

UNIVERSITY OF THE WESTERN CAPE

RESEARCH PAPER

The Impact of 9/11 on the South African Anti-Terrorism
Legislation and the Constitutionality thereof

UNIVERSITY *of the*
WESTERN CAPE

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Keywords

- September 11, 2001
- Protection of Constitutional Democracy Against Terrorist and Related Activities Act
- Terrorist Activity
- Constitution of the Republic of South Africa, 1996
- Detention without Trial
- Apartheid
- Human Rights
- Bail
- Investigative Hearings
- Principle of Proportionality



Abstract

My paper will aim at analysing the following: Firstly, what was South Africa's response to its international obligations regarding the 9/11 events, and secondly, how does such response comply with the country's constitutional framework?

In their fight against terrorism, all of these countries have taken all sorts of counter-terrorism measures, including some which are extremely questionable as they unduly restrict the exercise of basic rights such as freedom of expression, association and assembly. And at first glance, South Africa does not seem to be an exception, which is all the more astonishing in the country's historical context.

It will first give a brief outline of the most significant legislative changes in a number of countries to then concentrate on the South African anti-terrorism legislation. It will identify those provisions of the Act that have been discussed most controversial throughout the drafting process and analyse whether they now comply with constitutional standards. Particular emphasis will be laid on the possible differences between the South African Act and comparative legislation that derive directly from the Apartheid-history of the country.

Declaration

I declare that 'The Impact of 9/11 on the South African Anti-Terrorism Legislation and the Constitutionality thereof' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources i have used or quoted have been indicated and acknowledged by complete references.

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Chapter 1 - Introduction

The terrorist attacks in the US on September 11, 2001 have had profound effects on UN member states. One of them has been the articulation of a supra-national requirement to adopt anti-terrorism measures: Shortly after the events, on September 28, 2001, the United Nations Security Council adopted its Resolution 1373¹ with the aim of monitoring and raising the average standard of global government action against terrorism. As it was issued under Chapter VII of the UN Charter, the Resolution requires² states to take the necessary steps to prevent and suppress the financing, preparation and commission of acts of terrorism, obliges states to prevent their territory from being used as a safe haven, to share information with other governments on terrorist activities, and to refrain from either actively or passively engaging in terrorist acts. And it requires states to ,[e]nsure 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 any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts³. Consequently, September 11 has led to remarkable changes in the legislative framework of almost all industrialised societies worldwide. Several states, some of which are discussed in more detail later, have introduced new anti-terrorism legislation.

South Africa is among those states. After a long and controversial drafting process, the South African Parliament has finally approved the country's draft anti-terrorism law on November 12, 2004. Being assented by the President, the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act*⁴ came into operation on May 20, 2005. During the public hearings of the National Assembly's Portfolio Committee on Safety and Security, then chairperson Muleleki George explained that the legislation was necessary to meet the country's legal obligations in terms of the ratified terrorism conventions.⁵ Many of the critics, on the other hand, remain unhappy with the Act as in their eyes it poses an immediate threat to some of the fundamental freedoms guaranteed in the 1996 Constitution.⁶ And, criticisms

¹ UN Security Council Resolution 1373, 28 September 2001, UN Doc. S/RES/1373 (2001), available at www.un.org.

² Resolution 1373 was issued under Chapter VII of the UN Charter for the Security Council to be able to order measures which are binding on member states of the UN (see Articles 39, 41 and 42 of the UN Charter).

³ UN Security Council Resolution 1373, above fn 1, at para 2(e).

⁴ Act 33 of 2004: Proc R18 in Government Gazette 27502 of 15 April 2005. In this paper, the Protection of Constitutional Democracy against Terrorism and Related Activities Act will be called 'the Act' or 'Anti-Terrorism Act'.

⁵ See Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004, 33 of 2004, Preamble.

⁶ The Constitution of the Republic of South Africa Act, 108 of 1996.

have not been limited to the provisions of the Act, but have also been extended to its necessity. Opponents argue that no new law may have been necessary because virtually all the violent activity commonly associated with terrorism is already a crime.⁷

My paper will aim at analysing the following: Firstly, what was South Africa's response to its international obligations regarding the 9/11 events, and secondly, how does such response comply with the country's constitutional framework? It will first give a brief outline of the most significant legislative changes in a number of countries to then concentrate on the South African anti-terrorism legislation. It will identify those provisions of the Act that have been discussed most controversial throughout the drafting process and analyse whether they now comply with constitutional standards. Particular emphasis will be laid on the possible differences between the South African Act and comparative legislation that derive directly from the Apartheid-history of the country.

My analysis will rely on literature study. I will examine primary sources such as legislation and case law and use secondary ones in order to draw my conclusion with regard to the analysed primary sources.



