CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES

*Sadhana Singh**

I. INTRODUCTION

While the 1990s was a decade of booming markets and booming profits, it was also a decade of rampant corporate criminality. There is an emerging consensus among corporate criminologists, which is that corporate crime and violence inflicts far more damage on society than all street crime combined. Heightened concern around this issue has been demonstrated by a number of recent conferences on commercial crime, staged by the Republic of South Africa (RSA)[1] through its South African Police Service (SAPS) and organized business. A declaration of "serious economic offences" as a "priority crime" is significant, since the seriousness (or not) with which certain crimes are regarded is reflected in the resources which the state allocates to policing them.

II. BACKGROUND

Corporate crime is said to cause business failure and disintegrate economies. The National Prosecuting Authority (NPA) Act, 1998 (Act No. 32 of 1998) provides that all Serious Economic Offences must be investigated. This has led to the opening of Specialized Commercial Court Centres in the RSA, a clear expression of the South African Government's commitment to an effective criminal justice system that delivers swift, reliable and fair justice and creates confidence among investors, local and international, the business sector and the general public. The most important motivations for the establishment of the specialized courts relate to the possibility that these institutions might make the administration of justice more efficient and thereby encourage the reporting of corporate crime. In this regard, the most important characteristics of such courts is their capacity to attract and utilize persons with appropriate expertise in the prosecution (in the case of criminal trials) and adjudication of matters in which such specialized knowledge is required for the most effective processing of cases. Thus both the prosecution and judiciary will become evermore familiar with complex factual issues, as well as with established law and procedure. This should lead to speedier and, therefore, less expensive proceedings for the state and litigants.

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* Senior Superintendent, Partnership Policing, South African Police Service, South Africa.

[1] Abbreviations used in this paper:

AFU	Asset Forfeiture Unit
DSO	Directorate of Special Investigations
FICA	Financial Intelligence Centre Act
ICD	Independent Complaints Directorate
NIA	National Intelligence Agency
NPA	National Prosecuting Authority
PGI	Prosecution Guided Investigation
POCA	Prevention of Organized Crime Act
RSA	Republic of South Africa
SAPS	South African Police Service
SAQA	South African Qualifications Framework
SARS	South African Revenue Service

III. FOCUSED DISCUSSIONS ON CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES

A. Liability of Legal Persons and Criminalization in Relation to Corporate Crime

1. Liability of Legal Persons

(i) Current Situation of Criminal Liability of Corporate Entities in the RSA

Since the Companies Act was enacted in 1973, fundamental legal developments have taken place in the RSA. The most important change was the adoption of the Constitution in 1996. No area of South African law can be analysed or evaluated without recourse to the Constitution, which is the supreme law of the country. The Bill of Rights, as provided for in Chapter 2 of the Constitution, constitutes a cornerstone of democracy in the RSA. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. It also regulates the relationship between economic citizens and thus may have fundamental implications for company law.

