

SPECIALIZED INSTITUTIONS FOR THE COMBAT OF ORGANIZED CRIME

COMPARATIVE LEGAL STUDY

1

**SPECIALIZED INSTITUTIONS
FOR THE COMBAT OF ORGANIZED CRIME**

RiskMonitor Foundation

Comparative Legal Study

Rada Smedovska

SPECIALIZED INSTITUTIONS FOR THE COMBAT OF ORGANIZED CRIME

Comparative Legal Study

Rada Smedovska, author

RiskMonitor Foundation

Sofia, 2010, ISBN 978-954-92501-4-5

RiskMonitor Foundation

29 Tzar Osvoboditel Blvd., 1000 Sofia, Bulgaria

e-mail: riskmonitor@riskmonitor.bg

<http://www.riskmonitor.bg/>

The publishing of this report was made possible
with the support of Open Society Institute – Sofia.

The views expressed in this report are those of the author
and do not necessarily reflect the views of Open Society Institute – Sofia.



© **RiskMonitor** Foundation 2010

All rights reserved. Publication of the report or parts of it
is not authorized in any form – electronic, mechanical, photocopying or otherwise –
without the written permission of the publisher.

Contents

I. INTRODUCTION	7
II. METHODOLOGY	8
III. OVERVIEW	9
IV. THREE DIFFERENT COUNTRIES, THREE IDENTICAL ISSUES	14
<i>THE DIRECTORATE OF SPECIAL OPERATIONS</i>	
<i>South Africa</i>	14
I. Introduction	14
II. Characteristics of organized crime in South Africa	15
II.1. Definitions of organized crime	15
II.2. The state's response to organized crime	17
II.3. Reasons for creating a specialized body for the combat of organized crime	18
III. Establishment of the Directorate of Special Operations (DSO)	19
III.1. Institutional structure of the DSO	20
III.2. DSO Structure	21
III.3. DSO Employees	24
III.4. DSO Functions	26
IV. Cooperation of the DSO with other institutions	28
V. Measuring DSO's Performance	29
VI. Political manipulations of DSO	30

**THE NATIONAL ANTI-MAFIA DIRECTORATE
(DIREZIONE NAZIONALE ANTI-MAFIA)**

Italy	33
I. Introduction	33
II. Characteristics of organized crime in Italy	34
II.1. Definition of organized crime.....	34
II.2. The Italian Mafias	36
II.3. Reasons for creating a specialized body for the combat organized crime.....	38
III. Establishment of the National Anti-Mafia Directorate (NAD)	40
III.1. Institutional structure of the NAD	41
III.2. NAD Structure	42
III.3. NAD Functions.....	44
III.4. International Cooperation of the NAD	44
IV. Creating the Anti-Mafia Investigations Directorate (Direzione Investigativa Anti-Mafia, DIA)	45
V. The effectiveness of the institutions investigating organized crime	46

THE SERIOUS ORGANIZED CRIME AGENCY (SOCA)

United Kingdom	51
I. Introduction	51
II. Characteristics of organized crime in the United Kingdom	51
II.1. Definitions of organized crime in the UK.....	52
II.2. Institutions for the combat of organized crime before the establishment of the SOCA.....	52
II.3. Reasons for creating a specialized body for the combat of organized crime.....	53
III. Establishment of the Serious Organized Crime Agency	54
III.1. SOCA Institutional Structure.....	55
III.2. SOCA Functions	57
IV. Accountability and Control of the SOCA	62
VI. Measuring SOCA's Performance	63

V. CONCLUSIONS	66
-----------------------------	----

SPECIALIZED INSTITUTIONS FOR THE COMBAT OF ORGANIZED CRIME

COMPARATIVE LEGAL STUDY



Executive summary

There exists no unified institutional model for fighting organized crime. Those countries around the world, which pursue the establishment of specialized bodies for combating organized crime, need to take into account each their existing legislative structures, political attitudes and public expectations. At first sight, the idea of creating a specialized crime-fighting body appears appealing. However, the experience of these countries shows that this is no easy task. Its realization often sets off political conflicts and raises concerns as to whether the chosen model is the most adequate.

Given the rising levels of organized crime, most of the relevant academic studies focus on defining this high-risk social phenomenon and the available methods for counteraction. They rarely take up the issue of the institutional structure of the specialized bodies for combating organized crime. The present study, carried out by researchers of the *RiskMonitor* Foundation, is an attempt to fill in this gap by providing a comparative legal analysis of the experience of three countries – the United Kingdom, Italy, and South Africa.

The three case studies indicate that the reasons for creating specialized crime-fighting bodies are relatively the same: poor coordination and overlapping powers of the responsible institutions, which leads to fruitless competition and ineffective and incomplete investigations. The comparative analysis provides strong evidence in support of the argument that having independent units within the prosecution is perhaps the best option. Such an approach is effective because it brings all investigation proceedings together under one roof or under the supervision of separate centralized bodies. The structural unity thus achieved is a means for overcoming the duplication of powers and the lack of collaboration and information exchange between the institutions. It increases significantly the possibility for cooperation starting at the earliest stages of the criminal proceedings. Equally important is the political, institutional and operational independence of these bodies, which makes possible the execution of many investigations of organized crime and corruption that may not have taken place otherwise.

Examining the experience of the three countries, the present paper draws attention to common problems and observations related to the creation and functioning of specialized institutions in charge of the investigation of organized crime. We hope that this study contributes a valuable source of information that will be of interest to both reform-seeking political officials and experts, and civic organizations active in this field, in their quest for a positive alternative and integrated model for fighting organized crime.

SPECIALIZED INSTITUTIONS FOR THE COMBAT OF ORGANIZED CRIME

COMPARATIVE LEGAL STUDY

"If we want to fight the mafia effectively, we need not turn it into a monster and say, 'It's an octopus.' We need only admit that it is like us." – Giovanni Falcone

I. Introduction

Does an institution exist today with the capacity to fight organized crime? If yes, how does it operate? Many researchers have attempted to answer these questions but rarely have they taken it up as the subject of a comparative legal study. Most analysts focus their attention on two main issues: the definition of organized crime and the available methods of investigation. The following paper is the first to take up the issue of the institutional structure of specialized bodies for preventing and combating organized crime.

The paper explores the experience of three countries – Italy, the United Kingdom, and South Africa – looking into the institutions in charge of the investigation of organized crime, the reasons for their establishment, and their mandate and operations.

The present study identifies problems in the creation of such institutions and highlights good practices and standards of work. The paper also discusses their performance level, using the statistics provided to the public by each of the institutions. Finally, it draws attention to the mechanisms needed for constructing an optimal institutional framework, which is vital for developing an integrated model for fighting organized crime.

II. Methodology

Faced with growing levels of organized crime in recent years, countries around the world have made significant reforms in their criminal justice system in order to increase the effectiveness of authorities fighting organized crime. The current paper presents the main trends and approaches designed to accomplish this mission. The number of countries included in the study is not by any means exhaustive; the three countries chosen for analysis represent the legal systems of both common and continental law. In two of the countries, the specialized institutions have been in operation only in the past several years.

To ensure consistency in the scope of the research and the content of each country report, this analysis concentrates on a number of subjects common to this issue. For the purposes of the study we have relied solely on publicly accessible information. This information includes primary and secondary legislation, official reports from the institutions being examined, statistical data, and academic and media publications. Where information detailing the practical operations of the institutions was available, it has also been included in the paper.

The current study does not claim to be comprehensive. It concentrates primarily on the characteristics of organized crime in each respective country, the main problems in this field, the reasons for creating a specialized body or bodies for combating serious crime, and the specific functions of such bodies. The country reports are not meant to be scientific or analytical papers, but rather aim to provide a theoretical description of the various approaches to fighting organized crime.

The study is divided into two parts. As each country included in it is unique, with its own specific practices, the first part provides a summary of the comparative analysis and presents the main observations and conclusions. The second part includes the individual reports on the specialized institutions for fighting organized crime in South Africa, Italy, and the United Kingdom.

III. OVERVIEW

At the beginning of the 21st century, organized crime is one of the most important issues on the political agenda and in public debates. Many countries around the world have undertaken serious legislative and institutional reforms to better prevent and fight organized crime, and a number of *ad hoc* legal acts have been adopted at international and European levels. Legal prosecution of organized crime requires significant efforts. First, the instruments for international cooperation and the national legislation need to identify and define the very phenomenon that the institutions are called to fight. Second, it is necessary to update the methods of counteraction and combat; any attempt to fight serious crime with the tools intended for conventional crimes is bound to fail.

One of the measures for improving *a priori* the effectiveness in fighting organized crime is the establishment of specialized bodies – be they part of the police, prosecution, courts or intelligence services. Recommendation 1 in the Resolution of the European Parliament of November 20, 1997 states:

[The EP] supports in principle the designation in each country of a body at national level responsible for the coordination of measures to combat organized crime, provided that this takes the form not of a new unwieldy level of bureaucracy but of a flexible service agency providing rapid, unbureaucratic and informal aid to national prosecution services.¹

The three countries included in this study are examples of those that have established specialized bodies for combating organized crime. In Italy, this is the *National Anti-Mafia Directorate* (NAD), in South Africa - the *Directorate of Special Operations* (DSO), and in the UK - the *Serious Organized Crime Agency* (SOCA). In two of these countries, the institutions have been set up recently; the DSO came into existence in 2001 and the SOCA in 2006, while the NAD was established in 1992.

Drawing upon the comparative review, the following main observations and conclusions can be made:

- **Lack of a common legal definition of „organized crime“**

None of the three national legislations we have studied provides a distinct definition of „organized crime“ that is capable of operating as a functional mandate for the responsible specialized institutions. However, this does not necessarily impact their performance in a negative way.

For example, before the establishment of the Directorate of Special Operations in South Africa, each regional police force worked with a different definition of organized crime. At a national level there was also a diversity of definitions, and it was unclear which definitions to use and for which cases. One conclusion may be that such formulations are not critical for the work of the institutions. On the other hand, this puts pressure on the authorities

¹ (No author), Resolution of the EP Of 20 November, 1997, “European Parliament website, [<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A4-1997-0333+0+DOC+PDF+V0//EN&language=EN>]

to develop systems of additional indicators to use in their investigative procedures.

The Serious Organized Crime and Police Act, which is the statutory foundation of SOCA in the UK, also fails to spell out what is „serious organized crime.“ Critics regard this a shortcoming of the law because it leaves room for a broad interpretation of the Agency's legislative mandate. The government report that endorses the idea for the creation of a specialized body for combating organized crime refers to the definition applied by the National Criminal Intelligence Service (which will subsequently become part of SOCA).

The concept of organized crime is written into the Italian legislation, however, no specific definition can be found in the normative documents. One notable feature of the Italian legislation is the distinction it makes between conventional organized crime and mafia-related crime. Conventional organized crime was defined as „associating in an organization for the purpose of committing a crime,“ to which, because of the changes in the legislation in 1982, a new type of crime was added – „associating in a mafia-type organization.“

• **Intensive legislative efforts dedicated to organized crime**

The countries studied here are rapidly developing legislative proposals on measures against organized crime. One reason for this is the alarming escalation of such crime. South Africa has adopted an entirely new set of laws in this area as a response to the change of political regime in the country and the transition to a democratic government. In the course of eight years, for example, ten new laws were introduced on various aspects of the fight against organized crime. Such progress is positive and commendable, showing that South Africa is thus embracing universal democratic standards. On the other hand, it causes certain difficulties because the existence of rules and regulations does not necessarily lead to an increase in the efficiency of the responsible institutions. Furthermore, successful enforcement of the law requires a longer timeframe.

The obstacle that Italy faces is quite different – a lack of coherent legislation regarding organized crime. The anti-Mafia legislation comprises various regulations scattered over many judicial branches. In ten years, 114 laws regarding organized crime were introduced. Most of these laws came in the aftermath of terrible crimes and were considered as offspring of the emergency situations that they followed.

• **Poor coordination between the competent institutions and overlapping powers are the main reasons for creating specialized bodies for combating organized crime**

The present study demonstrates that the rationale for establishing specialized bodies in charge of investigating organized crime varies little for each country. In most cases, the lack of effectiveness is attributed to 1) existing institutional problems and thus poor coordination between the various competent bodies, 2) incomplete and fragmentary investigations (Italy, South Africa, UK), 3) overlapping powers (especially in South Africa and the UK), and 4) lack of the necessary exchange of information and collaboration between the institutions which generates unhealthy competition between them (this is the dominant factor in the UK).

• Lack of a universal institutional model for tackling organized crime

Each country decides on the best structure and set-up of the designated body considering its own legislative and institutional framework, political priorities, public needs, social expectations, etc. In two of the countries, Italy and South Africa, the respective institutions are established as specialized functional directorates within the prosecution and perform specialized tasks related to criminal investigation.

The Italian National Anti-Mafia Directorate is created as part of the Prosecution of the Supreme Court of Cassation and plays the role of a central coordinating point for ensuring the efficiency of the investigations being carried out. It is supported by 26 District Anti-Mafia Directorates, which are in charge of the criminal investigations within their territory. Similar to the NAD, the Directorate of Special Operations in South Africa is part of the National Prosecuting Authority, which is the largest unit in the National Prosecution, and its main powers involve carrying out criminal proceedings on behalf of the state.

The experience of the UK differs significantly from that of the other two countries, since the Serious Organized Crime Agency is not only an investigation service but also an intelligence service. The SOCA was established as an Executive Non-Departmental Public Body (NDPB) of the Home Office, and has been criticized a great deal for its statute. Many in the academic circles have raised doubts with regard to its institutional structure. For one, it is not clear whether it is a law enforcement service, or an intelligence service. In the process of creating it, the government declared that it was not a new police force, but at the same time the Agency's statute foresees the same powers for its officers as for police officers. As an intelligence entity, the Agency has the power to collect information about particular serious crimes, however, this does not guarantee a subsequent investigation.

• Difficult „first steps“

In two of the countries, the first years of operation of the specialized crime-fighting institutions were marked by many difficult moments. In Italy, shortly after the launch of the NAD, two-thirds of its prosecutors organized a protest against its ineffectiveness and lack of management capacity. The overall fear was that, as structured, the NAD would never be efficient. This negative attitude was rooted in the belief that NAD is entirely the brainchild of Giovanni Falcone, the judge who laid the foundations of the institution but did not live to see it grow – he was killed shortly before its official launch. Nevertheless, in the course of time, these obstacles were set aside and the NAD came to prove its effectiveness.

The SOCA has to deal with other challenges, mainly due to its non-departmental status. During its first year of operation, the SOCA had to cope with many organizational problems; it needed to restructure the institutions brought together under its roof and adapt to new procedural rules, building its own organizational culture. Overall, in its two years of existence, the SOCA made a name for itself as „an organization that is cautious and bureaucratic, overburdened with managers and top-level executive positions.“

Only the creation of the Directorate of Special Operations in South Africa brought remarkable joy to society because of the high public expectations

and the need to regain trust in the judicial system. Difficulties for the Directorate emerged nevertheless in 2007, when the African National Congress declared its plans to restructure the police and the prosecution, requiring DSO to merge with the South-African Police Service (SAPS). No good reasons were provided to back-up the decision for the disbandment of the DSO. The opposition parties perceive this act as the intent of the ANC to protect its own members from possible accusations and investigations of corruption. In other words, the reform was triggered by political insinuations connected with DSO rather than concerns about its ineffectiveness.

- **Broadly defined legislative mandate hampers practical implementation**

The legislative practices in the countries studied here show that, in general, the functions of the specialized institutions are defined very broadly, which hampers the practical implementation of their mandate.

The South-African Directorate of Special Operations has the power to institute criminal proceedings, carry out investigations, and perform all functions related to investigating organized crime or any other crime category, as proclaimed by the President. The DSO may also gather, store and analyze information related to its activities. The legislator intentionally defined its scope of activity in such broad terms to allow a wider range of crimes to fall under its jurisdiction. The extent of the legal powers thus defined is an obstacle to its operational mandate because it lacks clarity and precision. To deal with this, the DSO has had to develop its own system of criteria detailing its spheres of activity, but they are closer to a set of internal terms of reference than a legal mandate in the true sense of the word.

The situation is similar with the SOCA. The legislative act defines it as an intelligence agency with law enforcement rights and three main functions: prevention and detection of serious organized crime, reduction of the number of such crimes, and reduction of the damage caused by crime. SOCA is also entrusted with collecting, recording, analyzing and disseminating information as needed to perform the above functions. As noted above, this has raised many concerns about the status of the Agency and its public image. Most likely, this is why the public still perceives the SOCA as an institution that has yet to find its right place.

The Italian experience in this regard is different. The National Anti-Mafia Directorate plays the role of a central coordinating point for the investigations carried out by the 26 District Anti-Mafia Directorates. To reach this goal, the powers of the person in charge of the NAD, the National Anti-Mafia Prosecutor, are clearly written into the law.

- **Absence of social and political criteria for assessing the performance of the bodies combating organized crime**

The effectiveness of any institution depends to a high extent on an accurate definition of its powers and functions. Respectively, assessment of the institution's performance reflects the level of achievement with regard to the objectives set before it and the political and public needs that have brought it into existence in the first place. The experience of the countries studied illustrates that, by and large, assessment criteria for the effectiveness of crime-fighting institutions are not available. Official reports issued by the institutions focus on statistical data and quantitative indicators. However,

the fight against organized crime requires a different type of assessment. Organized crime causes harm to the economic, political, and social life of the country. Therefore, when it comes to the performance of the institutions in charge of putting it to an end, they must concentrate much more on the qualitative aspects that have an impact on society as a whole.

The quantitative indicators may *a priori* reflect positive outcomes, but they do not always provide for the best image of the institution. In South Africa, for instance, the number of cases filed in court is impressive (94% during the first years, 85% for the period 2006-07), but this rate of success has been the subject to criticism and allegations that the DSO is only taking on select cases based on their probability of success. On the other hand, a comparison with the National Prosecution shows that the effectiveness of the DSO is the same as that of regular prosecutors, since the percentage of convictions is about 86%. Of course, we need to account for the fact that the National Prosecution investigates only conventional crimes and DSO tackles organized crime. In other words, the statistics are not definitive and only allow for a comparison of past and present performance. Within this context, it would be necessary to introduce more qualitative indicators, such as the cessation of criminal activity, the dismemberment of organized crime groups, etc.

The case is similar with the SOCA. The mission of the Agency – to reduce the damage caused by organized crime – requires qualitative indicators to measure its effectiveness. The reports of the Agency two years into its work focus primarily on statistical data, leaving behind the question as to whether the Agency has met the political and public standards for performance expected of such bodies. SOCA officers claim that, in general, confiscating large quantities of drugs does not significantly affect the illicit activities of the big drug dealers. Others have also voiced the concern that the SOCA's mandate is far too broad and hard to implement practically. In addition, since no independent body exercises control over the Agency, the performance assessment is in the hands of the SOCA. Furthermore, considering the absence of assessment criteria, it is hard to judge how efficiently and effectively the Agency has utilized its resources.

Again, Italy's experience in this respect is unique. It is one example of a country where measuring the performance of the crime-fighting institutions is not tied to the prosecutors' success in court and the ratio of resources to outcomes in the investigation. The explanation lies in the argument that using such data to assess the prosecutors' performance poses a threat to their independence, which is enshrined in and warranted by the constitutional principle of compulsory criminal action.

