime challenges. This section examines key participation offences across federal, New South Wales and South Australian criminal laws. These form part of a deliberate legislative strategy to extend criminal liability beyond traditional complicity or conspiracy doctrines and enable earlier interventions against individuals who lend support to criminal activities.

Federal offences: Commonwealth Criminal Code Act 1995, Division 390

Division 390 of the Criminal Code introduces three offences that criminalize involvement in criminal organizations and differentiate between lower- and higher-level participants, similar to the Canadian approach (see Figure 3).[146]

At the lowest rung is the least severe 'supporter' offence, which attracts five years imprisonment for those who provide material support or resources to criminal organizations. Next is the intermediate 'soldier' offence of committing an underlying offence for the benefit, or at the direction, of a criminal

organization, which carries a penalty of seven years imprisonment. The gravest offence, punishable by ten years imprisonment, targets those in positions of authority who direct the activities of a criminal organization.[147]

For purposes of the federal offences, a 'criminal organization' is an organization that consists of two or more persons, whose aims or activities include facilitating or engaging in conduct that constitutes an offence punishable by imprisonment for at least three years, where that offence, if committed, would be 'for the benefit of' the organization.[148]

An offence is 'for the benefit of' an organization if it results, or is likely to result, in the organization or one of its members receiving, directly or indirectly, a 'significant benefit of any kind', which includes illicit profits and indirect advantages such as protection or security for illegal activities.

The definition of a criminal organization does not require a formal structure, so it could include groups that form randomly to commit a single offence. This differs from its Canadian counterpart,[149] and also Article 2(a) of the UNTOC, which refers to a 'structured group' that exists 'for a period of time' and therefore has some sense of ongoing internal organization and stability.[150] Further, because the organization's aims or activities need only 'include' committing or facilitating an offence, crime may be just one among many organizational pursuits. Courts determine whether a particular group is a 'criminal organization' on a case-by-case basis, and their findings are only ever binding for the parties to the case. Unlike organized crime offences in some Australian states, the federal offences do not rely on declared or designated criminal organizations.[151]

Supporting a criminal organization: Section 390.4 of the Criminal Code

Section 390.4(1) criminalizes the provision of 'material support or resources' to a criminal organization where the support or resources aid, or there is a risk that they will aid, the organization in committing a 'constitutionally covered offence', i.e. an offence punishable by imprisonment for at least 12 months.[152] As Schloenhardt explains:

> The offence is designed to capture persons who – in one way or another, and without actually

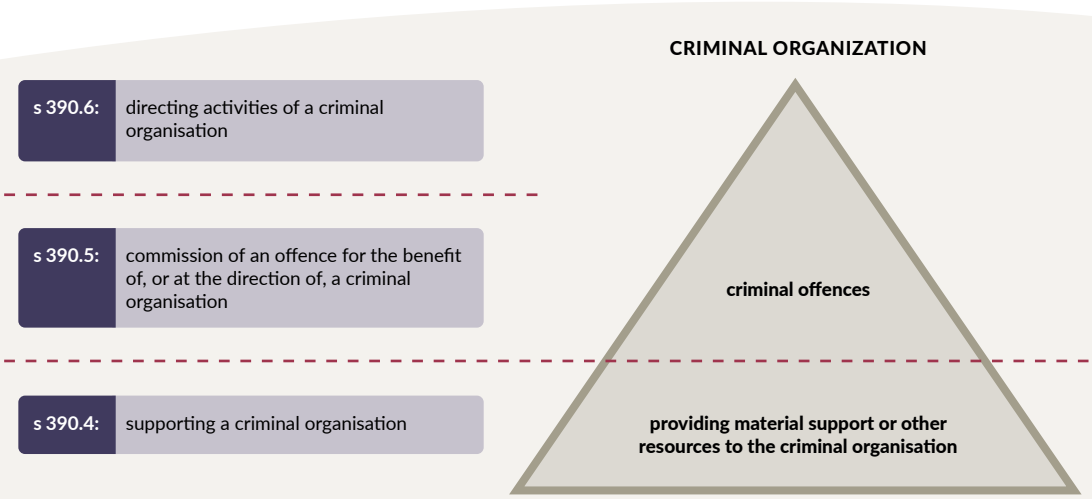

FIGURE 4 Organized crime offences in Australia's Criminal Code, Division 90.

NOTE: These provisions came into the Criminal Code through Schedule 4 of the Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010.

SOURCE: Andreas Schloenhardt, Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009, 7 October 2009, 3, https://www.aph.gov.au/DocumentStore.ashx?id=2633fe2b-17c9-4450-8741-97319e43b49a

carrying out any criminal offences (c.f. proposed s 390.5) or directing them (s390.6) – enhance the ability of a criminal organization to carry out criminal activities. Liability under s 390.4 may thus involve persons outside the criminal organization who have some interaction with the group even if they are not a part of the group.[153]

The Explanatory Memorandum to the Bill provides an example of this offence:

> Person A is a financial expert. Persons B, C and D are members of a criminal organization. Person A provides significant advice and training to persons B, C and D on how they might go about engaging in the money laundering of specific illicit profits of crime (in breach of an offence in Section 400.4 of the Criminal Code of dealing in proceeds of crime etc. – money or property worth $100,000 or more, which carries penalties of up to 20 years' imprisonment).[154]

The Memorandum also sets out what the prosecution must prove beyond a reasonable doubt to secure a conviction. First, that the accused intentionally provided 'real and concrete' material support or resources to a criminal organization or a member of one. Second, that the organization is a 'criminal organization' and that the accused was at least 'reckless' with respect to that fact. Third, that the material support or resources aided, or risked aiding, the criminal organization to commit an offence, and that the accused was at least reckless with respect to that fact or risk. Fourth, that the specific offence concerned is punishable by imprisonment for at least 12 months.[155]

A key distinguishing feature of this offence is that, unlike traditional aiding and abetting, the organization does not have to actually commit an offence with the support provided.[156] Liability can arise simply from the fact that, in the circumstances, the support objectively risked aiding the criminal organization to commit a crime.

New South Wales: Section 93T of the Crimes Act 1900

New South Wales (NSW) introduced Australia's first specific organized crime offences in 2006 with the passage of the Crimes Legislation Amendment (Gangs) Act. Subsequent legislation – the Crimes (Criminal Organizations Control) Act 2009 – established further powers to declare criminal organizations and impose control orders on their members.[157]

Central to the NSW participation offences is the definition of a 'criminal group' in s93S(1) of the Crimes Act: namely, a group of three or more people whose objectives include either:

a) obtaining material benefits from the commission of serious offences (punishable by five or more years imprisonment); or
b) committing serious violence offences (punishable by ten or more years imprisonment).[158]

Unlike the federal definition of 'criminal organization', a 'criminal group' includes groups whose objectives may be limited to the commission of 'serious violence offences', which departs from conventional conceptions of organized crime where material gain is the ultimate goal of illicit activity.[159]

Participation in criminal groups: Section 93T of the Crimes Act (NSW)

Section 93T of the Crimes Act enacted a basic participation offence and three aggravated offences that impose higher penalties.[160] Subsection (1) establishes the basic participation offence of knowingly or recklessly participating in a criminal group. Building on this, the following three subsections set out aggravated offences that combine group participation with violent conduct, specifically assaults connected to group activities (subsection 2), property damage (subsection 3) and assaults on law enforcement officers (subsection 4).

The discussion below is confined to the basic participation offence, as it constitutes the precondition for charges in relation to the aggravated offences.

The Crimes Act does not define 'participation'. While the term traditionally denotes aiding, enabling, counselling or procuring in the context of complicity and accessorial liability, its precise scope in s93T(1) remains unclear.[161] Notably, neither membership nor active participation in the group is a prerequisite for this offence.[162] As explained in the Legislative Assembly, the basic offence:

> targets those hiding in the background of a criminal enterprise and those who facilitate organized criminal activity [...] These are the so-called 'cleanskins', people with no criminal record who give criminals a legal front behind which to commit their crimes and minimize the risk of detection by law enforcement. They may be licensed hoteliers, real estate agents, smash repairers, pharmacists or public officials who, in various ways, aid and abet ongoing criminal activity.[163]

Under s93T(1), an offence is committed where a person 'participates in a criminal group' and (a) knows, or ought reasonably to know, that it is a criminal group, and (b) knows, or ought reasonably to know, that his or her participation in that group contributes to the occurrence of any criminal activity.[164]

The participation offence has two mental elements, both of which must be satisfied for conviction. These are the accused's knowledge, or reckless or negligent ignorance, (a) that the group is a criminal group and (b) that their participation contributes to the occurrence of any criminal activity. It does not require that the accused share or pursue the objectives of the criminal group, or that they intended their participation to contribute to the occurrence of any criminal activity.[165]

The inclusion of recklessness as an objective and lower *mens rea* threshold stands in marked contrast to the aggravated participation offence in s93T(1A), which criminalises 'directing any of the activities of a criminal group' by a person who subjectively 'knows that it is a criminal group'.

As for the consequences of the accused's participation (under subparagraph (b) of the offence), the inclusion of recklessness as an alternative *mens rea* threshold means that proof of mere foresight on the part of the accused that their participation could or might contribute to 'any' criminal activity, as opposed to some specific criminal activity or offence, will suffice.[166] In this regard, s93T(1) significantly broadens the scope of criminal liability beyond the traditional doctrines of secondary and inchoate liability, punishing individuals who may claim ignorance but who should reasonably have recognized the criminal nature of their associations and activities.

South Australia: Criminal Law Consolidation Act 1935

In 2012, South Australia (SA) amended its Criminal Law Consolidation Act 1935 (CLCA) by introducing a set of offences relating to criminal organizations, which included a core participation offence under s83E.[167] These amendments were part of a broader legislative push against serious and organized crime, complementing earlier laws that provided for the formal declaration of criminal organizations.[168]

Section 83D(1) of the CLCA sets out the key definitions relevant to participation offences:

- 'criminal group': two or more persons whose aim or activity includes engaging in or facilitating either (a) a 'serious offence of violence' (punishable by 5 years imprisonment, involving death or serious harm to a person or property); or (b) a 'serious offence' [punishable by imprisonment for life or for a term of 5 years or more] intended to benefit the group or its participants.[169]

- 'criminal organisation': either a 'criminal group' (as defined) or a 'declared organisation' (an organisation formally declared as such by a court in terms of the Serious and Organised Crime (Control) Act 2008).
- 'participating in a criminal organisation': includes, but is not limited to, the following: recruiting others to participate in the organisation; supporting the organisation; committing an offence for the benefit of, or at the direction of, the organisation; and occupying a leadership or management position in the organisation or otherwise directing any acts of the organisation.

The definition of 'criminal organization' brings together two approaches for prosecution: the 'criminal group' approach, where prosecutors can prove in any given case that a group meets the statutory criteria of a 'criminal group', and the 'declared organization' approach, where prosecutors can rely on an existing declaration to that effect.

The CLCA also broadly defines 'participating' to cover various forms of conduct, including recruiting, supporting and directing, unlike federal law which creates separate offences for each role. The definition is non-exhaustive ('without limitation') and is therefore flexible enough to encompass other forms of participation as they arise from the facts of each case.

Participation in criminal organization: Section 83E

In terms of s83E(1) of the CLCA, it is an offence for a person to participate in a criminal organization:

(a) knowing that, or being reckless as to whether, it is a criminal organization; and
(b) knowing that, or being reckless as to whether, his or her participation in that organization contributes to the occurrence of any criminal activity.

While the elements of this offence are identical to those under s93T(1) of the Crimes Act (NSW), they must be read together with three further provisions of the CLCA's broader statutory scheme, which drastically alter how the participation offence is prosecuted in practice.

The first is the 'rebuttable presumption' in s83E(7). Here, a person is presumed, in the absence of proof to the contrary, to be knowingly participating in a criminal organization if, at the relevant time, they were displaying the insignia of that organization. In other words, if the prosecution proves that the accused was displaying insignia at the time of the alleged offence, the court is entitled to conclude that the accused was knowingly participating in that organization, unless the accused can provide enough evidence to cast reasonable doubt on the presumption that they were knowingly participating.[170] Requiring an accused to respond to the presumption in this way eases the prosecution's task, but it also implicates fundamental fair trial rights such as the right to be presumed innocent.

