

# South African CRIME QUARTERLY

No. 69 | 2020

## The criminalisation of gang activity in South Africa

### Re-assessing the rationale

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<http://dx.doi.org/10.17159/2413-3108/2020/i69a6464>

*Criminal gang activity presents a substantial threat to the safety and security of, in particular, the inhabitants of the Cape Flats in Cape Town. The State has intervened legislatively through the form of the Prevention of Organised Crime Act 121 of 1998. This is somewhat of a ‘super-criminalisation’ given that similar common law and statutory measures already existed prior to the promulgation of the Act. What is the rationale for the criminalisation of gang activity in South Africa? Furthermore, if there is sufficient rationale for this super-criminalisation, is there sufficient basis to argue for the additional responsibility of gang leaders, which is currently left uncovered by the Act?*

There is no doubt, especially within the minds of the inhabitants of the Cape Flats, that criminal gang activity presents a substantial threat to the safety and security of the general public. Of the 3 975 murders in the Western Cape during the 2019/2020 financial year, 821 (20,6%) were gang-related.<sup>2</sup> Certain estimates suggest that the cumulative gang membership ranges between 80 000 and 100 000 gang members on the Cape Flats alone and that these gangs

contribute up to 70% of all crime committed there.<sup>3</sup> It is believed that approximately 130 gangs (in various manifestations and factions) operate in this area and that one of these gangs, the Americans, has 5 000 members.<sup>4</sup> A further complication is the fact that 85% of police stations in the Western Cape are understaffed which complicates the policing of gangs. The Equality Court has found that the formula used to distribute police resources unfairly

discriminated against people ‘on the basis of race and poverty’.<sup>5</sup> Several of those areas, such as Khayelitsha, Nyanga and Harare, are gang hot spots.

The Prevention of Organised Crime Act 121 of 1998 (POCA) was introduced over 20 years ago, to curb criminal gang activity, among other objectives. Yet, despite this statutory intervention, gang-related activity remains pervasive. It is, therefore, apposite to re-assess the rationale for criminalising gang activity.

Two questions must be posed given the seemingly ineffective statutory response. First, what is the rationale for criminalising gang activities when there are existing common law and statutory mechanisms available (such as the common purpose doctrine, incitement and conspiracy) to address criminal conduct associated with criminal gangs? I answer this by looking at the background to the promulgation of POCA and the interests it serves to protect. Second, if sufficient rationale exists, does POCA go far enough to protect these interests, or do these measures go too far?

## **POCA and gang activity**

The Constitutional Court, relying on the preamble of the Act, has held that POCA aims to address organised crime, criminal gang activities, money laundering and racketeering (generically known as ‘organised crime’).

These issues are a global problem and pose a serious security threat nationally. The situation was worsened by South Africa lagging behind international standards dealing with organised crime.<sup>6</sup> Organised crime not only endangers the lives of the inhabitants of the Republic but also threatens the economic stability of the country. The rise in organised crime is further exacerbated by the inability of the law to deal with gang leaders who distance themselves from the execution of crimes, making it difficult to strip them of their unlawful proceeds.<sup>7</sup>

Chapter 4 of POCA deals with criminal gang activity and was enacted in response to the ‘crisis situation’ on the Cape Flats, caused predominantly by the weakening of state borders,<sup>8</sup> the demise of the apartheid regime,<sup>9</sup> and the impact of the Group Areas Act 41 of 1950 (GAA).<sup>10</sup> This chapter, which came into operation on 21 January 1999, does not criminalise gang membership alone. Membership (or active participation) must be coupled with one of the offences listed under Chapter 4. A ‘criminal gang’ is defined under Chapter 1 as

[including] any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity[.]

Chapter 4 lists various offences such as aiding and abetting a criminal gang;<sup>11</sup> threats to commit or bring about violence or criminal activity;<sup>12</sup> inducement to contribute to gang activities and gang recruitment.<sup>13</sup> It is based on the US California Street Terrorism Enforcement and Prevention (STEP) Act of 1988.<sup>14</sup>

## **Interests to be considered**

Modern societies tend to attach criminal sanctions to four considerations, namely public morality, the preservation of the state, the protection of human interests, and the promotion of public welfare.<sup>15</sup> Two of these stand out in the context of criminal gang activities: protection of human interests and the promotion of public welfare.