IV. THREE DIFFERENT COUNTRIES, THREE IDENTICAL ISSUES

THE DIRECTORATE OF SPECIAL OPERATIONS

South Africa

I. Introduction

In 1994, South Africa began a process of institution building and constitutionalism. Ambitious reconstruction plans involved the reorganization of public services, legislative reforms, and institutional transformation and development. This was a difficult period because state institutions, including criminal justice departments, had to perform while at the same time implementing the reforms that the new constitutional state required of them. New laws and policies were introduced which aimed to build a new South Africa founded on the values of human rights, democracy, and anti-racism. In 1998 alone, 132 pieces of legislation were considered by Parliament.² A new set of legislation and strategies for the prevention and combat of organized crime were adopted, not only as a response to growing public insecurity and threats to the social order, but also in an attempt to regain public trust in the judicial system.

The phenomenon of organized crime is relatively new to South Africa, but has quickly grown to be one of the most serious and visible social problems. During the apartheid, criminal activity was low since the country, immersed in a civil war, was isolated from other parts of the world. The crime rate rose in the '80s and reached dramatically high levels in the early '90s. Consequently, the government declared the combat against crime its most important political priority.

The geographical location of South Africa also played a role in the rise of crime there. When the new democratic government took the country out of its international isolation, it became a transitional territory for drug trafficking between the Middle and Near East, America and Europe.

The idea for creating the Directorate of Special Operations was proposed in 1999 by the President of South Africa, Thabo Mbeki, but its official start was in 2001 with the adoption of the respective legislation. Several reasons led to its establishment: the constantly rising levels of organized crime, the inability of the South African Police Service to tackle it effectively, and the need to introduce new multidisciplinary methods for combating serious crime.

² Anton du Plessis, Martin Schönteich, and Jean Redpath, „Report on the South African Prosecuting Authority,“ in *Promoting Prosecutorial Accountability, Effectiveness and Independence* (Sofia, Open Society Institute & New York, Open Society Justice Initiative, 2008).

II. Characteristics of organized crime in South Africa

In 1994, the South African Police Service made their first attempt to assess the scope and gravity of organized crime in South Africa. In the following years, several more analyses followed, focusing primarily on the number of organized crime groups and the distribution of those groups according to the type of criminal activity. These assessments revealed the main trends in organized crime: a) continuing growth of organized crime activity, b) an increase in criminal activity carried out by international crime groups (Nigerian, Russian, Chinese, Italian), c) improved methods of operation of the local crime groups, and d) increased use of lethal weapons. The experts identified several necessary factors to be taken into account when analyzing the status of organized crime: first, the extent to which various crime groups have built or united under a common structure; second, the role of former members of the security forces from the time of apartheid; third, the access that crime groups have gained to different levels of government; and fourth, the flow of international organized crime groups into South African territory and the establishment of connections with local crime groups.³

The main reason for the rise in crime was the elimination of customs controls, which enabled international crime groups to access South Africa. At the time, law enforcement authorities were not prepared to deal adequately with these circumstances. They lacked the necessary expertise and resources and, on top of that, were under pressure to reform and shift from authoritarian control to democratic governance.

The international crime groups active on South African territory are predominantly Nigerian, Russian, Chinese, and Italian, and each specializes in particular criminal activities. According to the police, Nigerian crime groups control the cocaine markets; Russian groups control weapon trafficking, auto thefts, and drug dealing; and the Chinese control illegal ivory smuggling, money laundering, and trafficking of Chinese immigrants.

The analysis showed that as a whole, organized crime is fragmented and hard to put in numbers. According to a 2004 police report, 341 crime groups were operating on the country's territory. The major crimes committed were car thefts and drug trafficking, as well as the smuggling of precious metals and stones. There were two types of crime groups – local and international. The local groups lacked the cohesion and organization typical for the international mafia.⁴ Their structure instead was more dynamic and loose, which posed further obstacles to law enforcement authorities trying to put them on file and investigate them. There was also evidence of ties between local organized crime groups and Chinese triads, Russian criminal groups, and the Italian mafia.

II.1. Definitions of organized crime

For many years, there had been no in-depth study of organized crime in South Africa, which explains the absence of a legal definition of the concept. The South African Police Service Act of 1995⁵ provides a very general

³ Mark Shaw, „Organized Crime in post-Apartheid South Africa,“ ISS Occasional Papers No 28, Institute for Security Studies (January 1998).

⁴ P. Gastrow, *Organised Crime in South Africa: An Assessment of its Nature and Origins*, ISS Monograph Series, No 28, Pretoria: Institute for Security Studies (August 1998).

⁵ South African Police Service Act No 68 of 1995.

definition of this phenomenon. The act stipulates that a criminal offence is regarded as organized crime if committed „...by any enterprise or group of persons who have a common goal in committing crimes in an organized manner.“⁶ Other studies show that this is not the only definition used by the police. For instance, they refer to the definition provided by Interpol⁷ or the definition developed by A. Standing, which asserts that „organized crime is the systematic activity of committing crimes, motivated by greed for profit and/or power.“⁸ It is difficult to understand when and in what situations the various definitions apply, which suggests that a precise definition may not be crucial for the work of the police.⁹

Since these definitions stand wanting, the police introduced a system of additional indicators to be used in investigations. A minimum number of indicators must be present to define a criminal group as „organized“¹⁰:

- collaboration between more than two persons,
- participation in serious crime for a prolonged or indefinite period of time, and
- crime, motivated by the pursuit of material gain or power.

In addition to the above criteria, at least two of the elements below must apply:

- use of commercial or business-like structures,
- clear definition of tasks by group members,
- involvement in a money-laundering scheme,
- use of force for the purpose of intimidation, and/or
- exertion of influence on politics.

The Prevention of Organized Crime Act (POC) of 1998 took another shot at defining organized crime. The terminology used there refers to „patterns of criminal gang activities“ and „patterns of racketeering activities.“¹¹ Unofficial definitions of organized crime are also in circulation. For instance, the Institute of Security Studies provides the following formulation: „Organized crime is significant and planned criminal activity which involves several persons acting jointly, or at least with a common purpose, to commit a crime or a series of crimes, motivated by the prospect of direct or indirect material benefit. The persons involved may be human beings or corporate bodies.“¹²

Developing an accurate definition of organized crime in South Africa has been hindered by another widely-accepted term and the phenomenon to

⁶ South African Police Service Act of 1995, section 6 (1 & 2a).

⁷ „Any group having a corporate structure whose primary objective is to obtain money through illegal activities, often surviving on fear and corruption“ (Paul Nesbitt, „Head of Organized Crime Group,“ cit. in Bresler 1993, 319), <http://www.organized-crime.de/OCDEF1.htm#interpol>

⁸ Andre Standing, *Organized Crime: the Evolution of a Mainstream Definition*, ISS Monograph Series, No 77, Pretoria: Institute for Security Studies (February 2003).

⁹ Standing, *supra* note 8.

¹⁰ Ibid.

¹¹ Prevention of Organized Crime Act of 1998, chapters 2 and 4.

¹² (No author) <http://www.organized-crime.de/OCDEF1.htm#iss> (undated).

which it refers – „gangster.“ The Prevention of Organized Crime Act stipulates that this is „any formal or informal organization or association 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.“¹³

According to some South African researchers, gangsters have less formal structures than do criminal associations. They are active in selected regions. Their criminal activities are not incredibly intricate. Usually, they are young and give themselves gangster names.¹⁴ „A criminal gang consists of an organized group of members with a sense of cohesion, is generally territorially bound, creates an atmosphere of fear and intimidation in the community, and whose members engage in gang-focused criminal activity either individually or collectively.“¹⁵ The number of varying gang activities makes it more difficult to arrive at an adequate and understandable definition broad enough to cover all of the enterprises qualified as gang activity. Nevertheless, several characteristics appear to be common across the board¹⁶:

- Gangster groups are comprised of members of different ages, mostly between 20 and 40 years old.
- The gangsters' social status determines the type of criminal activity they engage in.
- Gangsters can be both street criminals as well as leaders of organized crime groups.

II.2. The state's response to organized crime

One of the first reactions of the government to growing crime was the development of an effective crime-fighting strategy and the introduction of legislation devoted to specific categories of crime. Preventing crime and fighting crime were described in two separate documents:

A) The first is the National Crime Prevention Strategy, adopted by the government in 1996. The long-term goals set out in this document were soon forgotten because of growing public frustration with rising crime and political pressure on the government for immediate solutions. New short-term measures were adopted and for a time the National Growth and Development Strategy was shelved.¹⁷

B) The second is the National Crime Combating Strategy, which was developed by the South African Police Service (SAPS) but has never been issued as an official document.¹⁸ The NCCS has two elements. The first describes the geographic areas with the highest recorded crime levels

¹³ Prevention of Organized Crime Act No 121 of 1998, section 1, (iv).

¹⁴ Gastrow, *supra* note 4.

¹⁵ Ibid.

¹⁶ Irvin Kinnes, „Gang Warfare in The Western Cape: Background,“ in *From Urban Street Gangs to Criminal Empires: the Changing Face of Gangs in the Western Cape*, ISS Monograph Series, No 48 (June 2000).

¹⁷ Anton du Plessis, Antoinette Louw, „Crime and Crime Prevention in South Africa: 10 Years After“ (Crime and Justice Program, Institute for Security Studies), *Revue canadienne de criminologie et de justice penale* (Avril 2005), at 430.

¹⁸ Ibid.

where the police invest most of their resources and conduct intensive police operations. The second part focuses on organized crime and investigations of organized crime groups carried out by highly qualified and experienced detectives. A public opinion survey in 2003 showed that the outcomes of the Strategy were good; in the regions where police operations took place, the level of public security rose significantly.¹⁹

Besides the two strategic documents outlining basic crime prevention and reduction policies in South Africa, many important new laws addressing specific crime problems were approved, the most important of which was the Prevention of Organized Crime Act of 1998.²⁰ The POC enabled the introduction of measures against organized crime, money laundering, and criminal group activities, the prohibition of racketeering and money laundering, the criminalization of certain activities regarded as gang activities, and also set forth procedures for asset recovery and confiscation of the proceeds from criminal activity. Along with the new law, new special units within the National Prosecuting Authority were established; these were the Directorate of Special Operations and the Criminal Asset Forfeiture Unit, which focuses on the implementation of civil and criminal asset forfeiture legislation.²¹

An encouraging step in the reforms was the introduction of entirely new legislation related to combating organized crime. The influence of the USA and the UK on this process was significant. Despite positive feedback from international experts on the coherent legislative framework, law enforcement representatives felt that „it is one thing to have comprehensive and good laws; it is another thing to implement them.“²² In less than ten years (from the beginning to the end of the '90s) ten new laws were adopted, even though they entered into effect much later – four in 1997-1998, two in 1999, and one in 2000.²³ Notwithstanding the period it will take for the effective implementation and enforcement of the laws, South Africa is making fast progress in drafting new legislation.

II.3. Reasons for creating a specialized body for combating organized crime

During the early years of political transformation in South Africa, political issues were higher on the government agenda, and organized crime only became a priority toward the end of the '90s. The number of media publications increased and with them also the public interest in organized crime investigations and their outcomes. However, the criminal justice system was inadequately prepared to react to this attention; there was no specialized body in charge of analyzing and combating organized crime. In most cases, the counteractions to these crimes were random and poorly coordinated between the many agencies working in this field. Institutional tensions were at the root of most of the existing problems.

Poor coordination: One of the main challenges with prevention and reduction of organized crime is poor coordination between the various

¹⁹ Ibid., at 431.

²⁰ Prevention of Organized Crime Act 121 of 1998.

²¹ Prevention of Organized Crime Act 121 of 1998, chapters 5 & 6.

²² Anton du Plessis, Antoinette Louw, *supra* note 17.

²³ Martin Schoenteich, „How Organized is the State's Response to Organized Crime?“ *African Security Review*, Vol. 8/No 2 (1999).

institutions in place. With regard to the criminal justice system, the tasks of investigating and collecting information about organized crime groups were divided among various units of the police force: the organized crime unit, the auto theft unit, the anti-corruption units, the Internal Security Unit, the National Intelligence Service, military intelligence, and the South African Secret Service. Such fragmentation prevented an accurate assessment of the financial resources invested in efforts against organized crime. The lack of transparent information about the allocation of financial resources to specific activities made an objective assessment of the institutions' performance very difficult.

Before the creation of the DSO, the national and regional divisions of the South African Police Service were in charge of criminal investigations. They were assisted by the Crime Intelligence Service (the former „Security Unit“, which dealt with political crimes during the Apartheid) and the National Intelligence Agency. Officers from these services have disclosed information about internal rivalry and competition between the police and the Agency.²⁴

Lack of investigative capacity: Toward the end of the '90s, academic studies point out that, despite the efforts of the authorities, there was an urgent need for a new assessment of the current developments in organized crime and a more sophisticated analysis of the various threats and risks the country faced. The annual reports of most of the crime-fighting institutions marked the number of arrests made as successes, but rarely mentioned any achievements of the investigation. The number of open cases and failed investigations was significantly high. The main reason for that was the lack of investigative capacity. For the institutions, it was hard to shift from a criminal justice system based entirely on personal confession to a new democratic system in which gathered evidence was the leading investigative element.²⁵ Another key problem was a lack of skills and resources, which prevented the special units from taking on more cases. Furthermore, the police forces proved incapable of attracting a core of experienced investigators who could lead the more complex and difficult investigations.

III. Establishment of the Directorate of Special Operations (DSO)

President Thabo Mbeki proposed the development of the DSO in 1999, soon after being elected president. Because there was no widespread debate in Parliament or among the public preceding the creation of the DSO, political opposition parties expressed some doubts; they feared that the DSO would become the President's elite „private police force.“ In spite of these concerns, the effective work of the Directorate later on, including the investigations of wealthy and prominent public figures, along with a very successful PR campaign, soon made the institution popular among the public.²⁶

The following three reasons sum up the rationale for the creation of the DSO²⁷: first, the perceived incapacity of the SAPS to investigate high-priority crimes; second, the need to develop a multidisciplinary approach in the fight

²⁴ Shaw, *supra* note 3.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations, 14 June 2005.

against organized crime and corruption; and third, the need to establish an entity that would be able to attract, recruit, reward and retain highly skilled personnel. The new agency received the support of all institutions involved in crime prevention and crime reduction: according to the police, „[T]here is a need of multidisciplinary investigations of organized crime and terrorism.“ The National Prosecuting Authority declared the need for „joined efforts for radical improvement of the citizens’ security,“ and the Minister of Justice and Constitutional Development emphasized the „need of effective measures against organized crime and corruption.“²⁸

Public frustration and low trust in the institutions’ ability to effectively tackle organized crime was the major factor leading to the establishment of the DSO. This may explain why the institution began work even before the respective legislation came into effect. The initiative was announced in September 1999, and the required legislative changes came into effect in January 2001. That is, for sixteen months the DSO operated on a legal void. Nevertheless, from the very beginning the members of the DSO, dubbed ‘the Scorpions’, were subjects of public euphoria as a result of a well-managed media campaign including free T-shirts and baseball caps emblazoned with their catchy name and logo. The person appointed as the director of the DSO (Frank Dutton) was not even in the country at that time but returned a month later from an assignment in the Hague.

The Scorpions officially came into legal existence in January 2001, when the amendments to the National Prosecuting Authority Act were adopted.²⁹ The people in the Directorate had to work under a great cloud of uncertainty during this initial period before the legislation was approved; most were seconded to the unit and did not know if they would eventually be appointed to the DSO. Nobody knew exactly where the new unit would fall and what its powers and obligations would be. The legislative acts concerning the DSO took several months to finalize. At first, a draft Directorate of Special Operations Bill was drawn up. Members of Parliament complained that the bill was confusing and difficult to follow. Eventually, the Scorpions came into existence by an Amendment to the National Prosecution Act.

III.1. Institutional structure of the DSO

The DSO is a specialized unit within the National Prosecuting Authority, and is therefore accountable to it. The decision to locate it outside the police force reflects the persisting perception of politicians and the public that the police cannot effectively tackle complex forms of organized crime. In the early 1990s, allegations circulated about serious levels of crime within the police itself. When President Mbeki announced the creation of the DSO, he admitted that one of its tasks would be the investigation of corruption matters within the police.³⁰

The National Prosecution Service is the largest entity within the National Prosecuting Authority whose main power is to institute and conduct criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.³¹ The other units operate

²⁸ The Khampepe Commission, *The Future of the Scorpions at Stake*, ISS Monograph Series No 126, Pretoria: Institute for Security Studies (June 2006): at 2.

²⁹ National Prosecuting Authority Amendment Act 61 of 2000.

³⁰ Anton du Plessis, Martin Schoenteich, and Jean Redpath, *supra* note 2.

³¹ National Prosecuting Authority, *Annual Report 2005/06* (2007), at 18.

independently of the National Prosecution and mainly perform supporting functions or work on specialized criminal proceedings. The other units include:³²

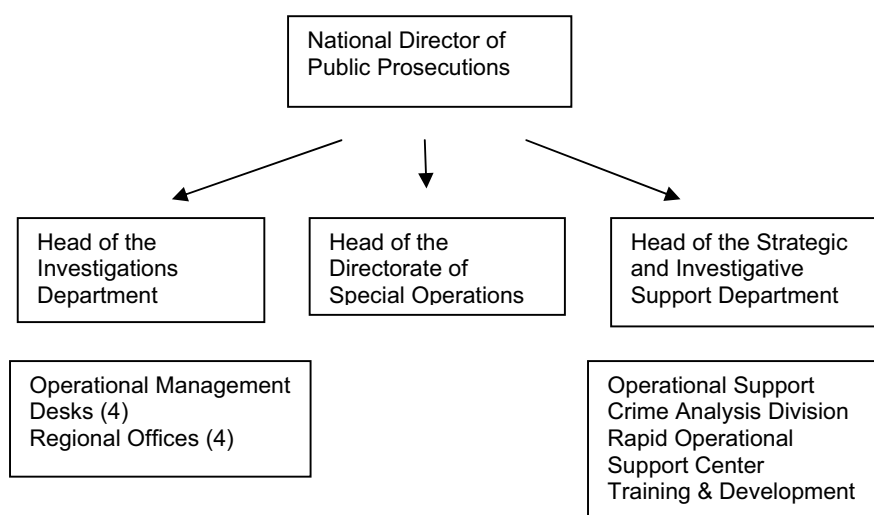
- the Directorate of Special Operations,
- the Criminal Asset Forfeiture Unit, which carries out asset recovery proceedings as laid down in the civil and penal codes³³,
- and four corporate units grouped in the National Directorate for Special Services.

The Directorate of Special Operations reports directly to the National Director of Public Prosecutions (NDPP). The National Director is not formally the head of the DSO but it is within his powers to veto any investigation, including those carried out by the Scorpions. Several years into the establishment of the DSO, an old debate regarding its constitutionality resurfaced. By statute, the Directorate of Special Operations is part of the National Prosecuting Authority instead of the South African Police Service, though South Africa's Constitution stipulates the existence of a single national investigative police institution.³⁴ However, there is no indication in the Constitution that the investigation falls exclusively within the powers of the police. This explains the inclusion of the following lines in the Preamble to the National Prosecuting Authority Amendment Act of 2000: „[T]he Constitution does not provide that the prevention, combating or investigation of crime is the exclusive function of any single institution.“³⁵

III.2. DSO Structure

The structure is as follows:³⁶

Figure 1: Directorate of Special Operations



³² Plessis, Schoenteich, and Redpath, *supra* note 2.

³³ Prevention of Organized Crime Act 121, chapters 5 and 6.

³⁴ Constitution of the Republic of South Africa Act 109 of 1996, Article 199 (1).

³⁵ National Prosecuting Authority Act, <http://www.info.gov.za/view/DownloadFileAction?id=68230>

³⁶ LF McCarthy, Directorate of Special Operations „Scorpions“, *Presentation to Parliament*, 18 June 2004.

The Head of the DSO is one of four Deputy National Directors of Prosecution appointed by the National Director of Public Prosecutions. He or she is responsible for the overall management and operation of the Directorate and consults with the head of the Investigations Unit for authorizations and permits.³⁷

The DSO has two main departments: the *Strategic and Investigative Support Department* and the *Investigations Department*.

