Keynote Address by the Deputy Minister of Justice and Constitutional Development,

The Hon JH Jeffery, MP

On "Effective Collaboration in the Prosecution of Complex Transnational Crimes"

At the African Prosecutors Association's 8th Annual General Meeting

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Programme Director

The President of the African Prosecutors Association, Ms Martha Olivia Imalwa

The 5 Vice-Presidents of the African Prosecutors Association and other members of the Executive Committee

The hosting Attorney General, the Attorney General of Cape Verde, Dr Julio Martins Tavares

Other Attorneys General and National Directors of Public Prosecutions present

Representatives from the United Nations Office on Drugs and Crime

Prosecutors from across our continent

Ladies and gentlemen

It is an honour for me to be here with you this morning. I wish to convey the very best wishes from the Minister of Justice and Constitutional Development, the Hon Jeff Radebe MP, who unfortunately could not be here due to a prior diary commitment. And I bring with me the greetings from the people of South Africa.

Transnational organized crime has been described as a multidimensional and ever-increasing global threat. The World Bank has found that regions of the world which experience high rates of crime may lose as much as 14% of their GDP per annum. These estimates include the effects of crime on productivity

and domestic and foreign investment, as well as the impact on employment and consumption. Other social costs would add an additional 4.9 percent of regional GDP and would include the costs of loss life and health, police and criminal justice system expenditure and the cost of private security. Corruption may strip a country of a further 0.5-4% of GDP annually.

The impact of transnational organised crime is far-reaching. High levels of transnational organised crime lead to a loss of public confidence in the authorities, the creation of competing centres of political power, and public unrest. In some African countries the operations of criminal syndicates have precipitated or prolonged civil wars. With the extension of links between criminal groups across national borders, there is a possibility for economic and political power to drift away from governments into the hands of transnational business corporations and transnational organized crime. The State is often weak, due to a lack of skills, resources and legal weapons to combat these crimes. On the other hand, members of transnational organized crime syndicates often have massive resources to try and corrupt much of society, law enforcement and the state.

There are global trends in transnational organized crime. During the last 15 years the world has seen an exponential increase in transnational organized crime, thus clearly showing that these crimes know no borders. Furthermore, economic and technological globalization has enabled criminals to move from so-called "low-level" activities like drug trafficking, prostitution and illegal gambling to "corporate" activities, like migrant smuggling, environmental crime, bank fraud, and large-scale insurance fraud. Internationally the globalization of transnational organized crime has been facilitated by the following factors:

- The fading of borders and inadequate guarding thereof. Large-scale migration has created new emigrant and refugee communities that, through family networks and other ties, can serve as recruitment bases, hiding places and cover for trafficking and distribution networks.

- The increasing global economy and free-market movement of goods. Increased trade and reduced border checks provide cover and markets for trafficking illicit products.

- Unanticipated new technological possibilities in traditional and electronic communication. Organized crime groups are able to communicate covertly with relative ease and anonymity across jurisdictional boundaries. This provides transnational organized crime groups, including terrorist groups, the opportunity to mastermind with military precision any form of criminal attack on states and individuals as has been seen in countries such as Kenya, Spain, Indonesia, Tanzania and the United States. The technological advances have also facilitated large and rapid cash transactions in the layering stages of money laundering.

- Cheaper and faster transportation as well as postal system distribution improvements facilitate illicit trafficking. The growth in low cost airlines and the increase in flights also create opportunities for an increase of illegal immigration by air traffic.

These factors all play a role in the prosecution of such cases. The international community derives substantial benefit from a borderless global world, but as a result also has to deal with the negative impact of globalisation on international crime. Professor Murdoch Watney of the University of Johannesburg correctly argues that although certain types of crimes are increasingly committed across borders and may be described as borderless, the combating, investigation and prosecution of such crimes is still very much confined to the borders of a state.

Criminal networks have taken advantage of the opportunities resulting from the dramatic changes in world politics, business, technology, communications and international travel, and effectively utilise these opportunities to avoid and hamper law enforcement investigations, making it difficult to prosecute such crimes.

Crimes committed across borders, such as drug trafficking, human trafficking, money laundering, environmental crime and terrorism pose a massive international challenge. Also electronic or cybercrimes committed within one

A letter of request for mutual legal assistance was submitted to the Central Authority of the Federal Republic of Nigeria, in which key evidence was requested. The request was duly executed and the evidence provided.

The trial commenced on 1 October 2012. The prosecution called 33 witnesses, of whom 27 came from the Federal Republic of Nigeria. The included the Minister for the Niger Delta, rehabilitated former Niger Delta militant commanders and militants, doctors, businessman, co-perpetrators and/or co-conspirators and senior Nigerian law enforcement and government officials.