The social impact of gangs on communities in the Western Cape is also undeniable. Kinnes points towards the closing of government services due to gang activities, including the

closing of schools,<sup>16</sup> health service providers<sup>17</sup> and transport services.<sup>18</sup> This offends constitutional rights, such as the right to education,<sup>19</sup> right to access to health care,<sup>20</sup> children's rights<sup>21</sup> as well as the right to freedom from violence.<sup>22</sup>

The protection of human rights (especially life and bodily integrity) in the context of human interests, however, does not explain why participation in gang activities should receive separate criminalisation when the underlying acts are already defined as crimes. The rationale for separate criminalisation should transcend the underlying criminal activities. The same argument holds for the promotion of public welfare. Whether acts of violence are perpetrated by a gang or by a single criminal, the public welfare is threatened.

Duff argues that conduct should only be criminalised when three preconditions are met.<sup>23</sup> There must first be a moral wrong and the conduct will be morally reprehensible based on the harm caused or the substantial risk that the conduct carries. Second, the conduct demands a state response on behalf of victims and/or the wider community. Third, it must be necessary to underscore the wrongfulness of the vexed conduct 'as something that needs to be collectively marked and censured'.<sup>24</sup> Whether the criminalisation of modern gang activity fits Duff's model deserves further discussion.

The harm associated with gang activity is reprehensible in that it causes a substantial risk to the health, safety, security, property and lives of the inhabitants of South Africa. This is patent from the discussion above of gang activity on the Cape Flats. The state, therefore, has an interest in not only protecting inhabitants from the underlying crimes but also from the particular systemic *modus operandi* of criminal gangs.

Is the risk and the harm inflicted by and through criminal gangs morally reprehensible

enough to justify (separate) criminalisation? The 'pervasive presence' and harmful impact on communities is acknowledged in the preamble to POCA; thus signalling the kind of rationale for the criminalisation of gang activities. Systemic criminal endeavours that strike at the fabric of the community may be the foundation upon which criminalisation of gang activities rests. Empirical research has also shown that belonging or participation in gangs generally intensifies delinquency. Where there is a previous history of delinquency, periods before and after gang participation heightens delinquent behaviour.<sup>25</sup> This further justifies the need for additional anti-gang measures.

Gang members themselves are often equally victim to their circumstances. In *S v Jordaan and Others*, Binns-Ward J, in considering an appropriate sentence for gang members, addressed the systemic aspects, pervasive in communities such as the Cape Flats, which contribute towards the proliferation of gang activity. This includes the environment, peer pressure, unemployment and poverty and the perceived acceptance of 'gang culture as the way of life'.<sup>26</sup> The court acknowledged an element of 'moral condemnation' due to a general disregard for law and the safety and security of others. Although Binns-Ward J admitted that this condemnation should be somewhat tempered due to difficult socio-economic circumstances, it does not absolve gang members from accountability.<sup>27</sup> More important for present purposes is the sentiment that speaks to the systemic nature of criminal gang activities – that is, the 'gang culture', which needs to be meaningfully confronted.

It cannot therefore be denied that additional state intervention is necessary, as manifest in the criminalisation of conduct. Legal intervention is justified by the state's constitutional duty to protect its citizens, and especially the most vulnerable and marginalised communities.

Protection of the public from a wrong is not, however, limited to the criminalisation of conduct in order to create a remedy or protect the inhabitants from the moral wrong. Other public policy responses may also prove useful.<sup>28</sup> Poverty is at the core of the gang phenomenon in South Africa. Allocating additional resources to job creation, as well as youth programmes, may steer potential members away from joining a criminal gang. The Western Cape government has employed various strategies to deal with criminal gangs, including a four-pronged approach focused on intelligence management; project-driven gang investigation; community mobilisation and strategic deployment of police officers.<sup>29</sup> Its 2019 National Anti-Gangsterism Strategy has also included several non-punitive strategies founded in especially social work, community interventions, redress and education.<sup>30</sup>

The role of criminal law as a deterrent should also not be ignored. As Simester and Von Hirsch plainly put it, criminal law does not politely ask ‘do not assault others, *please*.’ It tells: ‘do not assault others, *or else*’.<sup>31</sup> It is questionable whether POCA has had this effect. Gang-related crimes and gang wars have increased since its promulgation. From a pure crime- prevention standpoint, POCA does not seem to have made an impact on the South African criminal justice system. There have been few reported cases under POCA Chapter 4 since its promulgation in 1999.<sup>32</sup> The deterrent effect of POCA is further undermined by its relatively short sentences for gang-related offences, which range between three and eight years.<sup>33</sup>

## Overcriminalisation?

There are, for the most part,<sup>34</sup> existing crimes in both statute and common law (such as murder, assault, rape, robbery, drug-related offences and so forth) that criminalise the kinds of activities that gangs engage in. Why then further

criminalise gang activities as a subgroup? A comparison with terrorism might be instructive, as anti-terror measures similarly super-criminalise already unlawful conduct within a specified context.