1. The Strategic and Investigative Support Department is comprised of three separate divisions:

The *Operational Support Division* provides operational support to regional offices, which includes conducting surveillance operations, assisting investigators with the interception and monitoring of suspects, performing high-risk arrests, and protecting witnesses. Operational Support staff is based at the head DSO office, and must therefore travel around the country to carry out their supporting functions.

The *Training and Development Division* consists of eight trainers. The Unit is responsible for training new employees and for conducting „certification examinations“ for new recruits who are supposed to acquire certain core skills and on-the-job training during their initial 24 month probation period.

The staff of the *Crime Analysis Division* primarily includes analysts (about 2% of DSO employees). When the Scorpions were initially created, there was ambiguity about their role and they were not much involved in the CAD's operations. Over the course of time, however, their duties and powers were specified with more detail and the analysts became an essential part of the DSO. The analysts are divided into „senior“ and „junior“ analysts, each with distinct duties. Senior analysts perform strategic work; they analyze the main criminal trends in each region, provide strategic guidelines, and must participate in the preparation of the annual management plan of the DSO. Junior analysts do the technical work-data entry into special software created for the purposes of the DSO, data analysis, etc.

The *Rapid Operational Support Center* is part of the *Crime Analysis Division*. Its responsibility is collecting information from national institutions, private organizations and companies. (Most often, the ROSC files requests and receives information from the Ministry of Interior and the mobile phone companies.)

2. The Investigations Department

The National Director of Public Prosecutions appoints the Head of the Investigations Department. This gives him or her some autonomy in decision-making; s/he has the power to decide whether or not to initiate a full investigation; s/he may authorize preparatory investigations and decide which investigations the Scorpions, including those referred to DSO by the National Director of Public Prosecutions, should carry out. When there is a dispute, the Head of the Investigations Department must consult with the NDPP and, in reality, s/he frequently adopts the latter's position.³⁸

Time has shown that the day-to-day operations and policies of the

³⁷ J. Redpath, *The Scorpions: Analyzing the Directorate of Special Operations*, ISS Monograph Series No 96, Pretoria: Institute for Security Studies (March 2004), at 34.

³⁸ Ibid., at 17.

Investigations Department are shaped to a large extent by the person in charge of it. Until 2002, that person was Percy Sonn, who professed to follow an „open-door“ policy and had an informal relationship with the people who worked for him. He found the bureaucratic procedures required to be followed within the NPA very burdensome, and tried to circumvent them whenever he could in order to get the job done.³⁹ In July 2002, Percy Sonn resigned. Leonard McCarthy, whose management style was completely opposite to that of Sonn's, replaced him. McCarthy believed in a strict observation of the letter of the law in all procedures and a reliance on written communication with his subordinates.

Regional offices

The Directorate of Special Operations has four regional offices. They are usually led by the deputy directors of public prosecutions, but these deputy directors have far less authority than prosecutors have in the National Prosecution Service. Regional heads are responsible for the overall management of their offices and staff. They have no power alone to decide to initiate a full DSO investigation; they can only decide on „pre-preparatory“ investigations in which the officers involved do not have full use of DSO powers. All preparatory investigations and full investigations have to be authorized by the director of the Investigations Department.

To initiate an investigation, the head of a regional office has to provide a motivation, including existing evidence, as to how the matter appears to fall under the DSO's operational mandate. Regional heads can therefore only make a recommendation as to whether an investigation should be taken on. For authorization to undertake a trap or undercover operation,⁴⁰ the regional head may approach the local office of the Provincial Director of Public Prosecutions or the National Director's office (National Prosecuting Authority). An application for an interception order („wire tap“) must go via the relevant Operational Management Desk (see below). The Director of the Investigations Department approves the applications for a search warrant, as s/he must also designate the persons conducting the search.

Each regional office is divided into groups. A prosecutor, who is responsible for each individual case, leads each group. Prosecutors therefore spend most of their time in supervising, managing, and coordinating the investigations. In addition, each case is assigned a „lead investigator.“ The case is the primary responsibility of the investigator, with the assigned prosecutor acting in an advisory capacity until the case is court-ready. After that, the case becomes the primary responsibility of the prosecutor.

Some regional offices have experimented with an alternative organizational system in which each group has two group leaders, one of whom is a prosecutor and one an investigator. This new system reflects both a shared perception that prosecutors are not always best placed to properly lead an investigation and a desire for more control over the investigation by the investigators themselves. In reality, each regional office faces different challenges, and how each one operates depends on the people involved.⁴¹

³⁹ Ibid.

⁴⁰ The Office of the Head of Operations: DSO. Circular:1. Effective Date 8 November.2001. Signed: Acting Investigating Director Adv. LF McCarthy 7-11-2001.

⁴¹ Redpath, *supra* note 37, at 32.

Operational Management Desks

Since November 2001, four Operational Management Desks have been established at the DSO head office. The function of these desks is to assist the Head of the Investigations Department and the Head of the DSO in processing the authorizations requested from the regions. Each desk deals with a different category of crime⁴²; financial crimes, corruption-related crimes, crimes falling under the Prevention of Organized Crime Act, and organized crime groups. Initially, there was criticism against the creation of these desks as just another layer of bureaucracy between the head of investigations and the regional offices. However, the desk structure is defended on the basis that it is impossible for the head of operations alone to process all the authorizations and respectively assign the work according to the type of crime. Because of the workload, the DSO takes on a very small number of cases per year.⁴³

III.3. DSO Employees

The total number of DSO employees is about 600, classified into several categories.

Investigators

The investigators comprise most of the DSO, about 64% of all employees. There are three types of investigators called *special investigators*, *senior special investigators*, and *chief investigating officers/chief special investigators*. Many argue that this structure significantly reduces the career opportunities within DSO. Once a person is promoted to senior special investigator, the only available step up is chief investigating officer. Higher-ranking positions are limited in number, and this is a real obstacle to the young and ambitious officers joining the DSO.⁴⁴ Chief Special Investigators (CSIs) are appointed to each regional DSO office. They are not directly involved in the investigations but oversee all the investigators and their work. The CSI's main job is to support the head of the regional office.

According to the provisions of the Criminal Procedure Act, special investigators have powers that are bestowed upon police officials relating to a) the investigation of offences, b) the entry and search of premises, c) the seizure and disposal of articles, and d) arrests and the execution of warrants.⁴⁵ Before the amendments to the National Prosecuting Authority Act of 2000, the Scorpions did not possess these powers which only extended to SAPS at that time. Therefore, during the first sixteen months of operations of the DSO, while the legislation was in the process of revision, the police assisted the DSO. Investigators designated by the director of the Investigations Department to work on a case enjoyed more powers than the police officers⁴⁶ (in particular, regarding searches and seizures).⁴⁷

Investigators always work in a group and do not have much freedom of action. Each group, usually led by a prosecutor, decides on the assignment of

⁴² DSO Circular 1, *supra* note 40.

⁴³ Redpath, *ibid.*, at 34.

⁴⁴ *Ibid.*

⁴⁵ National Prosecuting Authority Act 32 of 1998, sections 30 (2).

⁴⁶ National Prosecuting Authority Act 32 of 1998, sections 28.

⁴⁷ National Prosecuting Authority Act 32 of 1998, section 29.

tasks, and group members must inform all others about the steps taken and information collected on each case.

Prosecutors

Prosecutors comprise the other main group of officers in the DSO, about 18%. Their duties and functions (as well as their salaries) are similar to that of the prosecutors in the National Prosecuting Authority. The basic function of DSO prosecutors is to supervise and direct the investigation, ensuring strict control of the prosecution upon the investigation during the pre-trial phase. In this regard, the constitutionality of the DSO's operations has been subject to debate; critics argued that a prosecution-led investigation poses a risk for the impartiality of the prosecution.⁴⁸ The National Director of Public Prosecutions has brought attention to this issue, proposing measures to avoid it.⁴⁹

Prosecutors must be careful to avoid becoming a witness to facts or incidents that might later require testimony in court: „Integration or closer co-operation between the investigator and prosecutor should not be equated with role confusion. The investigator is still the best person to perform the function of collecting the evidence. The prosecutor can review, advise and direct the investigator, however all the time mindful of the fact that he or she remains an officer of the court with certain ethical obligations...The prosecutor is there to guide the investigation not to do the job of the investigator. The prosecutor has to at all times be wary not to end up as a fact witness.“⁵⁰

The *Khampepe Commission of Inquiry into the Mandate and Location of DSO* contested these claims and concluded that there is no need to change „the mandate of DSO in collecting evidence.“ In June 2006, the Cabinet confirmed the findings of the Khampepe Commission.⁵¹

Analysts

They represent 2% of the officers in DSO, and are divided into two groups – Senior and Junior Analysts – each with different tasks. The Senior Analysts perform strategic work, study the basic criminal trends in each region, provide strategic advice, and participate in the preparation of the annual operations plan of DSO. Junior Analysts perform work that is more technical: data analysis, data entry using the specialized software designed for the DSO, etc.

Administrative Officers

They represent 14% of the employees in the DSO; more than half of the administrative officers work in the regional offices as opposed to the head office.

Some characteristics of DSO personnel have remained the same throughout the years. One concerns the average age of DSO staff; a quarter of DSO members are under the age of 30, and only 3% are older than 50 years of age.⁵² Many young people were recruited in 1999 to join the newly created DSO, most of whom were recent university graduates or graduates of

⁴⁸ Redpath, *supra* note 37, at 63-65.

⁴⁹ Bulelani Ngcuka, „Prosecution-led Investigation: A practical overview,“ Paper presented at the 2nd World Conference on Modern Criminal Investigation, Organised Crime and Human Rights, Durban, 5 December 2001.

⁵⁰ Ibid.

⁵¹ (No author) National Prosecuting Authority, *Annual Report 2005/06*, at 5.

⁵² Redpath, *supra* note, at 23.

specialized training in the FBI. Hiring younger officers carries certain risks, though; they may not be part of the former political regime but they lack sufficient professional and life experience. The idea behind recruiting young people was seen as an investment of sorts – the new and inexperienced will be trained, and, in time, become experienced. However, the more experienced officers must deal with a heavier workload because they have to mentor and correct the mistakes of their younger colleagues.

Another special feature of the DSO is the diversity of its staff compared to other institutions in South Africa. Seventy percent of the employees are African, Asian, etc., and nearly 30% are women, most of whom are prosecutors or administrative officers. The remaining 68% are men who work as special investigators.⁵³

III.4. DSO Functions

The DSO's legal functions allow it to perform criminal proceedings, conduct investigations, and carry out all necessary functions incidental to investigations related to organized crime or any other category of crime as proclaimed by the President,⁵⁴ as well as to gather, store, and analyze information consistent with its functions.⁵⁵ The legislation adopted with regard to the Directorate was intentionally defined in broad terms so that more types of crimes would fall under its legislative mandate. The National Prosecuting Authority Act clearly states that this does not derogate from the SAPS any power that relates to the prevention, combating, or investigation of crime.⁵⁶ Yet the scope of powers as stipulated in the DSO statute is in reality an obstacle to the Directorate's operative mandate and requires a more detailed delineation. During the debates over the legislative changes regarding the DSO, the parties decided that the mandate would be subject to further negotiations between the institutions. Because they failed to reach an agreement, they settled on the inclusion of the following provision in the Amendments: to create a „committee, to be known as the Ministerial Coordinating Committee,⁵⁷ headed by the Minister of Justice. The committee may determine (a) policy guidelines in respect to the functioning of the Directorate of Special Operations and (b) procedures to coordinate the activities of the Directorate of Special Operations and other relevant government institutions, including the SAPS.“⁵⁸ Because the Committee meets only occasionally, the DSO had to develop its own criteria using experience from previously conducted investigations. The endpoint of the debates on the DSO's mandate is the document known as *Circular 1*, issued by the Head of Operations of the DSO, which outlines the general and particular criteria that the Head of the Investigations Department must apply

⁵³ Ibid., at 24.

⁵⁴ The President can issue a proclamation only at the recommendation of the Minister of Justice and the National Director; the proclamation must be presented to the Parliament before it is publicly announced. Art. 7 (1)(a) and (2) of the National Prosecuting Authority Act 32 of 1998.

⁵⁵ National Prosecuting Authority Act of 1998, section 7.

⁵⁶ National Prosecuting Authority Act of 1998, section 26 (2).

⁵⁷ National Prosecuting Authority Amendment Act of 2000, sections 31 (2)(a)(i). The Committee comprises cabinet members responsible for the administration of justice and constitutional development, safety and security, correctional services, intelligence services, defense, and other services as designated by the President.

⁵⁸ National Prosecuting Authority Act 32 of 1998, section 31 (1).

before authorizing a preliminary criminal investigation.⁵⁹

The procedure preceding the authorization of a criminal investigation is complex and restrictive. In the first place, it is necessary to decide if the crime falls within the strategic focus of the DSO. Within the DSO's mandate fall the following crimes: drug trafficking, organized violence, smuggling of precious metals, human trafficking, vehicle theft, serious and complex financial crime, and organized public corruption. There are fourteen general criteria or factors which also must be taken into account before a criminal investigation can start. They include: the seriousness and scope of the crime, whether the crime is committed in an organized manner, what the structure of the organized criminal group is and what impact it has in the region where it operates, the character of the organized criminal group – national or international, whether the criminal activity involves at least five persons, what the outcome has been of previous law enforcement efforts in neutralizing the group and whether the DSO's involvement would be more appropriate, to what extent the criminal group has penetrated the public or private sector, whether there is potential for cooperation with the specialized units of the SAPS, whether DSO involvement would neutralize future losses for the markets and industry, what the potential risk is of the crime for public safety, how much the investigation will cost, and the financial dimensions of the crime. Information like that leads the public to believe that DSO spends more time and efforts deciding what to do than actually doing things.⁶⁰ The procedure includes further factors that must be considered, such as which officers (from a list of twenty persons) may be designated to carry out the investigation.

The procedure for authorizing investigations is not only detailed and comprehensive, but at the same time highly burdensome. It is hardly possible to gather information about a criminal group or an offence committed to support an authorization *prior to* investigation, a classic vicious circle situation; no investigation can be carried out without authorization, but investigations cannot be authorized until there is some investigation. The legislation does provide for the authorization of a *preparatory investigation* prior to the authorization of a full investigation.⁶¹ To authorize a preparatory investigation, the head of the Investigations Department must apply the same stringent criteria. Matters like that give the impression to outside institutions that the DSO begins work on a case (as a preparatory investigation) and then decides to drop it.⁶²

Second, Circular 1 sets the same financial standard for the whole country (in terms of the financial dimensions of the crimes), yet the country is patently not financially homogenous. There are richer and poorer regions, so the financial threshold of a crime will differ accordingly.

Third, the mandate revolves around types of crime and not types of criminals (yet there may be perpetrators involved in many other crimes).

Fourth, the operational mandate was determined without prior consultation with any other institutions, including the Ministerial Committee referred to

⁵⁹ DSO Circular 1, *supra* note 40.

⁶⁰ Redpath, *supra* note 37.

⁶¹ National Prosecuting Authority Act 32 of 1998, section 28 (13).

⁶² Redpath, *ibid.*, at 48.

above. Consequently, Circular 1 works more as a set of internal terms of reference than a mandate in the true sense of the word.

A further problem concerning the DSO's operational mandate is the overlapping of powers with the SAPS, which also has a specialized organized crime unit. Some critics suggest that it is a waste of resources for both the DSO and the SAPS to be covering organized crime. There are examples of parallel investigations run by the DSO and the various specialized units of the SAPS. There are other cases where the DSO and the SAPS have acted jointly, illustrating the fact that the existence of the two institutions creates an environment of healthy competition as well as opportunities for fruitful cooperation.

IV. Cooperation of the DSO with other institutions

Several institutions in South Africa are closely linked to the Department of Special Operations and their contribution to the successful implementation of its mandate is very important. They are:

1. The *Crime Information Collection Unit*: a relatively new structure within the National Prosecuting Authority; no decision has been made yet whether it will remain within the NPA or merge with the DSO. The unit is responsible for surprise checks and searches as well as the collection of information related to ongoing investigations. CICU works for both the DSO and the National Prosecuting Authority.
2. The *Asset Forfeiture Unit*: a unit set within the NPA, not the DSO. The unit is in charge of confiscating property acquired through criminal activity. It works for both the SAPS and the DSO. The officers in the unit are mainly prosecutors specialized in procedures for criminal assets recovery.
3. *Priority Crimes Litigation Unit*: a unit created in 2003 with a proclamation by the President.⁶³ The unit was initially established as part of the DSO under a different name (*Special National Projects Unit*), but was transferred in 2003 to the National Prosecution. The unit supervises and leads the criminal investigations of the following cases:
 - Rome Statute crimes,⁶⁴ including genocide, crimes against humanity, and war crimes,
 - Crimes against the state, including national and international terrorism,
 - Contraventions of legislation outlawing mercenary action,⁶⁵ and nuclear, chemical and biological weapons proliferation,⁶⁶ legislation governing arms control,⁶⁷ the use of nuclear energy⁶⁸ and intelligence services,⁶⁹

⁶³ Proclamation in terms of section 13(1)(c) of the National Prosecuting Authority Act 32 of 1998: (no gazette number) Proclamation by the President of the Republic of South Africa, National Prosecuting Authority Act, 1998, March 24, 2003.

⁶⁴ Rome Statute of the International Criminal Court, Act 27 of 2002.

⁶⁵ Regulation of Foreign Military Assistance Act (No. 15 of 1998).

⁶⁶ Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993.

⁶⁷ National Conventional Arms Control Act 41 of 2002.

⁶⁸ Nuclear Energy Act 46 of 1999.

⁶⁹ Intelligence Services Act 65 of 2002.

- and criminal proceedings and cases involving missing persons, as authorized by the Truth and Reconciliation Commission.⁷⁰

V. Measuring DSO's Performance

The activity of the DSO enjoys high popular approval, but the Scorpions are critical of their own work and believe that this approval is due to their successfully created media image.

Table 1: The Directorate of Special Operations – Statistical Data for the Period 2002–2007⁷¹

Activity	2002/03	2003/04	2004/05	2005/06	2006/07	Change compared to previous year	Change over combined period
Investigations finalized	190	205	325	318	267	-16.06%	40.5%
Arrests	66	290	471	447	617	38%	834.8%
Prosecutions finalized	180	189	234	243	214	-11.9%	18.9%
Conviction rate	86%	94%	88%	82%	85%	3,7%	-1,2%

The data illustrates a very high percentage of convictions; in the first years it reached 94%, while for the period 2006-2007 it was 85%. This rate of success gave rise to arguments that DSO was 'cherry-picking' its cases, taking on cases that are certain to be successful in court.⁷² If we look at the National Prosecution, for the 2006-2007 period, 378,296 cases were finalized,⁷³ and the percentage of convictions was 85.8%. This indicates that the DSO's performance level compares to that of regular prosecutors. However, it is important to keep in mind that the National Prosecution tackles conventional crime, while the DSO deals with organized crime cases.

It is hard to determine how the total number of finalized cases and the length of their investigation have affected the popularity of the Scorpions. On the surface, the number of cases is low and the period of investigation is too long. Experts argue that the high number of convictions should not be used to measure the DSO's performance. In other words, the quantitative indicators

⁷⁰ (No gazette number) Proclamation by the President of the Republic of South Africa, National Prosecuting Authority Act, 1998, 24 March 2003, <http://www.npa.gov.za/UploadedFiles/PCLU%20PROCLAMATION.tif> (accessed 20 July 2007).

