

INSTITUTE FOR SECURITY STUDIES (ISS):
SUBMISSION TO THE PORTFOLIO COMMITTEE ON SAFETY
AND SECURITY
ANTI-TERRORISM BILL 2002

BACKGROUND ON THE INSTITUTE FOR SECURITY STUDIES

The Institute for Security Studies (ISS) is an independent, non-governmental research institute with a focus on human security in Africa. It is recognised both locally and internationally as one of the leading applied research institutes doing work on security in Africa. It is supported by a multi-disciplinary staff with experience in regional research projects of this nature.

ISS Programme on Terrorism in the SADC Region

The Institute for Security Studies is currently conducting an applied research project entitled "Combating Terrorism in the SADC region". The broad objectives are:

- i) To assess the present and future threat of terrorism in SADC countries; and
- ii) To examine existing legislation relating to terrorism with a view to identify legislative and institutional needs, recommend legislative changes, and assist with the harmonising of such legislation in SADC region.

Earlier, during 2002, the Institute collaborated with the African Union on a joint project that culminated in a High-Level Intergovernmental meeting held in Algiers from 11 to 14 September 2002. That meeting finalized a Plan of Action and recommendations on the Prevention and Combating of Terrorism in Africa that was subsequently endorsed by the recent meeting of the Executive Council of the African Union in N'Djamena (from 3-6 March 2003) and will be submitted to the forthcoming 2nd Ordinary Session of the Assembly of the Union for adoption.

Is there a need for anti-terrorism legislation in South Africa?

Before exploring the need for anti-terrorism legislation, we render a short historical overview of the present "Bill". The evolutionary process of the South African anti-terrorism legislation has been marked by much controversy. Its roots can be traced back to the overhaul of the existing security legislation in the mid-nineties. The idea initially was to bring South Africa's collection of security legislation in line with the Constitution. In November 1995, Safety and Security Minister Sydney Muffamadi approached the South African Law Commission (SALC)

to undertake a review and rationalisation of existing security legislation. According to the Ministry, the history of security legislation and the new political climate required that existing legislation in South Africa, including the Internal Security Act of 1982 and similar acts in the former TBVC states had to be repealed and a new Act be enacted which conformed to international norms, the Constitution and the country's then current circumstances and requirements.

The South African Police Service conducted the initial research on terrorism and drafted a document containing a bill, which was submitted to SALC in October 1999. In mid-2000, SALC released its draft Anti-Terrorism Bill. The Bill was severely criticised for its wide definition of what constituted terrorist activity as well as its proposed curbing of civil liberties, such as detention without trial. In its motivation for the draconian nature of the Bill, SALC announced that effective anti-terrorism legislation was one of the tools available to governments in their fight against terrorism. It thus sought to bring South African legislation in line with international conventions dealing with terrorism. The Bill was returned to legal drafters later that year.

The next draft of the South African anti-terrorism legislation was submitted to Parliament in November 2002. Although controversial clauses such as detention without trial had been scrapped, many critical clauses remained. The present Anti-Terrorism Bill was tabled in Parliament on 10 March 2003.

Before presenting our comments on the Bill in greater detail, we briefly explore the need for anti-terrorism legislation.

In the aftermath of 11 September 2001, pressure grew on the government to show its commitment to counteract global terrorism. On September 28, 2001 the United Nations Security Council adopted Resolution 1373 in terms of Chapter VII of the United Nations Charter. All states, including those who are not United Nations members are compelled to implement the resolution's operative provisions. This includes the criminalisation of the financing and other acts of support for terrorism, the freezing of bank accounts, the introduction of effective border controls and other measures to fast track the exchange of operational information.

The operative provisions of UN Resolution 1373 were presented as:

- i) To deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- ii) To ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to other measures against

them, such terrorist acts are established as serious criminal offences in domestic law and regulations and that the punishment reflects the seriousness of such terrorist acts;

- iii) To afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

An analysis of existing South African security legislation would indicate that voids exist in current South African legislation, making it insufficient to satisfy the operative provisions of UN Resolution 1373. In addition to South Africa's international obligations, it has to satisfy regional commitments, in particular the *Organisation of African Unity Convention on the Prevention and Combating of Terrorism (The Algiers Convention of 1999)*.

Terrorist threat assessments indicate that no country is safe from the global reach of terrorists and their supporters (referring to those individuals who will rather resort to violence than any other form of dissent). This is underlined by the terrorist incidents in Nairobi, Dar-es-Salaam and Mombassa. South Africa in its recent past witnessed an urban terror campaign in the Western Cape and a spate of bombings by a rightwing terror group, known as the "*Boeremag*".

The ISS recognizes the threat of transnational and domestic terrorism to the internal stability of the Republic of South Africa, its citizens as well as against foreign interests. This threat should however not be evaluated in isolation; a regional holistic approach is required; reaffirming international commitment in implementing presented counter-terrorism initiatives. African countries are increasingly being used as a target or "battleground" for international and transnational acts of terrorism. Between 1996 and 2001 eight percent (8% or 194 incidents¹) of acts of all acts of international terrorism were committed on African soil that resulted in 5 932 casualties, the second highest casualty rate after Asia.

Prior to UN Resolution 1373 the South African Government announced its commitment to counter terrorism in its "Official Policy on Terrorism", in March 1998, through adopting a four-part strategy:

- i) To uphold the 'rule of law';
- ii) To never to resort to any form of general and indiscriminate repression;
- iii) To defend and uphold the freedom and security of all its citizens; and
- iv) To acknowledge and respect its obligations to the international community.

In achieving these commitments the following obligations were presented:

¹ Between 1996 and 2001, 2 483 incidents of international terrorism were recorded throughout the world that resulted in 24 086 casualties.

- a) To condemn all acts of terrorism;
- b) To take all lawful measures to prevent acts of terrorism and to bring those to justice who are involved in acts of terrorism;
- c) To protect foreign citizens from acts of terrorism in South Africa;
- d) To, in an event of an act of terrorism committed in a foreign country that involve a South African citizen to co-operate with the targeted country;
- e) Not to make concessions that could encourage extortion by terrorists;
- f) Not to allow its territory to be used as a haven to plan, direct or support acts of terrorism;
- g) To support and co-operate with the international community in their efforts to prevent and combat acts of terrorism;
- h) To use all appropriate measures to combat terrorism; and
- i) To support its citizens who are victims of terrorism.

The proposed Bill honours international obligations by adopting necessary domestic legislation but a few refinements are suggested to guard against an overzealous approach as well as to assure legal certainty.

Legislation should aim to balance between the threat and counter-measures, between the current and future threat and the protection of human rights. The submissions will primary focus of the following:

- "Definition of acts of terrorism"
- Question of "banning organizations"
- Role of "investigative hearings"

Working procedure prior to submission

In preparing this submission, ISS researchers conducted informal round-table discussions and interviews on various aspects with Advocate Anton Katz, Advocate Johan de Waal, Dr Jakkie Cilliers (ISS Executive Director), Kathryn Stuurman (ISS Senior Researcher) and Martin Schönteich (ISS Senior Researcher), Dr Philip C. Jacobs (Chief Manager: Legal Component Detective Service), Pierre van Wyk (Researcher: South African Law Commission), Nokukhanya Ntuli (Parliamentary Researcher: IDASA), Felicity Harrison (Parliamentary Researcher: Southern African Catholic Bishops' Conference) and Douglas Tilton (Parliamentary Researcher: South African Council of Churches' Parliamentary Office). The recommendations reflected in this submission are, however, those of the ISS researchers alone and do not reflect those of the individuals listed above or their organizations.

A comparative legislative analysis of existing anti-terrorism legislation was undertaken including the Mauritian "*Prevention of Terrorism Act of 2002*", the Canadian *Bill C-36*, the

American “*Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*” (USA Patriot Act of 2001), the Indian “*Prevention of Terrorism Ordinance of 2001*”, the British “*Anti-Terrorism, Crime and Security Bill of 2001*” and the German “*Gesetz zur Bekämpfung des Internationalen Terrorismus*” (*Terrorismusbekämpfungsgesetz 2002*). In addition, relevant United Nations and Commonwealth documentation was consulted.

COMMENTS ON THE ANTI-TERRORISM BILL 2003

Each section that will be discussed in this submission intends to present:

- Current phrasing of the section of the “Bill” under discussion
- Discussion: problems/ weaknesses of the section
- [Suggestion on how to improve the specific clauses of the “Bill”](#)
- Additional legislation or legislation necessary for cross-reference will also be presented

Attached to the submission is a proposed amended “Counter-Terrorism Bill” containing amendments and additions as proposed by the ISS.

“TITLE”

ANTI-TERRORISM BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in Government Gazette No. 24076 of 15 November 2002)
(The English text is the official text of the Bill)*

Discussion

The objective of the proposed “Bill” is to create a legislative framework for counter-terrorism initiatives. In line with the objective envisaged, we recommend to entitle the set of legislation as “Counter-Terrorism Bill”.

Suggestion

We recommend to refer to the set of legislation as the:

“Counter-Terrorism Bill”

DEFINITIONS

“PROPERTY”

The proposed Bill defines “property” as:

“**property**” means real or personal property of any description, whether tangible or intangible;

Discussion

The definition of “property” is similar to the definition as presented in the “Prevention of Organised Crime Act”. There may be some similarities in terms of illegal financial between operations, a clear difference exists between organised crime syndicates and groups and individuals associated with terrorism, but by and large they differ in organizational structure, operations and objectives. It is therefore suggested that another approach should be implemented in countering and investigating terrorism. It is suggested to make a clear differentiation in terms of “property associated with terrorist individuals or entities and “property” linked to organised crime syndicates. The suggested definition is clearer defined, referring to all possible forms of “property” in assuring legal certainty.

Suggestion

“**property**” means any asset of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form including electronic or digital evidencing title to, or interest in, such assets including but not limited to bank credits, travelers cheques, money orders, shares, securities, bonds, drafts, and letters of credit.

“TERRORIST ACT”

Previous drafts of the Anti-Terrorism Bill contained broad definitions of “terrorist act”. The latest definition is as follows:

“**terrorist act**” means an unlawful act, committed in or outside the Republic;
 (a) a convention offence; or
 (b) likely to intimidate the public or a segment of the public;

The following section is divided into a section on the “convention offences” and the “Algiers Convention.

a) Convention Offences

The “Bill” attached a list of United Nations convention as Schedule 1, referring to particular articles within the conventions: In particular nine of the twelve United Nations Conventions on Terrorism and the Organisation of African Unity Convention on the Prevention and Combating of Terrorism (Algiers Convention 1999). The nine convention offences are:

- Interference with, seizure or exercise of control of an aircraft (Article 11 of Convention on Acts Committed on Board Aircraft (1963))

- Seizure or unlawful exercise of control of an aircraft (Article 1 of Convention for the Suppression of Unlawful Seizure of Aircraft (1970))
- Performing acts of violence on, damaging or destroying an aircraft (Article 1 of Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971))
- Murder, kidnapping or attack upon the person, official premises, private accommodation, transport or liberty of an internationally protected person (Article 1 and 2 of Convention on the Prevention and Punishment of Crimes against International Protected Persons (1973))
- Receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material (Article 7 of Convention on the Physical Protection of Nuclear Material (1980))
- Performing an act of violence at an airport or destroying or damaging the facilities at an airport (Article II of Protocol for the Suppression of Unlawful Acts of Violence at Airports (1988))
- Manufacture of unmarked explosives (Article 2 of Convention on the Making of Plastic Explosives (1991))
- Delivery, placing, discharge or detonation of an explosive or other lethal device (Article 2 of Convention on the Suppression of Terrorist Bombings (1997))
- Provision or collection of funds to be used to carry out a terrorist act (Article 2 of Convention on the Suppression of the Financing of Terrorism (1999))

The nine conventions are the ones that the South African government has ratified to date. South Africa is required to ratify all twelve of the United Nations Conventions on Terrorism.