Chapter 2 - Comparative Reactions to UN Resolution 1373

The September 11 attacks horrified and outraged people around the world. On a political level they have triggered a widespread agreement that the problem of international terrorism could not be dealt with within the established legal framework of existing criminal laws and procedures but that legislative activity was needed in order to deal with the threat of future terrorist offences. Accordingly, in addition to forming coalition structures in the fight against terrorism, domestic legal measures have been introduced in a range of countries⁸, many of them creating a host of new offences and penalties aimed at meeting the above mentioned requirements set out in Security Council Resolution 1373 and taking the measures needed to

⁷ Before the Act was passed, numerous laws existed that could be used to combat terrorism and related criminal activity, including the State of Emergency Act of 1997; the Defence Act of 1957; the Internal Security Act of 1982; the Intimidation Act of 1982; the Criminal Law Second Amendment Act of 1992; the Regulation of Foreign Military Assistance Act of 1998; the Armaments Development and Production Act of 1968; the Explosives Act of 1956; the Dangerous Weapons Act of 1968; the Firearms Control Act of 2001; the Non-Proliferation of Weapons of Mass Destruction Act of 1993; the National Key Points Act of 1980; the Diplomatic Immunities and Privileges Act of 1989; the Civil Aviation Offences Act of 1972; and the Merchant Shipping Act of 1951.

⁸ For an overview of adopted or proposed anti-terrorism legislation see www.amnesty.org or "In the Name of Counter-Terrorism: Human Rights abuses worldwide", available at: www.hrw.org.

protect the fundamental rights of everyone within the jurisdiction of the respective country against terrorist acts, especially the right to life.

Resolution 1373 established a committee of the Security Council to monitor the implementation of the Resolution and called upon all states to report back to the committee within 90 days on steps taken towards its implementation. Because this reporting requirement was interpreted as a virtual deadline for the enactment of anti-terrorism legislation⁹, many of those laws have been introduced through fast-track legislative processes that have granted little time for parliamentary scrutiny and public debate. What is more, even though twelve international treaties related to terrorism have been adopted within the UN context¹⁰, it has thus far proved impossible for the international community to agree on a universally recognised definition for ‘terrorism’ or ‘terrorist act’ or establish a cohesive enumeration of appropriate responses to terrorist acts within the international system.¹¹ This is due to the fact that acts constituting terrorism can depend on – among other things – social context, historical perspective and racial, religious or other group identity.¹²

Notwithstanding the political difficulties of defining terrorism, international as well as domestic law requires that criminal offences be defined in a precise, unequivocal and unambiguous manner and that criminal law not be applied retroactively so that individuals have fair warning regarding the conduct being prohibited. This *nullum crimen sine lege* principle – or principle of legality – is inherent in domestic as well as international criminal law and is laid down in Article 15 of the International Covenant on Civil and Political Rights (ICCPR)¹³ and Article 7 of the European Convention on Human Rights (ECHR)¹⁴, to only name a few.¹⁵ It is agreed upon that states who are responding to the threat of terrorism continue to be bound by their obligations under international human rights law. While a range of countries have used the ‘war against terrorism’¹⁶ to introduce legal measures contrary to those obligations, some deserve special attention. The cases detailed below are examples for not only defining terrorism excessively broad so as to risk criminalizing conduct that is

⁹ Roach, A comparison of South African and Canadian anti-terrorism legislation, (2005) 2 SACJ 127 (129).

¹⁰ There are 12 major multilateral conventions and protocols related to states' responsibilities for combating terrorism. For full texts and details see http://www.unodc.org/unodc/en/terrorism_conventions.html.

¹¹ See Obote-Odora, Defining International Terrorism, (1999) 6 Murdoch University Electronic Journal of Law, available at <http://www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61.html>.

¹² Schmidt, A. and Jongman, A. et al in their book Political Terrorism, at pg 5, cited 109 different definitions of terrorism, which they obtained in a survey of leading academics in the field.

¹³ Article 15(1) of the ICCPR states: „No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed...“.

¹⁴ Article 7(1) of the ECHR states: „No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed...“.

¹⁵ Those spell out fundamental human rights to which everyone is entitled and which a state party to them is obliged to respect, protect, promote and fulfil.

¹⁶ Statement by the President of the United States of America, George W. Bush, in his Address to the Nation on September 11, 2001.

protected under human rights- and constitutional law, such as the right to freedom of association or expression, but to also base far-reaching legal consequences onto the respective definitions of terrorism or terrorist acts, which could be used to severely prosecute relatively minor offences:

1. United States¹⁷

In the U.S., the USA Patriot Act of 2001¹⁸ was drafted shortly after the September 11 events and signed into law on October 26, 2001. The Act contains more than 150 sections and amends over 15 federal statutes, including the Federal Criminal Code, the Foreign Intelligence Surveillance Act (FISA), and the Immigration and Nationality Act (INA).