⁷¹ *Annual Report 2006/07*, National Prosecuting Authority (2007) <http://www.npa.gov.za/UploadedFiles/Section%202%20%20Delivery.pdf>

⁷² Redpath, *supra* note 37, at 50.

⁷³ *Annual Report 2006–2007*, *supra* note 71.

of DSO performance are of little bearing and serve primarily to compare past and present achievements.⁷⁴ Taken out of context, the number of convictions can illustrate both effectiveness and low efficiency. For example, a sudden increase in the number of conviction cases might indicate that the DSO is taking on easy matters and ignoring the more difficult ones. The only way to measure accurately DSO performance is in a qualitative manner, on a case-by-case basis. Many DSO officers believe that other indicators should measure the effectiveness, for instance whether the DSO has disrupted or ended the particular criminal activity, or whether the criminal organization has been broken down.⁷⁵ Experts have proposed a legislative amendment which would require the DSO to report to the Ministerial Committee or another independent institution and highlight unsuccessful cases, in order to enable the identification of more appropriate quantitative indicators and to achieve a more realistic assessment of the Directorate's operations.

VI. Political manipulations of DSO

In 2000, the DSO started a corruption investigation of the South African arms procurement deal, which was finalized by the national government in 1999 (in the amount of several billion South African rands). In July 2003, it became public that the Deputy President of South Africa at the time, Jacob Zuma, was a suspect in the investigation. In August 2003, the National Director of the DSO announced that despite the evidence against Zuma, the National Prosecuting Authority would not prosecute.⁷⁶ The lawsuit against Schabir Shaik, the businessman who was involved in the arms deal and who was accused of corruption with Zuma, was to proceed, however. In 2004, the National Director of the DSO resigned, citing personal reasons. A year later, Shaik was convicted and shortly after, President Mbeki announced that Deputy President Jacob Zuma would be relieved of his government duties because of the latter's connections with Shaik, as found in the judgment.⁷⁷ Zuma would, however, retain his position as Vice Chairman of the African National Congress.

Not long afterwards, the National Prosecuting Authority announced that it would bring charges against Zuma on two counts of corruption, and the trial was set to begin in July 2006. In September of the same year, the Supreme Court refused the prosecution's request for a further postponement and removed the matter from the roll. The NPA maintained it would still file the case again once the various issues delaying the trial had been resolved.

Following a three-week investigation in December 2006, Zuma was charged with the rape of a prominent anti-HIV activist in his home. Zuma voluntarily resigned from his position with the ANC while the investigation was going on. In May 2007, the court ruled that consensual sex had taken place and acquitted him.⁷⁸ Zuma returned to his position as Deputy President of the ANC. The corruption case against Zuma is still pending.

⁷⁴ Redpath, *supra* note 37, at 51.

⁷⁵ Ibid.

⁷⁶ C. Johnson, „Zuma not to be prosecuted,” *The Mercury*, 27 August 2003.

⁷⁷ (No author) „Statement of the President of South Africa, Thabo Mbeki, at the Joint Sitting of Parliament on the Release of Hon Jacob Zuma from his Responsibilities as Deputy President: National Assembly,” Government of South Africa website, 14 June 2005. [<http://www.dfa.gov.za/docs/speeches/2005/mbek0614.htm>]

⁷⁸ *The State v Zuma [S v Zuma] [2006] JOL 17305 (W)*.

The investigations of high-power political officials and the aggressive media strategy of the Scorpions have provoked negative reactions among the political community. In response to that, on April 1, 2005, President Mbeki appointed a special commission, headed by Judge Sisi Khampepe, to conduct an inquiry into the mandate and location of the DSO.⁷⁹ The inquiry sought to reduce tensions between the police and the DSO with the police claiming the DSO should become part of it. The report of the Khampepe Commission came out in June 2006.⁸⁰ The Commission recommended that the DSO remain within the National Prosecuting Authority but the Minister of Security and Safety should take over the political control and responsibility for the law enforcement component of the DSO. The Cabinet accepted the recommendations.

In July 2007, the ANC policy chief, Jeff Radebe, told an ANC conference that the DSO, the South African Municipal Police forces and the provincial traffic police must be brought under the umbrella of the South African Police Service, despite the conclusions of the Khampepe Commission published a year earlier.⁸¹ The issue of the merger of DSO with the SAPS may have emerged again because of media publications from October 2006: they revealed that the DSO was investigating the National Commissioner of the Police and other senior police officers⁸² and included allegations of close ties of the Commissioner with the „leader of a large smuggling organization.“⁸³

The decision to disband the DSO was launched by the ANC without any compelling reasons to support it. The opposition parties perceive in that act only an attempt by the ANC to protect prominent members of the party from investigation of corruption and prosecution by the DSO. The leader of the Democratic Alliance, Hellen Zille, announced that six members of the Executive Committee of the ANC were under investigation, and the DSO was investigating two of them.⁸⁴

At the same time, two new bills dealing with the disbanding of the Directorate – the General Law Amendment Bill and the National Prosecuting Amendment Bill – were initiated. This was cause for many negative reactions in political and public circles, and many regard the proposed merger of the DSO and the SAPS as futile, citing the success of DSO since its creation. Supporters of the independence of DSO put forward the following arguments: the investigation and prosecution are working together within one institution, which increases

⁷⁹ (No author) „Statement on the Commission of Inquiry into the Mandate and Location of DSO - Khampepe Commission,“ Government of South Africa website, 25 July 2005, [http://www.info.gov.za/speeches/2005/05072614451001.htm] (accessed July 9, 2007).

⁸⁰ (No author). „Statement on the report of the Khampepe Commission of Inquiry,“ Government of South Africa website. June 29, 2006 http://www.info.gov.za/speeches/2006/06062915451001.htm (accessed July 20, 2007).

⁸¹ Paddy Harper, „All-in-one plan for police,“ *Sunday Times*, July 1, 2007, http://www.suntimes.co.za/article.aspx?ID=505777 (accessed July 9, 2007).

⁸² Wisani wa ka Ngobeni, Dominic Mahlangu and Dumisane Lubisi „Scorpions spied on Selebi,“ *Sunday Times*, October 29, 2006 (http://www.suntimes.co.za/article.aspx?ID=305138 (accessed July 9, 2007).

⁸³ Simphiwe Piliso, Jocelyn Maker and Jessica Bezuidenhout, „Selebi named in explosive diary,“ *Sunday Times* http://www.suntimes.co.za/article.aspx?ID=316074 (accessed July 9, 2007).

⁸⁴ (no author) „ANC's Efforts to Disband Scorpions Sinister: Opposition,“ *The Citizen*, 21 Jan. 2008 [http://www.citizen.co.za/index/article.aspx?pdsc=56697,1,22].

significantly the cooperation between prosecutors and investigators from the early phases of investigation; the political, institutional, and operational independence of the DSO enables it to carry out many corruption investigations which otherwise would be impossible; the effectiveness of the DSO is due to the relatively small size of its staff, their professional qualification and interdisciplinary skills, and good remuneration.⁸⁵

Parallel to introducing the proposed bills to the Parliament, the findings of the Khampepe Commission were made public, even though a publication of the report had not been previously planned. President Mbeki decided to release the report in 2008, in order to include it in the debates on the two bills regarding the DSO.⁸⁶ The Khampepe report explicitly stated that the need for the Directorate of Special Operations is as strong now as it was at the time of its creation.⁸⁷ The report also drew attention to several areas of the DSO's operations that are problematic. It cited the lack of coordination between the DSO and the SAPS, as well as cases of the DSO violating its statute in the implementation of its mandate, including cases of unlawful collection of information which posed threats to national security. According to the Khampepe Commission, the DSO needs to revise its disclosure of information and publicity policies. The Commission cites instances of publicly disclosing information about ongoing investigations, which poses a risk of violating basic constitutional provisions concerning the confidentiality of information during investigations.

The changes regarding the statute and functions of the DSO proposed by the government provoked considerable public reactions, and the case reached the courts. In 2008, the Pretoria High Court ruled that it did not have the jurisdiction to decide on an application filed by Hugh Glenister to stop the state from disbanding the crime-fighting unit. The court concluded that the principle of separation of powers prevented it from interfering with the executive's power to prepare and initiate legislation, as well as with the right of Parliament to deliberate on proposed legislation brought before it.⁸⁸ In June 2008, the petitioner Hugh Glenister announced he would file the papers to the Constitutional Court of South Africa.

⁸⁵ HB Holomisa, MP, UDM President, „Letter to President Thabo Mbeki regarding the Proposed Bill regarding the Directorate of Special Operations,“ 4 March 2008.

⁸⁶ Bathandwa Mbola, „Scorpions Report Made Public,“ *SouthAfrica.info, The Official Gateway*, 6 May 2008 [<http://www.southafrica.info/about/democracy/scorpions-060508.htm>].

⁸⁷ „Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations („the DSO,“), Final Report,“ February 2006, [<http://www.info.gov.za/View/downloadfileaction?id=80441>].

⁸⁸ „Scorpions Battle Taken to Constitutional Court,“ *Mail&Guardian Online* [<http://www2.mg.co.za/article/2008-06-18-scorpions-battle-taken-to-constitutional-court>].

THE NATIONAL ANTI-MAFIA DIRECTORATE (DIREZIONE NAZIONALE ANTIMAFIA)

Italy

I. Introduction

The word „mafia“ is certainly one of those in the Italian language that is the best known internationally. Initially, it was used to describe the criminal activities going on in the region of Sicily. The etymology allows for many interpretations, and the historical genesis of the word is unclear; some relate it to the Arabic *mahyah* or *ma afir*, an Arab sheikh who ruled in Palermo between 831 and 1072. Others refer to the French adjective „*mauvais*“.⁸⁹ Historians link the term with the first letters of the phrase „*Morte Alla Francia, Italia Apela*“⁹⁰ or „*Morte Ai Francesi, Invasori, Assassini*“.⁹¹ In Italian, the word *mafia* appears in 1868 as a synonym to the crime organization Camorra.

The Italian legal system applies the term for the first time in the Anti-Mafia Act of May 31, 1965.⁹² This new law extended the legal scope of its application to include not only persons regarded as „socially dangerous“ but also to those „suspected of belonging to associations of the mafia-type,“ the Camorra or other organized criminal groups, whose objectives and actions are similar to that of mafia organizations. The enforcement of the law, however, did not have the expected effect for two main reasons – first, the absence of a legal definition of the term „mafia organization,“ and second, one of the measures included ordering a suspect to reside in a designated place outside of Sicily, which actually opened up new opportunities to develop illicit activities in the cities of northern and central Italy.⁹³

One main characteristic of the Italian legislation with regard to counteracting organized crime is an apparent lack of coherence. The anti-mafia legislation comprises a number of acts found in various legal branches. Most of the laws have been adopted in the aftermath of terrible crimes⁹⁴ and are the offspring of the emergency situations; they are answers to the criminal challenge and not part of a coherent law enforcement program. In ten years, from 1982 to 1992, one hundred and fourteen laws regarding organized crime were introduced.⁹⁵ A few examples confirm this supposition:

- The law bringing into existence the first Anti-Mafia Commission in 1963 came in the aftermath of a bombing that killed seven police officers.

⁸⁹ From French: „Bad“

⁹⁰ „Death to France“

⁹¹ „Death to the French, usurpers, murderers“

⁹² Anti-Mafia Act 575 of 31 May 1965.

⁹³ Alison Jamieson, *The Anti-Mafia: Italy's Fight Against Organized Crime* (Macmillan Press LTD, 2000), at 37.

⁹⁴ Legislazione Anti-Mafia, LIBERA, Associazione Nomi e Numeri Contro le Mafie, www.liberanet.org.

⁹⁵ Umberto Santino, „Mafia and Mafia-type Association in Italy,“ in J.A. Albanese, D.K. Das, A. Verma (eds), *Organized Crime. World Perspectives* (Prentice-Hall, 2003): 82-100. An electronic copy of the contribution is available at [<http://www.centroim-pastato.it/otherlang/mafia-in-italy.php3>].

- The legislative amendments on organized crime prevention adopted in 1975 came in the wake of the murder of Palermo's prosecutor, Pietro Scalone.
- The so-called „Rognoni-La Torre“ Law for the first time designated as a new crime „a mafia-type association“ („mafia conspiracy“) and introduced measures to authorize the confiscation of possessions belonging to a person who is suspected of being a member of a criminal group.
- In 1991, after the murder of yet another public official, the National Anti-Mafia Directorate (*Direzione Nazionale Antimafia*, hereafter the NAD) and the Anti-Mafia Investigations Directorate (*Direzione Investigativa Antimafia*, hereafter the DIA) were created.
- In 1992, after bombing attacks against two magistrates, Giovanni Falcone and Paolo Borsellino, the government took new urgent measures to amend the Penal Procedure Code. The changes mainly concerned the regulations about the mafiosi that collaborate with law enforcement officials and the prison treatment conditions for persons convicted for organized crime.

In an effort to bring the various laws in order and to build a more effective anti-mafia legislative system, in 1998 the Ministry of Justice launched a working group with the task of developing a coherent, unified piece of legislation. In 2001, the group proposed a bill bringing together the various existing penal procedures. For political reasons, however, the bill remained only a draft.

Despite its fragmented nature, the Italian legislative framework does provide special regulations and procedures for counteracting organized crime. The application of these regulations extends over three different levels: the pre-trial and trial proceedings and the execution of sentences. Aside from that, the penal procedure regime applied to mafia crimes follows a double track; it can be extremely harsh or it can be lenient to criminals who renounce their organizations and become the so-called *pentiti*, „collaborators with justice.“

As concerns the investigation of organized crime, the Italian legislation provides for two specialized institutions established to increase effectiveness in prosecuting such crimes. Looking to improve the efficiency of the police force and following the reforms of 1991, the Anti-Mafia Investigations Directorate was set up, specializing in investigations of mafia-type organizations. Together with the development of the DIA and to improve the coordination of the organized crime investigations, the National Anti-Mafia Directorate was created; it oversees the 26 District Anti-Mafia Directorates, which are in charge of mafia crime investigations.

II. Characteristics of organized crime in Italy

II.1. Definition of organized crime

The term „organized crime“ is noted in a large part of the Italian legislation, even though there is no official definition of it. Organized crime in Italy has gone through several phases before it reached its current form. These phases can be understood only with reference to the changes in the social context, towards which organized crime has always shown itself to be extremely flexible and capable of adapting. We can distinguish the following four phases⁹⁶:

⁹⁶ Umberto Santino, *supra* note 95.

- An incubation period, which lasted from the 16th century to the early 19th century, during which period Italy transitioned from feudalism to capitalism. The economic aim of crimes (like thefts, robberies, kidnapping) was the accumulation of wealth. The mafia was still small in numbers. When the mafiosi died they did not leave any inheritance to their heirs, who were thus forced to continue with the crimes, extortion, kidnappings, killings.
- An agrarian phase, which started before the formation of the unified Italian State and continued up until the 1950s. In Western Sicily, the mafiosi were above all an expression of the middle classes. As rent collectors they operated estates within the large country in collaboration with the big landowners, who were often absentees. To reach their goals they often exercised violence, extortion, and even killings.
- An urban-entrepreneurial phase extending from the 1950s until the '60s. Through the smuggling of contraband cigarettes in the Mediterranean area, the mafia groups began to operate more on an international level.
- The present day mafia, from the '70s to today, could be defined as financial mafia. The Sicilian mafiosi, who now control territory all over the island, are assuming an increasingly important role in the trafficking of drugs.

According to Italian sociologists, organized crime includes all forms of criminal associations and criminal behavior related to such associations. The sociologists' definition of organized crime covers a variety of criminal organizations – associations for the purpose of committing offences, secret groups, and terrorist organizations – as well as crimes committed within and by the mafia itself (such attacks on rival groups, settling internal conflicts).⁹⁷

The Italian law classifies mafia-associated crimes into several categories, namely participation in mafia-type associations, association for the purposes of illicit trafficking of drugs, kidnapping for extortion, association for the purpose of illicit cigarette and tobacco smuggling, human trafficking, and offences committed through mafia methods.⁹⁸

The Italian legislation also distinguishes between conventional organized crime and specific mafia-type crime. The legal definition for conventional organized crime is „association for the purpose of committing offences“⁹⁹; after the adoption of the Rognoni-La Torre Law in 1982, the following type of crime was added: „mafia-type association.“¹⁰⁰ An association for the purpose of committing an offence is in place when „two or more persons come together for the purpose of committing an offence.“ A conventional crime association

⁹⁷ Piero Luigi Vigna, „Fighting Organized Crime, with Particular Reference to Mafia Crimes in Italy,“ *Journal of International Criminal Justice* [http://jicj.oxfordjournals.org/cgi/content/full/4/3/522].

⁹⁸ Code of Criminal Procedure, Art. 51 (3)bis.

⁹⁹ Art. 416 of the Penal Code.

¹⁰⁰ Article 416-bis of the Penal Code defines the mafia as a specific type of criminal association (mafia conspiracy), stating that „[c]onspiracy is of a Mafia type when whoever belongs to it uses the power of intimidation which arises from Association membership *and* uses the system of subordination *and* the *omerta* (code of silence) that arises from this in order to commit crimes *or* to obtain – directly or indirectly – control over economic activities, concessions, over activities contracted out to the private sector by the State *or* to obtain unfair profit for himself or for other people or to hinder or deny the right to vote or acquiring votes in elections for the benefit on oneself or others.“

has a stable organized structure in place, whether formalized or not, for the purpose of committing an indeterminate number of offences. In contrast, mafia-type associations additionally have the capacity for intimidation; the members of the mafia exploit this power to coerce a third party into subjection and into keeping the „law of silence“ (*omertà*).¹⁰¹ Italian law defines a mafia-type method by three components, which are necessary and essential conditions to qualify an organization as a mafia-type association: capacity to intimidate, forced subordination, and the law of silence. There is also a difference in terms of the objectives pursued by a conventional crime association and a mafia-type association. While the former engage in activities defined by the law as criminal offences, a mafia-type association can pursue further objectives, separately or in combination. The mafia aims to get control, directly or indirectly, over political institutions and economic activities, concessions, public tenders and public contracts, in order to obtain either unfair profits or advantages for themselves or others, or to hinder or deny the right to vote by vote rigging and vote buying for themselves or others.

Mafia organizations aim to gain control not only over criminal activities (such as drug and arms trafficking), but also over a wide spectrum of legitimate business activities. It is important to emphasize that such legitimate activities are not simply a consequence or a disguise of criminal activities, but the finalization of the mafia enterprise. The criminal activity serves as a means to acquire economic power, but it is also a political instrument, part of a global project for overtaking vast areas of real political power. Therefore, the legislation considers a mafia-type crime as committed even when there is no criminal intent, but when the organization, using mafia-type methods, aims to gain a monopoly, to accomplish political and electoral goals, or to obtain unlawful profits.¹⁰²

II.2. The Italian Mafias

La Cosa Nostra: This is the largest mafia organization in Europe. Its main centers are in Sicily, with branches in other Italian regions, in the USA, Canada, Russia, and France. The mafia engages in international drug trafficking, money laundering, extortion, racketeering, and arms smuggling. It has about 5,000 members, with another 20,000 serving as supporters. The leadership of Cosa Nostra belongs to the Corleone family in Palermo, with main representatives Toto Riina, Leoluca Bagarella and Bernardo Provenzano. All three are serving sentences in prison for the murders of many politicians and high magistrates.

Cosa Nostra has a hierarchical pyramid structure. On top is the boss (head) of the family (*capofamiglia*) who designates an adviser (*consigliere*) and a deputy (second-in-command) (*sotto capo*), as well as leaders of crews of 10 soldiers (*capodecina*). At the bottom of the pyramid are the „men of honor“ (*uomini d'onore*). Membership in the criminal group is by invitation or conviction, and the act is formalized by taking an oath following the performance of a special ritual.¹⁰³

¹⁰¹ [no author], The National Anti-Mafia Bureau, International Affairs Department, http://www.lex.unict.it/cde/documenti/affari_italiani/2000/000217olaf.htm.