The outstanding conventions are:

- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988)
- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988)
- Convention on the Physical Protection of Nuclear Material (1980)

Suggestion

Firstly, it would be commendable to attach all twelve conventions on terrorism as well as the Algiers Convention as Annex to the Bill, making sure that all possible parties will have access to the referred international and regional instruments. The outstanding conventions are all in the process of being ratified. It would be useful to have domestic legislation in place to speed up the ratification and implementation process. In fact, ratification of international instruments is often delayed due to a lack in domestic legislation. Instead of having to amend the Anti-Terrorism Bill at a later stage to provide for the domestic requirements for ratification, convention offences should include offences as specified in the three outstanding conventions.

Secondly, in terms of the practicality of Schedule 1, the United Nations Conventions may not be accessible at short notice. When time is of the essence, a defence lawyer may struggle to establish the offence his/her client has been arrested for. Similarly, it is unusual to criminalise an act, if it not defined.

The following definition of a “terrorist act” is suggested:

“terrorist act” means:

- a) any act which is a violation of the criminal laws of the Republic and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
 - (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
 - (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
 - (iii) create general insurrection in a State².
- b) is any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii) or
- c) is designed or intended to disrupt any computer system or the provision of services directly related to governmental computer systems, communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure; or
- d) involves releasing into the environment or any part thereof of distributing or exposing the public or any part thereof to –
 - (i) any dangerous, hazardous, radioactive or harmful substance; or
 - (ii) any toxic chemical; or
 - (iii) any microbial or other biological agent or toxin

Notwithstanding subsections (a) to (d) an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work, shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm.

Reference to provisions (a) (i) to (iii) would also reflect Cabinets official policy on terrorism as adopted in March 1998 that defined terrorism as: “The incident or incidents of violence and the threat thereof against a person, a group of persons or property, not necessarily related to the aim of the incident to coerce a government or civil population or a segment thereof to act or not to act according to certain principles.”

Under (a) (i) the addition of “likely to intimidate the public or a segment of the public” is expedient due to the nature of the offences listed in the schedule. The definition fails to provide legal certainty by providing two mutually exclusive interpretations. To ensure legal certainty, not only should the mentioned clause be omitted but “convention offences” (as discussed above) be spelled out. Under the *“Intimidation Act of 1982”*, intimidation refers to persons who through their behaviour, speech or published writings seek to create fear in

² Reference should be made to “Common Law Crimes” referred to in the prosecution of persons who engages in terrorist activities. In particular treason, sedition, public violence, murder, kidnapping, arson, malicious damage to property etc.

other people for their own safety, the safety of their property or the security of their livelihood are guilty of an offence. This form of intimidation extends beyond the normal acceptable boundaries of freedom of speech or expression (as referred to in the Bill of Rights – in that this right does not extend to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes the incitement to cause harm³). The act is targeted at persons who intend to frighten, demoralise, or incite the public (or a particular section of the population) to do or abstain from doing any act. Any person who does any of these things and commits (or threatens to commit) an act of violence, is guilty of an offence and can be convicted to be fined to an amount at the discretion of the court and/or imprisonment for a period of up to 25 years.

Provisions c) and d) reflect recent changes in the modus operandi of individuals and groups associated with terrorism. This includes the growth of cyber-terrorism and the use of weapons of mass destruction in acts of terrorism.

The inclusion of provision e) ensures the protection of fundamental rights as provided for in the Constitution.

“Self-determination and Liberation Struggles”

The tenth convention offence is the commission of a terrorist act as contemplated in section 1 of the Organisation of African Unity Convention on the Prevention and Combating of Terrorism (Algiers Convention 1999). The 35th Ordinary Session of the Assembly of Heads of State and Government adopted the Convention in the Algerian capital Algiers in July 1999. It entered into force on 6 December 2002. South Africa has both signed and ratified the Convention.

What differentiates the Algiers Convention from other conventions on terrorism is Article 3(1). Struggles for national self-determination are thereby excluded from its definition of terrorism. Article 3(1) provides as follows:

1. Notwithstanding the provisions of Article 1, the struggles waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

South Africa was one of the primary role-players in promoting the Algiers Convention. Article 3(1) is of particular significance in the national and regional context, taking us back to the days when a myriad of liberation forces were declared or referred to as “terrorists”. It is therefore surprising that the particular article was not included under convention offences. Since South Africa has ratified the convention in its entirety the definition of a “terrorist act” should be included with its exclusion clause, Article 3(1).

³ Section 16.

Our suggestion is to add Article 3(1) to the Preamble following:

AND MINDFUL that the Republic, has since 1994, become a legitimate member of the community of nations and is committed to bringing to justice persons who commit such terrorist acts; and to carrying out its obligations in terms of the international conventions on terrorism;

AND RECOGNIZING that the struggles waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts

“TERRORIST ORGANISATION”

The current “Bill” provides the following definition:

“terrorist organisation” means an organisation declared as such under section 14

Suggestion

Later in this submission, we propose that legislation should avoid an organisational focus, but rather concentrate on individuals. For the purposes of control over terrorist financing, we recommend to replace “organisation” with the concept “entity” throughout the Bill:

“ terrorist entity” means a person, group, trust, partnership, fund or an unincorporated association or organization”

**CHAPTER 2: MEASURES RELATING TO OFFENCES
OFFENCES AND PENALTIES**

Convention Offences

Although reference will be made to offences relating to United Nations, we propose that all United Nations “counter-terrorism Conventions, including United Nations Resolution 1373 as well as the Organization of African Unity Convention on the Prevention and Combating Terrorism (Algiers Convention), be attached.

Aircraft and Airport Safety

According to Schedule 1 in the proposed “Bill”, Convention offences (a) and (b) are separate offences:

<p>(1)(a) Interfering with or Seizure or exercising control of an Aircraft</p> <p>(a) When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.</p> <p>(b) In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.</p> <p>(b) Seizure or exercising control of an aircraft Any person who on board an aircraft in flight:</p> <p>(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or</p> <p>(b) is an accomplice of a person who performs or attempts to perform any such act commits an offence</p>
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It is suggested to merge Article 11 of *Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963)* and Article 1 of the *Convention for the Suppression of Unlawful Seizure of Aircraft (1970)*. The wording of the “Anti-Terrorism Draft Bill” (2002) is recommended:

<p>2.(1) Seizure or exercising control of an aircraft Any person who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft with the intent to-</p> <p>(a) cause any person on board the aircraft to be detained against his or her will;</p> <p>(b) cause any person on board the aircraft to be transported against his or her will to any place other than the next scheduled place of landing of the aircraft;</p> <p>(c) hold any person on board the aircraft for ransom or to service against his or her will; or</p> <p>(d) cause that aircraft to deviate from its flight plan, commits an offence, and is liable on conviction to imprisonment for life.</p>
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Convention offence (2) is Article 1 of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)*, as stipulated under (3) of the “Convention Offences”:

<p>(2) Performing acts of violence on or damaging or destroying an aircraft</p> <p>(1) Any person commits an offence if he unlawfully and intentionally:</p>

- a. performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
 - b. destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
 - c. places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
 - d. destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
 - e. communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.
2. Any person also commits an offence if he:
- a. attempts to commit any of the offences mentioned in paragraph 1 of this Article; or is an accomplice of a person who commits or attempts to commit any such offence.

We propose to include "convention offence" (f) as listed in Schedule 1. The set of offences is contemplated in Article II of the *Protocol for the Suppression of Unlawful Acts of Violence Serving International Civil Aviation (1988)*. We recommend the re-grouping of convention offences from a chronological order to a logical order, namely the grouping of similar offences such as offences pertaining to civil aviation, maritime navigation, etc.

Proposed Convention Offence (3):

- (3) Performing an act of violence at an airport or destroying or damaging the facilities of an airport-**
Any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon:
- (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or
 - (b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport."

It should however be noted as a matter of cross-reference that under the *Civil Aviation Offences Act No. 10 of 1972*, section (2) (1) (a) to (f) provisions for the following offences were created in safeguarding aircraft and persons and property on board:

- Anyone who:
- a) on board an aircraft in flight
 - (i) by force or threat of force or by any other form of intimidation and without lawful reason seizes, or exercises control of, that aircraft;
 - (ii) assaults any person, if such assault is likely to endanger the safety of the aircraft
 - (iii) assaults or wilfully interferes with any member of the crew of that aircraft in the performance of his duties;
 - b) destroys an aircraft in service or wilfully causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight
 - c) places on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft or to cause damage to it which renders it incapable of flight or is likely to endanger its safety in flight;
 - d) destroys or wilfully damages air navigation facilities or wilfully interferes with their operation;

- e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in service;
- f) places at, on or in any designated airport, heliport or air navigation facility any device or substance which is calculated to endanger, injure or kill any person, or to endanger, damage, destroy, render useless or unserviceable or put out of action any property, vehicle, aircraft, building, equipment or air navigation facility or part thereof.

Shall be guilty of an offence and liable on conviction to imprisonment for a period of not less than five years but not exceeding thirty years.

Safety of Maritime Navigation

Article 3 of the *Convention for the Suppression of Unlawful Acts against Safety of Maritime Navigation* stipulates:

- (4) Any person commits an offence if that person unlawfully and intentionally: seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- (a) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
 - (b) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
 - (c) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
 - (d) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
 - (e) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
 - (f) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).
- (5) Any person also commits an offence if that person: attempts to commit any of the offences set forth in paragraph 1; or
- (a) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
 - (b) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

We suggest reverting to Article 6 of the previous South African “Anti-Terrorism Bill” (2002).

Proposed Convention Offence (4):

- (4) Endangering the Safety of Maritime Navigation**
- Any person who, in respect of a ship registered in the Republic or within the territorial waters of the Republic or maritime navigational facilities, unlawfully and intentionally -
- (a) seizes or exercises control over such a ship by force or threat thereof or any other form of intimidation;
 - (b) performs any act of violence against a person on board such ship if that act is likely to endanger the safe navigation of that ship;
 - (c) destroys such a ship or causes damage to such ship or to its cargo which is likely to endanger the safe navigation of that ship;
 - (d) places or causes to be placed on such ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;
 - (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of such ship; or
 - (f) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of such ship;
- commits an offence and is liable on conviction -
- (i) to imprisonment for a period not exceeding 20 years; or

- (ii) if the death of any person results from any act prohibited by this section, to imprisonment for life.

Fixed Platforms on the Continental Shelf

We suggest the inclusion of offences as stipulated by Article 2 of the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988)*:

Any person commits an offence if that person unlawfully and intentionally:
seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or

- a. performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or
- b. destroys a fixed platform or causes damage to it which is likely to endanger its safety; or
- c. places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or
- d. injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (d).

Any person also commits an offence if that person:
attempts to commit any of the offences set forth in paragraph 1; or

- a. abets the commission of any such offences perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
- b. threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform.