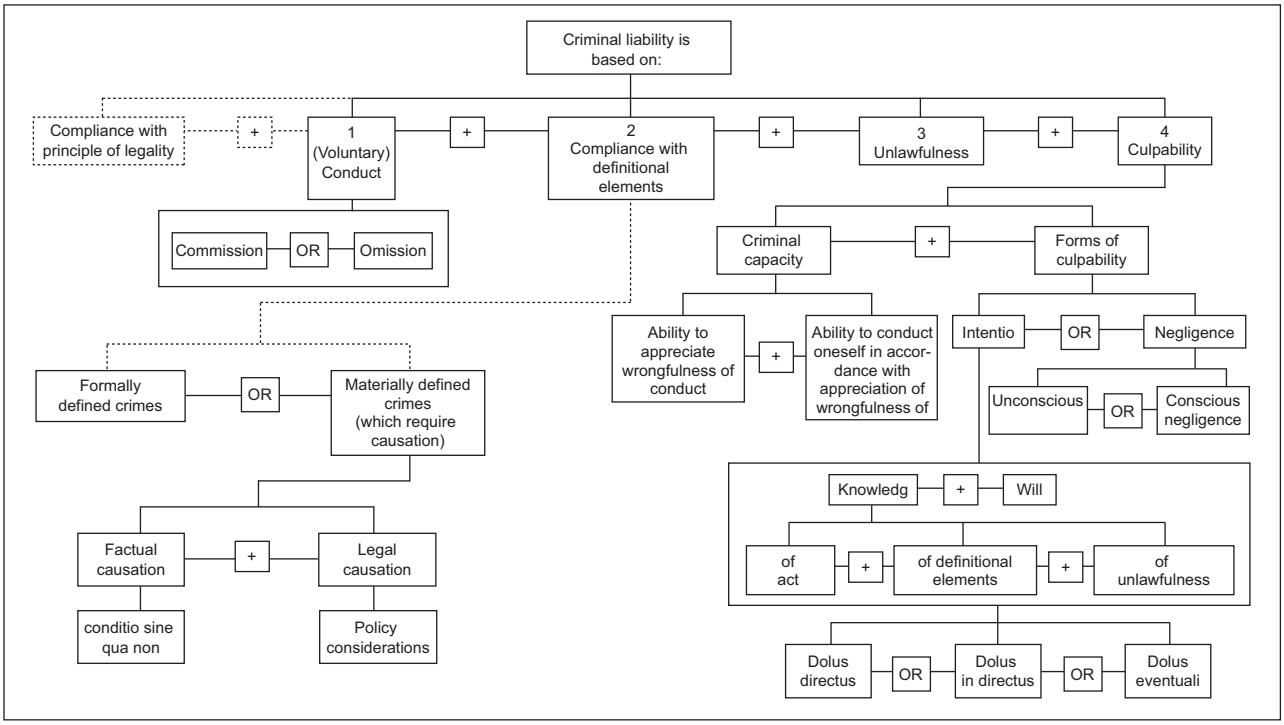
Section 332 of the Criminal Procedure Act 51 of 1977 provides for the prosecution of corporations and members of associations. Section 332 (1) thereof provides: For the purpose of imposing upon a corporate body criminal liability for any offences, whether under any law or at common law – any act performed, with or without a particular intent, by or on instructions or with permissions, express or implied, given by a director or servant of that corporate body; and the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that body corporate in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interest of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

(ii) Legal Framework of Criminal, Civil and Administrative Sanction

Company law provides the legal basis for one of the most important institutions organizing and galvanizing the economy, namely, corporate business entities. The decision of the Department of Trade and Industry in the RSA to review and modernize company law in this country was based on the need to bring our law in line with international trends and to reflect and accommodate the changing environment for business, both in the RSA and globally. The current framework of South African company law is built on strong foundations, after much review, and new developments in the country. Criminal, civil and administrative sanctions are regulated and administered within the parameters of criminal law and the framework as set by the Criminal Procedure Act. The detailed legislative, regulatory and procedural frameworks dictate police action, and every specialized unit has a legal mandate and a legal framework within which to operate.

(iii) Various Kinds of Criminal Liability

Schedule A, Criminal Law (Snyman) indicates the construction of criminal liability. This will be illustrated by means of a diagram as shown below. The diagram below represents a standard crime. There are exceptions to this standard model. Strict liability crimes dispense with the requirement of culpability. The reason why compliance with the principle of legality is indicated with a dotted line is the following: if a person's liability for a well-known crime such as murder or theft has to be determined, it is so obvious that such a crime is recognized in our law that it is usually a waste of time to enquire whether there has been compliance with the requirement of legality. The reason why the box containing the words "Compliance with definitional elements" is further subdivided with a dotted line, is the following: crimes may according to their definitional elements be classified or subdivided in different ways.