Zedner refers to Waldron’s inconsistency in categorising acts of terror, on the one hand, as just a manifestation of the underlying crime, and on the other hand as something that transcends the underlying criminal offence.<sup>35</sup> Waldron argues that the 11 September 2001 attacks, for example, were murders in a quite straightforward sense.<sup>36</sup> Yet he admits that there is ‘a special sort of moral outrage’ which transcends that associated with non-terrorist acts of, for example, murder or destruction of property.<sup>37</sup> The latter sentiment seems to encapsulate the motivation for criminalising gang activities. Waldron’s latter sentiment is reminiscent of Moseneke J’s justification of the common purpose doctrine in *S v Thebus and Another*.<sup>38</sup> The common purpose doctrine is seen as a necessary tool in the fight against ‘collective criminal conduct’, which is a ‘significant societal scourge’, and the particular difficulty of proving such conduct due to the evidentiary hurdles associated with group-based crimes.<sup>39</sup> It was submitted that without the common purpose doctrine certain participants of crime would escape prosecution and this ‘would not accord with the considerable societal distaste for crimes by common design’.<sup>40</sup>

To be clear: terrorism is a phenomenon which may or may not be worthy of super-criminalisation; common purpose is a mode of liability. But they share the underlying rationale, namely that the normal principles of criminal law, which tend to focus on the harmful conduct directly committed by an individual, are adjusted to express outrage about secondary effects or motive (in the case of terrorism) and assign criminal responsibility to individuals associated with criminal conduct under conditions

where the normal modes of liability would be inadequate (common purpose doctrine).

Gangs are undeniably a scourge affecting not only individuals but communities, especially the Western Cape's poorest and most marginalised communities. It is perhaps not self-evident that their underlying crimes are more of a problem than crimes committed by individual perpetrators and therefore deserving of some sort of super-criminalisation.

Moseneke J is however of the opinion that 'collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals'.<sup>41</sup>

Snyman rejects this argument and asserts that there is no difference between an infringement of rights by an individual or by a group,<sup>42</sup> which echoes Waldron's first sentiment. A harm is, simply, a harm.

Snyman also rejects Moseneke J's submission that without the common purpose doctrine certain participants in crime would escape prosecution and this 'would not accord with the considerable societal distaste [public opinion] for crimes by common design'.<sup>43</sup> This argument relies on the Constitutional Court judgment in *S v Makwanyane*,<sup>44</sup> where the Court rejected societal and public opinion as grounds to retain the death penalty.<sup>45</sup> It can be safely assumed that, considering the rampant nature of crime in South Africa,<sup>46</sup> public opinion in favour of criminalisation and punishment remain strong. Regardless, as I have argued elsewhere,<sup>47</sup> the rationale for the criminalisation of group-based crimes like criminal gang activities, and the justification for the application of modes of liability such as the common purpose doctrine and the doctrine of joint criminal enterprise should not simply be regarded as pragmatic 'crowd-pleasing' exercises, but rather as principled efforts to confront the very real problem of criminal gang activities in a legally and constitutionally defensible way.

An additional consideration is the principle of fair labelling.<sup>48</sup> There should be appropriate 'labelling' for the wrong that has been committed because not all crimes are equal. Placing crimes in broad categories, such as crimes against the person or property, without differentiating further seems insufficient to precisely indicate the exact nature and seriousness and underlying protected interest.<sup>49</sup> Thus, it may be insufficient to label a member of a criminal gang based solely on his most recent offence (of, say, assault). Criminal gang activity, the repeated or habitual pattern of criminal conduct causing systemic fear, risk and harm in the affected communities, is more than the sum of any number of individual crimes. There is a difference between Mr X, who is a common thief and Mr Y, who is a gangster. Mr Y is immediately associated with a myriad of unidentified crimes, which are associated with the 'gangster lifestyle', and this is the underlying cause of harm to the community. At the same time, this 'labelling' by the community can be unfair, because Mr Y may only have committed relatively minor gang-related offences but is now painted with the same broad brush along with Mr Z, a man responsible for several brutal murders.