It is recommended to revert to Article 10 of the South African "Anti-Terrorism Draft Bill" (2002): Suggested Convention Offence (5):

(5) Offences relating to fixed platforms

- (1) Any person who unlawfully and intentionally -
- (a) seizes or exercises control over a fixed platform on the continental shelf, or the exclusive economic zone or any fixed platform on the High Seas while it is located on the continental shelf of the Republic, by force or threat thereof or by any other form of intimidation;
 - (b) performs an act of violence against a person on board such a fixed platform if that act is likely to endanger the platform's safety;
 - (c) destroys such a fixed platform or causes damage to it which is likely to endanger its safety;
 - (d) places or causes to be placed on such a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety;
 - (e) injures or kills any person in connection with the commission or the attempted commission of any of the offences referred to in paragraphs (a) to (d); or
 - (f) damages or destroys any off-shore installation referred to in section 1 of the Maritime Traffic Act, 1981 (Act No. 2 of 1981), commits an offence.
- (2) A person convicted of an offence referred to in subsection (1) is -
- (a) liable on conviction to a fine or to imprisonment for a period not exceeding 20 years;
 - (b) in the case where death results from the commission of the offence, liable on conviction to imprisonment for life.

Taking of Hostages

We propose to include Article 1 of the *International Convention against the Taking of Hostages (1979)*. The offences stipulated in the Convention have not been included in the proposed Bill. The offences according to above Convention are:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the

offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

Any person who:

attempts to commit an act of hostage-taking, or

- (a) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.

It is suggested to revert to Article 8 of the South African "Anti-Terrorism Draft Bill" (2002)

Proposed Convention Offence (6):

(6) Taking of hostages

Any person, who, in the Republic -

- (a) detains any other person, hereinafter referred to as a hostage; and
- (b) in order to compel a State, international governmental organization or a natural or juristic person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage, commits an offence, and is liable on conviction to imprisonment for life.

Protection of International Protected Persons

According to the proposed "Convention Offences" in Schedule 1 of the proposed Bill, "murdering, kidnapping or attacking an internationally protected person or endangering his or her person or liberty" is an offence. However, Article 1 (cited under "Convention Offence (d)) of the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973)* stipulates:

"internationally protected person" means:

A Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;

- (a) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household;
- (2) "alleged offender" means a person as to whom there is sufficient evidence to determine prima facie that he has committed or participated in one or more of the crimes set forth in article 2.

The cited Article fails to specify the offence, which is in fact contemplated in Article 2 of same Convention. In terms of suggestions made on the particular Convention, it is regarded necessary to include "intent" in that the suspect knowingly targeted an "international protected person". In terms of being equal before the law the burden of proof should be on the prosecutor to provide sufficient evidence that the "protected person" was not simply at the wrong place and time when the crime was committed. This will also be made easier with including Article of the Convention (currently excluded). We propose to revert to Article 9 of the "Anti-Terrorism Draft Bill" (2002).

Proposed Convention Offence (7):

(7) Protection of internationally protected persons

- (1) A person who murders or kidnaps an internationally protected person is guilty of an offence and is liable on conviction to imprisonment for life.
- (2) A person who commits any other attack upon the person or liberty of an internationally protected person is guilty of an offence and is liable on conviction:
- (a) where the attack causes death—to imprisonment for life;
 - (b) where the attack causes grievous bodily harm—to imprisonment for a period not exceeding 20 years; or
 - (c) in any other case—to imprisonment for a period not exceeding 10 years.
- (3) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):
- (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
 - (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present; is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 10 years.
- (4) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):
- (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
 - (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present; with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 20 years.
- (5) A person who intentionally destroys or damages by means of fire or explosive:
- (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
 - (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present; is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 15 years.
- (6) A person who intentionally destroys or damages by means of fire or explosive:
- (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
 - (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present; with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 25 years.
- (7) A person who threatens to do anything that would constitute an offence against subsections (1) to (6) is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding 10 years.
- (8) For the purposes of this section kidnapping a person consists of leading, taking or enticing the person away, or detaining the person, with intent to hold the person for ransom or as a hostage or otherwise for the purpose of inducing compliance with any demand or obtaining any advantage.
- (9) Any person who -
- (a) willfully and unlawfully, with intent to intimidate, coerce, threaten or harass, enters or attempts to enter any building or premises which is used or occupied for official business or for diplomatic, consular, or residential purposes by an internationally protected person within the Republic; or
 - (b) refuses to depart from such building or premises after a request by an employee of a foreign government or an international organization, if such employee is authorized to make such request, commits an offence, and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.

It is also important to note that under the *Diplomatic Immunities and Privileges Act of 1989*

Physical Protection of Nuclear Material

Schedule 1 stipulates that the “receiving, possessing, using, transferring, altering, disposing or dispersing of nuclear material” is a “convention offence” according to Article 7 of the *Convention on the Physical Protection of Nuclear Material (1980)*:

The intentional commission of:

- an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to

- cause death or serious injury to any person or substantial damage to property;
- theft of robbery of nuclear material;
- an embezzlement or fraudulent obtaining of nuclear material;
- an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;
- a threat:
 - i. to use nuclear material to cause death or serious injury to any person or substantial property damage, or
 - ii. to commit an offence described in sub-paragraph (b) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;
- an attempt to commit any offence described in paragraphs (a), (b) or (c); and
- an act which constitutes participation in any offence described in paragraphs (a) to (f) shall be made a punishable offence by each State Party under its national law.

It is suggested to include Article 11 of the South African “Anti-Terrorism Draft Bill” (2002).
Proposed Convention Offence (8):

- (8) Offences with regard to nuclear matter or facilities**
- (1) Any person who unlawfully and intentionally -
- (a) intends to acquire or possesses radioactive material or designs or manufactures or possesses a device, or attempts to manufacture or acquire a device, with the intent -
 - (i) to cause death or serious bodily injury; or
 - (ii) to cause damage to property or the environment;
 - (b) uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material with the intent -
 - (i) to cause death or serious bodily injury;
 - (ii) to cause damage to property or the environment; or
 - (iii) to compel a natural or juristic person, an international organization or a State to do or refrain from doing an act, commits an offence.
- (2) Any person who -
- (a) threatens, under circumstances which indicate the credibility of the threat, to commit an offence referred to in subsection (1)(b); or
 - (b) unlawfully and intentionally demands radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force, commits an offence.
- (3) A person convicted of an offence in terms of this section is liable on conviction to imprisonment for life.

Cross-reference should also be made to the *Non-Proliferation of Weapons of Mass Destruction Act No. 87 of 1993* as well as the *Nuclear Energy Act of 1999*. The former provides for control over weapons of mass destruction: “means any weapon designed to kill, harm or infect people, animals or plants through the effects of a nuclear explosion or the toxic properties of a chemical warfare agent or the infectious or toxic properties of a biological warfare agent, and includes the delivery system exclusively designed, adapted or intended to deliver such weapons”.

Marking of Plastic Explosives

It is suggested to omit “convention offence” (g) as stipulated under Schedule 1 in the proposed “Bill” (g) refers to Article 2 of the *Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)*:

Each State Party shall take the necessary and effective measures to prohibit and prevent the manufacture in its territory of unmarked explosives.

Reference should be made to the following legislation, related to Plastic Explosives that led to provisions in domestic legislation to the Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991):

Explosives Act No. 26 of 1956 section (8) provided that “no person shall import into or export from the Republic, or cause to be imported thereto or exported there from any explosive, unless he has obtained a permit issued under the authority of an inspector.”

The *Explosives Amendment Act No. 83 of 1997* amend the Explosives Act, 1956 to give effect to the Convention on the Marking of Plastic Explosives for the Purpose of Detection – holds that no person may manufacture, import, possess, sell, supply or export any plastic explosive that is not marked with a detection agent. A detection agent is a substance – as laid down by the United Nations Convention ... which is mixed into an explosive to enhance its ability to be detected by vapour-detection means.

Any person who wilfully causes an explosion causing danger to life or property (but without fatally wounding anyone) is liable to imprisonment without the option of a fine for a period between three (3) and fifteen (15) years.

The Explosives Bill, 2002 under section 26 provide that-

- 1) No person may manufacture, import, transport, keep, store, possess, transfer, sell, supply or export any unmarked plastic explosives.
 - (a) The marking of plastic explosives must be done in such a manner as to achieve homogeneous distribution in the finished product.
 - (b) The minimum concentration of a detection agent in the finished product at the time of manufacture must be in accordance with the Technical Annexure to the Convention.
- 3) Subsection (1) does not apply –
 - (a) or 15 years after 8 May 1998 in respect of the transportation, keeping, storage, possession, transfer or transmission of any unmarked plastic explosives manufactured in, or imported into, the Republic before that date by or on behalf of an organ of state performing military or police functions; or
 - (b) in respect of the manufacture, importation, transportation, keeping, storage, possession, transfer, sale, supply or transmission of any unmarked plastic explosive in limited quantities as determined in writing by the Chief Inspector solely for use in –
 - research, development or testing of new or modified explosives;
 - training in the detection of explosives; or
 - the development or testing of equipment for the detection of explosives; or
 solely for forensic scientific purposes, and in such quantities and under such conditions as may be prescribed.

Delivering, placing, discharging or detonating an explosive device or other lethal device

“Convention offence” (h) refers to Article 2 of the *International Convention for the Suppression of Terrorist Bombings (1997)*:

1. Any person commits an offence within this Bill if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:
 - a. With the intent to cause death or serious bodily injury; or
 - b. With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.
3. Any person also commits an offence if that person:
 - a. Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or
 - b. Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or
 - c. In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

It is suggested to draw on Article 7 of the South African “Anti-Terrorism Draft Bill” (2002).
Proposed Convention Offence (10):

- (9)(1) Any person who unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transport facility, a public transportation system, or an infrastructure facility —
- (c) with the intent to cause death or serious bodily injury; or
 - (d) with the intent to cause extensive damage to, or destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss, commits an offence, and is liable upon conviction to imprisonment for life.
- (2) This section does not apply to the military forces of a State -
- (a) during an armed conflict; or
 - (b) in respect of activities undertaken in the exercise of their official duties.

Cross-reference should also be made to existing legislation, with special reference to the Explosives Act of 1956 that regulates the manufacture, storage, transport, importation:

Especially under Section 22 of the Explosives Act of 2002 make provision for the following provisions also relevant to the Bill.

- 1) For the purposes of this section "explosion" includes a fire caused by explosives.
- 2) Any person who intentionally delivers, places, discharges or detonates explosives with intent to cause death or serious bodily injury to any other person or to damage or destroy any place, facility or system is guilty of an offence.
- 3) Any person who intentionally or negligently causes an explosion, which endangers life or property, is guilty of an offence.
- 4) Any person who in any manner –
 - a) Threatens that he or she or any other person intends to cause an explosion or to place explosives in such a manner or at such a place that life or property is or might be endangered is guilty of an offence;
 - b) Communicates false information, knowing it to be false, regarding any explosion or alleged explosion or explosives, or regarding any attempt or alleged attempt thereto, is guilty of an offence.

Financing of Terrorism

We also suggestion the omission of (j) listed under “Convention Offences refers to the provision or collection of funds used to carry out a terrorist act. The issue of terrorist financing is dealt with in Chapter 4 of the proposed “Bill”. It is regarded as sufficiently covered in the chapter, and it is hence unnecessary to list it as a convention offence as well.