2. Criminalization in Relation to Corporate Crimes

It is sometimes debated whether or not it is desirable to punish an entity such as a corporate body which is not, like a natural person, capable of thinking for itself or of forming any intention of its own. It is sometimes said that the idea of blameworthiness inherent in the concept of culpability presupposes personal responsibility - something which an abstract entity such as a corporate body lacks. The corporate body has no physical existence and does not think for itself or act on its own; its thinking and acting are done for it by its directors or servants, and it is argued that it is these persons of flesh and blood who ought to be punished. On the other hand, there is in practice a great need for this form of liability, especially today when there are so many corporate bodies playing such an important role in society. It is very difficult to track down the individual offender within a large organization; an official can easily shift blame or responsibility onto somebody else. In any event, other branches of the law, such as the law of contract, acknowledge that a corporate body is capable of thinking and of exercising a will. This form of liability is especially necessary where failure to perform a duty specifically imposed by statute on a corporate body (for example the duty to draw up and submit certain returns or reports annually), constitutes a crime.

Holding a corporate body criminally liable raises certain procedural questions such as who must be summoned, who must stand in the dock, who must act on the corporate body's behalf during the trial, and what punishment must be imposed. In the RSA the matter has been regulated by statute since 1917. The original Section 384 of the Criminal Procedure and Evidence Act 31 of 1917, has been replaced by other sections, and at the moment the matter is governed by the provisions of Section 332 of the Criminal Procedure Act 51 of 1977. Section 332(5) of the Criminal Procedure Act further provides that a director or servant of a corporate body may be convicted of a crime committed by the corporate body, unless he or she can prove that he or she did not take part in the commission of the crime and that he or she could not have prevented it. However, the provisions of the Constitution of the RSA, read with various other laws, must be taken into consideration, as caution should be taken to avoid a reverse onus which could infringe the presumption of innocence in section 35(3)(*h*) of the Constitution and that this violation may not be justified in terms of the limitation clause in section 36(1) of the Constitution.

Statutory offences in terms of the Companies Act have been dealt with in the context of the acts constituting the offences. The same has been done in respect of the penal provisions. The penalties for the respective offences which are stated in section 441(1) have been dealt with in the context of the offences concerned. Section 441(2) is of particular importance in that it provides that the court convicting any person or company for failing to perform any act required under the Act may not only impose a penalty but may

order the person or company to perform that act within such period as the court may determine. Criminal liability has been attached to certain general acts relating to the falsification of records and the suppression of records, documents and other evidence.

B. Current Situation and Issues Concerning Corporate Crime in the RSA

Within the Department of Justice, a number of control measures have been introduced to limit the incidence of corporate crime. The SAPS and the National Intelligence Agency (NIA) are assisting the Department of Home Affairs to set up various corporate crime units, such as the anti-corruption unit. Measures aimed at strengthening the Independent Complaints Directorate (ICD) are under way. The NIA is assisting the ICD in its anti-corruption tasks. The SAPS see the immediate challenge as mobilizing resources to make corporate crime more dangerous and less profitable. Removing the profits of crime, *inter alia* through the forfeiture of assets, is attaining widespread priority. South Africa's eagerly awaited Money Laundering Act will come into effect later this year, thereby recognizing that the driving force behind commercial crime internationally is drug money and its laundering. With the assistance of the Reserve Bank and financial institutions, this legislation should prove an effective tool in combating illegal financial transactions.

The success of the SAPS in combating corporate crimes will be indicated by: a decline in the incidence of corporate crime; a rise in the percentage of recorded cases; and a marked rise in the number of successful prosecutions. These objectives can be achieved through: the development of codes of conduct, and prevention and standard response procedures to corporate crime; promotion of principles of good business practice and good governance; and rallying of public support for an anti-corruption ethic. Further, numerous conferences have also been held on commercial crime facilitated by organized business and the SAPS. Corporate crime, sometimes referred to as serious economic offences or commercial crime, has also been declared a number one priority crime in terms of the SAPS Strategic Plan 2005-2010 under the domain of organized crime.