¹⁰² Ibid.

¹⁰³ The prospect member, escorted by several older members, is taken to a designated place where he is told that he is joining an organization defending the weak and the needy. A cut on his finger is made, and the blood is smeared on the image of a saint, which is then set on fire while he is holding it in his hands. During this time, he takes the oath; afterwards he is introduced to the *capofamiglia*.

'Ndrangheta: This organization's roots date back to the middle of the 19th century in Calabria, a poor rural region in southern Italy. At present it is one of the most powerful and aggressive criminal organizations, with branches in Argentina, Australia, Belgium, Canada, Columbia, the USA, France, Germany, and elsewhere. Similar to Cosa Nostra, it has full control of its territory. The 'Ndrangheta is a „unique confederation of single mafia families“¹⁰⁴ numbering around 6,000 members.

Most of the groups (of which there are about eighty-six) operate in the area of Reggio Calabria. The word *'ndrina* comes from Greek and means „a person who never submits“. The *'ndrina* is the basic unit, each of which is autonomous, controlling a designated territory.¹⁰⁵

The organization is engaged mainly in international arms and drug trafficking, money laundering and extortion.

It has a flat structure where each family controls its own territory and has a full monopoly over the legal or illegal activities. All members of the clan are relatives, which is very significant for strengthening the ties within the criminal organization.

La Camorra: This is the only mafia organization with urban roots. At the end of the 50s, the term „camorra“ was used to describe small criminal groups engaged in illegal activities within certain regions of Italy. During the 60s, they grew in size and efficiency due to two factors – first, because the Neapolitan area had become a center for cigarette smuggling, and second, on account of the presence of Sicilian mafia bosses who set up small criminal groups that were branches of the „head office“ fighting for the control of the port and the Neapolitan area.

At present, there are 145 Camorra organizations with 7,000 members.¹⁰⁶ They have operational bases in other European countries as well as in Latin America. They are mainly engaged in drug trafficking, cigarette smuggling, financial fraud, robberies, kidnapping and trafficking in persons.

La Sacra Corona Unita, SCU: This is a relatively small organization with 50 clans and approximately 2,000 members. The SCU is active in the region of Apulia (Puglia), southeast Italy. A member of the Camorra who wanted to expand its activity to this area, Raffaele Cutolo, created it in 1970. The group is involved in frauds, weapons smuggling, and international drug trafficking.

Three key organizational levels exist and members must perform a special religious ritual to move up the ladder.¹⁰⁷

¹⁰⁴ Federico Varese, „How Mafias Migrate: The Case of the 'Ndrangheta in Northern Italy,“ [http://findarticles.com/p/articles/mi_qa3757/is_200606/ai_n17176956/].

¹⁰⁵ If more than one *'ndrina* operates in the same territory, they can unite in a *locale*.

¹⁰⁶ Santino, *supra* note 95.

¹⁰⁷ The lowest level is *Società Minore*, made up of lower-level criminals who do street-level activities. New members start out as *picciotti* and go through a 40-day trial to ensure they are suitable for criminal work and are not associated with the police. Then they are inducted into the next phase of the level, the *manovalanza*, or worker. The second level, the *Società Maggiore*, is made up of two positions: the *Lo Sgarro* position is given only to members that have killed at least three people for SCU, and for the *La Santa* position the member is given a firearm (to use on oneself upon failing SCU), a cyanide pill, cotton (representing the mountain peak Monte Bianco, which is considered sacred), a lemon (for treating the wounds of one's comrades), a needle (to puncture the index finger of the right hand), hand-

II.3. Reasons for creating a specialized body for combating organized crime

Legislative issues

The Italian anti-mafia legislation lacks coherence, since most of the legal acts have been introduced in response to criminal challenge and emergency situations. This is one reason to regard it as inefficient and the legislative approach as inadequate.

A decisive step in the fight against organized crime was the adoption of the *Rognoni-La Torre Law* in 1982.¹⁰⁸ Until then, despite frequent arrests of mafiosi, the criminal justice system failed to prove its efficiency: criminals only served short-term sentences and returned to the criminal world, usually to their previous position, and without losing any of their assets. A strong opposition and resistance campaign was waged against the La Torre law by organized crime because it introduced to Italian legislation two novel features:¹⁰⁹

1) It recognizes a „mafia-type association“ as a new type of crime, adding thus to the legal qualification of the conventional criminal „association for the purpose of committing offences.“

2) It includes preventive measures in relation to property, allowing the seizure and confiscation of the property belonging to persons suspected of being members of criminal groups. The law also provides for the seizure and confiscation of the property of their relatives, partners, or cohabitants, property of which they have direct or indirect ownership, and which is acquired illegally or cannot be verified on the basis of their business activity or income tax declaration, unless the person suspected of having ties with the mafia can provide evidence that the property has been legally obtained.

This was a turning point in the way anti-mafia investigations were conducted. From then on, investigations concentrated not simply on mafia crimes but on the „mafia as a criminal form,“ as a dynamic organization engaged in legal or illegal activities.¹¹⁰ Effective law enforcement and investigation work made possible the *Maxi* trial against the mafia in the period between 1986-1992, with 476 defendants when, for the first time, key representatives of the mafia were successfully convicted. The mafia bosses and contract killers received life sentences, and the rest of the criminals together received thousands of years in prison. After a superior court upheld the sentences in 1992, the response of organized crime was vicious – bombing attacks against magistrates Giovanni Falcone and Paolo Borsellino, and attacks in Rome, Florence, and Milan in 1993.

In 1988, the High Commission for the Mafia Fight was established to coordinate the organized crime investigations. Practice showed that

kerchiefs (representing purity of spirit), and a *spartenza* (a gift of some sort, usually cigarettes). The final level is the *Società Segreta*, the core of the organization where key decisions are made.

¹⁰⁸ Law No. 646 of September 13, 1982, was named after its authors Pio la Torre and the Minister of Interior at the time, Virginio Rognoni. Pio la Torre and Carlo Alberto Dalla Chiesa, prefect for Palermo, were killed a couple of days before the law was approved.

¹⁰⁹ Pierre Luigi del'Osso, National Direction Anti-Mafia, www.mjeli.government.bg/Npk/docs/Library/Other/DireccionNacionalAnti-MafiaBG.pdf.

¹¹⁰ Alison Jamieson, *supra* note 93, at 38.

this institution was not well conceived, as it combined judicial, police and intelligence functions. The head of the institution became a „super-magistrate“ with intelligence and law enforcement powers, but without any control or accountability in reality.

Institutional issues

Up until 1991 when a massive reform of the police force took place, the police enjoyed powers within their respective provincial territory which limited their investigative operations only to that area. The large number of investigative bodies in the provinces, the territorial restrictions, and the difficulties with introducing more effective forms for coordinating the work resulted in incomplete and isolated investigations. The police failed to discover the connections between alleged mafia-type crimes, and they did not manage to penetrate organized crime structures.¹¹¹

To fix the problem, in 1991 the three chief police forces in Italy – *Polizio di Stato*, *Arma dei Carabinieri*, *Corpo della Guardia di Finanza* – were restructured into central and provincial police services to ensure better coordination of their investigation activities. The central offices had the power to conduct investigations across the whole country. The provincial offices, remaining in close connection with the central office, were assigned the investigations across the territory of several provinces, which comprised, in reality, a significant part of the entire country. The idea was that this new administrative division would bring order and coherence to the investigations of organized crime.

The rationale for the reform was the understanding that organized crime offences are not spontaneous, but usually carefully planned. Consequently, such crimes are often times linked, so by merely investigating and verifying the links and relationships between them, the criminal network itself could be uncovered, and the criminal group and individual perpetrators identified.

With regard to the prosecution we observe the same issues – a lack of coordination and connection between the various offices. Until 1991, the prosecutor's offices of the courts in Italy (*Procure della Repubblica*) had investigative powers on crimes committed by mafia-type organizations. Here as well, the outcome was incomplete investigations with no coordination and interaction between them. On top of that, the prosecution, which has supervisory powers over the police, had more restricted territorial access than the police itself had.¹¹²

Political conflicts

One key feature of organized crime in Italy, which distinguishes it from other types of crime, is its invasion into legitimate business spheres and public and government institutions. The influence of the mafia is often explained by its close and intertwining connection with politics, which has made some authors argue that the mafia should not be considered an element external to society.¹¹³ For some magistrates, the mafia has grown to be a „state within the state,“ displacing the state in many sectors such as public security and order, economic regulation, and the judicial system—spheres where the state's

¹¹¹ Pierre Luigi del'Osso, *supra* note 109.

¹¹² Ibid.

¹¹³ U. Santino, *Oltre La Legalita*, (Palermo, Centre Siciliano di Documentazione, Appunti 6: 1997), 36.

control is weak or entirely absent. The magistrate Giovanni Falcone, who became internationally prominent for his achievements in the fight against organized crime, states that „Cosa Nostra has no interest in going against the state, rather its interest is to exploit all deformations, poorly functioning systems and administrative loopholes in order to invade them.“¹¹⁴

For the first time in 1994, the Anti-Mafia Committee acknowledged the infiltration of political and economic life by organized crime in one of their reports.¹¹⁵ The task of the Committee was not simply to confirm the existence of relationships between politics and organized crime; it had to give some clarity about their nature, the conditions that made them possible, and their development over different periods of political life. The Committee reported on entire political sectors and parties that had been infiltrated by criminal groups, as well as about ties between the mafia, the business world, and politicians. The findings of the Committee caused its deputy chair to declare, „[T]he delay in coming to terms with this problem is the reason for the inadequate reaction of the state toward organized crime.“¹¹⁶

In November 2002, the former Prime Minister, Giulio Andreotti, was sentenced to 24 years in prison for ties with the mafia and the murder of an investigative journalist; later on, he was cleared of the charges. He would not have been liable to serve his term anyway, as Italian law does not allow the imprisonment of anyone over the age of 75.¹¹⁷ It is a public secret that people from the circle of Silvio Berlusconi are also suspected to have ties with organized crime.

Furthermore, the mafia has a very strong influence over the local businesses. The Chairman of the Anti-Racketeering Committee announced that close to 160,000 companies, mostly in Southern Italy, had been racketeered by the mafia. In Sicily, about 80% of the businesses pay the so-called *pizzo* to crime groups. Large businesses, primarily in construction, are coerced to „report“ to organized crime groups.¹¹⁸

III. Establishment of the National Anti-Mafia Directorate (NAD)

The continued effort for success in prosecuting organized crime forced the Italian government to begin reforms in 1991. The key objective of this massive overhaul was better coordination of the preliminary investigations of cases of particularly serious crimes committed by the mafia. The outcome was radical change in the organizational structure of the prosecution.

The idea for the creation of the NAD belongs to the magistrate Giovanni Falcone. He prepared the first version of the legislative decree for the NAD.

¹¹⁴ Alison Jamieson, *supra* note 93, at 13.

¹¹⁵ The first parliamentary Anti-Mafia Committee began work in 1963, and was succeeded by several other committees. It is comprised of 25 members of parliament and 25 senators, and its main objective is to investigate organized crime, assessing the relevance of the legislative and administrative measures to the public needs.

¹¹⁶ Jamieson, *supra* note 93, at 63.

¹¹⁷ [no author] „Italy ex-PM Cleared of Mafia Ties,“ <http://news.bbc.co.uk/2/hi/europe/2996565.stm>.

¹¹⁸ Румяна Божкова, „Борбата с мафията в Италия заприлича на сапунка“ [The fight against the mafia in Italy resembles a soap-opera], *Novinar* Newspaper, [<http://www.novinar.net/?act=news&act1=det&stat=center&mater=MjQ5NzszNDI>].

Falcone also applied to become the first director of the NAD, and though he was by far the most qualified candidate, he was outvoted in the Superior Council of the Magistracy (SCM) commission for the appointment of heads of judicial offices. The outcome of the vote may be explained by the fact that, while working on the decree, Falcone was accused by the magistrates' trade union and its representatives in the SCM of trying to undermine prosecutorial independence and sacrificing his own independence.¹¹⁹ The recommendation of the commission that outvoted Falcone in favor of another candidate was never confirmed by the plenary session of the SCM, as Falcone was assassinated on May 23, 1992.

III.1. Institutional structure of NAD

The National Anti-Mafia Directorate comes into place as a part of the Prosecution within the Supreme Court of Cassation in Rome.¹²⁰ It is designed to act as a central coordinating point of the investigations, ensuring the efficiency of operations. The NAD is supported by 26 District Anti-Mafia Directorates; they investigate organized crime in the territory falling under the jurisdiction of the respective Court of Appeals, to which each of the district directorates belong.¹²¹ The Prosecutor of the Court of Appeals appoints the prosecutors to lead the organized crime investigations, taking into account their conduct and professional experience. The appointment is for a period of at least two years. The Superior Council of the Magistracy has to be notified about the employees appointed in each Anti-Mafia Directorate.¹²² When a directorate is established for the first time, the National Anti-Mafia Prosecutor is notified of the appointment of each prosecutor.

The National Anti-Mafia Prosecutor, appointed for a period of four years by the Superior Council of the Magistracy with the approval of the Minister of Justice, heads the NAD.¹²³ The Prosecutor can serve a maximum of two terms. The National Anti-Mafia Prosecutor works under the supervision of the Prosecutor General at the Court of Cassation, who is accountable for the activity of the NAD and the District Anti-Mafia Directorates to the Superior Council of the Magistracy. The National Prosecutor is assisted by 20 prosecutors who are appointed for a term of two years under his approval by the SCM based on their experience in organized crime investigations and their ability to work on a team.¹²⁴

The officers of the National Anti-Mafia Directorate and the magistrates of the prosecution enjoy all the powers that the Italian Constitution extends to them: magistrates are subject only to legality and the law,¹²⁵ they are autonomous

¹¹⁹ Giuseppe Di Federico, „Prosecutorial Accountability, Independence, and Effectiveness in Italy,” in *Promoting Prosecutorial Accountability, Independence and Effectiveness* (Sofia: Open Society Institute, 2008).

¹²⁰ Decree-Law No 367 of 20 November 1991, Art. 6.

¹²¹ Decree-Law No 367 of 20 November 1991, Art. 5, converted into a law No 8 of 20 January 1992.

¹²² Decree-Law No 367 of 20 November 1991, Art. 5, converted into a law No 8 of 20 January 1992.

¹²³ Decree-Law No 195 of 24 March 1958, Art.11 (3) (concerning the creation and operations of the Superior Council of the Magistracy).

¹²⁴ Decree-Law No 367 of 20 November 1991, Art. 6 (4), converted into a law No 8 of 20 January 1992.

¹²⁵ Constitution, Art. 101 (2).

and independent from the executive and legislative powers of the state,¹²⁶ and they are irremovable.¹²⁷

III.2. The NAD Structure

The NAD consists of five divisions and several units:

- Three of the divisions are engaged with the traditional mafia organizations operating in Sicily, Campania, Calabria and Apulia (the Cosa Nostra, Camorra, 'Ndrangheta, and Puglia crime groups).
- The *New Mafia Division* is in charge of the other forms of crime, such as Albanian, Chinese, Russian, etc.
- The *Research and Documentation Division* studies the evolution of legislation related to organized crime, existing court practices, and theoretical issues. The unit also proposes topics for analysis and discussion.
- The *Information Technologies Division* is in charge of administering the database and identifying the best technologies applicable for the fight against organized crime (e.g., telecommunications). The division conducts technical analyses and, on that basis, proposes to the court counteractive measures to prevent the use of new technologies for criminal activities by organized crime groups.

The following units also belong to NAD: *Suspicious Financial Transactions, Kidnapping and Extortion, Prevention, Public Tenders, Telecommunications, and Organized Crime in Agriculture.*

III.3. NAD Functions

The National Anti-Mafia Directorate has powers over the entire territory of the country, and its main task is conducting intelligence and investigation of organized crime. The Directorate receives additional support from the different security services of the state and the central and provincial divisions of the police forces engaged in combating mafia. The NAD also coordinates the operations of all district Anti-Mafia directorates.

The functions of the NAD are largely based on the legal definition of the crime of "mafia-type association." The thematic scope of its powers includes the following crimes:

- a) association for purposes of committing offences,¹²⁸
- b) mafia-type association (mafia-type organized crime),¹²⁹
- c) kidnapping for the purpose of extortion,¹³⁰
- d) association for the purposes of illicit trafficking of narcotic or psychotropic substances,¹³¹
- e) all crimes committed by intimidation, the exercise of violence, and subjection to the law of silence which are characteristic of mafia-type organizations,

¹²⁶ Constitution, Art. 104 (1).

¹²⁷ Constitution, Art. 107 (1).

¹²⁸ Penal Code, Art. 416.

¹²⁹ Penal Code, Art. 416bis.

¹³⁰ Penal Code, Art. 630.

¹³¹ Presidential Decree No 309 of 9 October 1990, Art. 74.

- f) association for the purpose of international cigarette smuggling,¹³²
- g) placing or holding a person in conditions of slavery or servitude,¹³³
- h) trafficking in human beings,¹³⁴ and
- i) the sale and purchase of slaves.¹³⁵

The National Anti-Mafia Prosecutor oversees the work of the district prosecution offices to ensure more effective coordination of the investigations and full utilization of the capacity of the police forces, and to guarantee the completeness and speed of investigative work.¹³⁶ The accomplishment of these activities requires in-depth knowledge of the mafia and a more concerted effort to collect and disseminate information and data about organized crime.¹³⁷ For that purpose, the Prosecutor has at his disposal an information database incorporating documents and information from judicial sources (crime reports, arrests, testimonies of „collaborators of justice“). The district Anti-Mafia Directorates must also maintain an electronic database linked to the central office of the NAD. The information and analysis is stored on disks and is significantly more reliable and dependable than the standard police reports.¹³⁸

When the NAD was created, the prosecutors that had been appointed to the Directorate waged strong resistance against the proposed hierarchical supervision of their work. The first version of the legislative decree for the NAD assigned the director of that office substantive hierarchical powers with regard to the district prosecutors (he could issue binding instructions, take over cases from the district prosecutors, and directly conduct the necessary investigative activities). The magistrates opposed that proposal and forced the Minister of Justice to eliminate from the decree the hierarchical supervision over the activities of the local prosecutors. They argued that with respect to the protection of the prosecutors' independence, spontaneous collaboration was the only legitimate means to encourage coordination between them.¹³⁹ The final version of the statute gives the National Anti-Mafia Prosecutor a wide range of powers. According to the law, he can:¹⁴⁰

- issue binding instructions to the 26 District Directorates to avoid investigative conflicts and promote more effective ways to coordinate their joint investigation work;
- call meetings of the district prosecutors to clear up existing conflicts and discrepancies in the investigative work, if those instructions are not followed. The purpose again is more effective coordination;
- if such meetings prove ineffective, take over a given case and conduct the

¹³² Art. 291-quarter, introduced with art. 1 - Law No 92 of 19 March 2001 – of Presidential Decree No 43 of 23 Jan. 1973.

¹³³ Penal Code, Art. 600.

¹³⁴ Penal Code, Art. 601.

¹³⁵ Penal Code, Art. 602.

¹³⁶ Decree-Law No 367 of 20 November 1991, Art. 7 (2) converted into Law 8 of 20 Jan. 1992.

¹³⁷ Pierre Luigi del'Osso, *supra* note 109.

¹³⁸ *Ibid.*

¹³⁹ Giuseppe Di Federico, *supra* note 119.