Let us return to the terrorism example. Acts of terror often occur on a grandiose scale – evoking immense fear and panic in the process. Indeed, causing fear is the most obvious element of terrorism (together with motive). If death occurs in such a mass attack, the deaths may not be forensically or legally distinct from mass murder by an individual. That is also the case with a gang attack. If a criminal gang carries out a group assault, murder, or drug deal, those underlying crimes are still, for the most part, objectively and definitionally, identical to instances of crime committed by a single perpetrator. This sense of terror is also evoked in gang-related crime. Indeed, as we have seen from the earlier discussion, the prevalence of

criminal gang activities in certain communities in the Western Cape is so systemic that there should in principle be no reason to view the justification for the criminalisation of terrorism any differently from the criminalisation of criminal gang activity.

It is therefore unsurprising to find broader rationales mentioned in the preamble to POCA, including protection of life and liberty and safeguarding of national security. The preamble serves as a reminder of the rationale for the criminalisation of crimes that affect interests deeper and broader than the individual criminal acts that form the predicate offences of systemic and complex crimes such as racketeering, money laundering and criminal gang activities.

Another important reason for the criminalisation of gang activities goes beyond the underlying protected interests and focuses on the operational question of the effectiveness of the existing common law and statutory law arsenal for purposes of combating these types of crimes. Effectiveness in this context is understood in terms of the utility of existing common law and statutory crimes (murder, robbery, theft, public violence and so on) to achieve successful prosecutions of gang-related activities.

Considering the above, it is clear that a sufficient rationale exists for the additional or super-criminalisation of gang activity. In fact, it arguably does not go far enough, as considered in the next section, on the responsibility of gang leaders.

### **The additional responsibility of gang leaders**

POCA Chapter 4 has no express provision pertaining to the additional or alternative punishment of gang leaders. The closest provision is section 9(2)(b) which criminalises the inducement to contribute to a pattern of criminal

gang activity.<sup>50</sup> This carries an extremely short maximum sentence of three years (or a fine).<sup>51</sup> The sentence is aggravated to a maximum of five years if committed within 500 metres of a school or educational institution.<sup>52</sup> Section 2(1)(f) further criminalises the management of an 'enterprise' within the meaning of section 1 of POCA. Securing a conviction for this offence is evidentially complex as certain elements have to be proven.<sup>53</sup>

Liability for leaders or criminal 'masterminds' under the common law is also problematic, because liability can only ensue where the accused's active and/or direct involvement (as a leader-*cum*-instigator, leader-*cum*-conspirator or party to a criminal endeavour under the common purpose doctrine) can be proven. The liability under these forms is harsher because the punishment is usually equal to physical or actual perpetration. But this may be justifiable as will be illustrated below. The scheme under POCA similarly requires an active and/or direct contribution to be proven by the state.

The problem in holding leaders of criminal organisations or criminal gangs liable lies in proving their direct involvement with the crimes committed by subordinates lower in the chain of command or even in the absence of such a 'formal' chain of command. The leader is too far removed from the actual perpetration of the crime. Neha points to a two-fold problem under international criminal law and the difficulties faced by tribunals: holding an individual responsible for crimes committed as 'part of a collective criminal project' and furthermore, justifying labelling that person as a perpetrator even though he or she did not carry out any part of the wrongful act.<sup>54</sup> These are identical to the problems faced by the state and the courts in holding gang leaders responsible for their crimes.

To circumvent this issue, several doctrines under international law and foreign jurisdictions<sup>55</sup>

have developed to hold the commanders or superiors in a military relationship or leaders of criminal organisations responsible for the crimes committed by their subordinates. This includes the doctrine of command responsibility<sup>56</sup> and liability for control through an organisation.<sup>57</sup> A discussion of these mechanisms falls outside of the scope of this contribution but, in short, it would make it possible to hold leadership figures responsible through the conduct of their subordinates. There are strong justifications for holding gang leaders responsible for the actions of their subordinates. While it is clear that leaders of criminal gangs should be held responsible for their role in ordering, instructing or masterminding criminal endeavours, there is also motivation for further, additional or harsher punitive sanctions for this role. Commentators have argued that leaders of criminal organisations cannot be treated as regular instigators because subordinates cannot ‘substantially deviate’ from the instructions of the leader.<sup>58</sup> A harsher punishment should therefore be imposed due to this power the leader wields over the subordinate.