Hoaxes involving noxious substances or things or explosives or other lethal devices or weapons of mass destruction

The proposed "Bill" omits the issue of hoaxes involving noxious substances, other lethal devices or weapons of mass destruction. We thus recommend the inclusion of Article 12 of the South African "Anti-Terrorism Draft Bill" (2003). Proposed Convention Offence (11):

(10) Hoaxes involving noxious substances or things or explosives or other lethal devices or weapons of mass destruction

(1) A person is guilty of an offence if he or she —

- (a) places any substance or other thing in any place; or
- (b) sends any substance or other thing from one place to another (by post, rail or any other means whatever);
- (c) with the intention of inducing in a person anywhere in the world a belief that it is likely to be (or contain) a noxious substance or other noxious thing or a lethal device or a weapon of mass destruction.

(2) A person is guilty of an offence if he or she communicates any information which he or she knows or believes to be false with the intention of inducing in a person anywhere in the world a belief that a noxious substance or other noxious thing or a lethal device or a weapon of mass destruction is likely to be present (whether at the time the information is communicated or later) in any place.

(3) A person guilty of an offence under this section is liable on conviction to imprisonment for a period not exceeding 10 years or a fine or both.

(4) For the purposes of this section "substance" includes any biological agent and any other natural or artificial substance (whatever its form, origin or method of production).

(5) For a person to be guilty of an offence under this section it is not necessary for him or her to have any particular person in mind as the person in whom he or she intends to induce the belief in question.

(6) The court, in imposing a sentence on a person who has been convicted of an offence under subsection (1), may order that person to reimburse any party incurring expenses incident to any emergency or investigative response to that conduct, for those expenses. A person ordered to make reimbursement under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered to make reimbursement under this subsection for the same expenses. An order of reimbursement under this subsection shall, for the purposes of enforcement, be treated as a civil judgment.

Cross-reference to *Explosives Act No. 26 of 1956*:

Any person who threatens, or falsely alleges, that any other person intends to cause an explosion whereby life or property is, or may be, endangered, in order to intimidate any person, is liable on conviction to imprisonment for a period between three (3) and fifteen (15) years.

SECTION 2 OFFENCES AND PENALTIES

2. (1) Any person who—

- (a) commits or threatens to commit a terrorist act;
- (b) conspires with any person to commit or bring about a terrorist act; or
- (c) incites, commands, aids, advises, encourages or procures any other person to commit or bring about a terrorist act, is guilty of an offence and liable on conviction to imprisonment which may include imprisonment for life.

(2) Any person who knowingly facilitates the commission of a terrorist act is guilty of an offence and liable on conviction to imprisonment which may include imprisonment for life.

(3) Any person who becomes or remains a member of a terrorist organisation after the date on which it is declared as such is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.

(4) Any person who knowingly does anything to support a terrorist organisation economically or in any other way is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.

(5) (a) Any person is guilty of an offence if he or she knowingly—

- (i) harbours or fails to report to the authorities the presence of a member of a terrorist organisation;
- (ii) furnishes weapons, food, drink, transport or clothing to a member of a terrorist organisation;

- (iii) receives any benefit from a terrorist organisation or any member of such an organisation; or
- (iv) carries out any instruction or request by a terrorist organisation or any member of such an organisation on its behalf.
- (b) Any person convicted of an offence contemplated in paragraph (a) is liable to imprisonment for a period not exceeding 15 years.
- (6) Any person who fails to comply with section 15 or 16 is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.
- (7) (a) Any person is guilty of an offence if he or she—
 - (i) fails to comply with an instruction of a police officer in the exercise of his or her powers under section 6; or
 - (ii) wilfully obstructs a police officer in the exercise of those powers.
- (b) Any person convicted of an offence contemplated in paragraph (a) is liable to a fine, or imprisonment for a period not exceeding six months.

Discussion:

Subsections (1) and (2) broadly define the principal act.

Banning of organizations - Subsection (3) holds dangerous implications. Firstly it criminalises membership of a terrorist organisation. The issue of banning organisation is particularly controversial within the South African political and historical context. By banning organisations, the law forces offenders underground. From a practical and strategic vantage point, banning erases any trace of the organisation. The organisation will go underground which may hamper police and intelligence investigations. Notwithstanding the fact that a name change may sideline or render ineffective the banning of such an organisation.

Secondly, the criminalisation of membership of terrorist organisations seems to ignore the current international climate and modus operandi, in which acts of terror occur. There is a tendency for terrorist groupings to move away from a strong centralised core to small and independent cells.

In terms of clause (3) it furthermore remains unclear how a person can renounce membership of a banned terrorist organisation. In some cases, a person may not know that the organisation has been banned. It is also not specified whether there is a grace period of person being able to renounce membership. Another question arises with regards to the issue of proof of membership of a terrorist organisation. Without ensuring legal certainty in defining support, investigators and prosecutors are clearly hampered.

Instead it is suggested that South African lawmakers should learn from our very own history, in not making the same mistakes in banning organizations.

Intend - It is hence recommended that clause (3) is omitted altogether or be amended by adding the word “knowingly”. The clause would read:

(3) Any person who **knowingly** becomes or remains a member of a terrorist organisation after the date

on which it is declared as such is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.

The addition of this word would indicate that a person professes membership of an organisation in full knowledge that it is a banned entity.

Harbouring and Supporting Terrorists

- (4) Any person who knowingly does anything to support a terrorist organisation economically or in any other way is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.
- (5) (a) Any person is guilty of an offence if he or she knowingly—
- (i) harbours or fails to report to the authorities the presence of a member of a terrorist organisation;
 - (ii) furnishes weapons, food, drink, transport or clothing to a member of a terrorist organisation;
 - (iii) receives any benefit from a terrorist organisation or any member of such an organisation; or
 - (iv) carries out any instruction or request by a terrorist organisation or any member of such an organisation on its behalf.

Any person convicted of an offence contemplated in paragraph (a) is liable to imprisonment for a period not exceeding 15 years.

Subsection (5) a (i) and (ii) reflects similarities with the Drugs and Drug Trafficking Act No.140 of 1992 under Section 10 which refers to the obligation to report certain information to police:

- (1) If the owner, occupier or manager of any place of entertainment, or any person in control of any place of entertainment or who has the supervision thereof, has reason to suspect that any person in or on such place of entertainment uses, has in his possession or deals in any drug in contravention of the provisions of this Act, he shall -
- a) as soon as possible report his suspicion to any police official on duty at that place of entertainment or at the nearest police station, as the case may be; and
 - b) at the request of the said police official, furnish that police official with such particulars as he may have available regarding the person in respect of whom the suspicion exists.

However these provisions cannot be directly applied to the “harbouring or assistance to suspected terrorists. The situation could be described as different, especially in terms of sentiment and sympathy. Although terrorists need the support of the community from which they operates (especially logistical and financial support), witnesses are often reluctant to come forward out of a fear of reprisal. Before any legal measures could be implemented the following question needs to be answered:

- In “forcing” community and close family members will these individuals not be more reluctant in providing information, protecting perpetrators;
- Could the South African Police Service provide the necessary protection to those members of the community that do provide information (in particular referring to the poor track record of the Witness Protection Program).
- The image of the Police and the security forces first needs to be improved in building trust enforcing community responsibility and participation.

With regards to clause (4) and (5) a similar argument can be made about the wrong focal level. The clauses address support for organisations, but no cognisance is taken of individual

actors. Furthermore, there is no consideration of coercion. A person may be forced to support a terrorist entity.

Suggestion

As part of a broader strategy to counter terrorism through encouraging community support and participation Articles 2(2) and 2(5) are regarded as counter-productive in making it a criminal offence in a situation where it is essential to establish community support as a more effective instrument in countering terrorism. Cooperation and cohesion with community members are more important in countering the harbouring suspected “terrorists” through countering an “us versus them” approach.

3. (1) Any person or terrorist entity who intentionally—
- (a) commits or threatens to commit a terrorist act;
 - (b) conspires with any person to commit or bring about a terrorist act; or
 - (c) incites, commands, aids, advises, encourages or procures any other person to commit or bring about a terrorist act, is guilty of an offence and liable on conviction to imprisonment which may include imprisonment for life.
- (3) Any person who (knowingly) becomes or remains a member of a terrorist organisation after the date on which it is declared as such is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.
- (4) Any person (entity) who knowingly does anything to support a terrorist organisation economically or in any other way is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.
- (6) Any person who fails to comply with section 15 or 16 is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.
- (7) (a) Any person is guilty of an offence if he or she—
- (i) fails to comply with an instruction of a police officer in the exercise of his or her powers under section 6; or
 - (ii) wilfully obstructs a police officer in the exercise of those powers.
- (b) Any person convicted of an offence contemplated in paragraph (a) is liable to a fine, or imprisonment for a period not exceeding six months.

Offences Relating To Internationally Protected Persons

3. Whenever a person is convicted of an offence involving an act committed against the person or property of an internationally protected person, the court must treat the fact that the victim is an internationally protected person as an aggravating factor in passing sentence.

Discussion

This clause should be left out for the following three reasons:

- 1) Firstly, it is not clear whether the offender commits an act against an internationally protected person, knowing his or her status. A petty thief may steal a diplomat’s purse ignorant of the fact that the person he/she has robbed is an internationally protected person. There is thus a presumption of intention. In terms of suggestions made on the particular Convention, it is regarded necessary to include “intent” in that the suspect knowingly targeted an “international protected person”. In terms of being equal before the law the burden of proof should be on the prosecutor to provide sufficient evidence that the “protected person” was not simply at the wrong place and time when

the crime was committed. This will also be made easier with including Article of the Convention (currently excluded).

- 2) Secondly, this clause instructs the court how to analyse evidence. The court is under an obligation to treat the fact that a victim is an internationally protected person as an aggravating factor in passing sentence.
- 3) In the current Bill only section 3 relates to the “UN Convention on the Prevention and Punishment of Crimes Against International Protected Persons”. Although excluded in this discussion, this convention, along with the other eleven UN Conventions would have been discussed in the proposed “Counter-Terrorism Bill” as attached.

Jurisdiction In Respect Of Offences

4. (1) A court of the Republic has jurisdiction in respect of any offence referred to in this Act, if—
- (a) the accused was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered in the Republic; or
 - (b) the offence was committed—
 - (i) in the territory of the Republic;
 - (ii) on board a vessel, a ship, an installation in the sea over the continental shelf or an aircraft registered in the Republic at the time the offence was committed;
 - (iii) by a citizen of the Republic or a person ordinarily resident in the Republic;
 - (iv) against the Republic, a citizen of the Republic or a person ordinarily resident in the Republic;
 - (v) on board an aircraft in respect of which the operator is licensed in terms of the Air Services Licensing Act, 1990 (Act No. 115 of 1990), or the International Air Services Act, 1993 (Act No. 60 of 1993); or
 - (vi) against a government facility of the Republic abroad, including an embassy or other diplomatic or consular premises, or any other property of the Republic; or
 - (c) the evidence reveals any other basis recognised by law.
- (2) Whenever the National Director receives information that a person who is alleged to have committed an offence under this Act, may be present in the Republic, the National Director must—
- (a) order an investigation to be carried out in respect of that allegation;
 - (b) inform any other foreign States which might also have jurisdiction over the alleged offence promptly of the findings of the investigation; and
 - (c) indicate promptly to other foreign States, which might also have jurisdiction over the alleged offence, whether he or she intends to prosecute.
- (3) If a person is taken into custody to ensure the person’s presence for the purpose of prosecution or extradition to a foreign State the National Director must, immediately after the person has been taken into custody, notify any foreign State which might have jurisdiction over the offence in question either directly or through the Secretary-General of the United Nations, of the—
- (a) fact that the person is in custody; and
 - (b) circumstances that justify the person’s detention.
- (4) If the National Director declines to prosecute, he or she must notify any foreign State which might have jurisdiction over the offence in question accordingly

Matters of jurisdiction with regards to terrorist investigations could be tricky. There are five bases of jurisdiction in International Law:

- Territorial jurisdiction
- Active Personality
- Passive Personality
- Crimes against the State
- Universal Jurisdiction

Territorial jurisdiction refers to jurisdiction based on territory. A state has jurisdiction over any crime committed in its territory. This may include its property abroad or any aircraft or ships registered in that country. This type of jurisdiction is mostly found in countries with an adversarial Anglo-American type-of-law. The inquisitorial continental-type legal systems may recognise this type of jurisdiction too.