Organized crime is a concept that appears to have established itself in criminology, although it has not yet received universal legislative acceptance or wide judicial recognition. However, it is not in serious dispute that organized crime is a global challenge. It is also accepted that linkages have long been established among criminals working in different countries in the region and beyond.

The RSA has embarked on an Organized Crime and Money Laundering programme dedicated to studying trends in the incidence of organized crime in Southern Africa since 1997. The programme strives to contribute to building the capacity of policy-makers and law enforcement agencies in the region to combat organized crime.

The conventional view is that money laundering follows a traceable pattern, comprising various stages. In reality, not every act of money laundering neatly follows a pattern (*Institute for Security Studies*).

Since 2002 the Institute for Security Studies in the RSA has been studying the nature and scale of money laundering in east and Southern Africa. The findings of the study are periodically published in newsletters, surveys and monographs. The programme is committed to continue to assist state and non-state institutions to detect and control money laundering in the region.

The RSA has developed a comprehensive legal structure to combat money laundering. Currently, the main statutes are the Prevention of Organized Crime Act 1998 (POCA) and the Financial Intelligence Centre Act 2001 (FICA). The financial intelligence unit and other supervisory and investigative bodies appear adequately staffed and genuinely committed to implementing the new system.

Additionally, the RSA has a number of agencies that investigate and prosecute cases involving money laundering. The NPA provides a national framework for prosecutions. Within the NPA, the Directorate of Special Operations (DSO) investigates and prosecutes a range of more serious cases. The NPA's Asset Forfeiture Unit (AFU) supports the police and other law enforcement structures in all aspects of forfeiture. The SAPS investigates criminal activity generally and has allocated the responsibility for investigating money laundering to specific units. The South African Revenue Service (SARS), which includes the Customs Service, is responsible for revenue collection and the investigation of tax evasion and evasion of

customs duties and works closely with law enforcement agencies on money laundering matters.

C. Issues Concerning Investigations

1. Specialized Investigative Authorities and Training Methods for Investigators

The RSA has developed a comprehensive legal structure to combat corporate crime. The statutes include the Prevention of Organized Crime Act 1998 (POCA), and the Financial Intelligence Centre Act 2001 (FICA). Some of the specialized investigative authorities (as mentioned at 2. *infra*) include: SAPS, NIA, NPA, AFU, SARS etc.

In the RSA, the *Detective Learning Program* which is registered at the South African Qualifications Authorities (SAQA) is mandatory, prior to the offering of more specialized training. Also, the RSA has embarked on an *Organized Crime and Money Laundering Program* dedicated to studying trends in the incidence of organized crime in Southern Africa since 1997. The programme strives to contribute to building the capacity of policy-makers and law enforcement agencies (not exclusive to the SAPS) in the region to combat organized crime.

Additionally, investigators already have adequate legal means to obtain information and evidence regarding alleged offences. Investigators also have sufficient legal tools for a wide range of investigative techniques.

2. Co-operation Between Investigative Authorities at the State Level

The investigative authorities include the SAPS, the Commercial/Organized Crime Unit, the DSO, the Sexual Offences Unit (SOCA), the Specialized Tax Unit, the Asset Forfeiture Unit and the Special Commercial Crimes Unit. These units form part of the Integrated Case Flow Management Steering Committee which meets bi-monthly to discuss the various issues around crimes. A further co-operation "safety-net" is the Prosecution Guided Investigations (PGI). PGI is still under development for formal implementation but has been informally practiced for many years now. This, in short, allows the prosecutors and all key parties to form an integrative approach and to become involved in investigations much earlier and not when the case is ready for court.