The second noteworthy provision grants a statutory defence to lawyers by providing that 'a legal practitioner acting in the course of legal practice will be taken not to be participating in a criminal organization or in an activity of [such] organization.'[171] The legislative intention was presumably to recognize that criminal defence lawyers necessarily engage with members of criminal organizations in ways that could be construed as 'supporting' the organization. However, the safe harbour only covers conduct within 'the course of legal practice' – a phrase that remains ambiguous and open to abuse. While it would clearly cover court advocacy and client advice, the phrase potentially extends to any activity undertaken by a lawyer in their professional capacity, including those that may recklessly enable criminal organizations, such as corporate structuring, property transfers or transactions that form part of a corrupt deal.

The third is a hybrid judicial notice mechanism in respect of the criminal status of a group, introduced in s83G of the CLCA:

> If, in any criminal proceedings, the court is satisfied beyond reasonable doubt that a particular group was, at a particular time, a criminal group within the meaning of this Part, the court may, on the application of the Director of Public Prosecutions, make a declaration to that effect.[172]

This allows a court, having determined beyond reasonable doubt in any criminal proceedings that a group constitutes a 'criminal group', to formally declare as much upon application by the director of public prosecutions. The declaration is neither a conviction nor a finding of guilt, but rather a judicial determination of an organizational characteristic. It is made incidentally to the primary proceedings. The significance of this declaratory power is apparent from the very next statutory provision:

> If a declaration is made in relation to a group under this section, that group will, for the purposes of any subsequent criminal proceedings, be taken to be a criminal group in the absence of proof to the contrary.[173]

In other words, if a group has already been officially declared a criminal group in previous criminal proceedings, a court in subsequent criminal cases involving that group can treat the declaration as proof of the group's criminal status, unless there is evidence showing otherwise.[174] Accordingly, the prosecution does not have to prove afresh that the relevant group is a 'criminal organization' (recall that the definition of 'criminal organization' includes a 'declared organization', namely a criminal group that has previously been declared as such). Instead, the statute imposes an evidentiary burden on the accused to provide sufficient evidence to create reasonable doubt about the group's criminal status by showing, for example, that the group has changed since the declaration or that the original declaration was flawed in some relevant way.

Japan

Japan's organized crime laws present a unique and unconventional model relative to the approaches adopted by most other jurisdictions. Japan's penal provisions for organized criminality rest upon the administrative designation or proscription of criminal groups known as 'boryokudan' (literally 'violence groups'). This is often described as a system of 'positive prohibition', where the state actively labels certain groups as criminal or illegal based on their dangerous nature, violent activities or the risks they pose to public safety.[175] While it is ultimately a highly rights-respecting and tolerant system, the labelling aspect bears striking parallels to counter-terrorism legislation, which similarly operates through the proscription of designated entities.

The Anti-Boryokudan Law

The Law to Prevent Unjust Activities by Organized Crime Group Members No. 77 of 1991, known as the Anti-Boryokudan Law, was Japan's response to the yakuza's burgeoning power throughout the late twentieth century. Traditional criminal laws, based on prosecuting discrete offences after their commission, proved inadequate to dismantle the yakuza's entrenched societal presence or curb their economic power. The legislation shifted this paradigm by introducing administrative measures to target the groups themselves, aiming to prevent their illegal activities and reduce their social foothold before crimes were committed.

Central to the Anti-Boryokudan Law is the designation process administered by the prefectural Public Safety Commission (PSC), a local government body responsible for public safety oversight and police operations. The designation of a group triggers a range of legal restrictions and enhanced penalties.

According to Article 3, a group can be formally designated as a boryokudan if it meets four criteria:

- hierarchical structure: the group must operate with a discernible hierarchical structure controlled by a leader
- purpose to obtain material benefit: a substantial purpose of the group must be to enable its members to use its power to obtain economic or financial benefits
- criminal records of members: a significant portion of its members must possess criminal records, indicating a consistent pattern of illegal behaviour[176]
- coercive activities: the group must utilize its influence to engage in coercive or exploitative activities that pose a threat to public order, e.g. extortion, illegal gambling, loan sharking.[177]

Once the PSC determines that a group satisfies these criteria, it issues a formal designation, which is then publicly announced and periodically reviewed. Members of a designated group are subject to a three-tiered system of legal control: legislatively prohibited acts, administrative orders issued upon violation, and criminal penalties for non-compliance with those administrative orders.

In respect of the first tier, for example,[178] Article 9 lists 27 specific 'violent demands' that a member of a designated criminal organization must not engage in by leveraging the organization's power, such as demanding protection money or coercing businesses.[179] A violation of Article 9 may result in the PSC issuing an administrative cease-and-desist order. Failure to comply with such an order is a criminal offence, punishable by imprisonment for not more than three years or a fine of not more than 5 million yen, or both.[180]

Act on Punishment of Organized Crimes and Control of Crime Proceeds

The enactment of the Act on Punishment of Organized Crimes and Control of Crime Proceeds No. 136 of 1999 (APOC) significantly enhanced Japan's organized crime laws in respect of regulating the proceeds of criminal activities. Its purpose is to strengthen penalties for organized acts such as murder, punish the concealment and receipt of criminal proceeds, and to provide for the confiscation of such proceeds.[181] For present purposes, the key provision of APOC relevant to the criminalization of participation or involvement in criminal organizations is the newly inserted Article 6-2.

Article 6-2, introduced by a 2017 amendment, establishes a conspiracy offence designed to criminalize preparatory acts performed in relation to serious offences. The provision's primary purpose was to fulfil Japan's obligations under the UNTOC,[182] and to facilitate early intervention against organized criminal groups before substantive offences occur. The offence requires proof of the following:

- the existence of an 'organized crime group', defined as a continuing association whose shared purpose includes committing the predicate offences
- an agreement between two or more persons to commit one of 277 predicate offences, with knowledge that such planning occurs as part of the group's activities
- the intentional performance by at least one conspirator of one or more preparatory acts to further the criminal plan, e.g. site reconnaissance, acquiring the necessary materials
- a connection between the planned predicate crime and the activities of the group.[183]

Members of Japan's yakuza syndicates. *© Richard Atrero de Guzman/Anadolu Agency/ Getty Images*

Even if the above requirements are met, Article 6-2 provides that, if the person who intends to perform the preparatory act turns themself in before doing it, they will be granted a reduction in, or absolution from, punishment. In this way, Japan expressly motivates potential conspirators to withdraw from criminal plans and cooperate with authorities.

Yakuza exclusion ordinances

The yakuza exclusion ordinances constitute a wide-ranging body of local laws enacted across all 47 Japanese prefectures, aimed at severing relationships between legitimate society and organized crime groups.[184] A pertinent example is Article 24-3 of Tokyo's ordinance, which prohibits business owners from providing 'property benefits' that 'assist the yakuza's activity or operation', if the business owner knows the recipient's yakuza affiliation.[185] Such benefits also include 'simple dealings, deliveries, and contracts' (e.g. pizza deliveries, repair services and venue rentals), reflecting a clear policy intention to isolate yakuza groups from their economic ecosystem.[186] The penalty structure for violations of Article 24-3 highlights reputational over criminal penalties.[187] If a breach is detected, the PSC first issues a warning. A further act of non-compliance may result in the public disclosure of the offending company's name, a sanction often more devastating than monetary penalties in Japan's reputation-sensitive business culture. Only after continued defiance do criminal sanctions apply, with a maximum of one year of imprisonment or a fine of 500 000 yen.

The ordinances also impose 'obligations of endeavour', a soft law mechanism that requires businesses to implement anti-yakuza measures that do not attract criminal penalties for non-compliance.[188] Under Tokyo's Article 18, for example, businesses are required to include contract terms in which the parties warrant they are not connected to organized crime groups and agree that the contract may be terminated unilaterally if any yakuza ties are later discovered.[189]

United States

The American legislative origins of POCA reveal the source of its core limitation in prosecuting enablers of criminal organizations. As previously noted in the introduction of this report, POCA was modelled on two key US statutes, namely the Racketeer Influenced and Corrupt Organizations Act and California's Street Terrorism Enforcement and Prevention Act.[190]

President Trump signs an executive order in January 2025 designating criminal cartels as foreign terrorist organizations. *© Jim Watson/POOL/ AFP via Getty Images*

Consequently, POCA inherited their design, which effectively targets the direct participants, managers and accomplices of criminal groups (in the form of enterprise and gang structures), but largely fails to capture the peripheral 'grey agent' enablers who provide crucial support without joining the group or committing predicate offences themselves. Fortuitously, an alternative legislative model capable of closing this gap can be found, not within US organized crime statutes, but within an entirely different strand of American law that has evolved to dismantle the support networks of a parallel national security threat.

That strand is the counter-terrorism framework, which contains the country's most potent tool for prosecuting enablers of known criminal groups, namely Section 2339B of Title 18 in the US Code (USC). Enacted in terms of the Antiterrorism and Effective Death Penalty Act of 1996, which passed in the aftermath of several high-profile terrorist attacks in the 1990s – including the 1993 World Trade Center and 1995 Oklahoma City bombings – Section 2339B criminalizes knowingly providing material support or resources to designated foreign terrorist organizations.[191] Although developed to target a different threat, the statute's mechanism for grounding criminal liability in the standalone act of supporting a formally designated group, rather than a specific predicate crime, is directly relevant to this report's objective of closing the very 'enabler gap' POCA inherited.

Section 2339B makes it a federal crime to 'knowingly provide' (or attempt/conspire to provide) 'material support or resources to a foreign terrorist organization'.[192] 'Material support or resources' is broadly defined to include 'any property, tangible or intangible, or service'. This could be 'currency, financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, personnel and transportation (excluding medicine or religious materials)'.[193] The breadth of this definition reflects the finding of Congress that terrorist organizations 'are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct'.[194]

To secure a conviction under Section 2339B, the prosecution must prove that the accused: (i) knowingly provided material support; (ii) to an organization designated as a foreign terrorist organization; (iii) with knowledge either of the fact that the organization has been so designated, or of the organization's engagement in terrorist activity or terrorism.[195] Unlike the other primary material support statute (18 USC s2339A), the *mens rea* for Section 2339B requires only knowledge of the foreign terrorist

organization's status as such. The *actus reus* is limited to providing 'material support' and does not require the support to cause or facilitate a subsequent offence. In sum, criminal liability is linked to the provision of material support to a designated organization with knowledge of that designation. Unlike traditional complicity liability, both the provider's intentions and the consequences of the support provided are irrelevant.

The formal designation of an organization as a foreign terrorist organization is made by the secretary of state in terms of 8 USC s1189. To designate, the secretary must find that: (i) the organization is a 'foreign organization'; (ii) it engages, or has the capacity/intent to engage, in 'terrorist activity' or 'terrorism'; and (iii) the terrorist activity/terrorism threatens US security.[196]

The power to designate is reserved exclusively for the executive branch of government. Designated organizations receive no prior notice and are not given an opportunity to challenge the evidence on which the decision is made. Organizations may ask the court to review its decision, but the review can only consider the evidence the secretary put on record. The grounds of review are strictly defined: a designation decision can only be set aside when it lacks substantial support in the record, is arbitrary, unconstitutional, or otherwise unlawful for want of authority or jurisdiction.[197]

Adapting the 'material support offence' model for South African organized crime

The preceding overview of Section 2339B indicates how the offence might be re-engineered to solve the specific problem at the heart of this report: prosecuting the 'grey agent' enablers who fall outside of POCA's current reach. While the Australian and Japanese models offer valuable insights into the procedural and evidentiary advantages of designation, Section 2339B uniquely provides the substantive doctrinal scaffolding for a new type of offence that utilizes designation as a precondition for criminal liability. The following section will therefore shift from description to prescription, arguing for the model's express adaptation by proposing a judicially-driven, designation-based material support offence tailored to the South African context.

Closing gaps in current criminal law addressing organized crime

Criminal organizations, like foreign terrorist organizations, rely heavily on sympathizers and quasi-criminal entrepreneurs for funding, weapons, equipment, training and logistical support. However, these enablers can escape liability under traditional criminal law doctrines of aiding and abetting, attempt and conspiracy if they cannot be shown to have knowledge of a particular crime and/or a specific intent to further or commit it.