Moral blameworthiness also plays a role. Eldar points to an ostensible legal intuition that the conduct of the leader is undoubtedly more reprehensible, by referring to the trial of Adolf Eichmann, a Nazi official.<sup>59</sup> There it was posited that criminal responsibility in fact increases further away from the actual perpetrator and higher up the organisational ladder.<sup>60</sup> This intuition may be founded in the retribution theory of punishment. This theory requires that an offender be punished for their acts and thus receives their just deserts for acting outside of the law.<sup>61</sup> Although this theory still enjoys widespread public favour, it has fallen out of favour in certain academic and criminological spheres due to the appropriate move towards movements such as restorative justice.<sup>62</sup> Incidental to this retributionist argument is that the contribution of leaders of organisations

should not be relegated to that of a mere accessory or conspiratorial nature.<sup>63</sup>

Coercion is a further justification for punishing the leaders of criminal organisations more severely than the direct perpetrators. In relationships of power imbalance and where there is coercion to execute orders, the subordinate may lack the capacity to act autonomously and freely.<sup>64</sup> South African law has recognised that coercion through an imbalanced relationship of power may influence the capacity of a perpetrator.<sup>65</sup> Other authorities, however, argue the counterpoint: that criminal organisations often operate based on positive, rather than negative, reinforcement and thus act akin to legitimate organisations.<sup>66</sup> Japanese triads such as the Yakuza act within a paradigm of extreme cohesion. In eighteenth-century Japan, the unique relationship between Yakuza leaders and subordinates, known as *oyabun-kobun* (which translates literally into ‘father-role/child-role’) was common and continues to exist.<sup>67</sup> Standing refers to the internal contradiction within South African criminal gangs because they often try to function both as a family as well as a business.<sup>68</sup>

Roxin’s theory of indirect perpetration through a criminal organisation<sup>69</sup> seems to have found favour at the ICC and compliments the ‘lack-of-autonomy doctrine’. The central idea of the theory is that a subordinate is merely a cog in the criminal machinery of the leader, who is the ‘intellectual author alongside the perpetrator at the heart of the events’.<sup>70</sup> The subordinate in this scheme is thus almost dehumanised and the leader is placed centrally in the sequence of criminal events. One can also view this to mean that the only actor of relevance is the leader and that the interchangeable, replaceable or even ‘fungible’ subordinates of the criminal organisation are of no significance in the context of criminal sanction. The implementation of the criminal

plan will therefore not be foiled by the failure of one subordinate to execute that plan.<sup>71</sup>

There is a strong legal as well as moral basis (founded in public opinion) for the more severe punishment of leaders in a criminal gang. It is therefore appropriate for the legislature to consider models and protocols particularly employed under international criminal law as well as foreign jurisdictions. This includes command responsibility and control through an organisation where physical perpetration by the leader is not required for criminal responsibility.

## Evaluation

The answer to the question of whether POCA's super-criminalisation of gang-related crimes serves a purpose can only be in the affirmative, if the legislation supplements previously existing common law and statutory offences in a meaningful way and in a way which is congruent with public policy. Public policy should reflect the interests of society, including the interests of the most vulnerable and the most marginalised. From the discussion above, it becomes clear that these measures are justified.

In fact, these measures and sentencing regime are insufficient, especially due to the lack of a mode of liability which can appropriately target leadership figures. More severe punishment is required especially for gang leaders, as their conduct is considered to be exponentially more reprehensible despite the lack of physical contribution to the crimes perpetrated by gang members. The foreign and international models mentioned above all have South African parallels which would provide a foundation for their incorporation into South African law – preferably through a carefully drafted statute. Mere duplication of laws is however strongly discouraged as this was the error made during the drafting of POCA.