Active Personality relates to jurisdiction based on the personality of the accused. Accordingly, a state holds jurisdiction over a person notwithstanding where the crime was committed, if the person is a citizen or resident in that country. This type of jurisdiction is characteristic of inquisitorial legal systems found in continental Europe.

Passive Personality is based on the personality of the victim against whom the crime is perpetrated. The United States of America is primarily associated with this type of jurisdiction. Should a crime be committed against a US citizen outside of its territory, the US would ascertain jurisdiction over the perpetrator.

“Crimes against the State” jurisdiction relates to crimes against the state itself. This may include crimes like forgery of government documents like passports or forged money. It also may involve the damaging or theft of government property outside of its territory.

Universal jurisdiction refers to crimes of such an atrocious nature that the nature of the crime compels all states to prosecute the perpetrators. This includes acts of terrorism, crimes against humanity and genocide.

Provisions (a) to (c) incorporate all bases of jurisdiction.

Suggestion:

It is suggested to include (a): the accused was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered in the Republic, or in (b) or to omit the word “or”. It otherwise carries the presumption that an act of terror falls either within universal jurisdiction or the other types of jurisdiction. The question arising here is whether or not all acts of terror should be considered crimes of universal jurisdiction, bearing in mind that victims of terror attacks often bear an array of nationalities. Subsection (c) is unnecessary as all types of jurisdiction have been covered in (a) and (b).

Our proposed section on “jurisdiction”:

4. (1) A court of the Republic has jurisdiction in respect of any offence referred to in this Act, if the offence was committed—
 (i) in the territory of the Republic;
 (ii) on board a vessel, a ship, an installation in the sea over the continental shelf or an aircraft registered in the Republic at the time the offence was committed;
 (iii) by a citizen of the Republic or a person ordinarily resident or domiciled in the Republic;
 (iv) against the Republic, a citizen of the Republic or a person ordinarily resident in the

Republic;

(v) the accused was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered in the Republic

(vi) on board an aircraft in respect of which the operator is licensed in terms of the Air Services Licensing Act, 1990 (Act No. 115 of 1990), or the International Air Services Act, 1993 (Act No. 60 of 1993); or

(vii) against a government facility of the Republic abroad, including an embassy or other diplomatic or consular premises, or any other property of the Republic; or

(2) Whenever the National Director receives information that a person who is alleged to have committed an offence under this Act, may be present in the Republic, the National Director must—

(a) order an investigation to be carried out in respect of that allegation;

(b) inform any other foreign States which might also have jurisdiction over the alleged offence promptly of the findings of the investigation; and

(c) indicate promptly to other foreign States, which might also have jurisdiction over the alleged offence, whether he or she intends to prosecute.

(3) If a person is taken into custody to ensure the person's presence for the purpose of prosecution or extradition to a foreign State the National Director must, immediately after the person has been taken into custody, notify any foreign State which might have jurisdiction over the offence in question either directly or through the Secretary-General of the United Nations, of the—

(a) fact that the person is in custody; and

(b) circumstances that justify the person's detention.

(4) If the National Director declines to prosecute, he or she must notify any foreign State which might have jurisdiction over the offence in question accordingly.

INFORMATION SHARING AND MUTUAL LEGAL ASSISTANCE

The flipside of jurisdiction is extradition. However, the proposed Bill exclude provisions for formally providing for "mutual legal assistance" as mandated under Resolution 1373. South Africa has signed the Southern African Development Community (SACD) "Protocol on Extradition" and "Protocol on Mutual Legal Assistance in Criminal Matters". To speed up the implementation of both protocols, it is recommended to include the following provisions in the "Bill":

INFORMATION SHARING, EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS

5.(1) Exchange of Information Relating to Terrorist Groups and Terrorist Acts

(a) The Director General of the Department of Justice, or the Minister of Justice may, on a request made by the appropriate authority of a foreign state (as is envisaged in Chapter 2 of the International Cooperation in Criminal Matters Act 75 of 1996), disclose to that authority, any information in his or her possession or in the possession of any other government department or agency, relating to any of the following –

(i) the actions or movements of terrorist entities or persons suspected of involvement in the commission of terrorist acts in that foreign state;

(ii) the use of forged or falsified travel papers by persons suspected of involvement in the commission of terrorist acts in that foreign state;

(iii) traffic in explosives or other lethal devices or sensitive materials by terrorist groups or persons suspected of involvement in the commission of terrorist acts in that foreign state;

(iv) the use of communication technologies by terrorist groups;

(b) The Director General or the Minister of Justice may refuse such a request provided that the disclosure is prohibited by any provision of South African law and more specifically if it is in contravention of the Refugees Act 130 of 1998 or if it will, in the Director General's or the Minister of Justice view, be prejudicial to national security or public safety.

(2) Counter terrorism Conventions to be used as Basis for Extradition

- (a) Where the Republic of South Africa becomes a party to a counter terrorism convention and there is in force, an extradition arrangement between the Government of the Republic of South Africa and another state which is a party to that counter terrorism Convention, the extradition arrangement shall be deemed, for the purposes of the Extradition Act, to include provision for extradition in respect of offences falling within the scope of that counter terrorism convention.
- (b) Where the Republic of South Africa becomes a party to a counter terrorism convention and there is no extradition arrangement between the government of the Republic of South Africa and another state which is a party to that counter terrorism convention, the Minister may, by Order published in the Gazette, treat the counter terrorism convention, for the purposes of the Extradition Act, as an extradition arrangement between the Government of the Republic of South Africa and that state, providing for extradition in respect of offences falling within the scope of that counter terrorism convention.

Notwithstanding anything in the Extradition Act or Mutual Assistance Act, and offence under this Act or an offence under any other Act where the act or omission constituting the offence also constitutes a terrorist act, shall, for the purposes of extradition of mutual assistance, be deemed not to be –

- (a) an offence of a political character or an offence connected with a political offence or an offence inspired by political motives; or
- (b) a fiscal offence

Notwithstanding anything in the Mutual Assistance Act, no request for mutual assistance in relation to an offence under this Act or an offence under any other act where the act or omission also constitutes a terrorist act may be declined solely on the basis of bank secrecy.

BAIL

5. Notwithstanding anything to the contrary in any law, where an accused is in custody for an offence under this Act, the provisions relating to bail contained in the Criminal Procedure Act, 1977 (Act No. 51 of 1977), apply as if the accused were charged with an offence referred to in Schedule 6 to that Act.

Discussion

For the purposes of this discussion, Schedule 6 of the *Criminal Procedure Act, 1977 (Act No. 51 of 1977)* is listed below:

[Schedule 6 added by s. 10 of Act No. 85 of 1997.]

Murder, when—

- (a) *it was planned or premeditated;*
- (b) *the victim was—*
 - (i) *a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or*
 - (ii) *a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1;*
- (c) *the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences:*
 - (i) *Rape; or*
 - (ii) *robbery with aggravating circumstances; or*
- (d) *the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.*

Rape—

- (a) *when committed—*
 - (i) *in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;*
 - (ii) *by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;*
 - (iii) *by a person who is charged with having committed two or more offences of rape; or*
 - (iv) *by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;*
- (b) *where the victim—*
 - (i) *is a girl under the age of 16 years;*
 - (ii) *is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or*

(iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973);
 (c) involving the infliction of grievous bodily harm.
 Robbery, involving—
 (a) the use by the accused or any co-perpetrators or participants of a firearm;
 (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or
 (c) the taking of a motor vehicle.
 Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.
 An offence referred to in Schedule 5—
 (a) and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule; or
 (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 5 or this Schedule.

Section 6 renders it difficult for a terror suspect to get bail. Schedule 6 of the *Criminal Procedure Act* lists crimes such as murder, rape and assault. Bail applications are difficult in such cases as a reverse onus is employed. The burden-of-proof rests with the defence team who has to show why the accused should be granted bail. However, not all offences under this act are of such a serious nature to warrant such strict procedure. The proposed “Bill” makes provision for less serious offences, for example:

7. (a) Any person is guilty of an offence if he or she—
 (i) fails to comply with an instruction of a police officer in the exercise of his or her powers under section 6; or
 (ii) wilfully obstructs a police officer in the exercise of those powers.
 (b) Any person convicted of an offence contemplated in paragraph (a) is liable to a fine, or imprisonment for a period not exceeding six months

This raises the question whether all bail applications in terrorist investigations should be treated as Schedule 6 offences. Does the above offence merit bail in terms of Schedule 6?

Suggestion

Instead of referring to bail within the Bill, Schedule 6 as presented in above-mentioned discussion needs to be amended, making provision for offences related to terrorism.

POWER TO STOP AND SEARCH VEHICLE AND PERSON

6. (1) If, on application *ex parte* by a police officer of the South African Police Service of or above the rank of director, it appears to the judge that it is necessary in order to prevent terrorist acts, the judge may issue a warrant for the stopping and searching of vehicles and persons with a view to preventing such acts, and such warrant applies for the period specified therein not exceeding 10 days.
 (2) Under such warrant any police officer who identifies himself or herself as such may stop and search any vehicle or person for articles or things which could be used or have been used for or in connection with preparation for or the commission or instigation of any terrorist act.
 (3) The police officer may seize any article or thing contemplated in subsection (2) and Chapter 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies with the necessary changes required by the context in respect of any such article or thing.
 (4) Section 29 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies in respect of the powers conferred upon police officers in terms of this section.

In terms of the *South African Police Service Act*, police officers already have stop and search powers to their avail. On sufficient suspicion, the police can make use of these powers.

Article 13 (8) of the South African Police Services Act (1995) stipulates that the National or Provincial Commissioner of Police can give permission to set up roadblocks. Furthermore, such roadblocks can be set up without permission if there are reasonable beliefs that a delay in waiting for permission will defeat the purpose of the roadblock. But search warrants still have to be issued by judges or magistrates. This can only be overridden if the person(s) to be searched is (are) informed of the reasons for the search (Article 13 (8)(g)(ii)).

This contrasts with the stipulations of Section 6 of the proposed "Bill". In terms of terrorist investigations, a police officer would have to obtain a search warrant from a judge to stop and search vehicles and suspects.