Due to security concerns, the South African Office for Witness Protection, accommodated some of the witnesses at the commencement of the trail, as well as a number of witnesses who were, at a later stage, taken into the Witness Protection Programme immediately upon their arrival in South Africa.

The case was successfully prosecuted due to the cooperation between South Africa and Nigeria, and the assistance of the Central Authority of Nigeria and the South African National Prosecuting Authority and Office for Witness Protection.

Programme Director,

Territorial integrity and national sovereignty make the prosecution of transnational crimes difficult. Perpetrators of transnational crimes have no regard for national borders. Canadian Judge, Kimberley Prost, whom you may know for her work at the International Criminal Tribunal for the former Yugoslavia, is of the view that, in fact, by structuring their organisations to span borders, such criminals are better able to protect their interests and organisations. They are positioned to take advantage of the differences between legal systems, the clash of bureaucracies, the protection of sovereignty, and, at many times, the complete incapacity of nations to work together to overcome their differences.

Given the limits on the exercise of extraterritorial enforcement jurisdiction, states have developed mechanisms to cooperate with each other in the

prosecution of transnational criminal matters. International cooperation in criminal matters encompasses many measures. Often it is suggested that it is only extradition and mutual legal assistance, but the effective prosecution of these cases entails much more than this. It **includes extradition, mutual legal assistance, the transfer of prisoners, the transfer of proceedings in criminal matters, witness protection, international cooperation for the purposes of confiscation and forfeiture of proceeds of crime as well as asset recovery,** as provided for in the United Nations Convention against Corruption, as well as a number of less formal measures, including measures in the area of international law enforcement cooperation.

Extradition is probably the best known, and certainly the oldest, form of international cooperation in criminal matters. It is a concept which originated in ancient societies such as the Egyptian, Chinese, Chaldean, and Assyro-Babylonian, with the first recorded extradition treaty dated circa 1280 B.C. when Ramses II, Pharaoh of Egypt, signed a peace treaty with the Hittites which expressly provided for the return of persons sought by each sovereign, who had taken refuge on the other's territory.

An extradition agreement may provide that a state will not extradite its own nationals. Furthermore, there is the issue of double criminality which requires that the crime for which extradition is requested should also be a crime in the requested state. South Africa's domestic law provides for extradition of persons accused of crimes which are punishable with a sentence of imprisonment or another form of deprivation of liberty for a period of six months or more.

Then there is the principle of speciality which provides that the extradited person may not be tried for an offence other than the crime for which he was extradited. This is a common clause in extradition agreements and also forms part of the South African extradition law.

Most extradition agreements contain a political offence exception to extradition. Section 15 of the South African Extradition Act 67 of 1962 provides that the Minister may at any time order the cancellation of a warrant for the arrest of a person issued in terms of the Act or discharge from custody a person detained in

terms of the Act if he is satisfied that the offence in respect of which the surrender of the person is sought is an offence of a political nature.

The political offence exception has been controversial as courts generally try to define a political offence in such a way that it excludes the political terrorist. The South African domestic extradition law provides for a political offence exception which excludes terrorist activity. Section 22 of the Act qualifies section 15 by stipulating that a request for extradition based on the offences referred to in section 4 or 5 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act may not be refused on the sole ground that it concerns a political offence.

Often the application of human rights norms is used as an objection or disqualification to extradition. Some extradition agreements provide for the application of human rights norms, but even those extradition agreements that do not provide for such application may refuse extradition on the grounds of human rights considerations. The two main human rights norms are the non-imposition of the death penalty and non-discrimination.

For example, South Africa will not extradite foreign nationals suspected of crimes that may lead to them facing the death penalty in those countries that seek to try them. In the matter of *Tsebe v Minister of Home Affairs* our Constitutional Court held that failure by the South African authorities to attain an assurance that the sentence of death would not be imposed constituted an absolute bar to extradition to a country where the death penalty could be imposed. In this case two Botswana nationals, Emmanuel Tsebe and Jerry Phale, were alleged to have committed murder in their home country and they sought to stave off their extradition. The Constitutional Court dismissed the appeal by South Africa's Ministers of Home Affairs and Justice and Constitutional Development who had sought to overturn an earlier Gauteng High Court ruling that had halted their deportation to Botswana.

In the Constitutional Court, Zondo AJ, as he then was, noted that *"we as a nation have chosen to walk the path of the advancement of human rights ... no matter who the person is and no matter what the crime is that he is alleged to*

have committed, we shall not in any way be party to his killings as a punishment and we will not hand such person over to another country [and] ... expose him to the real risk of the imposition and the death penalty upon him".