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## Notes

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- 1 Delano van der Linde is a Senior Lecturer and Subject Group Head: Criminal Law and Criminal Procedure at the Faculty of Law, North-West University. This article is based on research conducted for an LLD dissertation at Stellenbosch University. The institution has granted permission to publish derivative works from this research.
- 2 South African Police Service, *Crime statistics: Crime situation in Republic of South Africa (April to March 2019\_20)*, 31 July 2020, [www.saps.gov.za/services/april\\_to\\_march\\_2019\\_20\\_presentation.pdf](http://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf) (accessed 3 November 2020). Also see Delano Cole van der Linde, Why a law designed to fight gang violence in South Africa can't do the job, *The Conversation*, 19 February 2019, <https://theconversation.com/why-a-law-designed-to-fight-gang-violence-in-south-africa-cant-do-the-job-111568> (accessed 2 November 2020).
- 3 I Kinnes, From urban street gangs to criminal empires: The changing face of gangs in the Western Cape, *ISS Monograph* 48 (2000) ix, 10.
- 4 A Standing, *Organised crime: A study from the Cape Flats*, South Africa: Institute for Security Studies, 2006, 38–39.
- 5 *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC). For a comprehensive discussion of the case, see DC van der Linde, Poverty as a ground of indirect discrimination in the allocation of police resources: A discussion of *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC), *Potchefstroom Electronic Law Journal*, 23, 2020, <https://doi.org/10.17159/1727-3781/2020/v23i0a6625>.
- 6 *Mohunram and Another v NDPP and Another (Law Review Project as Amicus Curiae)* 2007 (2) SACR 145 (CC) para 144.
- 7 *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC) para 14–15.
- 8 Standing, *Organised crime*. This was due to restrictions placed on police powers with a stronger focus on human rights and due process.
- 9 The virtually unrestricted powers of the apartheid state's security apparatus (including the police) were greatly curtailed by the constitutional and legislative transformation of the post-apartheid era.
- 10 BE van Wyk and WH Theron, Fighting gangsterism in South Africa: A contextual review of gang and anti-gang movements in the Western Cape, *Acta Criminologica*, 18:3, 2005, <https://hdl.handle.net/10520/EJC28881>; TR Samara *Cape Town after Apartheid: Crime and governance in the divided city*, Minnesota: University of Minnesota Press, 2011, 93–94. D Pinnock, *Gang Town*, Cape Town: Tafelberg, 2016, 17–20.
- 11 Prevention of Organised Crime Act (21 of 1998) (POCA), section 9(1)(a).
- 12 *Ibid*, section 9(1)(b).
- 13 *Ibid*, section 9(2)(c).
- 14 STEP is in turn based on the US Racketeer Influenced and Corrupt Organizations Act of 1970 ('RICO'). See Debates of the National Assembly of 1998: 14 September to 6 November vol 21 8043. Also see *S v de Vries and Others* 2012 (1) SACR 186 (SCA) para 43.
- 15 GP Kemp (ed), *Criminal law in South Africa*, 2<sup>nd</sup> ed, Cape Town: Oxford University Press, 2015, 7–10; Hyman Gross, *A theory of criminal justice*, New York: Oxford University Press, 1979, 119.