Under article 13 (d) (i) to (v) any member who has reasonable grounds to suspects the following may set up a roadblock without prior authorization where a delay will defeat the objective of the roadblock:
(d) Notwithstanding the provisions of paragraph (a), any member who has reasonable grounds to suspect that

an offence mentioned in Schedule 1 to the Criminal Procedure Act, 1977, has been committed and that a person who has been involved in the commission thereof is, or is about to be, travelling in a motor vehicle in a particular area;

a person who is a witness to such an offence is absconding and is, or is about to be, travelling in a motor vehicle in a particular area and that a warrant for his or her arrest has been issued under section 184 of the Criminal Procedure Act, 1977, or that such a warrant will be issued if the information at the disposal of the member is brought to the attention of the magistrate, regional magistrate or judge referred to in that section, but that the delay in obtaining such warrant will defeat the object of the roadblock;

a person who is reasonably suspected of intending to commit an offence referred to in subparagraph (l) and who may be prevented from committing such an offence by the setting up of a roadblock is, or is about to be, travelling in a motor vehicle in a particular area;

a person who is a fugitive after having escaped from lawful custody is, or is about to be, travelling in a motor vehicle in a particular area; or

any object which-

is concerned in;

may afford evidence of; or

is intended to be used in

the commission of an offence referred to in subparagraph (i), whether within the Republic or elsewhere, and which is, or is about to be, transported in a motor vehicle in a particular area and that a search warrant will be issued to him or her under section 21(1)(a) of the Criminal Procedure Act, 1977, if he or she had reason to believe that the object will be transported in a specific vehicle and he or she had applied for such warrant, and that the delay that will be caused by first obtaining an authorization referred to in paragraph (a), will defeat the object of the roadblock, may set up a roadblock on any public road or roads in that area for the purpose of establishing whether a motor vehicle is carrying such a person or object.

Under Section 11 of the Drugs and Drug Trafficking Act No. 140 of 1992 police officials have the following powers:

(1) A police official may -

if he has reasonable grounds to suspect that an offence under this Act has been or is about to be committed by means or in respect of any scheduled substance, drug or property, at any time

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enter or board and search any premises, vehicle, vessel or aircraft on or in which any substance, drug or property is suspected to be found;

search any container or other thing in which any such substance, drug or property is suspected to be found;

if he has reasonable grounds to suspect that any person has committed or is about to commit and offence under this Act by means or in respect of any scheduled substance, drug or property, search or cause to be searched any such person or anything in his possession or custody or under his control.

In other words legislation on other serious offences as presented in the South African Police Services Act (1995) article 13 (8)(a) and (d) as well as under Section 11 of the Drugs and Drug Trafficking Act No. 140 of 1992 police officials could when reasonable grounds exist stop and search a vehicle and person in order to prevent a crime or when they are confronted by time constrains act without prior authorization. Although the involvement of a Judge is commendable it should not be applied if an act of terrorism could be prevented.

Suggestion:

It is suggested to employ the stop and search powers of the SAPS Act if time is of the essence. If these powers are required beyond a 48-hour period, then a Judge should get involved to safeguard basic constitutional rights.

- 7. (1) If, on application by a police officer of the South African Police Service of or above the rank of director, it appears to the judge that it is necessary in order to prevent terrorist acts, the judge may issue a warrant for the stopping and searching of vehicles and persons with a view to preventing such acts, and such warrant applies for the period specified therein not exceeding 10 days.*
- (2) Under such warrant any police officer who identifies himself or herself as such may stop and search any vehicle or person for articles or things which could be used or have been used for or in connection with preparation for or the commission or instigation of any terrorist act.*
- (3) The police officer may seize any article or thing contemplated in subsection (2) and Chapter 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies with the necessary changes required by the context in respect of any such article or thing.*
- (4) Section 29 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies in respect of the powers conferred upon police officers in terms of this section.*

CHAPTER 3

INVESTIGATIVE HEARINGS

Order for gathering information

- 8.** (1) Subject to subsection (3), a police officer may, for the purpose of investigating an offence under this Act, apply *ex parte* to a judge for an order for the gathering of information.
- (2) A police officer may make an application under subsection (1) only if the prior written consent of the National Director has been obtained.
- (3) A judge to whom an application is made under subsection (1) may make an order for the gathering of information if there are reasonable grounds to believe that—
- (a) an offence in terms of this Act has been committed;
 - (b) material information concerning the offence, or information that may reveal the whereabouts of a person suspected by the police officer of having committed the offence, is likely to be obtained as a result of the order; and
 - (c) all other reasonably possible avenues for obtaining the information have been tried without success.
- (4) An order made under subsection (3) may—
- (c) allow the examination, on oath or affirmation, of a person named in the order;
 - (d) require the person to attend at a place, mentioned in the order, for the examination and to remain in attendance until excused by the presiding judge;
 - (e) require the person to bring to the examination a particular thing in his or her possession or control and to produce it to the presiding judge;
 - (f) designate another judge as the judge before whom the examination is to take place; and
 - (g) include any other terms or conditions that are desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the purposes of any ongoing investigation.
- (5) A judge may vary the terms and conditions of an order for the gathering of information.

Discussion

Previous drafts of the Anti-Terrorism Bill contained provisions for “detention without trial” in terrorist investigations. The provisions stirred much controversy amongst several sectors of society, and was subsequently got replaced with “investigative hearings”. Nonetheless, justifiable concerns remain with regards to “investigative hearings” about fundamental human rights and the need to guard against arbitrary arrest and detention.

The proposed clause on the hearings offers no time frame. A suspect could be detained for the purposes of an “investigative hearing” for an indefinite period of time. Section 6 on “Power to stop and search vehicle and person” stipulates a set time frame of ten days to stop and search a person or a vehicle, yet there is no such time frame for an investigative hearing.

The only safeguard against possible abuse is the involvement of a judge. Despite this, detention for investigative hearings should be set for short periods of time. It is recommended to limit the time frame.

Furthermore, there is no formal distinction between an “investigative hearing” and an actual terrorist legal prosecution. For example, a judge granting an order for gathering information should be a different person to the presiding judge in the subsequent trial.

There exist justifiable concerns about the rights of the individual and the need to guard against arbitrary arrest and detention. This should be weight against the particular circumstances and the immediate threat. For example, under the *Criminal Law Second Amendment Act of 1992* Section 23 (2), (3), (4) & (5) provisions are made for the “Detention of persons for interrogation in respect of the possession of certain weaponry” that in a broad sense refer to “procedures to gather information” that could also be useful in this Bill. Special attention should be given to the time limit for proceedings:

(2) Notwithstanding anything to the contrary in any law contained, any person arrested by virtue of a warrant under subsection (1)⁴, shall as soon as possible be taken to the place mentioned in the warrant, and detained there or at any other place and subject to such conditions as the magistrate may from time to time determine, in custody for interrogation until the magistrate orders his release when satisfied that the detainee has satisfactorily replied to all questions at the said interrogation or that no useful purpose will be served by his further detention. Under (3) (a) Any person arrested in terms of a warrant issued under subsection (1), shall be brought before a magistrate within 48 hours of such arrest and thereafter not less than once every 10 days.

(b) The magistrate shall at every such appearance of such person before him enquire whether such person has satisfactorily replied to all questions at his interrogation and whether it will serve any useful purpose to detain him further.

(c) Any person detained under subsection (1) may at any time make representation in writing to the magistrate relating to his detention or release.

(d) The attorney-general in whose area of jurisdiction any person is being detained under subsection (1) may at any time stop the interrogation of such person, and thereupon such person shall be released from custody immediately.

(4) No person shall in terms of this section be detained for a period in excess of 30 days.

(5) No person, other than an officer in the service of the State acting in the performance of his official duties, shall have access to a person detained under subsection (1), or shall be entitled to any official information relating to or obtained from such detainee: Provided that the legal representative of a person so detained shall have access to him.

Under Section 12 of the *Drugs and Drug Trafficking Act No. 140 of 1992* the following similar provisions are made, as presented in above-mentioned discussions:

(1) Whenever it appears ... that there are reasonable grounds for believing that any person is withholding any information as to a drug offence, whether the drug offence has been or is being or is likely to be committed in the Republic or elsewhere, from that attorney-general, any such public prosecutor or any police official, as the case may be, he may issue a warrant for the arrest and detention of any such person.

(3) Any person arrested and detained under a warrant referred to in subsection (1) shall be detained until the magistrate orders his release when satisfied that the detainee has satisfactorily replied to all questions at the interrogation or that no useful purpose will be served by his further detention; Provided that the attorney-general concerned may at any time direct in writing that the interrogation of any particular detainee be discontinued, whereupon that detainee shall be released without delay.

(4) (a) Any person arrested under a warrant referred to in subsection (1) shall be brought before the magistrate within 48 hours of his arrest and thereafter not less than once every ten days.

(b) The magistrate shall at every appearance of such person before him enquire whether he has satisfactorily replied to all questions at his interrogation and whether it will serve any useful purpose to detain him further.

(c) Such person shall be entitled to be assisted at his appearance by his legal representative.

(5) Any person detained in terms of this section may at any time make representations in writing to the magistrate relating to his detention or release.

(6) No person, other than an official in the service of the State acting in the performance of his official

⁴ (1) Whenever it appears to a magistrate on the ground of information as submitted to him upon oath by the public prosecutor that **there is reason to believe that any person is withholding from a policeman any information** relating to his possession (of any weaponry referred to in section 32 of the Arms and Ammunition Act) he may at the request of the public prosecutor issue a warrant for the arrest and detention of such person.

duties –	
(a)	shall have access to a person detained in terms of this section, except with the consent of the magistrate and subject to such conditions as he may determine; Provided that the magistrate –
(i)	shall refuse such permission only if he has reason to believe that access to a person so detained will hamper any investigation by the police;
(ii)	shall not refuse such permission in respect of a legal representative who visits a person so detained with a view to assisting him as contemplated in subsection (4) (c); or
(b)	shall be entitled to any official information relating to or obtained from such detainee.

It is also relevant to acknowledge through above-mentioned reference as well as under the *Prevention of Public Violence and Intimidation Act 139 of 1991* that provisions for “Commission of Inquiry regarding the Prevention of Public Violence and Intimidation” special provisions are not uncommon in South African legislation for procedures associated with “Investigative Hearings” as presented in this Bill. However the following discussion could provide additional and relevant comments to the application of investigative hearings in the prevention and investigation of incidents associated with terrorism.

Suggestion

It is suggested that a distinction be made between two categories of investigative hearings:

- i) Investigative hearing in preventing acts of terrorism (pro-active) – If the aim of the investigative hearing is to prevent an act of terrorism and time is of the essence the reasoning for an investigative hearing is clear and acceptable as presented in the Bill.
- ii) Investigative hearing in investigating and/or building a case (retro-active) – If an investigative hearing is used with the intention of building a case in reaction to an act associated with terrorism without a time constrain, clearer justifications should be presented in justifying the Court’s involvement. Although the aim of investigative hearings will be to built a stronger case against primary suspects (considering that information revealed during proceedings cannot be used against the person involved) the process lend itself to be considered as a “fishing” for information due to a lack of evidence.

We suggest incorporating the former type of investigative hearing. The only purpose of such hearing would be the prevention of a threatened act of terrorism.

Obligation to answer questions and produce things

<p>11. (1) A person named in an order made under section 8 must answer questions put to him or her by the National Director or a person representing the National Director, and must produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.</p> <p>(2) The presiding judge must rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.</p> <p>(3) No person may be excused from answering a question or producing a thing under subsection (1) on the ground that the answer or thing may incriminate the person or subject the person to any proceedings or penalty, but—</p>
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(a) no answer given or thing produced; and
 (b) no evidence derived from the answers given or things produced, may be used or received against the person in any criminal proceedings, other than a prosecution under section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955), or on a charge of perjury.

Order for custody of thing

12. The presiding judge, if satisfied that any thing produced during the course of the examination will be relevant to the investigation of any offence under this Act, may order that the thing be placed into the custody of the relevant police officer or someone acting on behalf of that police officer.

