Changing Attitudes: Whodunnit vs The POCA

The reason why Illegal, Unreported, Unregulated (IUU) fishing has been dealt with as an exclusive fisheries management issue is somewhat complex. It is born out of a general misconception of the phenomenon labelled “Organised Crime” and the law enforcement agencies’ responses to it.

Government operate on three levels, Legislative, Executive and Judicial. Each level has the responsibility to respond to the phenomenon but there is little co-ordination and or co-operation. Sitting in my chair, *inter alia* labelled as the Environmental Organised Crime Prosecutor, I can see that within the Police organised crime is addressed at least three different branches or levels each with a different goal. There is the Directorate Priority Crime Investigations [Hawks] and per definition, Organised Crime is secondary, within their mandate. There are three units within the DPCI umbrella. One Unit with a commercial crime investigation goal, another with an Anti- Corruption investigation goal and the third with a priority crime investigation goal. This priority crime investigation is qualified with an SAPS instruction that the investigation ought to be project driven based on certain priority crimes and so they say organised crime is addressed.

Measured on the number successful Racketeering POCA prosecutions, the project driven investigations had limited success. From the eight Racketeering prosecutions that crossed my desk, only one came from a proper “police project” investigation.

Parallel with these three Units exists a Provincial SAPS Organised Crime Unit, which is kept busy by gang related investigations such as murder, attempted murder and robbery that is per definition, not organised crime.

The law enforcement strategy is mainly one of Reactive Law Enforcement. Citizens report crime and the law enforcement react and attempt to identify and bring the culprit to book. In short, a “Whodunnit” question. A Sherlock Holmes approach where keen observation, deduction, [forensic science](https://en.wikipedia.org/wiki/Forensic_science), and [logical reasoning](https://en.wikipedia.org/wiki/Logical_reasoning) provides the key to the culprit. This to a degree explains the name of the Police Directorate that holds the mandate to investigate organised crime as being Priority Crime Investigations. The priority comes from the “citizen’s report” e. g. armed robbery, house robbery etc. The outcome of this attitude force organised crime investigations to start with the offence and trace the culprit.

However, organised crime investigation requires a Proactive Law Enforcement strategy. The enforcement officer need to seek out indications of criminal behaviour in a proactive way. One of the reasons is because the nature of this criminal behaviour include a degree of victim participation, for example drugs, corruption and prostitution. The outcome of this approach is to start with the culprit and work towards the crime.

Wildlife and Fisheries crime are to a degree, “victimless”. The citizen, as in the Sherlock Holmes scenario, does not normally know about the fisheries contraventions and as such, a different line of report has to be followed. Other interests such as food security, interests of the society and the fear of species extinction play a role. These interests require a Proactive Law Enforcement strategy, as the culprits are generally known and the interests’ needs protection prior the event.

The settled way of thinking or feeling about enforcement, the “Whodunnit” attitude, seems to favour the Reactive Law Enforcement approach. The structure within the South African Police Services as well as in the NPA mirrors this.

In 1998, the Prevention of Organised Crime Act [POCA] came into being. For years, the tools given to the law enforcement agencies was kept dormant. It took a well-constructed initiative by the NPA and the SAPS to change the attitude. Those of us involved will remember tutors from the USA telling us about the phenomenon labelled as “Organised Crime”. We heard about the RICO [Racketeer Influenced and Corrupt Organizations statute] and were encouraged to go and watch the movie, American Gangster, in which Denzel Washington explained something about organised crime. The movie is based on the criminal career of Frank Lucas, a gangster who smuggled heroin into the United States on American service planes returning from the Vietnam War.

The POCA does not define the term, Organised Crime. The absence of a definition is remarkable as the phrase features prominently in the name of the Act and in its preamble. Our courts acknowledged the fact that the POCA does not define “organised crime” but did not attempt to probe the meaning of this term. In *National Director of Public Prosecutions v Vermaak* 2008 (1) SACR 157 (SCA) the court remarked “There has for some time been a controversy, engendered largely by the short title of the Act, as to whether it is confined to cases of ‘organised crime’. Precisely what that term is said to mean is not altogether clear, the term is not defined in the Act. … and for present purposes I use the term to describe offences that have organizational features of some kind that distinguish them from individual criminal wrongdoing.” No indication was given as to what the relevant organisational features may be.

The category “organised crime” usually excludes crimes such as domestic violence and other crimes that yield no profit. Crime that pays forms the backbone of organised crime because its perpetrators are understood to direct their energy at criminal activities, such as drug-dealing, abalone and rhino poaching that yield profit for syndicate masterminds. It is the organisational element of the syndicate that needs to receive the attention of the law enforcement agencies and not only the outcome of the crime itself.

The Preamble to the POCA *inter alia* states, “That it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity.”