- 16 P Saal, Schools reopen after bullets fly in gang turf wars, *TimesLive*, 1 June 2017, [www.timeslive.co.za/news/south-africa/2017-06-01-schools-reopen-after-bullets-fly-in-gang-turf-wars/](http://www.timeslive.co.za/news/south-africa/2017-06-01-schools-reopen-after-bullets-fly-in-gang-turf-wars/) (accessed 2 November 2020) discusses how turf wars in Lavender Hill caused four schools to close and two teachers suffered mild strokes due to the stress from the ongoing violence. Only about 50% of the learners returned to the school after they reopened. Also see M Charles, At least 15 killed in ongoing #BishopLavis gang violence, *Cape Argus*, 1 August 2017, [www.iol.co.za/capeargus/at-least-15-killed-in-ongoing-bishoplavis-gang-violence-10583599](http://www.iol.co.za/capeargus/at-least-15-killed-in-ongoing-bishoplavis-gang-violence-10583599) (accessed 2 November 2020).
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- 18 I Kinnes, Gangs, drugs and policing in the Cape Flats, *Acta Criminologica*, 2, 2012, 16, <https://hdl.handle.net/10520/EJC171122>.
- 19 In terms of section 29 of the Constitution of the Republic of South Africa, 1996. This is especially an infringement of section 29(1) which guarantees *everyone* the right to a basic education.
- 20 Constitution section 27(1)(a).
- 21 Section 28(1)(c) promises the right to, *inter alia*, basic health care and social services.
- 22 Section 12(1)(c) of the Constitution. Also see C Booysen, March because gang violence victims 'are not free', *Cape Times*, 28 April 2017, [www.iol.co.za/capetimes/news/march-because-gang-violence-victims-are-not-free-8846044](http://www.iol.co.za/capetimes/news/march-because-gang-violence-victims-are-not-free-8846044) (accessed 2 November 2020).
- 23 L McNamara, Criminalisation research in Australia, in T Crofts and A Loughnan (eds), *Criminalisation and criminal responsibility in Australia*, South Melbourne: Oxford University Press, 2015, 33, 35; A Duff, Towards a modest legal moralism, *Criminal Law and Philosophy*, 8:1, 2014, 217–235, 226–228, <https://doi.org/10.1007/s11572-012-9191-8>.
- 24 McNamara, Criminalisation, 35 where the author refers to Duff.
- 25 TP Thornberry et al, *Gangs and delinquency in developmental perspective*, Cambridge: Cambridge University Press, 2003, 97–109.
- 26 *S v Jordaan and Others* (CC20/2017) [2018] ZAWCHC 10 (7 February 2018) para 3. Also, D Pinnock and R Pinnock, Strategic roadmap towards implementation of the National Anti-Gangsterism, *Strategy in the Western Cape: Provincial response to the National Anti-Gangsterism Strategy (NAGS)* 2019, (2019), 10–13.
- 27 *Jordaan*, para 4.
- 28 See McNamara, Criminalisation, 41.
- 29 D Plato, Briefing on provincial policing needs and priorities, 14 April 2015, [www.westerncape.gov.za/news/police%E2%80%99s-gang-strategy-not-stopping-scourge-gang-and-drug-related-crimes](http://www.westerncape.gov.za/news/police%E2%80%99s-gang-strategy-not-stopping-scourge-gang-and-drug-related-crimes) (accessed 2 November 2020).
- 30 Pinnock and Pinnock, *Strategy*, 46–54.
- 31 AP Simester and A von Hirsch, *Crimes, harms and wrongs: On the principles of criminalisation*, London: Bloomsbury, 2011, 5.
- 32 See *S v Thomas* 2015 JDR 1932 (WCC); *S v Solomon and Others* (CC23/2018) [2020] ZAWCHC 116 (29 September 2020); *S v Jordaan* (unreported case number CC20/2017) [2017] ZAWCHC 131 (16 November 2017); *S v Solomon and Others* (Solomon) (CC23/2018) [2020] ZAWCHC 116 (29 September 2020); *S v Mafahle and Others* unreported case number 4/2018) [2019] ZAFSHC 266 (5 July 2019).
- 33 See POCA, section 10.
- 34 See Van der Linde *Criminal gang activities*, for a comprehensive exposition on the overlap between common law and statutory mechanisms in dealing with criminal gang activities.
- 35 L Zedner, Terrorizing criminal law, *Criminal Law and Philosophy*, 8:1, 2014, 99–121, 112–113, <https://doi.org/10.1007/s11572-012-9166-9>.
- 36 J Waldron, Civilians, terrorism, and deadly conventions, in J Waldron (ed), *Torture, terror and trade-offs: Philosophy for the White House*, Oxford: Oxford University Press, 2010, 80, 108.
- 37 Waldron, Civilians, terrorism and deadly conventions, 108. See Zedner, Terrorizing criminal law, 113.
- 38 *S v Thebus and Another* 2003 (6) SA 505 (CC) (*Thebus*).
- 39 *Thebus*, para 34 (own emphasis). The most significant evidentiary hurdle is pinpointing the main actor(s) causally responsible for the unlawful consequence.
- 40 *Ibid*, para 40 (own emphasis).
- 41 *Ibid*.
- 42 CR Snyman, *Criminal law*, 6<sup>th</sup> ed, Durban: LexisNexis, 2014, 262–263 fn 55.
- 43 *Thebus*, para 40.
- 44 *S v Makwanyane* 1995 (3) SA 391 (CC).
- 45 *Ibid*, paras 88–89.
- 46 See for example *S v Nombewu* 1996 (2) SACR 396 (E), 422–423 where the court mentions 'state of lawlessness prevailing in the country' in public perceptions of the ineffectual criminal justice system allowing criminals to escape justice brought about (*inter alia*) due to police incompetence. Also see *S v Soci* 1998 (2) SACR 275 (E), 295.
- 47 See Van der Linde *Criminal gang activities*, 50–97.
- 48 See generally Kemp, *Criminal law*, 21. The author points out that this principle has not yet received explicit recognition in South African courts, but this should be the case as an embodiment of the right to human dignity in terms of section 10 of the Constitution.
- 49 Simester and Von Hirsch, *Crimes, harms and wrongs*, 202–204.
- 50 See Van der Linde *Criminal gang activities*, 176–178.
- 51 POCA, section 10(1)(b).
- 52 POCA, section 10(1)(b) read with sections 10(1)(d) and 10(2).
- 53 See Van der Linde *Criminal gang activities*, 127–136.