A reconfigured material support offence that justifiably removes these strict *mens rea* requirements could address this issue. It would do so by recognizing the distinct but previously unpunishable wrong of knowingly supporting and capacitating a legally designated criminal organization, fully aware of its criminal status and the undeniable risk of harm that providing such support entails.

The fungibility principle

Congress's finding that foreign terrorist organizations are 'so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct' articulates what is known as the 'fungibility principle': namely, the idea that since money and resources are interchangeable, any funds, goods or services provided to a terrorist organization, even for non-violent activities, can free up other resources to be used for terrorist purposes. Arguably, the principle applies equally to criminal organizations. Since

they, too, have no internal firewalls separating legitimate from illegitimate activities, every contribution, regardless of the provider's intent, enhances the organization's capacity for harm. A donation earmarked for a criminal gang's community outreach programme frees up resources for their criminal activity just as surely as one pledged to a terrorist group's charitable wing. Embracing this principle justifies a shift from POCA's current crime-centric approach to a more effective organization-centric model. Liability would no longer depend on the prosecutor's difficult task of proving an enabler's knowledge of, and intent to further, a specific future crime. Instead, it would be predicated on their knowledge of the group's judicially-confirmed criminal status. The fungibility principle provides the rationale for this shift: because any support invariably facilitates the group's criminal purpose, the law is justified in focusing on the enabler's awareness of who they are supporting, not on how that support is ultimately used.

Benefits flowing from judicial designation

Adapting the US model should not mean importing its flaws. A primary objection to the American approach is that the relevant statutory scheme vests the authority to designate exclusively in the executive branch of government, a restriction which raises serious concerns regarding executive overreach and the separation-of-powers. A South African adaptation must therefore cure the constitutional vulnerability inherent in this type of designation procedure. To pass constitutional muster, the proposed legislative framework must establish an exclusively judicial designation process. In practice, this means that only a High Court (or other superior court), sitting in open court, may declare an organization 'criminal' pursuant to an application brought by the state, which would bear the onus of proving its case beyond a reasonable doubt. This hybrid approach pairs the substantive offence of material support from the US model with a procedural mechanism for designation that is fully compliant with the rights and structural safeguards of the South African Constitution. As will be detailed below, making judicial designation as a pre-requisite for liability carries several crucial benefits.

First, it carries significant symbolic weight as an expression of public condemnation. When a court designates a group as criminal, it effectively declares that the entity has, through systematic criminal conduct, forfeited its place within lawful society and has become a continuing threat to both the rule of law and the moral foundations of civic life.

Second, a judicial designation stigmatizes and isolates the targeted organization, increasing the social, economic and reputational costs of knowingly associating with it. Such stigma deters potential recruits, collaborators and even professional service providers, such as accountants, lawyers or transporters, who might otherwise gamble on the law's present ambivalence towards their collusion.

Third, depending on the broader statutory framework in place, judicial designation can unlock enhanced investigative and surveillance powers for law enforcement, vindicate requests by dedicated organized crime units for increased resources and specialized equipment, and ultimately legitimize and support the kind of comprehensive police investigations necessary to dismantle larger, intransigent criminal networks.

Lastly, judicial designations provide greater legal certainty to financial institutions, businesses and individuals regarding their obligations to refrain from supporting proscribed organizations.

Addressing concerns regarding a reconfigured organized crime offence

Despite its advantages, adapting the material support offence for organized crime raises several concerns, particularly regarding the distinction between terrorist and criminal organizations, the scope of the *actus reus*, and the sufficiency of knowledge as the *mens rea*.

Distinguishing terrorist from criminal organizations

It is often argued that, compared to ordinary criminal organizations, terrorist organizations warrant categorically harsher treatment under the criminal law. Arguments of this kind typically invoke two main reasons for this.

First, unlike the aims of organized criminal groups, terrorists are driven by political or ideological motives: they aim to destabilize the state itself.[198] Whereas criminal organizations violate laws without challenging the authority of the state or its legal system, terroristic acts 'manifest a particularly strong antisocial position that pierces the heart of the sociolegal order as such'.[199]

Second, their violence has markedly different targets. Since criminal organizations primarily pursue financial gain, they typically target people who threaten their business interests: rival criminals, potential informants, witnesses or those who refuse to pay protection money.[200] Their violence is bounded and focused. Harm done to innocent bystanders represents collateral damage rather than intended casualties.

In contrast, the violence of terrorist organizations deliberately and primarily targets innocent civilians to deliver maximum psychological impact across society. When a terrorist group bombs a government building, it speaks to multiple audiences simultaneously: the public (instilling fear), the government (demonstrating its vulnerability), potential sympathizers (inspiring action) and the international community (seeking attention and legitimacy). Each terrorist act functions as political theatre on a grand scale, transforming violence into a perverted form of political discourse.

However, these distinctions are plausible only in typical or clear-cut cases. They fail to provide a sound basis for making distinctions along the spectrum of real-world cases, precisely because such organizations increasingly blur and overlap.

Consider the idea that political motivation distinguishes terrorism from organized crime. This distinction introduces a troubling element: the punishment of beliefs rather than actions. Suppose the leaders of an 'ordinary' criminal gang privately believe that the state is fundamentally illegitimate and view their criminal activity as a step toward its eventual overthrow. Despite this, they present themselves publicly as mere profit-seekers. Should the group be classified and designated as terrorist? This scenario creates a dilemma for the law.

If the group is not classified as terrorist, the decision is based on its public statements, not its true motive. The consequence is that the law would effectively punish the public expression of a political motive, not the motive itself – a position difficult to reconcile with commitments to freedom of thought.

On the other hand, to classify the group as terrorist, the law would be forced to delve into the private beliefs of its members to prove a true political agenda. This is a perilous step for a legal system to take, as it opens the door to intrusive inquiries into the thoughts of the accused, a practice that is both practically difficult to prove in court and normatively troubling for a liberal democracy.

The distinction based on victim selection, which is based not on motive but method, likewise falters on closer inspection. Criminal organizations also demonstrate disregard for innocent life when it serves their purposes. Imagine the plausible case of a criminal syndicate that wants to eliminate a rival who frequents a particular restaurant. It sets off a bomb during peak dining hours, killing numerous civilians alongside the target. The syndicate accepts these civilian casualties as unavoidable collateral damage, even though its deliberate aim was not necessarily to murder innocents, as one might expect of terrorist groups. Should the criminal law be more lenient towards the syndicate's wilful disregard for life than the terrorist's deliberate intent to murder, even where the scale of harm and death inflicted is equivalent?

The idea that terroristic violence should be singled out for its unique psychological impact in provoking a state of terror and panic in the general population is intuitively appealing. But again, there are counterexamples where criminal organizations are equally guilty by this yardstick. Consider one real-world case of 'narco-messaging'. In 2009, body parts of five men appeared in the city centre of Chilpancingo, the second largest city of the Mexican state of Guerrero, along with a poster, purportedly from the organized crime boss Arturo Beltrán Leyva. It mockingly called on rival groups to send 'more qualified people', publicly ridiculing their failed attempt on his life.[201] In any event, the argument based on the shock value of terrorism conflates the way that terrorist violence is experienced by perpetrators, victims and society with the principled grounds for making it a crime. To justify categorically harsher treatment for terrorism, we need more than a descriptive account of how it differs from other crime. We need a principled normative account of why these differences justify treating the two cases differently under a legal system committed to the harm principle.

A growing body of research shows that these organizations are, in fact, converging in their methods, motives and operations.[202] When a group primarily focused on economic gain targets public officials and infrastructure to influence state behaviour, adopting tactics indistinguishable from terrorism, or when a politically motivated group enters illicit markets to fund its operations, the definitional boundary wears thin. What justifies treating one more harshly than the other? Not the amount of harm caused: both organizations devastate lives and communities. Not the targeting of civilians: both demonstrate willingness to harm innocents when expedient. Not even the aim to compel governmental action: both now explicitly seek to influence state behaviour, albeit for different purposes. Indeed, both undermine the fundamental values that criminal law exists to protect, such as physical safety, property rights, freedom from coercion and public order. Both also challenge the state's monopoly on legitimate violence. Furthermore, the enablers and facilitators of both groups, providing weapons, training, transportation and logistical support with knowledge of the groups' violent activities, may contribute equally to the resulting harm. Yet under the current US law, only those facilitating the terrorist group face separate material support charges.

This convergence reveals that the true distinction may lie not in the nature of acts, magnitude of harm or even character of motives, but rather in the state's perception of which forms of violence most directly challenge its authority. The special legal regimes applicable to terrorist organizations may reflect more of a pragmatic response than a principled distinction in raw morality. On this view, the terrorist organization is punished more severely, not because it causes more harm or is morally more culpable, but because it challenges the state's claim to legitimate authority. This would suggest that categorically harsher criminal laws for terrorist organizations in truth prioritize the state's self-preservation over its duty to protect citizens from harm.

The point is not that terrorist and criminal organizations should not be distinguished, or that the state lacks legitimate reasons to defend itself against violent political challenges. It is rather that the distinction between the two – one that would justify harsher treatment under the criminal law – is hard to maintain. It sits uneasily with the law's professed commitment to punishing only wrongful and harmful conduct, and not the animating motives, methods and psycho-social characteristics of the group that inflicts it.

Scope of criminal conduct and relation to harm

Ordinary criminal laws require that the conduct criminalized is sufficiently connected to harmful outcomes. By contrast, terrorism laws like Section 2339B criminalize otherwise innocent conduct that is often remote from any harm. The current definition of 'material support' to designated terrorist

organizations includes aid such as financial services, lodging, training and expert advice, which may be too indirectly linked to actual harm to warrant criminalization in the context of organized crime.

To address this, any analogous offence for organized crime should narrow the scope of conduct it targets (its *actus reus*). A reasonable approach would be to define 'material support' more restrictively, limiting it to goods and services whose primary and conventional function is directly to cause, facilitate or conceal harm, violence or other wrongdoing.[203] This revised definition would satisfy the criminal law's established requirement for a clear link between conduct and harm, mitigating concerns about overreach and punishing innocent conduct. Where an object has both legitimate and illegitimate uses, the offence should include a heightened *mens rea* requiring knowledge of the buyer's criminal intentions with respect to the object, mitigating the risk of inadvertently punishing innocent transactions.[204]

Sufficiency of 'knowledge' as mens rea

Another potential concern is the strictness of the fault element in any reconfigured material support offence. It may be argued that mere knowledge (that the recipient criminal organization has been designated) falls below the threshold of a truly guilty state of mind, and that a subjective intention or purpose to facilitate wrongdoing is required instead.

However, this worry ignores what is achieved by the interplay between a *mens rea* of knowledge and a narrowly circumscribed *actus reus*. First, supplying harm-causing articles to an organization that one knows is expressly and publicly designated as criminal is often enough to establish an intention to promote or facilitate crimes by that organization. Here, proof of knowledge furnishes proof of intent by implication, without dragging in people who unwittingly associate with members of the designated group in any way at all.

Second, a *mens rea* of knowledge is sufficiently culpable on its own, regardless of whether its proof also establishes intent by implication. This is due to the consequences that flow from designating an organization as criminal. Designation is premised on a finding that members of a group collaboratively engage in serious criminal activity. Thus, it puts prospective suppliers on notice as to the group's criminal makeup and intentions. Designation effects an 'epistemological conversion': it removes uncertainty about an organization's criminal nature by converting rumour and speculation into legally knowable fact within the public domain. Anyone who is aware of a group's designation, is therefore aware of several morally significant facts: that society has judged the organization as systematically engaged in wrongdoing; that their support will sustain an entity that has been publicly identified as harmful to the moral and legal order; and that such support occurs in defiance of a declaration designed to isolate and neutralize the organization's capacity for harm.

Therefore, a *mens rea* of intent is unnecessary, since acting with a *mens rea* of knowledge – that is, with knowledge that the organization has risen to a level of criminality and threat that is enough to qualify it for designation – is sufficiently culpable on its own. This is especially true if a narrower definition of the offence's *actus reus* is adopted. In other words, we do not need to trade in absolutes and say, following the US Congress, that designated criminal organizations are '*so tainted* by their criminal conduct that any contribution to such an organization facilitates that conduct'.[205] It is enough to say that such organizations are 'sufficiently tainted' by their criminal endeavours such that any contribution of a particular kind – i.e. the narrower, specified list of harm-causing aid – facilitates those endeavours.