¹⁴⁰ Decree-Law No 367 of 20 November 1991, Art. 7 (2) converted into Law 8 of 20 Jan. 1992.

investigation directly, providing that the following two circumstances exist (which amount to illegal conduct on the part of the district prosecutors:

- 1) prolonged and unfounded investigative inactivity or 2) unjustified continuous violation of the norm providing for voluntary collaboration;
- This is considered an extraordinary measure and has not been enforced in the last fourteen years – that is, since the NAD was established. Should such a circumstance occur, the law provides for the possibility to appeal the decision of the NAD Director before the Prosecutor General at the Court of Cassation; the NAD Director must notify the Superior Council of the Magistracy of his decision and motives thereof;
 - order magistrates from his directorate or other directorates to temporarily assume the investigation of particularly complex cases when they require special professional experience, when the work on certain investigations needs to speed up or they are stalled, or to fulfill requests for investigative actions or specific and motivated procedural claims during judicial proceedings.

The power of the National Prosecutor to issue temporary assignments to magistrates from the NAD poses a risk of tensions within the Directorate. The officers in the district Anti-Mafia Directorates may conceive of such actions as leveling criticism against them or direct interference in their work. This is illustrated by two examples of prolonged investigations of two kidnapping cases from the beginning of 1998. In both cases the National Prosecutor proposed magistrates from the NAD to assist the district prosecutors, but the district directorates refused it.¹⁴¹

III.4. International Cooperation of the NAD

The NAD has an international cooperation division in charge of developing and expanding the relationships with judicial institutions engaged in the fight against organized crime in other countries, as well as information and data exchange regarding the mafia. To implement the coordination of the investigation and prosecution of crimes, the National Anti-Mafia Prosecutor is also expected to acquire, release, and update news reports, information, and data about international criminal groups which are collaborating with local criminal groups in illegal activities. The Ministry of Interior officially recognized the need for such cooperation in its Note of May 25, 1998, emphasizing that “[T]he acquisition and preparation of news reports, information and data about organized crime falls within the competences of the NAD and cannot be limited only to the territory of the country, because organized crime has long since become transnational.”¹⁴²

The responsibilities of the NAD include the provision of news, information, and data to the district directorates or foreign judiciary, which could lead to instituting a new investigation or supplement an investigation already underway.¹⁴³

¹⁴¹ Jamieson, *supra* note 93, at 97.

¹⁴² Pierre Luigi del’Osso, *supra* note 109.

¹⁴³ This specific power differs from the usual judicial order which falls under the competencies of the district Anti-Mafia Directorates and the Ministry of Interior, and is used to obtain evidence during the penal proceedings.

IV. Creating the Anti-Mafia Investigations Directorate

(Direzione Investigativa Antimafia, DIA)

In 1991 legislative measures regarding the police and their powers for fighting organized crime come into effect, seeking to ensure coordination of the investigative work. The reforms are a consequence of analysis showing that mafia-related crimes are not spontaneous, but usually carefully planned and executed.¹⁴⁴ The reform followed criticisms of ineffective coordination of the investigative work conducted by the three political institutions, resulting in isolated and incomplete investigations. The Anti-Mafia Investigations Directorate came into existence in October 1991.¹⁴⁵ This is an investigative institution within the Ministry of Interior with the specific task to investigate mafia-type organizations and alleged mafia crimes. DIA is a police agency supported by the various branches of the national security forces (comprised of officers of the *Polizia di Stato*, *Arma dei Carabinieri*, *Corpo della Guardia di Finanza*), and is expected to perform not only analytical work but to establish relations with similar foreign institutions. The Investigations Directorate has 12 regional offices.

The DIA implements three types of functions: prevention investigations, judicial investigations (supervised by the prosecution), and cooperation with foreign institutions for the purpose of investigative work.¹⁴⁶ Its responsibility is the analysis of structural characteristics of criminal organizations, their objectives and methods of operation, and national and international transactions. Within its duties fall judicial police investigations carried out under the supervision of the prosecution.

DIA Officers have the following powers:

- a) To conduct secret and undercover operations for the purpose of collecting evidence in cases of drug trafficking, money laundering and arms dealing.
- b) To request surveillance and wiretap warrants from the National Anti-Mafia Prosecutor necessary to collect information about mafia-related crimes, or for their prevention.
- c) To request authorization from the National Prosecutor for protective custody for persons suspected in preparing a mafia-type crime.
- d) To conduct investigative conversations with convicted criminals who are serving a prison sentence in order to collect information about organized crime, previously committed crimes, or future crimes.¹⁴⁷ The National Anti-Mafia Prosecutor can carry out such investigative conversations on his own initiative. This particular power aims to increase effectiveness in the fight against organized crime by using informal methods of obtaining information related to a specific investigation from individuals with inside knowledge about the mafia organization. The implementation of this task is not easy;

¹⁴⁴ Pierre Luigi del'Osso, *ibid.*

¹⁴⁵ Decree-Law No 345 of 29 October 1991, converted into Law 410 of 30 December 1991.

¹⁴⁶ Decree-Law No 345 of 29 October 1991, Art. 3, converted into Law 410 of 30 December 1991.

¹⁴⁷ Decree-Law No 306 of 8 June 1992; *State Gazette No 133 of 8 June 1992*, „Urgent Amendments to the new Penal Procedure Code and Introduction of Measures Against Organized crime.“

the authorization procedures for investigative conversations require the prior approval of all the prosecutors involved, which could cause a delay of several months.¹⁴⁸

The maximum period for investigating organized crime offences is twelve months, with a possible extension of up to two years.¹⁴⁹ The legislation permits phone wiretapping when this is deemed necessary for the investigation of an organized crime. Wiretapping is authorized for a period of 40 days, with a possible 20-day extension. The Minister of Interior, DIA's director, or the heads of the specialized police divisions may file a request for a wiretapping warrant with the judge or prosecutor for the purpose of prevention or the gathering of information about mafia-related crimes, kidnapping for extortion, or drug trafficking. The requirements for a wiretapping warrant in mafia-related crime cases are less stringent than in the case of conventional crimes. If it relates to the mafia, wiretapping may be authorized for the purpose of carrying out the investigation, whereas for conventional crimes the authorization is given only if the case is urgent. Preventive wiretapping on private property is authorized only if there is enough evidence that a crime has been committed on the premises. When an investigation of an organized crime offence is involved, this restriction does not apply. As a rule, records of phone conversations can be used only for intelligence purposes, whereas if they are obtained in connection with a specific crime, they are regarded as admissible evidence in court.¹⁵⁰

V. The effectiveness of the institutions investigating organized crime

Some of the main criticisms leveled against the combat of organized crime in Italy concern the failures of the legislative approach. Most of the existing laws were adopted in the aftermath of serious crimes, that is, in response to the criminal challenge, and this is why a large part of the legislation is based on decree-laws subsequently ratified by the Parliament. They were emergency measures taken in extraordinary circumstances. In this case, the overall conception is wrong that the fight against the mafia must be handled as an „emergency.“¹⁵¹ The criticism is that so far the Italian legislation on organized crime has been inadequate, without a clear plan for addressing this phenomenon systematically. Most of the existing laws are regarded as „symbolic,“ adopted in reaction to a crime and seeking more to demonstrate political power than to promote effectiveness.¹⁵²

¹⁴⁸ Jamieson, *supra* note 93, at 87.

¹⁴⁹ Decree-Law No 306 of June 8, 1991, converted into a law 356 of August 7, 1991. The provisions in the law regulate the investigative procedures related to serious crimes, collaborators with justice, the confiscation property acquired through crime, and the conditions for imprisonment. A Decree-Law (*decreto legge*) is a quasi-legislative act issued by the Executive that is effective for 60 days after its issuance, but expires if not approved by Parliament within that period.

¹⁵⁰ Piero Luigi Vigna, „Fighting Organized Crime, with Particular Reference to Mafia Crimes in Italy,“ *Journal of international criminal justice*, <http://jicj.oxfordjournals.org/cgi/content/full/4/3/522>.

¹⁵¹ Umberto Santino, „Law Enforcement in Italy and Europe Against Mafia and Organized Crime,“ [<http://www.centroimpastato.it/otherlang/mcdonald.php3>].

¹⁵² *Ibid.*

Some experts in Italy point out that not enough efforts are invested in collecting reliable analytical data about the overall performance of the prosecution and of the individual prosecutors. Other countries evaluate the prosecution's effectiveness in terms of the prosecutors' success in court and the actual outcomes, factoring in the efficient use of resources allocated for the investigation. In Italy, the very idea of using such data for performance assessment of the individual prosecutors and the prosecution would be perceived as a threat to their independence, calling attention to the constitutional principle of „compulsory criminal action.“¹⁵³

With regard to the National Anti-Mafia Directorate, it is important to mention that its first years were marked by tough challenges. Shortly after its establishment, eighteen of the prosecutors sent a letter to the Superior Council of the Magistracy complaining about the poor management capacity of the Directorate and its lack of effectiveness. Many were concerned that the institutional structure of the Directorate would be an obstacle to its future progress. One explanation for this negative attitude may have been the prevailing perception that the Anti-Mafia Directorate was entirely the brainchild of Giovanni Falcone. According to some, he was the only person with the potential to lead the NAD. The authors of the letter argued that the Directorate is an overly ambitious project in terms of its legislative mandate, which lacked clearly defined procedures and directives. There was no main goal set before the institution and as a result, its actions were mostly based on individual initiatives.¹⁵⁴

As was mentioned above, some of the criticisms were directed against the proposed role of the head of the NAD. The first version of the Directorate's Statute indicates that Giovanni Falcone conceived of the NAD as a supervisory structure where the main responsibility of the National Anti-Mafia Prosecutor was to lead and prioritize the cases under investigation. This role implies more extended power gathered in the hands of that person, especially with respect to the District Prosecutors, allowing him to issue executive directives, to take over cases from the district directorates, and to conduct the investigations directly. The magistrates waged a strong protest against this hierarchical structure of the NAD, and the Minister of Justice was forced to remove the supervisory powers over the District Prosecutors, thus considerably reducing the prerogatives of the National Prosecutor.¹⁵⁵

After this stormy beginning, gradually the Anti-Mafia Directorate managed to overcome the obstacles. Despite all the concerns about its institutional capacity, the NAD gained significant expertise in the fight against organized crime (for instance against financial crimes, money laundering, etc.) The appointment of Piero Luigi Vigna as National Prosecutor at the end of 1996 gave a boost to the organization. The Directorate carried out studies on the criminal use of new technologies and their application in the day-to-day investigative work of the NAD. Special attention was paid to international cooperation and influence coming from foreign crime groups (namely Chinese, Russian, Columbian, and Albanian groups). Under Vigna, the NAD achieved better results and better accountability.¹⁵⁶

¹⁵³ Giuseppe Di Federico, *supra* note 119.

¹⁵⁴ Jamieson, *supra* note 93, at 96.

¹⁵⁵ Di Federico, *ibid.*

¹⁵⁶ Jamieson, *supra* note 93, at 97.

Alongside the NAD, the Anti-Mafia Investigations Directorate grew into a prestigious, professional institution and managed, within a short period, to solve the issues brought about by its internal structure and inter-departmental status.¹⁵⁷ The DIA devotes a great deal of its work to gathering information about mafia organizations and their strategies, tactics, and economic interests. On the negative side, the Directorate's financial independence, high salaries and flexible working time give it the air of a dynamic and well-functioning institution, while causing strong competition between the DIA and the other specialized police divisions. Some competition is always welcome as it encourages higher performance, but in reality the outcome is often an unwillingness to share information and obvious rivalry on the job.¹⁵⁸

Positive results from the existence of the DIA were already becoming visible by the end of 1992, one year after its creation. One indicator was the drastic increase in the number of arrests made between 1990 and 1995. According to the report of the Ministry of Interior, in 1990 there were 4850 arrests and they reached 11,223 in 1995.¹⁵⁹ There was also an increase in the number of arrests on the grounds of article 416bis for mafia-type associations; in 1991, only 874 arrests were made, compared to 1,324 in 1997.

The successful operation of these institutions was a new challenge to the mafia and it answered back by trying to „buy them off.“ It was a harsh blow to the DIA when information was released in 1997 that several officers had been „generously sponsored“ on a monthly basis by members of the Camorra to initiate investigations against their rivals instead of the Camorra. On May 20, 2008, the Italian police in Guilianno, in southern Italy, arrested 39 people, 23 of whom were police officers. All of them are held on suspicion of „ties with criminals and corruption-related fraud.“

The success in combating organized crime relies largely on one investigation method applied by the Anti-Mafia forces, namely, the so-called *pentiti* or „collaborators with justice“ (*collaboratori di giustizia*). From studying organized crime, the authorities understand that one way to tackle the issue is by cutting off ties within the criminal group and destabilizing its structure from within.¹⁶⁰ With this knowledge, the legislator proposed a set of measures that would allow, on the one hand, heavier punishments for perpetrators of mafia-related crimes, and on the other, mitigation of the criminal rules for those members of criminal groups who decide to cooperate with the authorities.

„Collaborators with justice“ are mostly former mafia members who, once in prison, decide to give up the organization and help the investigation.¹⁶¹ This approach of the authorities has proven extremely successful because it helps the investigation solve crimes and gives the investigators an opportunity to gain information about the strategies, tactics, and illegal undertakings

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ „Report of the Ministry of Interior for 1993–1995,“ http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stamp/notizie/biblioteche/app_notizia_19140.html

¹⁶⁰ Piero Luigi Vigna, *supra* note 150.

¹⁶¹ Two of the most well-known *pentiti* are Tommaso Buscetta and Salvatore Cancemi, who became collaborators in the mid-'80s, prior to the introduction of the relevant legislation.

of the mafia.¹⁶² A special Witness Protection Program has been developed, managed by the Central Protection Service, which is responsible for keeping track of the relocations of the witness and his relatives, issuing new IDs, securing more comfortable conditions in prison where the person serves a sentence, negotiating with the prosecution to reduce the sentence (plea bargaining), and securing financial protection.¹⁶³ When it is possible during a court trial, the collaborators are allowed to testify via video conference to guarantee their security.

In 1997, the number of *pentiti* dropped significantly because the Central Protection Service adopted new stringent criteria regarding the status of collaborators. This is an indication that, perhaps, their number before 1997 was unacceptably high.¹⁶⁴ In 2001, the legislation in this area also changed to include several new elements: the need to increase the number of informants outside of the mafia groups, a requirement for the informant to disclose the assets acquired through crime to make his testimony more trustworthy, the option to put the informant under cross-examination during a trial, and provisions for plea bargaining. By law, the witness is required to reveal everything he knows within a period of six months from the moment he decided to collaborate. Prosecutors consider this a very short and insufficient period for the purposes of this method of investigating organized crime.¹⁶⁵

In recent years, the number of collaborators with justice has been on the rise again, and one reason for that are the extremely tough jail conditions in the Italian correctional facilities. The regulations pertaining to imprisonment in Italy are referred to as the „article 41-bis regime.“ This legislative text was introduced in 1975 as an emergency measure. It allows the Minister of Interior and the Minister of Justice to temporarily suspend certain rules regarding the socialization of criminals for those convicted of organized crime.¹⁶⁶ In 1992, the law was amended to allow these restrictive measures to be enforced in cases of serious suspicion whether the internal order and security requirements in the prisons are strictly being followed.¹⁶⁷ The goal was to prevent meetings and communication between mafia members and to break the chain of command between mafia bosses and their subordinates.

The persons convicted for organized crimes serve their prison sentences under very restrictive conditions. They are allowed one visit a month by immediate family members only; communication is through a thick glass partition; telephone calls are recorded and outgoing calls are banned; participation in sports and cultural activities is not allowed; one-hour walks are allowed in the morning and afternoon.

¹⁶² Antonio la Spina, „Recent Anti-Mafia Strategies: The Italian Experience,“ in: D.Siegel and H. Nelen (eds.), *Organized crime: Culture, Markets and Policies* (Springer: 2008) [<http://www.springerlink.com/content/lq423888448j4484>].

¹⁶³ Decree-Law No 306 of 8 June 1992, Art. 13, converted into Law No 356 of 7 August 1992.

¹⁶⁴ Antonio la Spina, *supra* note 162.

¹⁶⁵ *Ibid.*

¹⁶⁶ Law No 345 of 1975, Art. 41bis.

¹⁶⁷ Law-Decree No 306 of June 8, 1992, Art. 14, converted into a Law No 356 of August 7, 1992. In 2002, the provisions of this regime were incorporated into the Penal Code.

Currently, 650 inmates are subject to the 41-bis regime.¹⁶⁸ In October 2007, despite heavy protests from the Italian authorities, an American court refused to extradite a member of Cosa Nostra convicted of drug trafficking on grounds that the tough jail regime in Italy constitutes a form of torture.¹⁶⁹ A month later, the European Court of Human Rights condemned Italy for the severe prison conditions under the 41-bis regime. The court ruled that the regime violates two articles of the European Convention on Human Rights. The first is Article 6, the right to a fair trial, and the second is Article 8, the right to respect for private life.

Despite the efforts and success of the institutions fighting against the mafia, various reports show that the mafia continues to be powerful in Italy and to control not only the criminal world, but also the state's economy. Organized crime represents the biggest segment of the Italian economy, accounting for more than 127 billion dollars in profits.¹⁷⁰

Through various activities – extortion, robbery, gambling, racketeering – organized crime accounts for 7% of Italy's GDP. The most profitable business is extortion (with a profit of 30 billion euro per year), followed by contraband and racketeering (10 billion euro per year).

¹⁶⁸ Ansa, „Italy Condemned For Tough Jail Conditions,“ [<http://www.lifeinitaly.com/News/news-detailed.asp?newsid=8062>]

¹⁶⁹ John Hooper, „Italy Dealt Double Blow Over Organized Crime,“ *The Guardian*, [<http://www.guardian.co.uk/world/2007/oct/17/usa.italy/print>].

¹⁷⁰ Pieter Kiefer, „Organized Crime Takes lead in Italy Economy,“ *The New York Times*, Web. October 23, 2007.

THE SERIOUS ORGANIZED CRIME AGENCY (SOCA)

United Kingdom

I. Introduction

The idea for a national agency for the combat of national and transnational crime dates back to the 1990s. It came to fruition in 2004, after the publication of the White Paper „One Step Ahead: A 21st Century Strategy to Defeat Organized Crime.“ The document presents in detail the government's vision and the basic parameters of the national agency: „The Government has set a straightforward objective: to reduce significantly the harm done to the UK and its citizens by organized crime.“¹⁷¹ One of the chief characteristics of the agency is that the focus is on reducing the harm caused by organized crime rather than on specific anti-crime actions. This predetermines the institution's design from the very beginning.

The *Serious Organized Crime Agency* (SOCA), called „the British FBI“, is a relatively new institution. It was established in response to the terrorist attack in London on July 7, 2005, to challenge the belief that the police in the country are not equipped to deal with the kind of terrorism which that occurrence highlighted.¹⁷² The main scope of activity of the SOCA is organized crime, which includes drug trafficking, money laundering and human trafficking. Its powers extend over Scotland and Northern Ireland, working closely with the Scottish Crime and Drug Enforcement Agency and the Northern Ireland Organized Crime Taskforce. This is the first institution with such a powerful mix of authorities and functions – SOCA officers can use the powers of a constable (police officer), a customs officer, and an immigration officer.

Right at the outset, academic circles have expressed concerns and criticisms about the Agency's statute, emphasizing the lack of clarity about certain elements of its institutional structure. The main question is whether the SOCA is a law enforcement service or an intelligence service. A year after its creation, the Agency was still looking to find its right place, as *The Guardian* claimed.¹⁷³ In the process of promoting the SOCA, the government declared that it is not a police institution, but at the same time, the Agency's statute grants SOCA officers the same powers as those of the police force.