Power of court with regard to recalcitrant witness

13. (1) Section 189 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), applies with the necessary changes required by the context in respect of a person contemplated in section 8.
 (2) A person referred to in subsection (1) who refuses or fails to give the information contemplated in section 8, may not be sentenced to imprisonment as contemplated in section 189 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), unless the judge is satisfied that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order

Discussion

For the purposes of this discussion Section 205 of the Criminal Procedure Act No. 51 of 1977 has been included:

205 Judge, regional court magistrate or magistrate may take evidence as to alleged offence.—
 2) A judge of the supreme court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4), upon the request of an attorney-general or a public prosecutor authorized thereto in writing by the attorney-general, require the attendance before him or any other judge, regional court magistrate or magistrate, for examination by the attorney-general or the public prosecutor authorized thereto in writing by the attorney-general, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the attorney-general or public prosecutor concerned prior to the date on which he is required to appear before a judge, regional court magistrate or magistrate, he shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.
 3) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall mutatis mutandis apply with reference to the proceedings under subsection (1).
 4) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.
 5) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.
 [S. 205 substituted by s. 11 of Act No. 204 of 1993.]

The following discussion ties in with the arguments made in terms of “investigative hearings”.

Sections 11 to 13 may temper with freedom and protection of the media. The provisions may also infringe on reporters’ ability to work in dangerous environments. Provisions within the *Criminal Procedure Act 1977* and Section 9 of present Bill cover the terrain sufficiently.

Sections 11 to 13 expand on “investigative hearings”. A person named in the order for an investigative hearing is obliged to answer questions put to him or her by the National Director of Public Prosecutions. The only objection to answering questions in the investigative hearings relate to information that is protected by any law relating to non-disclosure of

information or to privilege. Two recent court battles deal with the issuing of subpoena to journalists to testify as witnesses in trials.

Rashaad Staggie, the former co-leader of the Hard Livings gang, was shot and set alight by a lynch mob during a march on his Salt River home in Cape Town on August 4, 1996. Pagad national co-ordinator Abdus-Salaam Ebrahim, security chief Salie Abader and three others were accused of conspiring to kill Staggie in Salt River. They pleaded not guilty to charges of public violence, attempted murder and murder.

“Cape Times” photojournalist Benny Gool, who witnessed and recorded Staggie’s murder subsequently was subpoenaed. “Die Burger’s” editor Arie Rousseau also was issued a subpoena to be witness in the Staggie murder trial. Benny Gool and fellow journalists argued that the subpoenaing of journalists may fuel the perception among members of the public that journalists act as agents of the police. Arguing that seven state witnesses in cases against Pagad had been killed since May 1998, Gool argued that the subpoena placed his life in danger. Cape High Court Judge Foxcroft declined to issue a warrant for the arrest of Gool, who failed to arrive to testify in trial of the Pagad members. Back then, omissions and inadequacies on the subpoena were cited for this decision.

On an international level, the subpoena against former “Washington Post” journalist Jonathan Randal to testify at a United Nations International Criminal Tribunal for the former Yugoslavia in The Hague caused an outcry in journalistic circles. Randal was issued a subpoena in February 2002 to appear at the trial of Radoslav Brdjanin, a former deputy prime minister of the Bosnian Serb government, who was accused of killing, torturing or expelling from their homes more than 100 000 non-Serbs during the 1992-1995 war in Bosnia. In a *Washington Post* article published on 11 February 1993, Randal quoted Brdjanin as advocating the expulsion of Croats and Muslims. Brdjanin’s defence counsel challenged the accuracy of parts of the article during the trial. Subsequently, the prosecution sought Randal’s testimony to defend it.

Randal refused to testify. His attorneys argued that journalists have qualified immunity from testifying for reasons of personal safety and freedom of the press. A lower court at the tribunal ruled in June 2002 that Randal’s testimony was “pertinent” and that he would have to take the stand. Randal’s attorneys appealed that decision. In December 2002, an appeals panel at the tribunal upheld Randal’s argument that the personal safety and independence of journalist could be jeopardised if they were required to give evidence in such trials. The judges stated that testimony from war correspondents had to be “direct and important” to the core issues in a case and had to convey information that could not reasonably be obtained from other sources.

Journalists are divided over the issue, with some saying immunity is needed whilst others say they have a moral obligation to testify. The *British Broadcasting Corporation's* former Belgrade correspondent, Jacky Rowland, testified against Serb leader Slobodan Milosevic at the same war crimes tribunal in The Hague. She said that she did not believe that she endangered her life by testifying.

Going back to the proposed anti-terrorism legislation, the new stipulations would compel journalists to testify. It is suggested that a clear distinction be made between investigative hearings and proper court proceedings (refer back to the debate on "Investigative Hearings"). In terms of a journalist's code of ethics, he/she is likely to volunteer information that may lead to the prevention of an act of terror or possible loss of life. Legal obligations and severe repercussions for not "answering questions" may cause the opposite of the desired outcome. It is hence recommended to abandon Sections 11 to 13. Proposed Section 9 and section 205 of the *Criminal Procedure Act 1977* contain the necessary elements to compel a person to report information that may reveal the whereabouts of a suspected terrorist or a suspected terrorist threat. This would be in line with the ruling by the Appeals Court in the Hague, testimony from journalists should be "direct and important" to the core issues in the investigative hearing. In addition, the testimony should convey information that cannot reasonably be obtained from other sources.

CHAPTER 4

MEASURES TO COMBAT TERRORISM

COMBATING SUPPORT FOR TERRORIST ORGANISATIONS DECLARATION OF TERRORIST ORGANISATION

Declaration of terrorist organisation

- (1) The Minister may declare an organisation to be a terrorist organisation by notice in the *Gazette* if that organisation is an international terrorist organisation in terms of a decision of the Security Council of the United Nations.
- (2) Subject to this section, the Minister may also declare an organisation to be a terrorist organisation by notice in the *Gazette* if there are reasonable grounds for believing that the organisation or any of its members on its behalf has—
- (a) claimed responsibility for a terrorist act; or
 - (b) committed a terrorist act; or
 - (c) endangered the security or territorial integrity of the Republic or another country.
- (3) Before acting in terms of subsection (2) the Minister must publish a notice in the *Gazette* stating—
- (a) that he or she intends to declare the organisation named in the notice as a terrorist organisation;
 - (b) the grounds for such declaration; and
 - (c) that the organisation or any member thereof may apply within 60 days to the High Court for an interdict prohibiting the proposed declaration.
- (4) Any member of the organisation contemplated in subsection (3) may, within 60 days after the publication of a notice in terms of subsection (3), apply to the High Court for an interdict prohibiting the proposed declaration.
- (5) If no application for an interdict has been made within the period of 60 days or if the Court refuses to grant the interdict, the Minister may declare the organisation to be a terrorist organisation by notice in the *Gazette*.
- (6) If the Court grants the interdict the Minister may, on notice to the person who obtained the interdict, apply to the High Court for an order—
- (a) revoking the interdict; and
 - (b) empowering the Minister to declare the organisation to be a terrorist organisation by notice in the *Gazette*.
- (7) The notice in the *Gazette* contemplated in subsections (5) and (6) must state any details known to the Minister which might enable members of the public to identify the organisation, its office bearers and its members.

Discussion

One of the key elements of United Nations Resolution 1373 is the blocking of terrorist financing. Paragraph 1(d) stipulates:

“Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons”.

Listing individuals and groups associated with terrorism (or “entities” as suggested under Section 1 on definitions) is regarded a useful instrument in blocking terrorist funding. For the prohibition of making funds available as presented in UN Resolution 1373⁵ it is regarded as a

⁵ UN Resolution 1373 paragraph 1(d): “Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons”.

useful instrument to present a list of individuals and groups associated with terrorism (or entities as suggested in the above-mentioned discussion). Through this list it will not be necessary to establish a link to terrorist acts in each individual case.

The proposed "Bill" takes it step further. Sections 14 (1) and (2) suggest the banning of organisations as a counter-terrorism measure in this regard. UN Resolution 1373 acknowledges the growing role of individuals in carrying out acts of terrorism. There is no reference to individual actors in the section.

Historic examples have shown that counter-terrorism measures aimed at terrorist organisations can be counter-productive. We would suggest a shift in focus from organisations to the activities of individuals for the following reasons:

1. Islamic organisations predominate the list of terrorist groups linked to UN Resolution 1373. Few groups/organisations with different ideologies are included. This raises the question of who undertakes the classification of "terrorist organisations". Individual countries should guard against "adopting" international regulations without acknowledging domestic and regional conditions. South Africa could be seen to be an instrument of US foreign policy.
2. A threat assessment of international terrorist trends shows that terrorists are moving away from well-structured centralised organisations to a more decentralized structure where individual actors and informal communication are the order of the day. It is difficult to differentiate between active members and supporters. The latter seldom actively commit acts of terrorism, but by targeting these individuals, governments will play into the hands of the former category.
3. The criminalisation of membership of a terrorist organisation potentially infringes on basic human rights, in particular freedom of association and speech.
4. A "proscribed organisation" can undertake a name-change, or the use of bona fide cover organizations and NGO's or a split between overt and covert structures to avert the consequences of being banned.
5. It will also be difficult to prove that "*a member of the organisation has committed, or is committing, a terrorist act on behalf of the organisation*" especially when the basis of the "organisation" is a broader ideal.

Suggestion

Instead of banning an organisation, an “entity” could be listed, with the following strategic consequences:

- It will broaden counter-terrorism initiatives while avoiding sensitive connotations towards the term “ban” and it will enable investigations without “targeting” specific groups.
- An “order to investigate” should be issued, which takes cognisance of the United Nation’s Security Council’s list of suspected groups and individuals. Investigations and other measures (such as the freezing of assets) could continue without indiscriminately arresting or “targeting” suspected “members”. This would facilitate an investigation of individuals associated with acts of terrorism (taking into account that within an organization not all its members are equally involved in illegal activities). The implication of “banning” is that all members of such an organisation are guilty by association. This step may hamper investigations. Instead of encouraging “members” or other individuals (with information) to come forward without the fear of being prosecuted the opposite may be achieved.

The banning of organizations should however not be regarded as the primary focus, as currently presented under 14(1) and (2) in the strategy to counter and prevent acts of terrorism.

14. (1) The Minister may declare an organisation to be a terrorist organisation by notice in the Gazette if that organisation is an international terrorist organisation in terms of a decision of the Security Council of the United Nations.
- (2) Subject to this section, the Minister may also declare an organisation to be a terrorist organisation by notice in the Gazette if there are reasonable grounds for believing that the organisation or any of its members on its behalf has—
- (a) claimed responsibility for a terrorist act; or
 - (b) committed a terrorist act; or
 - (c) endangered the security or territorial integrity of the Republic or another country.

FUNDING AND FINANCING OF TERRORIST ENTITY

The following sections relate to the issue of terrorist financing.

Determination by accountable institution

15. Whenever an organisation is declared a terrorist organisation in terms of section 14, every accountable institution must determine whether it is in possession or control of property owned or controlled by or on behalf of such organisation and must, if so, report that fact forthwith to the Financial Intelligence Centre.

Duty to report on property of terrorist entity

16. (1) An accountable institution which or a person who has control over property owned by or on behalf of a terrorist organisation or information about a transaction or proposed transaction in respect of such property must, as soon as the person or accountable institution or person learns of this fact, report it to the Financial Intelligence Centre and provide the particulars required by the Centre.
- (2) The director of the Centre may direct an accountable institution which has made a report in terms of subsection (1) to report—

- (i) at such intervals as may be determined in the direction, that it is still in possession or control of such property; and
- (ii) any change in the circumstances concerning the accountable institution's possession or control of that property.