One of early statutory definition of organised crime in the United States is found in the Omnibus Crime Control and Safe Streets Act of 1968 and reads

“Organized crime, means the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.”

The “highly organized group” element became more and more diluted in later definitions as in Canada the definition of “criminal organization” is set out in section 467.1(1) of the Criminal Code of Canada that reads;

"Criminal organization" means a group, however organized, that

(a) is composed of three or more persons in or outside Canada and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.”

The difficulty to agree on common terminology appears to stem from the different forms that organised crime takes all over the world and thus it might be safe to say that the POCA wisely did not define the term “organised crime”.

In a writing “On Analysing Crime”, Edwin H Sutherland [1973] said that all behaviour, lawful and criminal, is learned. The principal part of learning occurs within intimate personal groups and what is learned depends on the intensity, frequency and duration of the association. When the associations are criminal the drive and attitude of committing crime add up to criminal behaviour.

A strained environment, with poverty and limited economic opportunities, explain to some extent, why persons from disadvantaged groups become involved in organised crime. In order to survive the association with the criminal activities made the participants comfortable and this “traditional” organised crime culture continue while the condition exists. The criminals at the bottom of the abalone poaching food chain is an example of this. They are the persons addressed by the Reactive Law Enforcement approach. Sherlock is the investigating officer.

However, why the middle class and wealthy become involve in organised crime is more difficult to understand. The organised crime activities becomes more involved as it grows from abalone poaching, drug running to massive industry fraud, money laundering, insider trading and so forth. The participants become disconnected to environmental strain and become fuelled by power and greed.

The latest growth sectors for organised crime are [identity theft](https://en.wikipedia.org/wiki/Identity_theft) and online [extortion](https://en.wikipedia.org/wiki/Extortion). These activities are troubling because they discourage consumers from using the [Internet](https://en.wikipedia.org/wiki/Internet) for [e-commerce](https://en.wikipedia.org/wiki/E-commerce). E-commerce was supposed to level the playing ground between small and large businesses, but the growth of online organised crime is leading to the opposite effect.

Changing the lens when looking at crime will go a long way to an effective state response to organised crime. The clue is in the Preamble of the POCA where it is said that management and related conduct in connection with enterprises that are involved in a pattern of racketeering activity ought to be criminalise.

Section 2 of POCA provides law enforcement agencies with the tool to do just that. The challenge is to cultivate the skill and, to a degree, the political will to equip. The demise of investigating bureaus such as the Scorpions has had a negative effect on policing organised crime.

Section 2(1) of the POCA, contains prohibitions regarding racketeering and consists of eight subsections of which 2(1)(e) and 2(1)(f) are the most relevant.

Sections, 2(1)(e) and 2(1)(f), require proof of the existence of an **“enterprise”** and **“a pattern of racketeering activities”** however, the two subsections vary with regard to the accused person’s relationship to the enterprise and the pattern of racketeering activity. Both these concepts are defined in the POCA.

Section 2(1)(e) reads that any person whilst **employed** by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity commits an offence

Section 2(1) (f) reads that any person who **manages** the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise’s affairs through a pattern of racketeering activity, commits an offence.

The definition of an “enterprise” is wide and signifies an association that is substantially different from the acts that form the pattern of racketeering activity.

In order to establish the enterprise, there has to exist a common or shared purpose in a formal or informal structure whereby a system of authority ensures continuity. There are two separate categories of associations that come within the meaning of an enterprise. The first encompasses organisations such as corporations, partnerships and other “legal entities”, and the second, covers “any union or group of individuals associated in fact, although not a juristic person or legal entity”. The definition of an enterprise thus includes both legitimate.

A pattern of racketeering activity means the planned, ongoing, continuous or repeated participation or involvement in specific offences as set out in Schedule 1 to the POCA and time gap between the offences ought not to be more than 10 years.

Section 2(2) ease to burden on the prosecution to a degree in that the court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in tis section notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.

The penalty clause shall make any law enforcement officer to wear the organised crime glasses as it is a fine not exceeding R1 000 million, or to imprisonment for a period up to imprisonment for life.

It is a well-known fact that environmental crime syndicates all over the world generates millions of US dollars in illegally gained profit. It is said that organised crime, worldwide, generates a third of the world’s monetary turnover, an economic activity that exceeds the gross income of many countries. Fisheries law contraventions in the Fisheries environment has been for some time a worthwhile opportunity for criminal enterprises to generate huge profits. The attitude of the law enforcement officials ought to change in order focus not only on the predicate offences but to address investigate the enterprise [syndicate] responsible for the predicates.

Section 3 contains the penalties for the contravention of any of these sub-sections and reads that; “Any person convicted of an offence referred to in section 2 (1) shall be liable to a fine not exceeding

R1000-million (R1-billion) or to imprisonment for a period up to imprisonment for life.”