Acting Justice Zondo, noting that South Africa had passed legislation allowing for people to be tried in South Africa for specific crimes committed outside its borders, like The Prevention and Combatting of Corrupt Activities Act and the Implementation of the Rome Statute of the International Criminal Court Act for crimes against humanity wrote: *"There is no reason why similar legislation cannot or should not be put in place to ensure that persons ... can be tried by the South African courts when countries in which they allegedly committed the crimes are not prepared to give the requisite assurance [that suspects will not face the death penalty when tried]."*

Finally there is the issue of the incorporation of the extradition agreement between the requested and the requesting state into the domestic law of the requested state. For example, an extradition treaty between South Africa and another state can be validly entered into only in accordance with the provisions of section 2(1) of the Extradition Act read with section 231(1) and 231(2) of the Constitution. Section 231(1) provides that the negotiation and signing of all international agreements is the responsibility of the national executive and section 231(2) of the Constitution states that an international agreement binds South Africa internationally only after it has been approved by both House of Parliament.

As is the risk in all extraditions, it may sometimes be a cumbersome and lengthy process. In terms of our Extradition Act, the Minister of Justice receives the extradition request from a foreign state via diplomatic channels. The Minister will then issue a notification to a magistrate who in turn will issue a warrant of arrest. The arrest and detention are aimed at conducting an extradition enquiry. An extradition enquiry is regarded as a judicial and not an administrative proceeding. It is important to note that there is a significant differentiation between judicial and executive roles in extradition proceedings.

Although a magistrate fulfills an important screening role to determine whether or not there is sufficient evidence to warrant prosecution in the foreign state, the decision to extradite a person is ultimately an executive one.

In South Africa in the 2012/2013 financial year the Department of Justice and Constitutional Development processed 87 requests for mutual legal assistance and 46 extradition requests. Eighty six percent of these requests were processed within the prescribed time frame.

In addition to extradition, states have also developed mechanisms for requesting, obtaining and presenting evidence for criminal prosecutions. When evidence or other forms of legal assistance, such as witness statements or the service of documents, are needed from a foreign sovereign, states may attempt to cooperate informally through their respective police agencies or, alternatively, resort to what is typically referred to as requests for "mutual legal assistance".

Mutual legal assistance developed from the comity-based system of letters rogatory. For many years, states were required to rely entirely upon traditional letters rogatory, submitted through diplomatic channels, to gain access to such evidence. However, in our modern age, this method was insufficient to meet the growing demand for speedy and effective assistance in evidence gathering.

In contemporary practice, such requests may still be made on the basis of reciprocity but may also be made pursuant to bilateral and multilateral treaties that obligate countries to provide assistance. Many countries are able to provide a broad range of mutual legal assistance to other countries even in the absence of a treaty. One of the major advantages of this form of cooperation is that it covers a broad range of assistance including inter alia, taking evidence or statements of persons, search and seizure, the provision of documents or evidentiary items, the service of documents, and the temporary transfer of persons to assist an investigation or appear as a witness.

Furthermore assistance can be rendered at any state of a criminal process from investigation to appeal. Generally mutual assistance can be rendered directly between competent authorities in the two states, often Justice Ministries. This is one of the features of mutual assistance which makes it an effective and efficient mechanism of cooperation.

Programme Director,

For cooperation between states to succeed both states need to adhere to various international legal instruments, such as, for example, the United Nations Convention against Transnational Organized Crime and the Protocols thereto. All States have a shared responsibility to take steps to counter transnational organized crime, including through international cooperation and in cooperation with relevant entities such as the United Nations Office on Drugs and Crime.

The United Nations Convention against Transnational Organized Crime (UNTOC), adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. It opened for signature by Member States at a high-level political conference convened for that purpose in Palermo, Italy, in December 2000 and entered into force on 29 September 2003. The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Countries must become parties to the Convention itself before they can become parties to any of the Protocols.

The Convention represents a major step forward in the fight against transnational organized crime and signifies the recognition by Member States of the seriousness of the problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle those problems. States that ratify this instrument commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences (participation in an organized criminal group, money

laundering, corruption and obstruction of justice); the adoption of new frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.

States must ensure that its domestic legislation is in line with the obligations set out under the ratified instruments. For this reason South Africa has passed many pieces of legislation, such as, amongst others, the Extradition Act, the International Cooperation in Criminal Matters Act, the Prevention of Organised Crime Act, the Protection of Constitutional Democracy against Terrorist and Related Activities Act, the Prevention and Combating of Corrupt Activities Act, the Financial Intelligence Centre Act to combat money-laundering and terrorist financing activities, the Prevention and Combating of Trafficking in Persons Act.