SUMMARY AND EVALUATION

The offences in South Africa's Prevention of Organized Crime Act were devised to catch the villains we already know. As the Hydra Gang case study demonstrates, POCA succeeds in criminalising the conduct of individuals embedded within the core structures of organized crime: the leaders, managers, launderers, foot soldiers and complicit accomplices. However, its provisions stop short of recognizing the crucial truth that criminal organizations rely on a wider ecosystem of enablers and professional facilitators. These individuals knowingly provide essential specialized support to criminal organizations without directly participating in specific predicate crimes or handling tainted funds. POCA's offences do not ably capture these elusive participants and profiteers.

The comparative law analysis examined offences from selected foreign jurisdictions that criminalize broader forms of support and participation in criminal organizations. These participation offences tend to share certain characteristics that conceptually explain their ability to target enablers.

First, the imposition of 'tertiary liability', which extends liability to culpable forms of participation in organized criminal activity even before specific crimes are planned or committed, without requiring the actor to know which particular future offences may occur.

Second, their 'non-constitutive' character, which criminalizes conduct that, although not inherently harmful, significantly increases the risk of future harm in virtue of being closely associated with criminal activity.

And third, 'graduated liability', a form of role-based liability where a set of related offences distinguishes between supporters, soldiers and leaders, and imposes penalties that reflect the degree of responsibility corresponding to the role.

These are the most significant findings from the comparative law analysis.

- Canada's 'enhancer' offence. Section 467.11 of the Canadian Criminal Code criminalizes participation in, or contribution to, any activity of a criminal organization for the purpose of 'enhancing' its ability to commit or facilitate serious offences. This framework allows for prosecution even if the act itself is not criminal, as long as the purpose is to enhance the organization's criminal capacity. Critically, the offence does not require proof that the participation actually enhanced the commission of offences, nor does it require that any specific offences were actually committed – an important distinction from POCA's current 'aiding and abetting' liability.

- The UK's participation and 'relevant articles' offences. Section 45 of the Serious Crime Act 2015 targets individuals who provide arm's-length professional and non-professional services to support organized crime groups. The recent Crime and Policing Bill proposes the enactment of new offences that criminalize the supply or possession of 'relevant articles' (e.g. 3D printer firearm templates, vehicle concealments, pill presses) when circumstances reasonably suggest their use in serious crime.
- Australia's participation offences. Australia's federal laws (s390.4 of the Federal Criminal Code) criminalize the provision of 'material support or resources' to a criminal organization where the support or resources aid, or there is a risk that they will aid, the organization in committing an offence. Several Australian states also employ broad 'participation' offences (e.g. NSW's Section 93T) that allow for conviction based on a lower *mens rea*, such as recklessness. Notably, South Australia's organized crime law makes provision for the designation of a criminal organization as such, and pairs this with a rebuttable presumption where the designated status of a criminal organization is carried over (presumed) in future criminal proceedings involving the same organization.
- Japan's administrative designation model. In its Anti-Boryokudan Law and yakuza exclusion ordinances, Japan also employs a designation process for criminal groups, albeit one administered and controlled by a public safety body, with criminal liability arising only if members of designated groups defy administrative cease-and-desist orders.
- The United States' material support statute. The US uses a material support statute (18 USC s2339B) to counter foreign terrorist organizations by criminalizing the knowing provision of 'material support or resources' to designated organizations. While designed to combat terrorism, the concept of a designation-dependent offence with a circumscribed conduct (or *actus reus*) element offers a powerful framework that – with necessary adaptations such as requiring a judicial designation – could be applied to organized crime.

These foreign jurisdictions strengthen the prima facie case for extending POCA's scope to include offences that criminalize knowingly participating in, or providing strategic material support to, criminal organizations. They also illustrate how designation mechanisms can calibrate the required mental element, imposing stricter (i.e. lower) culpability thresholds for participation in, or support of, designated criminal organizations.

OVERVIEW OF THE PROPOSED AMENDMENTS TO THE ACT

In light of the above, this research proposes a set of amendments to POCA, introducing a new Chapter 4A (Participation offences relating to criminal organizations) and a new Chapter 5 (Civil designation of criminal organizations). The following is a summary. The proposed amendments to POCA are set out in the appendix.

Section 9A: Participation offences

The offences proposed under Chapter 4A's Section 9A are designed to capture enablers or quasi-criminal entrepreneurs. The section contains two sets of offences, distinguished by whether they relate to a designated criminal organization.

Offences for non-designated criminal organizations (Section 9A(1) and (2))

- **Conduct.** The provision of 'strategic material support' to a criminal organization. This term is precisely defined to include specialized resources, services or capabilities (e.g. encrypted communication systems, specialized financial structuring, technical countermeasures) that inherently facilitate criminal operations but fall outside ordinary commercial transactions.
- ***Mens rea.*** A heightened *mens rea* of intention or purpose is required. Specifically, the prosecution must prove that the accused provided strategic material support for the purpose of enhancing the organization's ability to facilitate or commit Schedule 1 offences, or with knowledge that the organization intends to use such support for criminal acts.
- **Interplay between conduct and *mens rea* elements.** For organizations that have not yet been subject to judicial designation, the threshold for criminalizing strategic material support is higher. Here, the prosecution must prove a heightened *mens rea* of intention or purpose: that the accused provided strategic material support for the purpose of enhancing the organization's ability to facilitate or commit offences, or with knowledge that the organization intends to use such support for criminal acts. This is combined with a specific conduct element to ensure that only clearly culpable actions are criminalized when the organization's criminal status has not been publicly and authoritatively confirmed through a judicial process. It targets individuals who deliberately align their commercial activities with the criminal objectives of an organization, even if they do not directly participate in the predicate offences.

Offences for designated criminal organizations (Section 9A(1A)-(1C))

- **Conduct.** The provision of 'strategic material support' to a designated criminal organization, or broad 'participation in or contribution to any activity' of a designated criminal organization, whether or not that activity constitutes an offence.
- ***Mens rea.*** A relaxed *mens rea* of mere knowledge or recklessness is required. This means the accused must have knowledge that the organization has been designated as criminal, and be reckless as to whether their support, participation or contribution will enhance the organization's ability to commit or facilitate Schedule 1 offences.
- **Interplay between conduct and *mens rea* elements.** Once an organization has been formally designated by a court, the *mens rea* required for the offence of providing strategic material support to it, or participating broadly in its activities, is relaxed to one of mere knowledge or recklessness. This reflects the effect of a designation as a public, authoritative determination that an organization is criminal, which then justifies a lower culpability threshold for those who knowingly or recklessly continue to support it. The idea is to deter continued facilitation by individuals who can no longer claim ignorance of the organization's illicit nature.

The proposed Section 9B explicitly states that the prosecution is not required to prove the actual commission of an offence (unlike secondary forms of liability, e.g. accomplice liability), the accused's knowledge of particular offences to be committed or that the accused shared the organization's criminal objectives.

Two types of designation: Section 9E and Sections 36A–36K (new Chapter 5)

The proposed amendments introduce two distinct judicial processes for designating criminal organizations, each serving a different purpose.

Criminal designation orders (new section 9E):

- **Process.** Made by a trial court during criminal proceedings under POCA.
- **Standard of proof.** Beyond a reasonable doubt that a group constitutes a criminal organization.
- **Purpose.** Serves as prima facie proof in subsequent criminal proceedings that the organization is designated. This streamlines the evidentiary burden for prosecutors in future cases involving the same organization, as they do not have to repeatedly prove the organization's fundamental criminal nature.

Civil designation orders (new Chapter 5, Sections 36A–36K):

- **Process.** Granted in civil proceedings initiated by the National Director of Public Prosecutions in the High Court.
- **Standard of proof.** Balance of probabilities that an organization is criminal and poses a risk to public safety.
- **Purpose.** Authorizes enhanced surveillance and monitoring powers for the South African Police Service, providing crucial intelligence-gathering capabilities, primarily in terms of intercept directions under the Regulation of Interception of Communications and Provision of Communication-related Information (RICA) Act. Civil designation orders are subject to robust due process protections, appeals and periodic reviews. Unlike criminal designations, civil designations do not operate as evidentiary presumptions in criminal proceedings.

The proposed amendments aim to consolidate POCA's effectiveness against organized crime. By introducing a designation framework alongside novel offences for enablers of criminal groups, the envisaged reforms seek to meaningfully enhance POCA's effectiveness against the complex and evolving threat of organized crime in South Africa.

APPENDIX: PROPOSED AMENDMENTS TO THE PREVENTION OF ORGANIZED CRIME ACT 121 OF 1998

Chapter 4A: Offences relating to designated criminal organizations

Section 1: Definitions and interpretation

Insert into Section 1(1) of the Act:

'criminal organization' means a structured group, however organized, that has as one of its main purposes or activities the commission or facilitation of one or more criminal offences, and includes a criminal gang;

'structured group' means a group or association of three or more persons, which is not randomly formed for the immediate commission of a single offence and whose members act in concert; for the avoidance of doubt, a structured group may exist notwithstanding the absence of all or any of the following:

(a) formal rules or formal membership, or any formal roles for those involved in the group;
(b) any hierarchical or leadership structure;
(c) continuity of involvement by particular persons in the group.

'designated criminal organization' means –

(a) for the purposes of criminal proceedings under Chapter 4A of this Act, a criminal organization in respect of which a criminal designation order has been made under section 9E; and
(b) for the purposes of civil proceedings under Part 5 of Chapter 5 of this Act, a criminal organization in respect of which a civil designation order has been made under section 36C.

'strategic material support' means –

(a) any specialized article, good, product, resource, service, programme, technique or capability that –
  (i) is designed, modified, adapted, or otherwise constituted in a manner that materially enhances the ability of a criminal organization to conceal, commit or facilitate the commission of any offence referred to in Schedule 1; and
  (ii) is not commercially available through unrestricted public channels without regard to the purchaser's identity, affiliation or intended application, and whose conditions of provision reasonably suggest awareness of use for or in connection with unlawful activity;

(b) and includes, without limitation –
  (i) the provision of accounting, corporate structuring, financial or fiduciary services, including software, digital platforms or other computer programmes, configured to conceal, disguise or misrepresent the nature, source, location, movement or ownership of property or any interest therein;
  (ii) the creation or supply of any communication system constructed, developed or modified to defeat or evade lawful surveillance measures;
  (iii) the provision of ongoing or regular access to premises offered, adapted, arranged or maintained in a manner such as to render them suited to facilitating the commission of any offence referred to in Schedule 1;
  (iv) the provision of specialized training in techniques adapted or readily adaptable for the commission of any offence referred to in Schedule 1;
  (v) the development or supply of technological or other measures configured to detect, disable or disrupt law enforcement activity and methods;
  (vi) the brokering or arrangement of alliances between criminal organizations, criminal gangs or other organized criminal groups;
  (vii) the provision of professional expertise offered, adapted or supplied in circumstances that directly enables the planning, execution or concealment of Schedule 1 offences;

(c) but excludes –
  (i) the provision of essential services comprising healthcare, basic education, use of or access to public utilities or legal representation;
  (ii) goods, services, resources or other support that is required, authorized or mandated by court order, or in terms of any other law of general application; and
  (iii) support or assistance that is incidental, de minimis or otherwise incapable of materially enhancing the ability of a criminal organization to conceal, commit, or facilitate the commission of any offence referred to in Schedule 1.

Section 9A: Offences relating to the provision of strategic support to criminal organizations

Offences in relation to criminal organizations

(1) Any person who –
  (a) knowingly provides strategic material support to a criminal organization;
  (b) for the purpose of enhancing the ability of the criminal organization to facilitate or commit any offence referred to in Schedule 1;

within the Republic or elsewhere, shall be guilty of an offence.

(2) Any person who –

(a) provides strategic material support to a criminal organization;

(b) with knowledge, at the time such support is provided, that the criminal organization, or one or more of its members, intends to use such support to facilitate or commit offences listed in Schedule 1;

within the Republic or elsewhere, shall be guilty of an offence.