Its intelligence powers allow the Agency to collect information about serious crimes, but this does not ensure that an investigation will follow. All of these issues sustain the ambiguity about SOCA's institutional make-up.

II. Characteristics of organized crime in the United Kingdom

The SOCA issued a Threat Assessment report which describes several categories of crimes committed on the territory of the country.¹⁷⁴ On the top

¹⁷¹ The Home Office, White Paper „One Step Ahead: A 21st Century Strategy for Defeat of Organized Crime,“ Web. 29 March 2004.

¹⁷² <http://frontlineonnet.com/fl2308/stories/20060505000907800.htm>.

¹⁷³ *The Guardian*, <http://www.guardian.co.uk/uk/2007/mar/31/ukcrime.prisonsand-probation1>, Web. March 31, 2007.

¹⁷⁴ (No author) „United Kingdom Threat Assessment 2006/07,“ SOCA website (undated), <http://www.soca.gov.uk/>.

of the list is **drug trafficking**, said to present the biggest threat. The paper cites the example that out of 900 tons of cocaine and heroin produced in Latin America, 300-400 tons are distributed in Europe, and between 35 and 45 tons reach the UK. In the report, the SOCA identifies 300 major drug importers in the UK, 3,000 wholesalers, and about 70,000 street dealers.¹⁷⁵ The arrests and confiscations made before the SOCA was in place have not been enough to establish stable mechanisms for shrinking the drug markets.

Second on the list are **immigration** crimes. There are organized crime groups involved in human trafficking. They exploit illegal immigrants, primarily as cheap labor in the sectors of agriculture, construction, and the food processing industry.

The third rank is **fraud**-related crimes in various spheres, including cigarette and alcohol smuggling and credit card fraud. In most cases, the revenue from these activities is used to finance other crimes. What stands out about the government's policy regarding organized crime is the introduction of a new method for measuring the level of crime and the damage it causes to the state every year. The Home Office sets its efforts on determining the social and economic price of organized crime, the level of social insecurity, and the scope and range of the organized crime market. In the strategy „One Step Ahead“,¹⁷⁶ the government calls organized crime „big business,“ with profits reaching close to 40 billion pounds per year. According to the paper, the distribution of organized crime in the UK looks like this: drug trafficking – 13 billion pounds a year, immigration crimes – 3 billion pounds, crimes related to intellectual property – 9 billion, tax evasion and fraud – 7 billion, and armed robbery and some cyber crimes.

In addition, new circumstances are emerging that contribute to the rise of organized crime. These are a few: technological improvements and the development of the world economy, credit card fraud (which has tripled since 1992), and the flights of British Airlines (a potential channel for drug trafficking and illegal immigration, which have increased by 40% between 1998 and 2005).

II.1. Definitions of organized crime in the UK

The legislation regulating the SOCA does not include a definition of „serious organized crime,“ which is a definite setback and a premise for a wide interpretation of the legal mandate and functions of the Agency.¹⁷⁷ In the White Paper „One Step Ahead: A 21st Century Strategy to Defeat Organized Crime,“ the government refers to the definition of organized crime proposed by the National Criminal Intelligence Service, namely „those involved, normally working with others, in continuing serious criminal activities for substantial profit, whether based in the UK or elsewhere.“

II.2. Institutions for the combat of organized crime before the establishment of the SOCA

Before the establishment of the SOCA, these functions were the responsibility of several different agencies:

¹⁷⁵ Sir Stephen Lander, „SOCA: One Year On,“ Serious Organised Crime Agency Website, February 13, 2007.

¹⁷⁶ „One Step Ahead,“ *supra* note 171.

¹⁷⁷ Ozlem Ulgen, „The UK's New Serious Organized Crime Agency (SOCA): Combining Intelligence and Law Enforcement,“ *Revue Internationale de droit penal*, Vol. 78 (2007/1): at 157.

- *The National Crime Squad*: established in 1998, comprised of 6 regional divisions with 1,330 investigators and 420 administrative staff. The unit came into existence following a report of the parliamentary commission on internal affairs which recommended that in order to improve the effectiveness of the fight against organized crime, the current structure of the Regional Crime Squads must be replaced by a better-coordinated structure on the national level. The NCS works on crimes such as drug trafficking, murder-for-hire (contract killings), immigration crimes, arms trafficking, money laundering, kidnapping and extortion. The staff includes police officers from the 43 police units in England and Wales.
- *The National Criminal Intelligence Service*: created as a separate structure in 1992. Its main function is organized crime intelligence. The legal mandate of the NCIS involves¹⁷⁸
 - a) gathering, storing and analyzing information, and b) providing intelligence information to police authorities in Great Britain, Northern Ireland and the National Crime Squad. One of its tasks is preparing profiles of the big criminal enterprises to be used as a basis for conducting national and regional investigations.
- *The National Hi-Tech Crime Unit*: established in 2001 to investigate computer crimes.
- *HM Customs & Excise*: formally in existence since 2005 and responsible for collecting various taxes. The agency controls the import and export of goods and the prevention of contraband of goods and drugs, including counterfeit goods.

II.3. Reasons for creating a specialized body for the combat of organized crime

Lack of effectiveness in fighting crime

The main reason for the creation of the SOCA was the lack of effectiveness in combating organized crime and competition between the various bodies working in this field. Because of the rivalry between the institutions, they rarely exchanged information and did not collaborate.¹⁷⁹ The various agencies failed to coordinate their work. They were not intelligence-led and lacked efficiency because of unrealistic expectations and short-term goals set before them.

Overlapping institutional powers

A further hindrance to success in the fight against crime was the overlap and duplication in powers among the responsible institutions¹⁸⁰ and the blurred lines between their mandates. The individual agencies lacked effective tools and skills for collaboration and exchange of information. This necessitated an institutional and organizational reform, focused above all on the process of information gathering and analysis.

Lack of understanding about certain categories of crime

The lack of strategic knowledge and understanding was one of the main reasons for the inefficient fight against organized crime in the area of cultural

¹⁷⁸ Police Act of 1997, Art. 2.

¹⁷⁹ Center for Crime and Justice Studies, „Serious Organized Crime: A New Approach“, www.crimeandjustice.org.uk/opus239/serious-organised-crime.doc.

¹⁸⁰ Redpath, *supra* note 37, at 79.

values. On the one hand, the police did not recognize this as an issue, on the other, the views of the public officials and law enforcement authorities regarding the investigation of crimes related to cultural values diverged greatly.

Lack of unified strategy

The institutions engaged in combating organized crime lacked clarity regarding their specific responsibilities and carried out their work according to the individual institutional priorities they had set for themselves. They failed to build partnerships and to cooperate with other agencies. Acting in isolation and pursuing separate strategies, they could not achieve the desired effectiveness.¹⁸¹

Development of the European Union

Another reason for establishing the SOCA was the further development of the EU and relevant EU institutions. The opening of the borders demanded new organizational changes to support the fight against drug and human trafficking, money laundering, etc. British analysts pointed out that the only way to accomplish this was to reduce the number of the existing agencies with duplicating and overlapping powers.

III. Establishment of the Serious Organized Crime Agency

The Home Secretary launched the idea for the SOCA on February 9, 2005. Two years of parliamentary debates on the need to restructure the intelligence sector preceded its creation. The debates of the legislators marked a historical moment for the country, as they took place amid unprecedented transparency and public interest. Until then, the understanding had prevailed that a reform of the intelligence services should not involve a wide public discussion about a new intelligence body and about its legal mandate.¹⁸²

A working group was set in place that was given the task of developing a proposal for how to run the centralized agency in the most effective way. The agencies, designated to go under the umbrella of the SOCA, participated in the discussions and supported the findings of the working group. The major outcome was the publication of the White Paper „One Step Ahead.“ The report outlined the following issues as the rationale for creating the SOCA¹⁸³: a) the dividing line between the institutional responsibilities of the bodies dealing with organized crime remained unclear in several areas, 2) an overall agreement on the existing overlap of their institutional powers, 3) duplication in the activities of some ministries, and isolated and uncoordinated actions against organized crime with difficult collaboration.

The proposals from the report found their place in the draft statute of the SOCA, which took a long time to pass in parliament. The main difficulty came from the contextual differences in which the terms „intelligence“ and

¹⁸¹ Clive Harfield, „SOCA: A Paradigm Shift in British Policing,“ *British Journal of Criminology* (No 46/2006), at 745.

¹⁸² Glen M. Segell, „Intelligence Transformation: The UK's 'Serious Organised Crime Agency' (SOCA),“ Paper presented at the 47th Annual International Studies Association (ISA) Conference, San Diego (March, 2006).

¹⁸³ „One Step Ahead,“ *supra* note 171.

„information“ were used. Debates ended with the decision to grant the Agency power to gather information for intelligence purposes, as defined in the Regulation of Investigatory Powers Act of 2000. Accordingly, the SOCA can gather and use information in the same way and under the same provisions as the police force.

A consequence of the Serious Organized Crime and Police Act of 2005, the SOCA formally came into being on April 1, 2006.¹⁸⁴ The following institutions merged under its umbrella: the National Crime Squad, the National Criminal Intelligence Service, the National Hi-Tech Crime Unit (NHTCU), the investigative and intelligence sections of HM Customs & Excise (now Revenue & Customs), and the Immigration Service's responsibilities for organized immigration crime (located at the two London airports). The Serious Fraud Office remained as a separate agency.

In April 2008, the Asset Recovery Agency (ARA) also merged with the SOCA. This agency was established in 2002 with the Proceeds of Crime Act, and remained in operation for four years. In January 2007, after criticisms that the ARA was costing taxpayers more than it was collecting,¹⁸⁵ the government proposed its merging with the SOCA.¹⁸⁶ In 2007, for example, the Agency froze assets belonging to Northern Ireland criminals worth almost £16m. The ARA had recovered only £8m from criminals, despite costing £60m to set it up.¹⁸⁷

The „founding fathers“ of the SOCA describe the agency as „more than simply a sum of the institutions incorporated within it.“¹⁸⁸ As conceived, the Agency is a distinct entity with its own mechanisms of operation, nothing like the classical investigative bodies.

The Serious Organized Crime Agency was established independently of the other special services, the External Security Intelligence Agency (MI6) and the National Security Intelligence Agency (MI5). Unlike the SOCA, MI6 operates worldwide to collect secret foreign intelligence in support of the British government's policies and objectives, to defend the national security, and to counter external threats to the UK. The National Security Agency, MI5 is responsible for protecting the UK against threats to national security from espionage, terrorism and sabotage, and distribution of weapons of mass destruction, whereas the SOCA has no such powers.

III.1. SOCA Institutional Structure

The SOCA is an Executive Non-Departmental Public Body (NDPB).¹⁸⁹ The agency is led by a Director General and a board with a majority of non-executive members (the board consists of eleven members). The Agency is operationally independent of the Home Office.

The **Board** is appointed by the Home Secretary and is responsible for ensuring that the SOCA fulfills its statutory responsibilities and meets the

¹⁸⁴ Serious Organized Crime and Police Act of 2005.

¹⁸⁵ <http://www.guardian.co.uk/uk/2007/may/24/ukcrime.prisonsandprobation>.

¹⁸⁶ <http://www.assetrecovery.gov.uk/aboutARA>.

¹⁸⁷ http://news.bbc.co.uk/2/hi/uk_news/6251339.stm.

¹⁸⁸ Clive Harfield, *supra* note 181, at 746.

¹⁸⁹ This is a distinct classification, typical for the British legislation, including four types of public bodies. The executive non-departmental institutions usually provide public services under the oversight of a Board, instead of a minister.

strategic priorities set out by the Home Secretary. The Home Secretary also appoints the **Chair of the Board** for a period of five years. The Chair is responsible for the Agency's overall approach and relationship with Ministers and with the government generally, its strategy, and for overseeing the Agency's operational performance.

The **Director General** is appointed by the Home Secretary and is responsible for everything the SOCA does operationally and administratively, including what operations will be conducted and how.¹⁹⁰ The participation of a government representative in the process of appointing the managing body of the SOCA suggests potential political influence on the Agency's activity. The responsibility of the Director General over SOCA's activities seems insufficient to compensate for a potential politicization of its operations.¹⁹¹ Criticism also emerged against key personnel, former members of the secret service, who were appointed to three of the main positions in the Agency. Doubts were raised regarding these experts' capacity in the field of criminal justice.

There are forty divisions of the SOCA across the UK. The Agency is divided into four directorates, each with specific functions:

The Intelligence Directorate gathers and assesses information. It then uses it to produce the best understanding of organized crime and to support the Agency's operational work against organized crime targets in the UK.

The Enforcement Directorate provides a flexible operational response to threats against key targets and serious organized crime groups.

The Intervention Directorate intervenes to reduce and prevent criminal activities.

Corporate Services provides administrative support, facilitating and developing the Agency's capabilities.

The Home Secretary has the right to determine the strategic priorities for the SOCA.¹⁹² Before doing so, s/he must consult a) the SOCA, b) the Scottish Ministers, and c) „such other persons as he considers appropriate.“¹⁹³ The strategic priorities must be taken into account when the SOCA prepares its Annual Plan for operations, which details how to fulfil these priorities and the Agency's sector policies. The SOCA is also required to publish an Annual Report including an assessment of the extent to which the Annual Plan for that year has been carried out.¹⁹⁴

The legislation does not require the SOCA to take into consideration public opinion on organized crime in determining its strategic priorities. Despite that, in the beginning of its work the Agency appealed to populism; the Chair of the Board declared that „all media publications on the various deals of

¹⁹⁰ Serious Organized Crime and Police Act of 2005, Art. 21 (1 & 2).

¹⁹¹ Clive Harfield, *ibid.*, at 750.

¹⁹² The priorities for 2006–2007 include the following: „The SOCA should devote a higher proportion of its resources and activities to intelligence than the agencies that it replaces. Class A drugs and organised immigration crime should be its top priorities, and in that order. It should also work to counter other crimes, including fraud against individuals and the private sector, hi-tech crime, the use of firearms.“

¹⁹³ Serious Organized Crime and Police Act of 2005, Art. 9 (2).

¹⁹⁴ Serious Organized Crime and Police Act of 2005, Art. 6 (9).

organized crime will be taken into account by the Home Secretary in setting the priorities of the SOCA.¹⁹⁵ All that said, the perception is still strong that the powers of the Home Secretary with respect to shaping SOCA's policies grant him too much authority over the Agency.¹⁹⁶

III.2. SOCA Functions

The statute defines the SOCA as „an intelligence-led agency with law enforcement powers“ with three basic functions¹⁹⁷: prevention and detection of serious organized crime, reduction of the number of crimes, and reduction of the harm caused by organized crime. The SOCA's specific powers include gathering, storing, analysis and dissemination of information consistent with its functions. This gives the SOCA unprecedented authority, bearing in mind that it is a civilian organization and not a police force.¹⁹⁸

General powers

Built as both a law-enforcement and an intelligence structure, the SOCA can institute criminal proceedings in England and Wales or Northern Ireland; at the request of any law enforcement agency and special police force, it can act in support of any activities of that agency. The SOCA can enter into other arrangements for cooperating with bodies or persons (in the United Kingdom or elsewhere) which it considers appropriate in connection with the exercise of any of the SOCA's functions. The SOCA may provide such assistance as it considers appropriate in response to requests made by any government or other body exercising functions of a public nature in any country or territory outside the United Kingdom.¹⁹⁹

Information Gathering

The legal basis for the SOCA's information-related activity is clearly set out in the Serious Organized Crime and Police Act 2005. The act contains strong provisions for the SOCA's information functions. The intention of Parliament in enacting these provisions was to vigorously promote the sharing of information between government departments, other public authorities, private organizations, and the SOCA for the cause of preventing and detecting crime and mitigating the harm it causes. By introducing the Bill, Parliament acknowledged the need for improvement in this area and noted, „...how difficult it has been, even with good will, to exchange the necessary intelligence information and to link investigation, intelligence, and prosecution.“²⁰⁰

The SOCA has the function of gathering, storing, analyzing and disseminating information relevant to²⁰¹ a) the prevention, detection, investigation and prosecution of offences, or b) the reduction of crime in other ways and the mitigation of its consequences.

The information gathering and disclosure powers of the SOCA raise certain questions with regard to the potential for violating human rights, in particular

¹⁹⁵ Harfield, *supra* note 181, at 749.

¹⁹⁶ Ibid., at 750.

¹⁹⁷ Serious Organized Crime and Police Act of 2005.

¹⁹⁸ Sir Stephen Lander, *supra* note 175.

¹⁹⁹ Serious Organized Crime and Police Act of 2005, Art. 5.

²⁰⁰ (No author), „Statement of Practice,“ SOCA website (undated), <http://www.soca.gov.uk/>.

²⁰¹ Serious Organized Crime and Police Act of 2005, Art. 3.

the right of private life, as stated in Article 8 of the European Convention on Human Rights. During the debates regarding this part of the statute of the SOCA, critics pointed out that the legal provisions are „broadly formulated, lacking a precise definition of the term ‘information’ and the Agency is given too much discretion with regard to the institutions to which it can distribute information.”²⁰² This was one reason for the SOCA to adopt its own Statement of Information Management Practice.²⁰³

By virtue of its statute, the Agency is authorized to receive information from any person or body, as well as to disclose information to other bodies or persons, if the disclosure is made for the purpose of the SOCA exercising any of its functions. The information flow is two-way. On the one hand, any person may disclose information to the SOCA if the disclosure is made in connection with the exercise of any of its functions²⁰⁴, provided such disclosure does not breach any of the provisions of the Data Protection Act 1998.²⁰⁵ Exemptions are allowed only when the non-disclosure of information can hurt the prevention or the investigation of a crime. On the other hand, the SOCA can disclose the information it gathers and any analyses of it to police forces, special police forces, and law enforcement agencies.²⁰⁶

Disclosure of information by the Agency enables the SOCA to respond to requests for support from law enforcement agencies and to support the work of the intelligence services in the exercise of their functions. The Agency may not gather or disclose information for anything other than a permitted purpose, i.e. for exercising its functions. Any disclosure to or by the SOCA must be considered in light of Article 8(1) of the European Convention on Human Rights. In order to further secure the observance of Article 8 and the Data Protection Act, the SOCA has put in place standards for the identification of its information requirements and for information handling, storage, processing, and dissemination.

Information, which the SOCA generally seeks, falls in two broad categories:

- 1) ‘personal’ information on individuals whom the SOCA suspects to be involved in or closely associated with others involved in serious crime, and
- 2) information that enables the identification and profiling of persons whose activities fall within the Agency’s statutory responsibilities. The information sought in such cases may include extensive personal data, in violation of the provisions of the Data Protection Act. However, the disclosure of large quantities of data, including personal data, may be essential to the SOCA. For instance, such data can help detect criminal activities disguised as legitimate business, etc.²⁰⁷

²⁰² Harfield, *supra* note 181, at 753.

²⁰³ (No author) „Statement of Information Management Practice,” SOCA website (undated), <http://www.soca.gov.uk/>, (accessed May, 2007).

²⁰⁴ Serious Organized Crime and Police Act of 2005, Art. 34 (1).

²⁰⁵ Serious Organized Crime and Police Act of 2005, Art. 34 (3).

²⁰⁶ Special police forces, according to the law, are the police forces of the Ministry of Defense, the Ministry of Transportation, and the Scottish Crime and Drug Enforcement Agency.

²⁰⁷ (No author) „Statement of Information Management Practice,” SOCA website (undated), <http://www.soca.gov.uk/>. (accessed May, 2007).

Investigation and law enforcement powers

The Director General of the SOCA may designate a member of the Agency's staff special powers, as he deems necessary.²⁰⁸ The Agency's officers can have one or more of the following powers at different times: a) a person having the powers of a constable (police officer), b) a person having the customs powers of an officer of Revenue & Customs", and c) a person having the powers of an immigration officer. No further training or taking of an oath is necessary in such cases.