Programme Director,

But what is it that we still need to do? How can be improve current cooperation efforts so as to ensure more successful prosecutions and higher conviction rates of transnational crimes?

There simply isn't one standard, generic, "one-size-fits-all" approach to follow, as there are too many variables at play. Every case has to be dealt with on its own circumstances and its own merits, taking into account variables such as the type of crime, the assistance that is being required, where the perpetrator and witnesses are, whether extraterritorial jurisdiction is involved, the type of legal system at play in the prosecuting state, in other words whether it is a common law system or a civil law system, and the resources available to try the case.

However, if one examines successful prosecutions involving international cooperation and complex transnational crimes, there are certain best practice principles and international trends which come to the fore. These principles have been endorsed by the United Nations and include the following:

- Existing treaties and laws should be reviewed periodically and amended as necessary to keep pace with rapidly evolving practices and challenges in international cooperation.
- They should provide maximum flexibility to enable broad and expeditious assistance.
- The often-cumbersome processes of extradition need to be streamlined. For that purpose, model treaties, such as the United Nations Model Treaty on Extradition, have been made available to countries wishing to enter into new bilateral agreements.
- Countries need to continue to develop and refine their treaty network and modernize their extradition treaties.
- Reviewing the national laws and renegotiating existing treaties are often necessary to ensure maximum flexibility in dealing with extradition requests

The current trend in international cooperation mechanisms is to favour arrangements which:

- allow direct transmission of requests for mutual assistance and expedite the sending and service of procedural documents;
- require compliance with formalities and procedures indicated and deadlines set by the requesting state;
- facilitate the cross-border use of technical equipment (for observation purposes) and the interception of communications;
- allow covert investigations to take place across borders;
- encourage the establishment of joint investigation teams;
- permit, under certain circumstances, the hearing of witnesses by video or telephone conferences; and,
- permit the temporary transfer of persons held in custody for purposes of investigation.

On a practical level, some frequently occurring problems have been identified in the prosecution process and suggested ways in which to remedy these problems are by way of improved communication channels, enhanced translation capacities, language training, the use of standardized forms, the development and use of checklists of evidentiary requirements, secondment and exchanges between personnel in central authorities or between executing and requesting agencies, training material and courses, bi-lateral and regional seminars and information exchange sessions and, the use of liaison officers and liaison magistrates to facilitate the preparation of the requests for assistance and any follow-up communications.

The possibility of transferring proceedings in criminal matters from one country to another is another interesting option upon which to build stronger international cooperation. Such a transfer can be used to increase the likelihood of the success of a prosecution, when another country appears to be in a better position to conduct the proceedings. It can also be a useful method of concentrating the prosecution in one jurisdiction and increasing its efficiency and the likelihood of it success.

Establishing Financial Intelligence Units are imperative to prosecute financial and economic crime and money laundering offences. Such offences require the quick identification and communication of information from banks and other financial institutions. In many instances, changes to bilateral treaties or national legal frameworks are required to allow for the lawful and expeditious exchange of that information across borders.

Futhermore, the existence of offshore centres presents practical problems from the point of view of cooperation among prosecution services. Difficulties are frequently experienced in dealing with the differences in company laws and other regulatory norms. There are also issues with cyber-payments, "virtual banks" operating in under-regulated offshore jurisdictions, and shell companies operating outside of the territory of the offshore centre. Control agencies have been trying to improve measures to curb money laundering in countries where participation in the "formal" financial sector is low. Understanding these

informal financial networks and how criminal actors can abuse them is a priority.

As many criminal and terrorist groups operate across borders, the threat they represent to witnesses and collaborators is not confined to national borders. Physical and psychological intimidation of witnesses and their relatives can take place in a variety of contexts. Furthermore, witnesses need at times to move from to another country during lengthy criminal proceedings. Victims of human trafficking may need to return to their country of origin while waiting for a hearing or a trial during which they are to provide evidence. Where a state is not be able to provide the required protection of witnesses, cooperation in the protection of witnesses and their relatives, including victims and witnesses of trafficking and their relatives, and collaborators of justice becomes a necessary component of cooperation between prosecution services.

Furthermore, international cooperation may also be required at times in order to protect interpreters, the prosecutors themselves and other judicial staff. These forms of international cooperation may include all aspects such as the effective protection of witnesses, practical measures to ensure that witnesses testify freely and without intimidation, the criminalization of acts of intimidation, the use of alternative methods of providing evidence, physical protection, relocation programmes, permitting limitations on the disclosure of information concerning their identity or whereabouts, and in exceptional circumstances, protecting the anonymity of the person giving evidence.