Offences in relation to designated criminal organizations

(1A) Any person who –

(a) provides, or procures any other person to provide, directly or indirectly, strategic material support to a designated criminal organization;

(b) with knowledge that the organization has been designated as a criminal organization;

(c) knowing, or being reckless as to whether, such support will enhance the ability of the organization or any of its members to facilitate or commit any offence referred to in Schedule 1.

within the Republic or elsewhere, shall be guilty of an offence.

(1B) Any person who –

(a) provides, or procures any other person to provide, directly or indirectly, strategic material support to a designated criminal organization;

(b) with knowledge that the organization has been designated as a criminal organization;

within the Republic or elsewhere, shall be guilty of an offence.

(1C) Any person who –

(a) participates in or contributes to any activity of a designated criminal organization, whether constituting an offence or not;

(b) with knowledge that an organization has been designated a criminal organization;

(c) knowing, or being reckless as to whether, such participation or contribution will enhance the ability of the organization or any of its members to facilitate or commit any offence referred to in Schedule 1;

within the Republic or elsewhere, shall be guilty of an offence.

Section 9B: Evidentiary

(1) In proceedings for any offence under section 9A –

(a) it shall not be necessary for the prosecution to prove –

(i) that the criminal organization concerned or any of its members actually committed or facilitated an offence referred to in Schedule 1;

(ii) that the accused knew the identity of any persons who constitute, or are members of, the criminal organization;

(iii) that the accused shared the criminal aims or objectives of the criminal organization;

(iv) that the accused knew the specific nature of any offence referred to in Schedule 1 which may have been facilitated or committed by the criminal organization or its members with such material support or contribution; or

(v) that the material support, participation or contribution, as the case may be, of the accused actually enhanced the ability of the criminal organization concerned, or any of its members, to commit or facilitate the commission of an offence referred to in Schedule 1.

(2) A civil designation order granted under Chapter 5 shall not suffice as proof that an organization is a designated criminal organization.

Section 9C: Defence

(1) In addition to any other defence available in law, it shall be a defence to a charge under sections 9A(1A)-(1C) of this Chapter if the accused proves, on a balance of probabilities, that –

(a) immediately after becoming aware of the designation order against the criminal organization, the accused –

(i) notified members of the South African Police Service of the nature of the support provided; and

(ii) cooperated with authorities to mitigate any harm that might result from such support.

Section 9D: Penalties

(1) Any person convicted of an offence in –

(a) section 9A(1) or 9A(2) shall be liable to a fine not exceeding R2 million or to imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment;

(b) section 9A(1A), 9A(1B) or 9A(1C) shall be liable to a fine not exceeding R1 million or to imprisonment for a period not exceeding 5 years, or to both such fine and imprisonment.

(2) In determining an appropriate sentence to be imposed in respect of an offence under this Chapter, the court shall, in addition to any other relevant factors, take into account the following aggravating factors:

(a) the nature, duration and scale of the support, participation or contribution provided to the criminal organization;

(b) the degree to which the support, participation or contribution materially enhanced the criminal capabilities of the organization; and

(c) whether the support, participation or contribution was deliberately structured to conceal its nature or to evade detection by law enforcement authorities.

(3) The court may, in mitigation of sentence, consider –

(a) any voluntary and timeous cooperation with law enforcement authorities by the accused; and

(b) any steps taken by the accused to terminate their support for the organization or to mitigate the harm caused by their conduct.

Section 9E: Criminal designation orders

(1) In any criminal proceedings under this Act, the trial court may, upon application by the National Director of Public Prosecutions, determine whether a group or association of persons constitutes a criminal organization as defined in section 1(1) for the purposes of making a criminal designation order.

(2) The court may grant a criminal designation order if it is satisfied beyond reasonable doubt that:

(a) a group or association of persons constitutes a criminal organization;

(b) members of the criminal organization associate for the ongoing purpose of organizing, planning, facilitating or committing one or more offences referred to in Schedule 1; and

(c) the activities of the criminal organization pose a grave risk to the health or safety of the public or any segment thereof.

(3) In making a determination under subsection (2), the Court shall have regard to the factors and considerations as set forth in section 36C(2) of this Act.

(4) A criminal designation order made in relation to a criminal organization will, for the purposes of any subsequent criminal proceedings, constitute prima facie proof that such organization is a designated criminal organization in the absence of evidence to the contrary.

(5) Where a court declines to make a criminal designation order, such determination does not preclude:
   (a) an application for criminal designation in subsequent criminal proceedings; or
   (b) the continued operation of any civil designation order made under Chapter 5.

Chapter 5, Part 5: Civil designation of criminal organizations

Section 36A: Application for designation order

(1) The National Director of Public Prosecutions may apply to the High Court for an order designating an organization as a criminal organization for the purposes of this Chapter.

(2) An application under subsection (1) shall –
   (a) be in writing to the High Court having jurisdiction where the organization is alleged to conduct its main activities;
   (b) identify with sufficient particularity the organization sought to be designated;
   (c) be supported by an affidavit as to:
      (i) the grounds on which the application is based, including the factual foundation for asserting that the organization is a criminal organization as defined in section 1(1);
      (ii) the nature of the organization and any of its distinguishing characteristics;
      (iii) any prior criminal convictions of persons identified as members of the organization, where such convictions relate to offences listed in Schedule 1;
      (iv) the structural features of the organization, including its leadership hierarchy, membership composition and operational methods;
      (v) any previous application for designation in respect of the organization and the outcome thereof;
      (vi) any final orders granted under this Act or any other law against the organization or its members; and
   (d) further be supported by at least one affidavit from a police officer of the rank of colonel or above, verifying the allegations made in terms of subsection (2)(c)(i)-(vi).

(3) The application may identify the organization by specifying its name, the name by which it is commonly known or other particulars sufficient to identify it with reasonable precision.

(4) An application under this section shall be served on –
   (a) any person whom the National Director reasonably believes represents, or occupies a leadership position within, the organization;
   (b) any person identified in the supporting affidavits as a member of the organization; and
   (c) any person whom the National Director reasonably believes may be directly and adversely affected by the outcome of the application.

(5) Nothing in subsection (4) requires the disclosure of information properly classified as:
   (a) information that would identify or might reasonably lead to the identification of an informant or undercover operative;
   (b) information that would reveal investigative techniques; or
   (c) information that would prejudice ongoing investigations or prosecutions.

(6) Where the National Director withholds information under subsection (5), the National Director shall:
   (a) inform the Court of the nature of the information withheld and the basis for withholding it; and
   (b) provide the Court with an opportunity to review the information in chambers to determine whether it has been properly withheld.

Section 36B: Notice of proceedings

(1) Upon filing an application under section 36A, the National Director shall:
   (a) apply to the Court on an ex parte basis for an order giving directions regarding the manner of service of notice of the proceedings under Section 36A;
   (b) ensure that, at least 14 days before the hearing contemplated in Section 36C, written notice of the proceedings is served on persons identified in the application as members of the organization, or on any other persons whom the Court directs should receive such notice: Provided that –
      (i) where a notice of intention to oppose the designation application is delivered, the National Director shall make application to the Court for service directions only after all papers have been exchanged and the hearing date has been determined; or
      (ii) where no notice of intention to oppose is delivered, or where such notice is delivered but no answering affidavit is delivered within the period prescribed by the rules of court, the National Director shall thereupon make application to the Court for an order regarding the manner of service of the notice; and
   (c) include in the notice:
      (i) a statement that proceedings have been instituted under Section 36A(1) of this Act for a designation order in respect of the named organization;
      (ii) the date and time at which the Court will hear the proceedings;
      (iii) the grounds on which the designation is sought;
      (iv) a statement that any person wishing to oppose the application is entitled to appear before the Court and defend the case and, where necessary, has the right to apply for legal aid; and
      (v) information regarding how interested parties may inspect or apply to inspect the designation application.

(2) The National Director shall, in addition to effecting service of the notice in accordance with the Court's directions under subsection (1), publish such notice of the proceedings in the Gazette and in one or more newspapers circulating in the district in which the organization is alleged to conduct any of its activities.

(3) In this section, 'interested party' means any person who would be entitled under section 36E to make submissions to the Court at the hearing of the application.

Section 36C: Determination of application

(1) The Court shall grant a civil designation order if it is satisfied on a balance of probabilities that the organization is a criminal organization as defined in section 1(1) and that the granting of the order represents a necessary and proportionate response to the threat posed by the organization's criminal activities.

(2) In making a determination under subsection (1), the Court may have regard to any relevant evidence, including evidence:
   (a) of a link between the organization and serious criminal activity;
   (b) of any convictions recorded against current or former members of the organization;
   (c) that current or former members of the organization have been or are involved in serious criminal activity, whether or not that involvement resulted in a conviction; and
   (d) that members of the organization are or have been members of a related organization whose members associate for a criminal purpose.

Section 36D: Content of designation order

(1) A designation order shall:
   (a) declare that the named organization is a designated criminal organization for the purposes of this Act;
   (b) identify with sufficient particularity the organization to which the order applies, including any known names, symbols, or other distinguishing characteristics;
   (c) specify the date on which the order takes effect; and
   (d) state that the order remains in force for a period not exceeding two years, unless extended upon application or terminated in accordance with the provisions of section 36G.

(2) Upon granting a designation order, the Court shall direct the National Director to:
   (a) publish the order in the Gazette;
   (b) publish notice of the order in at least two newspapers with national circulation; and
   (c) maintain a publicly accessible registry of all designation orders.

(3) Unless the Court directs otherwise, a designation order takes effect only when notice of it is published in accordance with subsection (2).

Section 36E: Hearing procedures

(1) At the hearing of an application under this Part, the following persons may make oral or written submissions to the Court:
   (a) the National Director, or any duly authorized representative;
   (b) any representative of the organization to which the application relates;
   (c) any person identified in the application or supporting affidavits as a member of the organization;
   (d) any person who is a member of the organization or who may be directly affected by the outcome of the application; and
   (e) any other person whom the Court considers should, in the interests of justice, be permitted to make submissions.

(2) Any person entitled to make submissions under subsection (1) who is not the applicant may file affidavits responding to the application.

(3) The applicant may, with the Court's permission, file affidavits responding to those filed under subsection (2).

(4) The Court shall require the presentation of oral evidence on the material allegations supporting the application and shall permit cross-examination of witnesses who have provided affidavits or oral testimony.

(5) The hearing shall proceed as follows:
   (a) the National Director shall present oral evidence supporting the application;
   (b) persons opposing the application may cross-examine the National Director's witnesses;
   (c) persons opposing the application may present oral evidence;
   (d) the National Director may cross-examine witnesses for the opposition; and
   (e) the Court may call for additional evidence as it deems necessary to establish the facts to the required standard.

Section 36F: Appeal and review

(1) Any person with a substantial interest in the designation order granted in terms of section 36C(1) may:
   (a) appeal against the order to the Supreme Court of Appeal; or
   (b) apply to the High Court for judicial review of the order.

(2) An appeal under subsection (1)(a) must be noted within 14 days of the designation order being published in the Gazette.

(3) An application for review under subsection (1)(b) must be filed within 180 days of the designation order being published in the Gazette, unless the Court grants leave to bring the application outside this period on the grounds of exceptional circumstances.

(4) The noting of an appeal automatically suspends the operation of a designation order pending the final determination of the appeal.

(5) Notwithstanding subsection (4), the National Director may apply to the Court hearing the appeal for an order directing that, despite the appeal, the designation order shall remain in force pending the final determination of the matter, if the interests of justice so require.

Section 36G: Termination of designation order

(1) The National Director or any person with a substantial interest in a designated criminal organization may apply to the High Court for termination of a designation order if:
   (a) there has been a material change in the nature or composition of the organization such that it no longer meets the criteria in section 36C(1); or
   (b) the organization has ceased to exist.

(2) An application under subsection (1) shall:
   (a) be in writing to the Court that granted the designation order;
   (b) set out the grounds on which termination is sought; and
   (c) be supported by affidavits detailing the material change in circumstances.

(3) No application for termination may be made under subsection (1) by a person other than the National Director unless:
   (a) at least 12 months have elapsed since the designation order was made or since any previous application for termination was determined; or
   (b) the Court grants leave on the basis of substantially changed circumstances.

(4) The Court shall grant an application for termination if it is satisfied that the criteria for designation in section 36C(1) are no longer met.