Applicability of rules relating to confidentiality

- 17.** (1) Subject to subsection (2), no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution or any other person with sections 15 and 16.
- (2) Subsection (1) does not apply to the common law right to legal professional privilege as between an attorney and client in respect of communications made in confidence for the purpose of legal advice or litigation which is pending or contemplated or which has commenced.

Protection of person making report

- 18.** (1) No action, whether criminal or civil, lies against an accountable institution or any other person complying in good faith with section 15 or 16.
- (2) A person who has made, initiated or contributed to a report in terms of section 15 or 16 or the grounds for such a report, is competent, but not compellable, to give evidence in criminal proceedings arising from the report.
- (3) No evidence concerning the identity of a person who has made, initiated or contributed to a report in terms of section 15 or 16 or who has furnished additional information concerning such a report or the grounds for such a report in terms of this Act, or the contents or nature of such additional information or grounds, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings.

Preservation and Forfeiture of Property of Terrorist Organisations

- 19.** (1) The Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), applies to property belonging to or controlled by or on behalf of a terrorist organisation.
- (2) For the purposes of subsection (1)—
- (a) “instrumentality of an offence” as defined in section 1 of that Act is deemed to include property belonging to or controlled by or on behalf of a terrorist organisation declared under section 14; and
 - (b) “proceeds of unlawful activities” as defined in section 1 of that Act is deemed to include property belonging to or controlled by or on behalf of a terrorist organisation declared under section 14.

Discussion

According to the United Nations, one of the key elements in countering terrorism is blocking terrorist financing. Provisions made under the *Prevention of Organised Crime Act* are insufficient in dealing with the matter. In fact, a clear distinction needs to be made between funding for terrorism and the proceeds of criminal organisations. Unlike the latter, terrorists may derive income from legitimate sources or from a combination of lawful and unlawful sources. Thus, funding derived from legal sources is key to differentiating between terrorist entities and traditional criminal organisations. In many cases, non-profit organisations may engage in the raising and distribution of funds for charitable, religious, cultural, educational, social and/or other legitimate purposes, which ultimately land up in the coffers of terrorist entities.

The following section deals with terrorist funding derived from legitimate sources.

Formal structured non-governmental organizations, fundraising and oversight

The actual, intentional financing of terrorism is not easy to prove. Donors of charities and non-government organisations may be caught unaware that their donations are diverged to and used by terrorist entities. The banning of such organisations and the freezing of assets may create a negative sentiment. It would seem useful to create an atmosphere of mutual trust between government, charities and non-governmental organisations, people who support charities and NGOs and those who derive benefit from these entities. In promoting transparency and accountability, government oversight should be flexible, effective and proportional to the risk of abuse. Smaller, local based organizations whose function it is to redistribute resources domestically would be excluded. This would tackle the sensitivity surrounding the issue of specific “targeting” of religion-based organisations.

Notwithstanding above discussion, it is suggested to include an additional section in the Bill addressing the following issues:

- i) What are the aims and objectives of an implicated entity
- ii) Are the beneficiaries real or just a cover
- iii) Do intended beneficiaries receive the funds
- iv) Establishment of a system of accountability of all funds

It is suggested that the following provision should be included in countering the abuse of charities for the financing of terrorism and in protecting legitimate charities that function within its set framework:

17. Refusal of Applications for Registration, and the Revocation of the Registration, of Gharities Linked to Terrorist Groups –

- (1) The Minister and the Minister of Finance may sign a certificate refusing and revoking registration of a charity, based on information received including any security or criminal intelligence reports, where there are reasonable grounds to believe that an applicant for registration as a registered charity has made, is making, or is likely to make available, resources directly available to facilitate an act of terrorism.
- (2) A copy of the signed certificate shall be served on the applicant or the registered charity, personally or by registered letter sent to its last known address, with a copy of the certificate.
- (3) The certificate or any matter arising out of it shall not be subject to review or be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with this section.
- (4) Within (30) thirty days of receipt of the copy of the notice under subsection (2), the applicant or the registered charity may make an application to the High Court to review the decision of the Minister.
- (5) Upon the filing of the application under subsection (4), a judge of that court shall-
 - (a) Examine in chambers, the information, including any security or criminal or intelligence reports, considered by the Minister and the Minister of Finance before signing the certificate and hear any evidence or information that may be presented by or on behalf of those Ministers (whether or not such information is admissible in a court of law), and may, on the request of the Minister, hear all or part of that evidence or information in the absence of the applicant or registered charity, or any counsel representing the applicant or the registered charity, if the judge is of the opinion that the disclosure of the information would be prejudicial to national security or endanger the safety of any person.
 - (b) Provide the applicant or registered charity with a statement summarizing the information available to the judge so as to enable the applicant or the registered charity to be reasonably informed of the circumstances giving rise to the certificate, without disclosing any information the disclosure of which would, in the judges opinion, be prejudicial to national security or endanger the safety of any person,
 - (c) Provide the applicant or registered charity with a reasonable opportunity to be heard,

and

- (d) Determine whether the certificate is reasonable on the basis of all the information available to the judge or if found not reasonable, quash it.
- (6) A determination under subsection (5) shall not be subject to appeal or review by any court.
- (7) Where the judge determines, under subsection (5), that a certificate is reasonable, or if no application is brought upon the expiry of (30) days from the date of service of the notice, the Minister shall cause the certificate to be published in the Gazette.
- (8) A certificate determined to be reasonable under subsection (5), shall be deemed for all purposes to be sufficient grounds for the refusal of the application for registration of the charity referred to in the certificate or the revocation of the registration of the charity referred to in the certificate.
- (9) Where the judge determines that the certificate is not reasonable, he or she shall order the registration or continued registration of the charity.

CONCLUSION AND SUGGESTED COUNTER-TERRORISM APPROACH

A different approach is suggested in countering terrorism despite similar tactics used by individuals associated with terrorism and organized crime. In providing the best possible medium- to long-term solution to the threat presented by terrorism the following strategic and tactical approaches are suggested:

Holistic Approach – A holistic approach is needed in preventing individuals and groups to resort to violence as a form of political and/or social dissent. In classical terms, violence and terrorism are only a manifestation of a larger deeper-lying political and/or social problem. Tolerance, socio-economic upliftment and understanding will not only guard against the formation of perceptions and misconception, but it will counter the root causes of terrorism.

Strategic Approach – This refers to a balance between the threat (and the strategy adopted by terrorist elements) and legislation. By implementing tough counter-terrorism legislation and investigation techniques terrorists will be forced to adopt new strategies. It is rather suggested to strike a fine balance between strategy and legislation. Individuals or entities involved in acts associated with terrorism will find alternatives. A more prudent approach would keep taps on their activities instead of “driving” them underground. Experiences in other countries have shown that extensive measures and a “hard approach” foster rather than prevent insecurity, acts of political violence and terrorism.

Cross-reference to other relevant legislation – In working towards an omnibus counter-terrorism bill, it is suggested that reference should be made to relevant existing legislation. This would contribute to a more effective approach towards the prevention, investigation and conviction of acts of terrorism. Although not referred to in the Bill, the following legislation relates to an existing counter-terrorism approach as presented in the initial initiatives:

2) ***Military and paramilitary training:***

- a) The *Judicial Matters Amendment Act No. 34 of 1998* Section 23 (3) prohibits a variety of acts connected with military, paramilitary or other similar operations.

It is prohibited for any person to:

- Train anyone, or undergo any training, to conduct any military or paramilitary operation;
- Train anyone, or undergo any training, to construct, manufacture or use any weapon, ammunition or explosive for the purpose of: Endangering life or causing serious damage to property, promoting any political objective, or for military or paramilitary purposes; or
- Employ two or more persons trained, or intended to be trained, with any weapon, ammunition or explosive with the purpose of: Endangering life or

causing serious damage to property, promoting any political objective, or for military or paramilitary purposes.

A contravention can lead to a fine or to imprisonment for a period of up to five (5) years.

- b) *Foreign Military Assistance Act of 1998* – The act prohibits anyone from recruiting, using of trained persons for, or financing or engaging in, mercenary activity. Mercenary activity is defined as “direct participation as a combatant in armed conflict for private gain. It is also prohibited to render or offer any foreign military assistance to any state or organ of state, group of persons or other entity unless the National Conventional Arms Control Committee has granted authorization. “Foreign military assistance” is broadly defined and refers to “military services or military-related services, or any attempt, encouragement, or solicitation to render such services in the form of-

(a) Military assistance to a party to an armed conflict by means of:

- (ii) Advice or training;
- (iii) personnel, financial, logistical, intelligence or operational support;
- (iv) personnel recruitment;
- (v) medical or para-medical services; or
- (vi) procurement of equipment.

(b) Security services for the protection of individuals involved in armed conflict or their property.

(c) Any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state.

(d) Any other action that has the result of furthering the military interests of a party to an armed conflict, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict.

Cross-reference in preventing and prosecuting clearly defined assistance to terrorist operations

- c) Explosives Act as explained under “bombings”

In not referring to above-mentioned legislation voids are created that either could be exploited by entities associated with terrorism or without referring to these legislation the impression is created that South Africa do not make provisions in its domestic legislation for practical countering acts associated with terrorism, including:

- Training in the manufacturing of explosive devices or any other military or paramilitary training that could be applied in acts of terrorism;
- Military assistance – although this legislation was primarily implemented to counter acts associated with mercenaries, it also could be made applicable to attempts made by South African citizens to participate in paramilitary or terrorist related activities that intentionally intends to undermine the safety in security of the target country.

Universal Jurisdiction - Due to the international nature of terrorism, in particular the global reach of terrorist financing, consideration should be given to provide for universal jurisdiction within the International Criminal Court over relevant offences.

Public Participation - A common perception exists that counter-terrorism legislation is a vital necessity in response to a threat and to restore public safety. On the contrary it resulted in public outcry and in forcing the public to come forward with information it is driving them away. South Africa should in particular guard against this development, especially since the South African Police Service is just in the process of restoring its negative image in restoring confidence. By making the community responsible for its own safety, public frustration (that counter public participation) will be countered that will on the medium and long-term strengthen democratic principles of participation. These instruments should be considered as the preferred strategy in countering terrorism in that it counter support terrorists receives.

In other words, a community-level counter terrorism policy/strategy needs urgent consideration that would emphasis community responsibility for countering terrorism. It is unfortunate that even a "liberal" "Anti-Terrorism" Bill will be accepted with caution and suspicion. Instead of using government and the law enforcement to drive the counter-terrorism strategy, a more effective approach will include constant consultation with the public through non-governmental organizations and the media to inform ordinary citizens of the dangers of terrorism, the modus operandi of individuals and groups associated with terrorism as well as its reach. Through knowledge ordinary citizens will feel more responsible, and be the eyes and ears of more formal counter-terrorism strategies, without being forced.

The development of any effective anti-terrorism legislation needs to take into consideration the present national, regional and international milieu in which acts of terror occur. Since the 1960s, the phenomenon of terrorism has reflected different developmental stages in its manifestation, modus operandi, target selection and objectives. Various regional and international counter-terrorism strategies to date have failed to contain terrorism. Increasing globalization not only facilitates transnational terrorism it also reflects the need for the international community to commit to a transnational counter-terrorism strategy.