During the parliamentary debates on the statute of the SOCA, the government rejected the claim that only police officers under references can have powers of police officers.

As a result, the civilians in the SOCA can have the powers of a constable, immigration officer, and customs officer. The Director General of the SOCA may at any time modify or withdraw a designation made under this provision by giving a notice to that effect to the designated person.²⁰⁹ That capacity gives the Director General significant power and control within the Agency.

Police officers (Constables)

Each officer of the SOCA has the power to arrest a suspect without a warrant.²¹⁰ If an officer has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it. Arrests can be made upon the presentation of a positive ID or identifying the address of the person, and for the following reasons: to prevent the person in question of causing physical injury to himself or any other person, or committing another crime; to protect a child or other vulnerable person from the person in question; or to prevent any prosecution for the offence from being hindered by the disappearance of the person in question. Since the SOCA does not have arrest facilities, each person arrested by a SOCA officer must be taken to a police department.

Officers also have the right of search and seizure. Before the Serious Organized Crime and Police Act of 2005 came into effect, a search warrant for private facilities was required in cases of serious crime. The warrant was good for one month and only for one place. The changes in the law after the creation of the SOCA have significantly altered this regime. The list of crimes for which a search is authorized has expanded; the warrant is valid for three months, during which time officers can search the premises an unlimited number of times, and for any subsequent search, after the first, only a permit from the police inspector is required. The warrant is also good for more than one place.

Police officers also have access to bank information with prior authorization of a judge. The list of crimes to which this applies was also expanded after the creation of the SOCA.

Immigration officers

Immigration officers may perform arrests, searches and seizures, but only for crimes under immigration law. They have no powers concerning the enforcement of immigration control.

²⁰⁸ Serious Organized Crime and Police Act of 2005, Art. 43.

²⁰⁹ Serious Organized Crime and Police Act of 2005, Art. 45.

²¹⁰ Serious Organized Crime and Police Act of 2005, Art. 110.

With the establishment of the SOCA, several new powers in the field of investigation were introduced. They were developed with the intent to significantly increase the effectiveness of the fight against organized crime.²¹¹ The powers involve the following:

Disclosure notices

When the investigating body²¹² has reasonable ground for suspecting that an offence has been committed, or that any person has information which relates to a matter relevant to the investigation of that offence, a disclosure notice²¹³ can be issued. Refusing to follow the order is regarded as crime and carries penalties ranging from a fine to one year in prison. Information acquired in this way cannot be used as evidence against the person who has provided the information.

Striking a deal with the prosecution (Plea bargaining)

Plea bargaining becomes a possibility when the criminal confesses that s/he is guilty of the offence and agrees to cooperate with the investigation. Respectively, the prosecutor decides whether to seek a reduced sentence. This is done not only to get the criminal to confess, but also to get him to collaborate with the prosecution.

Financial reporting orders

This power allows the SOCA to trace the financial affairs of convicted criminals for a maximum period of twenty years. This type of order is a new practice in English legislation, introduced with the Organized Crime and Police Act 2005. It allows monitoring the financial assets of criminals convicted for organized crime under the Theft Act, Sexual Crimes Act or Drug Trafficking Act.²¹⁴ A financial reporting order is issued by the court upon the request of SOCA officers. However, the court may do so only if satisfied that the risk of the person committing another similar offence is sufficiently high to justify making a financial reporting order. The order has effect for a period of five to twenty years.²¹⁵ A person for whom a financial reporting order has been issued must provide the details of his financial affairs in a report, including any specified documents relating to the period in question.²¹⁶ If the person fails to comply with any requirement of an FRO, s/he is guilty of an offence and is liable to be fined or imprisoned for a term up to 51 weeks.

More than ever now, the SOCA has been working in close cooperation with the prosecution from the early stages of an investigation. This saves time and improves effectiveness in the preparation of cases.²¹⁷ After the establishment of the SOCA in 2005, a special Council on Organized Crime was set up within the Crown Prosecution Service responsible for preparing

²¹¹ <http://www.cps.gov.uk/about/cjs.html>.

²¹² By law, they include (a) a constable, (b) a member of the staff of the SOCA who is, for the time being, designated under section 43, and (c) an officer of Revenue and Customs, or prosecutors.

²¹³ Serious Organized Crime and Police Act of 2005, Art. 62.

²¹⁴ Serious Organized Crime and Police Act of 2005, Art. 76 (3).

²¹⁵ Serious Organized Crime and Police Act of 2005, Art. 76 (6 & 7).

²¹⁶ Serious Organized Crime and Police Act of 2005, Art. 79.

²¹⁷ „New Powers Against Organised and Financial Crime,“ Paper presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty (July 2006), 5.

the cases for court and presenting them in court. Two other units were also created to deal with terrorism and high profile crimes. The Organized Crime Unit is in charge of investigating organized crime cases. It employs highly qualified prosecutors,²¹⁸ specialized in the field, who report to the Director of Public Prosecutions (the Prosecutor General). Under the law, the criminal investigations carried out by the SOCA are limited to determining that an offence has been committed and determining its perpetrator.²¹⁹ Cases arising out of criminal investigations by the SOCA are referred to the Organized Crime Unit of the Crown Prosecution Service or the Director of Revenue & Customs Prosecutions, who investigates hidden assets.

In cases of serious or complex fraud where the investigation has been instituted by the SOCA, the agency may continue with the investigation only with the agreement of the Director of the Serious Fraud Office, or if the Serious Fraud Office declines to act in relation to it. The same applies to the Revenue & Customs Agency.²²⁰

Criminal Asset Recovery Powers

The Serious Crime Act of 2007 extends civil and criminal asset recovery powers to the SOCA and the investigative bodies – the Crown Prosecution Service, the HM Revenue & Customs, and the Serious Fraud Office. Since April 1, 2008, the Asset Recovery Agency has been under the umbrella of the SOCA. The reforms enabled the SOCA and prosecutors to bring civil proceedings to prove that property has been obtained through unlawful activities in England, Wales and Northern Ireland. The SOCA can assist other institutions with similar instances, taking up high-profile cases of public interest. Where a law enforcement agency or prosecution authority has a criminal case which it has been unable to prosecute successfully, it can refer the case to the SOCA for consideration for civil recovery or tax action if it is a) recoverable property which has been identified and has an estimated value of at least £10,000, or b) recoverable property which includes property other than cash, cheques and the like. The SOCA is required to maintain a database with information about each case of asset recovery.

Asset recovery can apply to cash money, real estate, jewelry, or automobiles. One feature of civil asset recovery is the emphasis on the property acquired through unlawful activity, not the offender. Evidence of criminal conduct is necessary (such as witness testimonies based on hearsay or the testimony of another defendant in the same case). If enough evidence is available, the SOCA can issue two types of orders, an Interim Receiving Order and a Property Freezing Order.

Tax Fraud / Tax Evasion Powers

Effective April 1, 2008, tax powers were extended to the SOCA to carry out financial fraud investigations, provided there are sufficient grounds that an individual has received income, profit or other benefits from criminal activity related to the same or another individual. The SOCA can assume the functions of HM Revenue & Customs²²¹ for conducting the entire range of

²¹⁸ (No author), SOCA website (undated), <http://www.cps.gov.uk/about/facts.html>.

²¹⁹ Serious Organized Crime and Police Act of 2005, Art. 39 (7).

²²⁰ Serious Organized Crime and Police Act of 2005, Art. 2 (3&4).

²²¹ The Tax Collection and Administration Agency.

investigative proceedings, including corporate taxes if a designated company is involved in criminal activity.²²²

Money Laundering Powers

With the adoption of the Serious Organized Crime and Police Act in 2005, part of the financial intelligence powers were conferred onto the SOCA. This requires banks, casinos, civil servants, auditors, accountants, jewelry storeowners, lawyers, car dealers, and currency exchange bureaus to report knowledge or suspicion of money laundering to the SOCA. They do this via SARs, *Suspicious Activity Reports*. The report must include the name of the person suspected of money laundering, an address, the account number, transaction details (incl. the receiver's account number), reasons for the suspicion, the date of activity, the type/product of activity, details about the activity, etc.²²³ Each year, about 200,000 SARs are submitted, and about 40% prove valid.²²⁴ SOCA management has recently reviewed the system of collecting SARs to ensure it is reliable and effective. The Agency's Director General presented a paper on the functioning of the system, proposing twenty-four recommendations for improvement.²²⁵ Some of the recommendations propose that the SOCA take overall responsibility for the effective functioning of the SARs regime, including the improvement of the IT system used for SARs reporting, improvement of the current arrangements and centralized control for receiving, storing, processing, and accessing SARs, and the publishing of an Annual Report on the operation of the SARs regime.

IV. Accountability and Control of the SOCA

Government Influence

On paper, the SOCA has operational independence from the government. Since the Agency is an intelligence structure, it is necessary to find a good balance between this independence and the requirement for democratic ministerial and parliamentary oversight.²²⁶ In reality, since the Home Secretary appoints both the Director General of the SOCA and the Board, political interference or influence over the institution cannot be eluded. The Home Secretary is accountable to the Parliament for the SOCA's activity in that he²²⁷ a) sets the Agency's strategic priorities and the strategy for realizing these priorities – undeniably an important power concentrated in the hands of one political figure²²⁸, and b) presents the Annual Report of the Agency before Parliament and informs the Parliament of its activity. It is the Home Secretary, not a politically independent body, who is responsible for preparing a Code of Practice governing the day-to-day functions of the Agency.

²²² (No author) „Financial Intelligence Unit,“ SOCA website (undated), <http://www.soca.gov.uk/financialIntel/faqs.html#default>.

²²³ Ibid.

²²⁴ „New Powers Against Organised and Financial Crime,“ *supra* note 217, at 21.

²²⁵ Sir Stephen Lander, „Review of the Suspicious Activity Reports Regime (The SARs Review),“ Web. March 2006, at 19.

²²⁶ „One Step Ahead,“ *supra* note 171, at 23.

²²⁷ (No author), „Statement of Management,“ SOCA site (undated) www.soca.gov.uk.

²²⁸ Harfield, *supra* note 181, at 753.

Annual Plan and Annual Report

In the beginning of each year, the SOCA is required to present and make available to the public an Annual Plan for its activity. The Plan should include a description of the activities in England, Scotland and Northern Ireland, the strategic priorities set by the Home Secretary and the Board, the instruments and financial resources to achieve these priorities, and collaboration with other institutions.²²⁹ Every four months, the SOCA presents an activity report to the Home Office; on the request of the Home Secretary or on the initiative of the Agency, other short-term reports can be prepared as well.

At the end of each year, the Agency presents its Annual Report. Before its publication, it is submitted to the Home Secretary who presents it in Parliament and to the Scottish Ministers who present a copy before the Scottish Parliament.

One of the criticisms against the accountability of the SOCA is the lack of an independent body overseeing it. Experts allege that the performance assessment of the Agency is in its own hands, and given the lack of assessment criteria, it is hard to tell how effective and efficient the SOCA really is.²³⁰ During the debates on the statute of the SOCA, a question was raised about an independent oversight structure to the agency. Arguments supporting the idea that the establishment of a new body was not needed prevailed, and the control over SOCA was given to two already existing institutions, the Police Inspectorate and the Independent Police Complaints Commission. Assigning the oversight of the Agency to these institutions reinforces the argument that the SOCA is more like a police force, against the claims of its founders and leaders that it is a new type of agency. An independent body in control of SOCA would have eliminated any further disputes on this matter.²³¹ The issues of accountability and reporting mechanisms within the SOCA are further complicated because of the existing system of different institutions and control procedures in the UK. In Northern Ireland, for instance, the investigation of police complaints is the responsibility of an independent ombudsman. This requires the SOCA to negotiate a special mechanism for handling the complaints filed against the Agency on the territory of Northern Ireland. In Scotland, there is no control mechanism over the police forces – that is, complaints against the police are inspected by a Lord Advocate and Procurator Fiscal. Because of the existence of three separate monitoring mechanisms, the system of controls over the SOCA appears to be rather confusing and vague.

V. Measuring SOCA's Performance

Overall, it is not easy to carry out a performance assessment of the SOCA because of the insufficient accountability and transparency of its activity. In addition, the confidential character of the Agency's operations naturally prevents wide publicity about the SOCA. Since the Agency's main goal is reducing the harm caused by organized crime, its effectiveness should be judged against such criteria. However, the absence of such criteria underlines

²²⁹ „Statement of Management,” *supra* note 227.

²³⁰ Center for Crime and Justice Studies, „Serious Organized Crime: A new Approach” www.crimeandjustice.org.uk/opus239/serious-organised-crime.doc.

²³¹ *Ibid.*

the need to devise effective and transparent indicators to demonstrate how its activities are reducing the harm caused to UK individuals and communities by organized crime.²³² Furthermore, it is difficult to illustrate the impact of the SOCA because the definition of its mission, namely to reduce the harm done by organized crime, lacks clarity and does not include specific qualitative or quantitative targets. The Agency has been in existence for only two years, which is a rather short period to make any definitive conclusions. It is important to keep in mind that before the SOCA, the UK had no specialized anti-organized crime body, and the creation of the SOCA represents a significant cultural and institutional transformation in the way organized crime and the instruments to combat it are conceived.²³³

The operational principles upon which the SOCA is built distinguish it to a large extent from its predecessors and their approach to organized crime. The Agency is not a police force but an intelligence structure, and this is why the emphasis is on the information character of its powers. The statutory foundation of SOCA is justified by the need to increase the knowledge and understanding of the phenomenon of organized crime and its manner of operation. This may explain why former high-ranking officers of the secret service have taken key positions in the Agency.²³⁴

The SOCA is not expected „to respond to members of the public coming in and alleging a crime, or to events on the streets.“²³⁵ The Agency's priority falls on building up specific intelligence knowledge before going into action. It is within the agency's discretion to decide which of its operational powers best meet its mission for reducing the damage done by criminal activity. That is, the SOCA is given the choice of what action to undertake and what not. The Agency invests a lot of time and effort in understanding organized crime and the main issues related to it. That mission is realized through the preparation of the UK *Threat Assessment Report*, one of the few official publications of the Agency. The media allege that, despite the large number of analysts, the last assessment delivered by the SOCA dates back to 2006 and has not been updated since.²³⁶

The non-departmental character of the SOCA is a further hindrance to its work. During its first year of operation, it had to deal with many organizational problems brought about by the need to restructure the institutions that merged under its roof, to adapt to new procedural rules and build its own organizational culture.²³⁷

The statistical data in the Agency's Annual Report illustrate its accomplishments. For the 2006-2007 period, the SOCA reports the following:

²³² (No author) „UK Agency Seizes £3bn of Cocaine,“ *BBC News website*, <http://news.bbc.co.uk/1/hi/uk/6669019.stm>.

²³³ Sean O'Neill, „Is SOCA Too Soft?“ *Times Online*, <http://www.timesonline.co.uk/tol/news/uk/crime/article3919731.ece> May 13, 2008.

²³⁴ The Chair of the Board is the former boss of MI5, and former officers of MI5 and MI6 head two of the directorates of the SOCA.

²³⁵ Sir Stephen Lander, *supra* note 175.

²³⁶ Sean O'Neill, „SOCA Abandons Hunt for Crime Lords,“ *Times Online*, <http://www.timesonline.co.uk/tol/news/uk/crime/article3919686.ece>.

²³⁷ (No author), *Annual Report for 2006-2007*, Serious Organized Crime Agency (2007), at 3.

- the prevention of 35 potential murders and preparation of a list with 1,600 names of leaders of criminal groups
- the seizure of drugs valued at 125 million GBP, however, a comparison with previous years is not possible because of the different mechanisms for data collection and calculation.²³⁸
- 749 arrests within the UK and 1,096 outside it
- a 95% success rate of all cases presented by the prosecution to court (including cases of the agencies preceding SOCA).

The number of arrests and cases prepared by the prosecution represent a less significant part of the SOCA's activity and cannot be a reliable indicator of successful performance.

For the period 2007-2008, the Agency reported the following results:

- 91 tons of seized Class A drugs, a 20% increase compared to the previous year
- 41 financial reporting orders
- 53 information disclosure notes.

At the same time, the SOCA has been criticized for the relatively small number of court cases it has initiated. That number is significantly lower in comparison with the agencies preceding the SOCA. A setback in the asset recovery numbers is reported as well.

Overall, in its 2 years of existence, the SOCA has made a reputation of itself as „an organization that is cautious and bureaucratic, overburdened with managers and inexperienced at the sharp end.“²³⁹ The Agency is paralyzed by a „heavy management structure“ which has triggered the emergence of two opposing camps within the Agency. This is a probably one reason why 150 experienced officers recently decided to resign, claiming a lack of law enforcement functions and incompetent and ineffective management. Consequently, most of the officers currently in the Agency are analysts without enough experience in fieldwork, but required to fight organized crime.

Perhaps the biggest problem facing the SOCA is that its top managers are politicians and civil servants who prefer short-term, easily achievable goals. A further problem is the difficulty in delivering a reliable intelligence picture or map of organized crime, not to mention technical issues, such as the agency's computer system and database with intelligence information. The system only supports a limited number of users, which makes the exchange of information very difficult. More obstacles lie ahead, because the Home Office reduced the budget of the Agency for last year, while at the same time setting new goals and tasks before the SOCA.

²³⁸ (No author), BBC News, „UK Agency Seizes £3bn of Cocaine“ <http://news.bbc.co.uk/1/hi/uk/6669019.stm>.

²³⁹ Sean O'Neill, „Is SOCA Too Soft?“ *Times Online*, Web. May 13, 2008.

V. CONCLUSIONS

The comparative study of Italy, South Africa and the UK leads to one unexpected conclusion: their problems are quite the same. None of the countries has come up with a definition of organized crime or with assessment criteria to measure how effective the fight is against it. In each of the countries, the process of creating specialized bodies is extremely difficult, progress is slow, and they are subject to constant public scrutiny and questions concerning their institutional capacity. The problems are the same, regardless of the differences in the set-up of the investigative body. The problems persist on two continents, within two distinct legal systems, reflecting different political cultures and social experiences.

How can states fight organized crime successfully? This is the question politicians face in each country. Public debates involve developing various strategies and introducing legislative and institutional changes. The country reports for Italy, South Africa and the UK show that there is no universal model for combating serious crime. The existing political and institutional frameworks, public expectations and social attitudes shape the unique response of each country. Indeed, this is the right approach, because transferring piecemeal reforms and good ideas between countries does not always guarantee the desired outcome. Importing even a single element directly from a reform implemented in other countries should happen only after a comprehensive analysis and understanding of the relevant context.

The idea of creating a specialized body for the combat of organized crime is very appealing at first sight. We conceive it *a priori* as an attractive instrument to deal with this high-risk societal problem. The experience of the countries which have taken this path shows that this is a difficult task. Incorporating a new element into the existing system of investigation and prosecution services takes time and often generates other issues, conflicts, and doubts as to whether that model is the most adequate.

Practice also shows that against the backdrop of rising levels of organized crime, the reasons for creating specialized bodies are relatively the same. In most cases, they come down to poor coordination and overlapping powers of the existing institutions, leading to ineffective and incomplete investigations. The examples of the countries with operating special organized crime investigation bodies confirm that having independent units within the prosecution is perhaps the best option. Such an approach is effective because it brings all investigation proceedings together under one roof or under the supervision of separate centralized structures. The structural unity thus achieved is a means for overcoming the unhealthy competition, the duplication in powers, and the lack of information exchange and collaboration. Furthermore, it increases the possibility for cooperation starting at the earliest stages of the criminal proceedings. Equally important is the political, institutional and operational independence of such bodies as it makes possible the execution of many investigations of organized crime and corruption that may not have taken place otherwise.