(5) If the Court grants an application for termination, the National Director shall:
   (a) publish notice of the termination in the Gazette;
   (b) publish notice of the termination in at least two newspapers with national circulation; and
   (c) update the registry of designated criminal organizations accordingly.

Section 36H: Mandatory periodic review

(1) The National Director shall, at intervals not exceeding three years, review all designation orders to determine whether they should remain in force.

(2) Following a review under subsection (1), the National Director shall either:
   (a) apply for termination of the designation order; or
   (b) certify to the High Court that the designation order should remain in force, providing detailed reasons for this conclusion.

(3) Upon receipt of a certification under subsection (2)(b), the Court may:
   (a) accept the certification and order that the designation remain in force;
   (b) reject the certification and terminate the designation; or
   (c) direct the National Director to provide additional information or evidence.

(4) Any person with a substantial interest in a designated criminal organization may make representations to the National Director during a review or to the Court following a certification.

Section 36I: Organizational changes

(1) A change in the name, leadership or membership of a designated criminal organization does not affect its status as a designated criminal organization.

(2) If the members of a designated criminal organization substantially reconstitute themselves as another organization, that organization is taken to form part of the designated criminal organization.

(3) Where the National Director becomes aware that members of a designated criminal organization may have substantially reconstituted themselves as another organization, the National Director may:
   (a) apply to the Court for a declaration that the new organization forms part of the designated criminal organization; or
   (b) include such allegations in the mandatory periodic review under section 36H.

(4) In proceedings under subsection (3)(a), the Court may consider:
   (a) continuity of leadership or senior members;
   (b) similarity of purposes, methods or activities;

(c) the length of the period between the dissolution or apparent dissolution of the designated organization and the formation of the new organization or organization;
(d) transfer of assets, resources or operational capacity; and
(e) any other relevant factors.

(5) The procedures set out in sections 36B and 36E shall apply, with necessary modifications, to applications under subsection (3).

Section 36J: Evidentiary matters

(1) In proceedings under this Chapter, the Court must:
(a) observe the rules of evidence, subject only to such modifications as are strictly necessary to protect witnesses at risk of serious harm; and
(b) ensure that all parties have a reasonable opportunity to challenge evidence presented against them.

(2) A certificate signed by the National Director stating that a specified or organization was, on a specified date, a designated criminal organization shall be admissible as prima facie proof of that fact.

Section 36K: Effect of designation

(1) Notwithstanding any other provision of this Act, a civil designation order does not:
(a) render the designated organization's activities otherwise unlawful;
(b) impose criminal liability on members merely by virtue of their membership; and
(c) constitute proof that the organization is a criminal organization for purposes of any criminal proceedings under this Act.

(2) From the date upon which a civil designation order is granted, such order shall:
(a) for the purposes of an application for an interception direction under section 16 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (No.70 of 2002) –
(i) where the application concerns property reasonably believed to be owned or controlled by, or on behalf of, the designated criminal organization or any of its members, constitute prima facie proof that the gathering of information concerning such property is necessary, as contemplated in section 16(5)(a)(v) of that Act; and
(ii) constitute prima facie proof that the designated criminal organization is a 'group of persons or syndicate involved in organised crime' as contemplated in section 16(2)(e)(i) and section 16(5)(c)(i) of that Act;
(b) for the purposes of section 43A of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), form the basis of a directive to be issued by the Financial Intelligence Centre –
(i) notifying all or any category of accountable institutions that any business relationship with, or transaction involving, the designated criminal organization or its known members is considered 'higher-risk' as contemplated in section 42(2)(m) of that Act; and
(ii) directing those institutions to implement enhanced due diligence measures in respect of all such business relationships and transactions, and to take such further steps as the Centre may require to identify the proceeds of unlawful activities and combat the risks of money laundering, terrorist financing, and proliferation financing; and

(c) in any application for an exclusion of an interest in property under section 52 of this Act, constitute prima facie proof of the existence of 'reasonable grounds to suspect' as contemplated in that section, if the National Director proves on a balance of probabilities that the applicant acquired the interest concerned from a person whose membership in, or active association with, the designated criminal organization was, at the time of the acquisition, a matter of public knowledge in the locality in which the applicant resides or the transaction occurred.

NOTES

1 Global Initiative Against Transnational Organized Crime (GI-TOC), Global Organized Crime Index, 2023, https://ocindex.net/country/south_africa. The term 'syndicate', popularized by the South African media, suggests that organized crime is a unitary phenomenon, whereas 'organized crime' is an umbrella term that encompasses criminal actors, their roles in criminal governance and their connections to illicit markets. Organized crime comprises structures that can take various forms, such as hierarchical groups, networks and criminal enterprises based on market models.

2 DC van der Linde, The proliferation of criminal gang activities on the Cape Flats and the subsequent legislative and policy responses, *Fundamina*, 28, 2, 2022, 73–116, https://journals.co.za/doi/abs/10.47348/FUND/v28/i2a3.

3 National Assembly of South Africa, Interim report of the Portfolio Committee on Police on interventions to combat extortion, 23 October 2024, https://static.pmg.org.za/241101pcpolicereport.pdf.

4 Democratic Alliance, Dion George: ANC's mafia state is bleeding the national economy R155 billion every year, 27 September 2023, https://www.da.org.za/2023/09/ancs-mafia-state-is-bleeding-the-national-economy-r155-billion-every-year.

5 South African Police Service, Annual Crime Report 2022/2023, https://www.saps.gov.za/services/downloads/2022-2023-Annual-Crime-Statistics-Report.pdf.

6 GI-TOC, Western Cape Gang Monitor, 1, October 2023, https://globalinitiative.net/wp-content/uploads/2023/10/WC-Gang-monitor.-No.1.-GI-TOC-October-2023.v3.pdf.

7 Liza Vertinsky, *A Law and Economics Approach to Criminal Gangs*, Aldershot: Ashgate, 1999, 2.

8 See UNTOC Articles 5, 6, 8 and 23, https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.

9 Republic of South Africa, Prevention of Organized Crime Act [No. 121 of 1998] (POCA), https://www.saflii.org/za/legis/num_act/pooca1998294.pdf; Neil Boister, The cooperation provisions of the UN Convention against Transnational Organized Crime: A 'toolbox' rarely used?, *International Criminal Law Review*, 16, 1, 2016, 39–70, https://doi.org/10.1163/15718123-01601008.

10 Delano Cole van der Linde, Considering the constitutionality of South Africa's anti-gang legislation in light of the principle of legality, *South African Journal on Human Rights*, 36, 2–3, 2020, https://journals.co.za/doi/10.1080/02587203.2020.1859338.

11 André Standing, Organised crime: A study from the Cape Flats, Pretoria: Institute for Security Studies, 2006, 51, https://issafrica.org/research/books/organised-crime-a-study-from-the-cape-flats.

12 POCA, Section 9(1)(a)-(c).

13 POCA, Section 9(2)(a)-(c).

14 Ian Cameron, Media statement: Disregarding the true extent of Western Cape gang violence curtails ability to effectively respond, Parliamentary Communication Services, 3 April 2025, https://www.parliament.gov.za/press-releases/media-statement-disregarding-true-extent-western-cape-gang-violence-curtails-ability-effectively-respond.

15 Natasha Prince, 'Drug cop' guilty of being corrupt, IOL, 29 October 2014, https://www.iol.co.za/news/drug-cop-guilty-of-being-corrupt-1772150.

16 *Adams and Another v S* [2022] ZAWCHC 201 (17 October 2022), at para 68–70, https://www.saflii.org/za/cases/ZAWCHC/2022/201.html.

17 Tracy-Lynn Ruiters, Are South African police officers involved in organized crime?, IOL, 8 March 2025, https://www.iol.co.za/weekend-argus/news/are-south-african-police-officers-involved-in-organized-crime-7cc8ecb7-edbe-4980-8824-89cf9ce91193.

18 POCA, s2(1)(f).

19 *Savoi and Others v National Director of Public Prosecutions and Another* [2014] ZACC 5, para 24, https://www.saflii.org/za/cases/ZACC/2014/5.html.

20 André Standing, The threat of gangs and anti-gangs policy: Policy discussion paper, Institute for Security Studies, Paper 116, 2005, 3, https://issafrica.org/research/papers/the-

threat-of-gangs-and-anti-gangs-policy-policy-discussion-paper.

21 POCA, s1(1)(xvi).

22 POCA, s1(1)(v).

23 *S v Eyssen* [2008] ZASCA 97, at para 6, https://www.saflii.org/za/cases/ZASCA/2008/97.html.

24 POCA, s1(1)(xii).

25 *Savoi and Others v NDPP and Another* 2014 5 BCLR 606 (CC), at para 18, https://www.saflii.org/za/cases/ZACC/2014/5.html.

26 *S v Eyssen* [2008] ZASCA 97, at para 8, https://www.saflii.org/za/cases/ZASCA/2008/97.html.

27 *De Vries v S and Others* 2012 (1) SACR 186 (SCA), at para 48, https://www.saflii.org/za/cases/ZASCA/2011/162.html.

28 The Oxford Dictionary defines *actus reus* (Latin for 'guilty act') as 'action or conduct which is a constituent element of a crime, as opposed to the mental state of the accused'. *Mens rea* ('guilty mind') is 'the intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused'. Oxford Dictionaries, Oxford University Press, 6 September 2025, https://premium.oxforddictionaries.com.

29 In terms of s1(2) of POCA, 'a person is regarded as having knowledge of a fact if: (a) the person has actual knowledge of that fact; or (b) the court is satisfied that— (i) the person believes that there is a reasonable possibility of the existence of that fact; and (ii) he or she fails to obtain information to confirm the existence of that fact.'

30 Section (1)(3) of POCA provides that 'a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both – (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and (b) the general knowledge, skill, training and experience that he or she in fact has.'

31 *Savoi and Others v National Director of Public Prosecutions and Another* [2014] ZACC 5, note 25 at para 90, https://www.saflii.org/za/cases/ZACC/2014/5.html.

32 L de Koker et al, Negligent ignorance, in *South African Money Laundering and Terror Financing Law*, Edition 27, Lexis Nexis, March 2025.

33 *Prinsloo v S* [2016] 1 All SA 390 (SCA), https://www.saflii.org/za/cases/ZASCA/2015/207.html.

34 Ibid., at paras 157, 236, 239.

35 Ibid., at para 237.

36 *S v De Vries and others* [2008] ZAWCHC 36 (10 June 2008), at para 409, https://www.saflii.org/za/cases/ZAWCHC/2008/36.html.

37 *S v Eyssen* [2008] ZASCA 97, at para 5, https://www.saflii.org/za/cases/ZASCA/2008/97.html.

38 Ibid., at para 7.

39 Ibid., at para 14.

40 *Tiry and Others v S* [2020] ZASCA 137, https://www.saflii.org/za/cases/ZASCA/2020/137.html.

41 Ibid., at para 116.

42 Ibid., at paras 115–116.

43 *Prinsloo v S* [2016] 1 All SA 390 (SCA), at paras 64–66, https://www.saflii.org/za/cases/ZASCA/2015/207.html.

44 Ibid., at para 64.

45 *S v Eyssen* [2008] ZASCA 97, at para 5, https://www.saflii.org/za/cases/ZASCA/2008/97.html.

46 *Tiry and Others v S*, [2020] ZASCA 137, at para 109, https://www.saflii.org/za/cases/ZASCA/2020/137.html.

47 *Prinsloo v S* [2016] 1 All SA 390 (SCA), at para 51, https://www.saflii.org/za/cases/ZASCA/2015/207.html.39.

48 *S v Blignault and Others* (CC36/2017) [2018] ZAECPEHC 58 (26 October 2018), https://www.saflii.org/za/cases/ZAECPEHC/2018/58.html.

49 Ibid., at para 58.

50 Ibid., at para 55.

51 Nicholas Ryder, *Financial Crime in the 21st Century: Law and Policy*, Edward Elgar: Cheltenham UK and Northampton MA, USA, 2011, 10.

52 This follows from the separate definition of 'unlawful activity', which forms part of the broader phrase 'proceeds of unlawful activities'. The former was not originally defined in POCA, leading to interpretive uncertainty. This gap was addressed in 1999 by the POCA Second Amendment Act, which inserted a definition for 'unlawful activity' as 'any conduct which constitutes a crime or which contravenes any law, whether such conduct occurred before or after the commencement of this Act and whether it occurred in South Africa or elsewhere.' Republic of South Africa, Prevention of Organized Crime Second Amendment Act [No. 38 of 1999], https://www.saflii.org/za/legis/num_act/poocsaa1999428.pdf.