Criminals and experienced defence lawyers have to be met with equivalent skills. An investigating and prosecuting unit that has specialized knowledge and skills in transnational organised crime can to be created through various interactive processes, which includes the cumulative effect of amongst others, formal and informal theoretical training, and learning through practical application of theory, and mentoring by experienced colleagues. Experience, in turn, accumulates through high work ethics, dedication, constant learning and patience. Investigators and prosecutors argue that conservatively it takes eight years to acquire the specialist skills needed for investigating or prosecuting specialised crimes.

Prosecutor, investigator and analyst cooperation is essential in complex crime and a proven recipe for success. The early involvement of prosecutors means that cases with no prospect of success owing to lack of evidence or technical problems (e.g. where the chain of evidence is broken by private investigators) are closed at an earlier stage. Prosecutors have time for case preparation and consultations with complainants (unlike in other units) and develop relationships with clients which in turn improves information and intelligence. The proximity of investigators and prosecutors also makes it easier to investigate cases properly and collective efforts are a recipe for success as witnessed by the high conviction rates attained.

Successful prosecutions go hand-in-hand with successful investigations. Transnational organized crime cannot be adequately addressed by normal, "run-of-the-mill" and ordinary law enforcement techniques. Neither can it be adequately addressed by a unit that is burdened by daily crime fighting duties. Transnational organized crime can also not be adequately addressed by a unit that is subject to the bureaucratic red-tape governing law enforcement today.

Organized crime can only be adequately addressed by a flexible and dedicated law enforcement unit. International best practice further shows that such a unit must work closely with organs such as Inland Revenue, national intelligence structures, the police, prosecutors and other institutions, given the responsibility of safe guarding the economy of the country. In fact, practice has proven that in certain circumstances co-location between this special unit and other professions, such as prosecution and tax collection, is essential if not a *conditio sine qua non* for success.

Programme Director,

The crux of the matter is that transnational crime is forever changing and evolving. The key is to ensure that the way we deal with these crimes also evolves, so that it adapts to ever-changing challenges. There have been many recent developments in the European Union that we as Africa could consider. For example, the new European Arrest Warrant (EAW) has introduced several new innovations and best practice principles in the EU.

These innovations include expediting proceedings, as the final decision on the execution of the EAW should be taken within a maximum period of 90 days after the arrest of the requested person. Where the subject of the warrant consents, the maximum period is with in 10 days after consent has been given. Furthermore, the requirement of double criminality for successful extraditions has been abolished in prescribed cases. The new surrender procedure based on the EAW is removed from the realm of the executive and has been placed in the hands of the judiciary. The judicial authorities are competent to issue or execute an EAW by virtue of the law of the issuing or executing Member State, this cuts out the administrative process.

It is also interesting to note that European Union Member States can no longer refuse to surrender their own nationals and, in certain instances, the political offence exception has been abolished. In other words, the political offence exception is not enumerated as mandatory or optional ground for non-execution of an EAW.

In this regard we need to ask ourselves in Africa – are we doing enough to make the prosecution of transnational crimes easier? How can we simplify the procedures in extradition and obtaining evidence for the investigation of cases? Has the African Prosecutors Association done enough in its 10 years of existence in this regard? What more can it do?

We need to raise international awareness of complex transnational crimes and assist in building multilateral cooperation against it. It is essential for countries to partner with other countries so as to contribute key law enforcement resources. We need to expand cooperation with the United Nations to promote implementation of the United Nations Convention against Transnational Organized Crime and urge states to ratify it and we need to ensure that our individual states have the required national or domestic legislation to effective prosecute such crimes.

I wish the APA all the best for a very successful Annual General Meeting. It is indeed an honour and a privilege to be part of these proceedings.

I'm sure many of you, like me, had to struggle through a few years of Latin training at university before being allowed to practice as a lawyer. I do not remember much of the Latin grammar or the Latin tenses, but I do remember that it was Pliny the Elder who famously said "ex Africa semper aliquid novi", from Africa there is always something new. We need to constantly come up with new and innovative ways to deal with transnational crimes, adapting our laws and prosecutorial cooperation to the ever-changing demands that these types of crime require. Here in Africa, we have the knowledge and we have the expertise to become frontrunners in dealing with combating complex transnational crimes. If we do so, it will greatly benefit not only our own individual countries and regions, but the whole of our continent.

I thank you.