3 Acquisition of Information on Corporate Crime

A wide array of legislation regulates the acquisition of information, including the Criminal Procedure Act, criminal law statutes, the Constitution of the Republic, the SAPS Act, etc. There are specific procedures and techniques under this legislation which guide a crime scene from the inception of a complaint, to the mass media, dealing with informants and the various types of protection our law offers. It must be mentioned that in the RSA, every informer is treated with the utmost confidentially and the identity of such informers is protected. Special broadcast and media laws are also available in the RSA which then governs mass media. In the SAPS, we have a special communication department which handles all media matters, knowing that some matters could be of a sensitive nature. Additionally, South African law makes abundant provision for the protection not only of whistleblowers but all types of witnesses, e.g. an employee employed in a large co-operation who is being threatened by its management can also seek protection under the RSA law.

4. Material and Electronic Evidence

The Interception and Monitoring Prohibition Act, Act 127 of 1992 covers all aspects, including but not limited to, "identifying, obtaining and preserving; obtaining relevant computer data and recovering of deleted data; forensic analysis and other" in terms of the investigation and should be read as such.

The Act was enacted to prohibit the interception of certain communications and the monitoring of certain conversations or communications; to provide for the interception of postal articles and communications and for the monitoring of conversations or communications in the case of a serious offence or if the security of the RSA is threatened; and to provide for matters connected therewith.

For purposes of the investigation of crime, an investigator who executes a direction or assists with the execution of a direction may at any time enter upon any premises in order to install, maintain or remove a monitoring device, or to intercept or take into possession a postal article, or to intercept any communication, or to install, maintain or remove a device by means of which any communication can be intercepted, for the

purposes of this Act. Having specified such, one must also take into consideration the sovereign law of the land, the Constitution, and act accordingly.

5. Measures to Obtain Statement Evidence

(i) Techniques of Interrogation

The RSA judicial system and the SAPS in particular make use of an interview system which is registered by the South African Qualifications Authority as "Conduct an Investigative Interview". Investigative interviews are conducted through a systematic search for the truth in respect of a crime or an alleged crime. The investigative interview system uses sound and structured methodology to extract the maximum possible sum of information from a victim, informer, witnesses or suspect, allowing for the successful planning, conducting and concluding of an interview with a victim, informer, witness or suspect utilizing the P.E.A.C.E. model. The acronym P.E.A.C.E. stands for: P = Planning and Preparation, E = Engage and Explain, A = Account Phase, C = Closure and E = Evaluation of all information. Additionally, under section 213 of the Criminal Procedure Act, Act 51 of 1977, proof of a written statement must exist and the statement must comply with the provisions of consent."The statement shall purport to be signed by the person who made it, and shall contain a declaration by such person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or which he did not believe to be true. If the person who makes the statement cannot read it, it shall be read to him before he signs it, and an endorsement shall be made thereon by the person who so read the statement to the effect that it was so read."

(ii) Plea Bargaining

According to Section 106 of the Criminal Procedure Act, "when an accused pleads to a charge he may plead: that he is guilty of the offence charged or of any offence of which he may be convicted on the charge; or that he is not guilty; or that he has already been convicted of the offence with which he is charged; or that he has already been acquitted of the offence with which he is charged; or that he has received a free pardon under section 327 (6) from the State President for the offence charged; or that the court has no jurisdiction to try the offence; or that he has been discharged under the provisions of section 204 from prosecution for the offence charged; or that the prosecutor has no title to prosecute; or that the prosecution may not be resumed or instituted owing to an order by a court under section 342A(3)(*c*). Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge. An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea, provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(iii) Immunity

Various types of immunity exist. In RSA the State President may issue a free pardon under section 327 (6) of the Criminal Procedure Act. Also, the prosecution may not be resumed or instituted owing to an order by a court under section 342A(3)(*c*) of the Criminal Procedure Act.

6. Special Investigative Techniques

(The Criminal Procedure Act, Act 51 of 1971, section 252A covers all aspects, including but not limited to, "electronic and other forms of surveillance; undercover operations; other special investigative techniques and use of special investigative techniques at the international level" in terms of the investigation, and should be read as such).