53 L de Koker, M Basson, P Smit and J Symington, Chapter 3: Key money laundering offences, in *South African Money Laundering and Terror Financing Law*, Edition 27, Lexis Nexis, March 2025.

54 POCA, 1(1)(xv).

55 *National Director of Public Prosecutions v Seevnarayan* [2003] 1 All SA 240 (C), https://www.saflii.org/za/cases/ZAWCHC/2003/1.html.

56 Ibid., at para 47.

57 *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan* [2004] 2 All SA 491 (SCA), at para 69, https://www.saflii.org/za/cases/ZASCA/2004/38.html.

58 *Thales South Africa (Pty) Ltd v National Director of Public Prosecutions N.O and Others* (3957/2020)[2021] 2 All SA 274 (KZP), https://www.saflii.org/za/cases/ZAKZPHC/2021/1.html.

59 Ibid., at para 86.

60 Ibid., at para 88.
61 POCA, Section 4.
62 L de Koker, M Basson, P Smit and J Symington, Chapter 3: Key money laundering offences, in *South African Money Laundering and Terror Financing Law*, Edition 27, Lexis Nexis, March 2025. As the authors note, this argument was cited with apparent approval by the Court in *Thales South Africa (Pty) Ltd v NDPP*.
63 *S v De Vries and others* [2008] ZAWCHC 36 (10 June 2008), at para 56, https://www.saflii.org/za/cases/ZAWCHC/2008/36.html.
64 POCA, Section 5.
65 POCA, Section 6.
66 *S v Van der Linde* [2016] 3 All SA 898 (GJ), at para 128, www.saflii.org/za/cases/ZAGPJHC/2016/179.html.
67 See André Standing, Organised crime: A study from the Cape Flats, Institute for Security Studies, 2006, 51, https://issafrica.org/research/books/organised-crime-a-study-from-the-cape-flats.
68 POCA, s1(1)(xi).
69 POCA s1(1)(iv).
70 Ibid.
71 In contrast to s186.22(f) of STEP, which defines a criminal gang as 'having as one of its primary activities the commission of one or more of the criminal acts' listed in the Act. California Penal Code, Part 1, Title 7, Street Terrorism Enforcement and Prevention Act, https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=7.&part=1.&chapter=11.&article=.
72 *S v Mafahle and Others (4/2018) [2019] ZAFSHC 266 (5 July 2019)*, at paras 16–17, https://www.saflii.org/za/cases/ZAFSHC/2019/266.html.
73 *People v. Castenada* 23 Cal 4th 743 (2000), https://scocal.stanford.edu/opinion/people-v-castenada-32016.
74 *S v Jordaan and Others* 2018 (1) SACR 522 (WCC), at para 134, https://www.saflii.org/za/cases/ZAWCHC/2017/132.html.
75 *Canterbury and Another v S* [2024] JOL 65782 (WCC), at para 62, https://www.saflii.org/za/cases/ZAWCHC/2024/188.html.
76 *S v Solomon* (CC23/2018) [2020] ZAWCHC 116, at paras 923–926, https://www.saflii.org/za/cases/ZAWCHC/2020/116.html. See also *S v Davids*, where the court held that accused 1, 2, 3 and 4, because they formed a common purpose to commit murder, were each liable as co-perpetrators, and so could not be convicted of having aided and abetted that murder in terms of Section 9(1)(a). *S v Davids*, [2022] ZAWCHC 216, at paras 139–140, https://www.saflii.org/za/cases/ZAWCHC/2022/216.html.
77 *S v Quinta* [1974] 1 All SA 101 (T); SV Hoctor, Accomplices, in LTC Harms et al, eds, *The Law of South Africa*, Vol 11, Third Edition Replacement, Lexis Nexis, 2023, para 130.
78 *S v Kazi* 1963 (4) SA 742 (W) p.749.
79 *S v Thomas* 2015 JDR 1932 (WCC), n. 94.
80 *S v Peters and Another* (WCHC) unreported case number SS17/2013 of 4 November 2013 at para 95, https://www.saflii.org/za/cases/ZAWCHC/2013/218.html.
81 *S v Thomas* 2015 JDR 1932 (WCC) at paras 481-483.
82 Delano Cole van der Linde, Criminal gang activities: A critical and comparative analysis of the statutory framework under South African criminal law, Doctoral thesis, Stellenbosch University, 2018, 180.
83 *S v Eyssen* [2008] ZASCA 97, at para 6, https://www.saflii.org/za/cases/ZASCA/2008/97.html.
84 *S v Blignault and Others* (CC36/2017) [2018] ZAECPEHC 58 (26 October 2018), at para 55, https://www.saflii.org/za/cases/ZAECPEHC/2018/58.html.
85 Latin for 'consequent deceit'; defined as 'recklessness; the mental state of one who foresees the possibility that a harmful or illegal consequence will result from one's act (without desiring that consequence), yet who commits the act regardless'. Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (2 ed), Oxford University Press, 2022.
86 *Minister of Law and Order and Others v Pavlicevic* 1989 (3) SA 679 (A), paras 23–25, https://www.saflii.org/za/cases/ZASCA/1989/55.html.
87 The UK's serious organized crime strategy explicitly refers to organized crime groups' use of bespoke end-to-end encryption technologies supplied by specialist professional enablers. Home Office, No place to hide: Serious and organised crime strategy 2023–2028, December 2023, 23, para 65, https://www.gov.uk/government/publications/serious-and-organised-crime-strategy-2023-to-2028.
88 The distinction matters. A banker who launders drug money need not support the drug trade; they need only know the money's origins and act to obscure them.
89 Even utilitarians who believe that punishment is justified to help stop crimes and protect people should agree that the 'greater good' does not sweep away basic moral rules about punishment, especially to respect individuals' freedom and to consider a person innocent until proven guilty.
90 United Nations Office on Drugs and Crime (UNODC), United Nations Convention against Transnational Organized Crime, Article 5(1)(a)(ii), https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.
91 UNODC, Model legislative provisions against organized crime, Second edition, 2021, 32, https://www.unodc.org/documents/organized-crime/tools_and_publications/21-05601_Model_Leg_Prov_eBook.pdf.
92 Roger S Clark et al, Symposium: The United Nations Convention against Transnational Organized Crime, *Wayne Law Review*, 50, 1, Spring 2004, 161, 172.
93 UNODC, Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized

Crime, 2017, para 73, https://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html.

94 Andreas Schloenhardt, Palermo on the Pacific Rim: Organised crime offences in the Asia Pacific Region, UNODC, August 2009, 68–75, 29, www.unodc.org/roseap/en/2009/08/Palermo/story.html.

95 Ibid.,30.

96 AP Simester and Andrew von Hirsch, Remote harms and non-constitutive crimes, *Criminal Justice Ethics*, 28, 1, 2009, 89–107, https://doi.org/10.1080/07311290902831441.

97 AP Simester, Prophylactic crimes, in GR Sullivan and Ian Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms*, Hart: Oxford, 2012, 59–78.

98 Mark K Levitz and Robert Prior, Criminal organization legislation: Canada's response, Vancouver Bar Association, *The Advocate*, 61, 3, May 2003, 375–388, 375.

99 Ibid.

100 Daniel Prefontaine and Eileen Skinnider, Canada's experience in dealing with organized crime/gangs: Legislation and case law, International Society for the Reform of Criminal Law, 22nd International conference codifying the criminal law: Modern initiatives, 11–15 July 2008, 6, https://isrcl.com/wp-content/uploads/2021/12/Prefontaine.pdf.

101 Ibid.

102 Criminal Code of Canada, RSC 1985, c C-46 Section 467.1(1), https://canlii.ca/t/56hjs.

103 *R v Venneri* (2012) SCC 33 at para 36, https://canlii.ca/t/frxxp.

104 Ibid., at para 41.

105 *R v Lindsay* (2005) OJ No. 2870 (the Beauchamp appeal) at paras 947–948, https://canlii.ca/t/1l4qm.

106 *R. v Beauchamp* (2015) ONCA 260 at paras 169–183, https://canlii.ca/t/gh77w.

107 Ibid. The court reasoned that a quantitative approach would be unworkable (what specific percentage constitutes 'main'?) and would undermine the legislation's purpose by allowing criminal organizations to 'cancel out' or 'neutralize' their illicit activities with legitimate fronts.

108 *R v Leclerc* [2001] Q.J. No. 426 (February 15, 2001), cited in Daniel Prefontaine and Eileen Skinnider, Canada's experience in dealing with organized crime/gangs: Legislation and case law, International Society for the Reform of Criminal Law 22nd International conference codifying the criminal law: Modern initiatives, 11–15 July 2008, 11, https://isrcl.com/wp-content/uploads/2021/12/Prefontaine.pdf.

109 *R v Beauchamp* 2009 ONSC 3006 (July 8, 2009) (the Beauchamp Charter challenge) at para 70, https://canlii.ca/t/24mpl.

110 *R v Khawaja* 2012 SCC 69 at paras 45–46, https://canlii.ca/t/fv831.

111 Criminal Code of Canada, RSC 1985, c C-46 at s467.11(2)(a)-(d), https://canlii.ca/t/56hjs.

112 Ibid., s467.12(1).

113 *R v Venneri* (2012) SCC 33 at para 55, https://canlii.ca/t/frxxp.; referring to the judgment in *R v Lindsay* (2004) 70 O.R. (3d) 131 (SCJ), where the court noted that the Oxford English Dictionary defines the phrase to mean 'allow oneself to be connected with or seen to be supportive of'.

114 This example appears in Mark K Levitz and Robert Prior, Criminal organization legislation: Canada's response, Vancouver Bar Association, *The Advocate*, 61, 3, May 2003, 375–388, 381.

115 2009 ONSC 4872 (November 16, 2009) (the Beauchamp judgment on conviction), https://canlii.ca/t/26nvg.

116 Ibid., at paras 347, 508.

117 Ibid., at paras 15, 509.

118 Ibid., at paras 16, 510.

119 Ibid., at paras 527 and 535–536.

120 Home Office, No place to hide: Serious and organised crime strategy 2023–2028, December 2023, 9, para 10, https://www.gov.uk/government/publications/serious-and-organised-crime-strategy-2023-to-2028.

121 Legislation.gov.uk, Serious Crime Act 2015, Explanatory notes, para 142–143, https://www.legislation.gov.uk/ukpga/2015/9/notes.

122 Criminal Law Act 1977, Part 1, https://www.legislation.gov.uk/ukpga/1977/45/part/I.

123 See the introduction to the comparative law analysis, specifically the discussion of 'tertiary liability'.

124 Home Office, No place to hide: Serious and organised crime strategy 2023–2028, December 2023, 9-10, para 12, https://www.gov.uk/government/publications/serious-and-organised-crime-strategy-2023-to-2028.

125 Legislation.gov.uk, Serious Crime Act 2015, Explanatory notes, 2, para 145, https://www.legislation.gov.uk/ukpga/2015/9/notes.

126 Home Office, No place to hide: Serious and organised crime strategy 2023–2028, December 2023, 4, https://www.gov.uk/government/publications/serious-and-organised-crime-strategy-2023-to-2028

127 Serious Crime Act 2015, https://www.legislation.gov.uk/ukpga/2015/9/section/45.

128 Explanatory notes to the Serious Crime Act 2015, para 145, https://www.legislation.gov.uk/ukpga/2015/9/notes/division/3/3/1/1.