- 54 J Neha, The control theory of perpetration in international criminal law, *Chicago Journal of International Law*, 12(1) (2011), 159–200, 161–162.
- 55 Such as Germany and Canada.
- 56 In terms of article 28 of the Rome Statute of the International Criminal Court, adopted 17 July 1998 entered into force 1 July 2002, 2187 UNTS 90 (the Rome Statute).
- 57 Article 25(3)(a) of the Rome Statute.
- 58 See T Weigend, Perpetration through an organization: The unexpected career of a German legal concept, *Journal of International Criminal Justice*, 9:1, 2011, 91–111, 102–103, <https://doi.org/10.1093/jicj/mqq077>.
- 59 H Silving, *Constituent elements of crime*, Springfield: Thomas, 1967, 147; S Eldar, Punishing organized crime leaders for the crimes of their subordinates, *Criminal Law and Philosophy*, 4:2, 2010, 183–196, 183–84, <https://doi.org/10.1007/s11572-010-9089-2>.
- 60 Eldar, Punishing organized crime leaders, 184 referring to *Attorney General v Eichmann* (1961) Criminal Case No 40/61, 197. Also see *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07 (30 September 2008), para 503 referring to the Eichmann case.
- 61 WR LaFave and A Wakeman Scott, *Handbook on criminal law*, St Paul: West Publishing, 1972, 24. Also see Snyman, *Criminal law*, 11–20 for a review of the theories of punishment.
- 62 Kemp, *Criminal law*, 22. Also see Snyman, *Criminal law*, 11–15 and Van der Linde, *Criminal gang activities*, 184–189.
- 63 See F Muñoz-Conde and H Olasolo, The application of the notion of indirect perpetration through organized structures of power in Latin America and Spain, *Journal of International Criminal Justice*, 9:1, 2011, 113–135, 134, <https://doi.org/10.1093/jicj/mqq076>.
- 64 Eldar, Punishing organized crime leaders, 185. See also *Katanga and Chui*, para 495; See Gerhard Werle and Florian Jessberger, *Principles of international criminal law*, 3<sup>rd</sup> ed, Oxford: Oxford University Press, 2014, 239–244 for the grounds under international criminal law for excluding criminal law.
- 65 Kemp, *Criminal law*, 182–183. Kemp refers to the presumption of coercion applying in favour of a child offender. The state will consequently have to prove that the child had the ability to resist the compulsion or coercion of the older person exercising his or her influence over the child. This must of course be understood in the context of the criminal capacity of a child, especially considering the Child Justice Act 2008 (75 of 2008). In the context of gangs, the court in *S v Bradbury* 1967 (1) SA 387 (A) however (at 404) held that “[a]s a general proposition a man who voluntarily and deliberately becomes a member of a criminal gang with knowledge of its disciplinary code of vengeance cannot rely on compulsion as a defence or fear as an extenuation. But each case must be judged on its own facts.” Although the Appellate Court did admit here to the fact that each case must be judged on its own facts, the general rule holds that an accused cannot escape liability or claim extenuating circumstances when he or she ‘voluntarily and deliberately becomes a member of a criminal gang’ knowing the murderous practices or policies of that gang. The *locus classicus* for compulsion in South African law is however *S v Goliath* 1972 (3) SA 1 (A). The crux of the judgment is that compulsion can be used as a complete defence, even in relation to a charge of murder. The facts of each case will however have to be judged on its own merits. Human beings cannot be held to the highest ethical standards or ideals and favour the life of one above that of another. The Court pointed out that it is accepted that the average person will consider their own lives as more important and are not expected to act like heroes. (*Goliath*, especially 21 and 25–26). See further JM Burchell, *Principles of criminal law*, 5<sup>th</sup> ed, Cape Town: Juta, 2016, 174–178; JRL Milton, Recent cases, *South African Law Journal*, 84 (1967), 121, 145–148.
- 66 Eldar, Punishing organized crime leaders, 185. Also see DC Smith, Organized crime and entrepreneurship, *International Journal of Criminology and Penology*, 6:2, 1978, 161–177, 161,
- 67 DE Kaplan and A Dubro, *Yakuza: The explosive account of Japan’s criminal underworld*, London: Little, Brown Book Group, 1987, 18–19. Also see Eldar, Punishing organized crime leaders, 185–186.
- 68 Standing, *Organised crime*, 70. Also see SA Venkatesh and SD Levitt, ‘Are we a family or a business?’ History and disjuncture in the urban American street gang, *Theory and Society*, 29:4, 2000, 427–462, 427–462, <https://www.jstor.org/stable/3108583>.
- 69 See C Roxin, *Täterschaft und Tatherrschaft*, 8<sup>th</sup> ed, Hamburg: De Gruyter, 2006.
- 70 Roxin, *Täterschaft*, 245, quoted in *Katanga and Chui*, para 515. See Eldar, Punishing organized crime leaders, 186. The author here is not in favour of this theory because it does not withstand scrutiny due to a lack of empirical data supporting it. See also F Jessberger and J Geneuss, On the application of a theory of indirect perpetration in Al Bashir: German doctrine at The Hague?, *Journal of International Criminal Justice*, 6, 2008, 853–870, 860, <https://doi.org/10.1093/jicj/mqn073>.
- 71 See *Katanga and Chui*, para 516.