The section of the Act was enacted to authorize the use of traps and undercover operations and for the purposes of admissibility of evidence. However, the law and its limitations and the Constitution of the RSA should also be considered when applying this section.

"Any law enforcement officer, official of the State or any other person authorized thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to

prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3). If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered." When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard for the various factors, as applicable by this section; e.g. whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission, etc.

"An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise."

D. Issues Concerning the Prosecution

1. Mitigation, Immunity and Considerations

Mitigation, immunity and considerations can be read together in the investigation and/or prosecution. The role that mitigating factors surrounding the offender should play is streamlined. It makes little sense to claim that every offender is different and that this is the reason for having sentence discretion, when most of these differences do not affect the sentence at all. A re-evaluation of these subjective features is necessary, and much can be learned from systems where specific reductions of sentence are offered for specific mitigating factors, such as a plea of guilty, remorse, and other subjective factors that really reduce the blameworthiness of the offender. All the purposes of punishment need to be directly related to the interests of society. If there is no evidence that a particular sentence would deter others, or would individually deter the offender, then that factor should not be mentioned as a sentencing feature. The same goes for reform and incapacitation. In South Africa we are working on greatly expanding our resources for the execution of sentences. The courts are also being expanded.

Various types of immunity exist. In the RSA the State President may issue a free pardon under Section 327 (6) of the Criminal Procedure Act. Also, the prosecution may not be resumed or instituted owing to an order by a court under Section 342A(3)(*c*) of the Criminal Procedure Act.

E. Issues in Trial and Adjudication

1. Disclosure of Evidence before Trial

The Criminal Procedure Act, Section 217 states that, "Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided that a confession made to a peace officer, other than a magistrate or justice or, in the case of a peace officer referred to in Section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question be admissible in the evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto".

2. Clarification of Disputes before Trial

The Criminal Procedure Act, specifically Section 212B, states that, "if an accused has appointed a legal adviser and, at any stage during the proceedings, it appears to a public prosecutor that a particular fact or facts which must be proved in a charge against an accused is or are not in issue or will not be placed in issue in criminal proceedings against the accused, he or she may, notwithstanding section 220, forward or hand a notice to the accused or his or her legal adviser setting out that fact or those facts and stating that such fact or facts shall be deemed to have been proved at the proceedings unless notice is given that any such fact will be placed in issue. The first-mentioned notice contemplated in subsection (1) shall be sent by certified mail or handed to the accused or his or her legal adviser personally at least 14 days before the commencement of the criminal proceedings or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed upon by the accused or his or her legal adviser and the prosecutor. If any fact mentioned in such notice is intended to be placed in issue at the proceedings, the accused or his or her legal representative shall at least five days before the commencement or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed upon with the prosecutor deliver a notice in writing to that effect to the registrar or the clerk of the court, as the case may be, or orally notify the registrar or the clerk of the court to that effect in which case the registrar or the clerk of the court shall record such notice. The court may on its own initiative or at the request of the accused order oral evidence to be adduced regarding any fact contemplated in subsection (4)."

3. Effective Methods of Fact Finding

(i) Witness Protection

According to the Witness Protection Act, a witness is any person who is or may be required to give evidence or has given evidence in any proceedings. Subsections 7(1) and (2) of the Witness Protection Act provides as follows: "Any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness, may report such belief to the investigating officer in the proceedings concerned; any person in charge of a police station; if in prison, a person in charge of the prison or registered social worker; to the public prosecutor; to any member of the Office for Witness Protection; and apply in the prescribed manner that he or she or any related person be placed under protection."

(ii) Expert Witnesses

An expert witness is someone who: has education of specialized knowledge; has superior knowledge regarding a subject; can deduce correct conclusions and can formulate an accurate opinion.

(iii) Others

The Criminal Procedure Act, Section 186, states that "the court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case".