129 Serious Crime Act 2015, Section 45(1), https://www.legislation.gov.uk/ukpga/2015/9/section/45.

130 Ibid., Section 45(6).

131 Ibid section., Section 45(3)-(5).

132 Ibid., Section 45(2).

133 Serious Crime Act 2007, Section 44(1), https://www.legislation.gov.uk/ukpga/2007/27/section/44.

134 Ibid., Section 45(b)

135 Joint Committee on Human Rights, *Legislative Scrutiny: (1) Serious Crime Bill, (2) Criminal Justice and Courts Bill (second Report), and (3) Armed Forces (Service Complaints and*

Financial Assistance) Bill, Second Report of Session 2014-15, HL Paper 49 / HC 746, 17 October, p.12, para 1.44, https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/49/49.pdf

136 Serious Crime Act 2015, Section 45(7)(a), https://www.legislation.gov.uk/ukpga/2007/27/section/45.

137 Ibid., Section 45(8).

138 Criminal Justice Bill 155 2023–24, https://bills.parliament.uk/bills/3511.

139 Ibid., Section 2(1–2).

140 Ibid., Section 2(3).

141 AP Simester and Andrew von Hirsch, Remote harms and non-constitutive crimes, *Criminal Justice Ethics*, 28, 1, 2009, 89–107, 101, https://doi.org/10.1080/07311290902831441.

142 Home Office, Two legislative measures to improve the law enforcement response to serious and organised crime: Government consultation, 2023,17, https://www.gov.uk/government/consultations/strengthening-the-law-enforcement-response-to-serious-and-organised-crime.

143 Home Office, Ministry of Justice and Ministry of Defence, Crime and Policing Bill: European Convention on Human Rights memorandum, November 2023, para 20, https://publications.parliament.uk/pa/bills/cbill/58-04/0010/ECHRMemo.pdf.

144 Lorana Bartels, Max Henshaw and Helen Taylor, Cross-jurisdictional review of Australian legislation governing outlaw motorcycle gangs, *Trends in Organized Crime*, 24, 2021, 343–360.

145 Ibid., 343.

146 These provisions came into the Criminal Code through Schedule 4 of the Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010. See Andreas Schloenhardt, Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009, 7 October 2009, 3, https://www.aph.gov.au/DocumentStore.ashx?id=2633fe2b-17c9-4450-8741-97319e43b49a.

147 Ibid., 4.

148 Sections 390.4(1)(c)-(e), 390.5(1)(c)-(e), and 390.6(1)(c)-(e) of the Criminal Code (Commonwealth), https://www.legislation.gov.au/C2004A04868/2018-12-29/text/2; see Andreas Schloenhardt, Palermo on the Pacific Rim: Organized crime offences in the Asia Pacific region, UNODC, August 2009, 45, www.unodc.org/roseap/en/2009/08/Palermo/story.html.

149 Andreas Schloenhardt, Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009, 7 October 2009, 9, https://www.aph.gov.au/DocumentStore.ashx?id=2633fe2b-17c9-4450-8741-97319e43b49a.

150 UNTOC, https://www.unodc.org/romena/en/untoc.

151 Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009 (Cth), Explanatory Memorandum, 130, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4211_ems_8f2df4d9-5478-43ff-b118-3aa50f4e40dc%22.

152 Criminal Code (Commonwealth), s390.4(1), https://www.legislation.gov.au/C2004A04868/2018-12-29/text/2.

153 Andreas Schloenhardt, Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009, 7 October 2009, 9, https://www.aph.gov.au/DocumentStore.ashx?id=2633fe2b-17c9-4450-8741-97319e43b49a.

154 Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009 (Cth), Explanatory Memorandum, 140, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4211_ems_8f2df4d9-5478-43ff-b118-3aa50f4e40dc%22.

155 Ibid., 141.

156 Ibid., 140.

157 Ibid.

158 Crimes Act 1900 (NSW), s93S(1)(a)-(d), https://legislation.nsw.gov.au/view/html/inforce/current/act-1900-040#sec.93S.

159 Andreas Schloenhardt, Palermo on the Pacific Rim: Organized crime offences in the Asia Pacific region, UNODC, August 2009, 98, www.unodc.org/roseap/en/2009/08/Palermo/story.html.

160 Ibid., 94.

161 Andreas Schloenhardt, Palermo on the Pacific Rim: Organized crime offences in the Asia Pacific region, UNODC, August 2009, 100, www.unodc.org/roseap/en/2009/08/Palermo/story.html.

162 S93T(6) of the Crimes Act provides that, 'for the purposes of this section a person may participate in a criminal group whether or not the person is a member of the criminal group', https://legislation.nsw.gov.au/view/html/inforce/current/act-1900-040#sec.93T.

163 NSW, Hansard, Legislative Assembly, 30 Aug 2006, 1144, Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown).

164 Crimes Act 1900 (NSW) S93T(1), https://legislation.nsw.gov.au/view/html/inforce/current/act-1900-040#sec.93T.

165 Andreas Schloenhardt, Palermo on the Pacific Rim: Organized crime offences in the Asia Pacific region, UNODC, August 2009, 101, www.unodc.org/roseap/en/2009/08/Palermo/story.html.

166 *R v Crabbe* (1985) 156 CLR 464, https://www.legal-tools.org/doc/1a9972/pdf; *Boughey v R* (1986) 161 CLR 10, 21, https://www.legal-tools.org/doc/9dc68f/pdf/; Andreas Schloenhardt, Palermo on the Pacific Rim: Organized crime offences in the Asia Pacific region, UNODC, August 2009, 102, www.unodc.org/roseap/en/2009/08/Palermo/story.html.

167 South Australia, Criminal Law Consolidation Act 1935 (Version 1.9.2025), Part 3B—Offences relating to criminal organisations (CLCA), https://www.legislation.sa.gov.

au/__legislation/lz/c/a/criminal%20law%20consolidation%20act%201935/current/1935.2252.auth.pdf.

168 Such as the Serious and Organised Crime (Control) Act 2008 (SA).

169 Similar to the NSW approach, the definition explicitly states that it is irrelevant whether members are subordinates, if only some are involved in planning or carrying out activities, or if membership changes over time. CLCA, s83D(2).

170 This is distinct from a 'legal burden', which would require the accused to prove their non-participation on a balance of probabilities rather than merely raise reasonable doubt. If the evidential burden is met, the presumption is rebutted, and the prosecution must then prove knowing participation beyond a reasonable doubt, as is ordinarily required for all elements of a criminal offence.

171 CLCA, s83E(8).

172 CLCA, s83G(1).

173 CLCA s83G(2).

174 S83G(2) uses the phrase 'in the absence of proof to the contrary'. However, in Australian criminal law, this phrase is consistently interpreted to mean that the accused only has to present enough evidence to raise doubt, and not to fully prove, on a balance of probabilities, that the group is not criminal. Australian Law Reform Commission, Burden of proof, in Traditional rights and freedoms – Encroachment by Commonwealth laws, ALRC Report 129, 1 March 2016, https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/9-burden-of-proof-2/.]

175 Andreas Schloenhardt, Palermo on the Pacific Rim: Organized crime offences in the Asia Pacific region, UNODC, August 2009, 273–4, www.unodc.org/roseap/en/2009/08/Palermo/story.html.

176 Andreas Schloenhardt, Mission unaccomplished: Japan's Anti-Bôryoku-Dan law, *Zeitschrift für Japanisches Recht*, 15, 29, 2010, 123–136, 129.

177 Andreas Schloenhardt, Palermo on the Pacific Rim: Organized crime offences in the Asia Pacific region, UNODC, August 2009, 200, www.unodc.org/roseap/en/2009/08/Palermo/story.html.

178 Other articles also specify prohibited actions that apply to members of designated groups, whose violation can similarly serve as grounds for administrative orders and criminal charges; see Articles 15, 16, 20, 29, 30-2 and 30-6.

179 Anti-Boryokudan Law, Article 9, paras 5 and 3.

180 Ibid., Article 46-1.

181 APOC, Article 1. English translation available at https://www.japaneselawtranslation.go.jp/en/laws/view/3587/en.

182 Article 5 of the UNTOC obliges parties to criminalize either 'the agreement to commit serious crimes' or 'participation in the activities of organized criminal groups'. Article 6-2 satisfies the former.

183 APOC, Article 6-2, https://www.japaneselawtranslation.go.jp/en/laws/view/3587/en.

184 Tetsuya Hoshino and Takuma Kamada, Third-party policing approaches against organized crime, *Journal of Quantitative Criminology*, 37, 2021, 791–811, https://doi.org/10.1007/s10940-020-09466-6.

185 Metropolitan Police Department, Tōkyō-to bōryokudan haijo jōrei (Tokyo Yakuza-Exclusion Ordinance), 2023.

186 Ibid.

187 Ibid.

188 Andrew Rankin, Recent trends in organized crime in Japan: Yakuza vs the police, & foreign crime gangs, Part 2, *Asia-Pacific Journal*, 10, 7, 4, 2012, e4, https://doi.org/10.1017/S155746601203224X. doi:10.1017/S155746601203224X.

189 Metropolitan Police Department, Tōkyō-to bōryokudan haijo jōrei (Tokyo Yakuza-Exclusion Ordinance), 2023.

190 Racketeer Influenced and Corrupt Organizations Act (RICO), Organized Crime Control Act of 1970, Public Law 91-452, 84 Stat. 941, codified at 18 USC s1961–1968, 1970, https://www.justia.com/criminal/offenses/white-collar-crimes/racketeering-rico/. California Street Terrorism Enforcement and Prevention Act (STEP Act), California Penal Code, Chapter 11 §§ 186.20-186.33, 1988, https://law.justia.com/codes/california/2007/pen/186.20-186.33.html.
The appellation 'Street Terrorism' in the long title of the STEP Act was no coincidence; it was used to justify stronger, more punitive measures by framing gang activity not merely as isolated criminal acts, but as a coordinated and organized threat to public security. The legislative findings cited in the original text of the 1998 STEP Act provide the most enlightening example of this tendency, as Section 186.21 of California's Penal Code explicitly states: 'The Legislature hereby finds and declares that…the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, *terrorize*, and commit a multitude of crimes against the peaceful citizens of their neighborhoods…It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together are the chief *source of terror* created by street gangs' (emphasis added).

191 Antiterrorism and effective death penalty act, in LE Sullivan, MS Rosen, DM Schulz, MR Haberfeld (eds.), *Encyclopedia of Law Enforcement*, 3, 2004, 542–543, https://doi.org/10.4135/9781412952415.n218.

192 18 USC s 2339B(a)(1), https://www.law.cornell.edu/uscode/text/18/2339B.

193 18 USC s 2339A(b)(1), https://www.law.cornell.edu/uscode/text/18/2339A.

194 *Holder v. Humanitarian Law Project*, 561 US 1 (2010) at 47, https://www.law.cornell.edu/supct/html/08-1498.ZS.html.

195 Jimmy Gurulé, Criminalizing material support to domestic terrorist organizations: A national security imperative, *Journal of Legislation*, 42, 7, 2021, 22–23, https://scholarship.law.nd.edu/jleg/vol47/iss2/2.

196 8 USC s 1189 - Designation of foreign terrorist organizations, at (a)(1)(A), https://www.law.cornell.edu/uscode/text/8/1189.

197 Patrick J Keenan, The changing face of terrorism and the designation of foreign terrorist organizations, *Indiana Law Journal*, 95, 3, 2020, 806, https://www.repository.law.indiana.edu/ilj/vol95/iss3/4.

198 This reflects the definition of terrorism implied in paragraph 3 of the United Nations Security Council Resolution 1566 (2004) as criminal acts 'committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public [...] intimidate a population or compel a government or an international organization to do or to abstain from doing any act'. United Nations Security Council, https://digitallibrary.un.org/record/532676?v=pdf.

199 Liat Levanon, Criminal prohibitions on membership in terrorist organizations, *New Criminal Law Review*, 15, 2, 2012, 224–276, 232, https://doi.org/10.1525/nclr.2012.15.2.224.

200 Ibid.

201 The example is from Brian J Phillips and Viridiana Ríos, Narco-messages: Competition and public communication by criminal groups, *Latin American Politics and Society*, 62, 1, 2020, 1–24, n.p., https://www.jstor.org/stable/26873336.

202 Zaid Falah, Tal Mimran and Mohammed S Wattad, Organized criminals as terrorists, *Southern California Interdisciplinary Law Journal*, 33, 1, 3 March 2024, http://dx.doi.org/10.2139/ssrn.4746551.

203 AP Simester and Andrew von Hirsch, Remote harms and non-constitutive crimes, *Criminal Justice Ethics*, 28, 1, 2009, 89–107, 101, https://doi.org/10.1080/07311290902831441.

204 Ibid.

205 *Holder v. Humanitarian Law Project*, 561 US 1 (2010) at 47, https://www.law.cornell.edu/supct/html/08-1498.ZS.html.

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