4. Sentencing Process

The Bill of Rights provides for due process, including the right to a fair, public trial within a reasonable time after being charged, and the right to appeal to a higher court. It also gives detainees the right to state funded legal counsel when "substantial injustice would otherwise result". There is a presumption of innocence for criminal defendants. Judges and magistrates hear criminal cases and determine guilt or innocence. Magistrates can use assessors in an advisory capacity in bail applications and sentencing. According to Section 274, a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court. In principle, South African courts employ a discretionary sentencing system. Within the boundaries set by the legislature, the courts have to exercise a judicial discretion in order to determine an appropriate sentence, based on a balancing of all the different factors present in the particular case. This discretion is coupled with a well-established system of appeal against sentences imposed in all the trial courts, as well as judicial review of sentences imposed in the lowest courts. No trial court is likely to impose a sentence in the full knowledge that that sentence is likely to be quashed on appeal, with the result that the appellate system influences the outcomes of criminal cases

substantially. The State is also permitted, in terms of the Criminal Procedure Act, to appeal against a patently lenient sentence.

F. International Co-operation

1. Current Situation of, and Problems and Challenges in, the Investigation, Prosecution and Trial of Above Mentioned Offences, in Relation to International Co-operation

The Republic of South Africa occupies a very important position in the world when it comes to the issue of international law enforcement co-operation. It is clear that South Africa by virtue of its position in Southern Africa, Africa and the whole world, is a very important player in the combating of transnational crime. With its assumption of the Presidency of Interpol, its membership of SARPCCO and its hosting of FIFA World Cup 2010, it is pertinent that its contribution to international law enforcement co-operation should move from strength to strength.

The SAPS has played a very important role in conducting joint operations throughout the region by providing the necessary manpower and logistics throughout.

The SAPS have also made a distinguished contribution in the execution of regional training courses by providing facilities and other requirements. South Africa has also demonstrated its appreciation of the importance of strong international law enforcement co-operation by seconding officials to the Interpol General Secretariat, the Interpol Sub Regional Bureau for Southern Africa and by appointing police attachés to a number of countries within the region and beyond. Additionally, various structures and processes exist to co-ordinate security initiatives at both the international and regional (SADC) level.

At the national level the legislative framework for law enforcement co-operation has been boosted through the enactment of two pieces of legislation in particular: the International Co-operation in Criminal Matters Act, no.75 of 1996 and The Extradition Amendment Act, no.77 of 1996. National policy frameworks of relevance in considering the priorities for co-operation between state and civil society as well as at the inter-state level include: the National Crime Prevention Strategy 1996 and the National Police Plan and Policing Priorities and Objectives 1997/8 & 1998/9; and the various Strategic Plans of SAPS, including 2005 to 2010.

2. Problems and Challenges in Obtaining and Providing Mutual Legal Assistance and other Types of International Co-operation

Under the International Co-operation in Criminal Matters Act, 75 of 1996, South Africa has broad powers to provide a wide range of mutual legal assistance (MLA) related to crime matters, and can provide MLA even where there is no dual criminality. Thus, it can exchange information relating to most investigations, but cannot assist in seizing certain types of assets.

South Africa has acceded to the 1988 United Nations Convention and has ratified the 1999 UN Convention, and is working to ratify the 2000 UN Convention. It has also entered into many bilateral treaties and agreements, either for MLA or at a law enforcement level.

IV. SUMMARY

The President of the Republic of South Africa, Mr Thabo Mbeki, summed it all nicely when the he said "when in a society the shameless triumph, when the abuser is admired, when principles end and only opportunism prevails, when the insolent rule and the people tolerate it; when everything becomes corrupt but the majority is quiet because their slice is waiting ... when so much unite, perhaps it is time to hide oneself, time to suspend the battle; time to stop being a Quixote (impractically idealistic or fanciful); it is time to review our activities, re-evaluate those around us, and return to ourselves."

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