Prior to the USA Patriot Act, law enforcement authorities could conduct wiretaps only when they has probable cause to believe that a crime had been or was about to be committed. Searches of homes and their contents required warrants for which probable cause had to be demonstrated. In contrast to that, the Patriot Act allows law enforcement authorities to enter a home, office or other private place and conduct a search, take photographs, and download computer files without notifying the person whose property is being searched until some time after the search was conducted.¹⁹ It gives the police and the Federal Bureau of Investigation (FBI) greater powers to keep suspected terrorists under surveillance and monitor their conversations, to share intelligence with other agencies, and to conduct covert searches.²⁰ Particularly troubling are four provisions:

- Section 206, which permits the use of “roving wiretaps” and secret court orders to monitor electronic communications to investigate terrorists;
- Sections 214 and 216, which extend telephone monitoring authority to include routing and addressing information for Internet traffic relevant to any criminal investigation;
- Section 215, which grants unprecedented authority to the FBI and other law enforcement agencies to obtain search warrants for business, medical, educational, library, and bookstore records merely by claiming that the desired records may be related to an ongoing terrorism investigation or intelligence activities without the requirement of actual proof or even reasonable suspicion of terrorist activity.

¹⁷ For details see, for example, Cate, Privacy and other civil liberties in the United States after September 11, available at www.aicgs.org/Publications/PDF/cate.pdf.

¹⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT), Act of 2001, Public Law No. 107-56, for the complete text see <http://news.findlaw.com/cnn/docs/terrorism/hr3162.pdf>.

¹⁹ See USA Patriot Act), Title II: Enhanced Surveillance Procedures.

²⁰ USA Patriot Act at §§ 201-225.

Changes made to the INA²¹ include tightening immigration laws and restricting the due process rights of immigrants. The class of non-citizens subject to removal from the United States on grounds of terrorism has been expanded. Further, the Attorney General now has authority to indefinitely detain non-citizens if he has ‘reasonable grounds to believe’ that they are or have engaged in a terrorist activity or otherwise endanger national security.²² The provision stipulates that when a non-citizen is detained on grounds of suspected terrorism or endangering national security, deportation proceedings or criminal charges must be filed within seven days. However, non-citizens whose country of origin will not accept them may be detained for additional six-months periods if the Attorney General certifies the individuals as national security threats.

With regard to money laundering, the Act expands the authority of the Secretary of the Treasury to regulate the activities of U.S. financial institutions, particularly their relations with foreign individuals and entities. The Act also contains a number of new money laundering crimes, as well as amendments and increased penalties for earlier crimes, and it modifies several confiscation-related procedures.

2. United Kingdom²³

Mainly due to the country’s long-standing experience concerning terrorism related to the affairs of Northern Ireland, the United Kingdom had already enacted a wide range of legislative measures to counteract terrorist activity prior to September 11. Nevertheless, on October 15, 2001 the Government announced proposals to adopt new legislative steps ‘necessary to counter the threat from international terrorism’.²⁴ On December 14, 2001 parliament enacted the new Anti-Terrorism, Crime and Security Act (ATCSA). The ATCSA contains a range of new far-reaching powers:

It contains some significant disclosure powers and provisions governing the retention of communications data. Communications data includes all data relating to internet, telephone and postal communications. Public authorities are now permitted to disclose such information to each other for the purposes of any criminal investigation, including investigations outside the U.K..²⁵ The disclosure powers are far-reaching²⁶ and not confined to terrorist investigations but relate to criminal investigations in general.²⁷

²¹ Immigration and Nationality Act, available at www.uscis.gov/graphics/lawregs/ina.htm.

²² Immigration and Nationality Act, Section 236 A - Detention of Terrorist Aliens.

²³ For details see, for example, International Bar Association, International Terrorism: Legal Challenges and Responses, Chapter 3.4.1.2. and Chirinos, Finding the Balance Between Liberty and Security: The Lords’ Decision on Britain’s Anti-Terrorism Act, (2005) 18 Harvard Human Rights Journal 265.

²⁴ See House of Commons Debates, Volume 372 Column 923, 15 October 2001, the Secretary of State for the Home Department.

²⁵ Anti-Terrorism, Crime and Security Act (ATCSA), Part 3.

The ATCSA also introduced new restrictions on the right to seek asylum.²⁸ And with regard to money laundering the Treasury is permitted to make a freezing order if it reasonably believes that a foreign government or resident is engaged in action detrimental to the economy of the United Kingdom or constituting a threat to the life or property of one or more citizens of the United Kingdom.²⁹

One of the most controversial features of the ATCSA was the introduction of the indefinite detention without charge or trial of non-U.K. nationals suspected of terrorism-related activities who could not be returned to their own country or to a different country because of practical problems related, for example, to securing proper documentation or because they might be subject to inhuman or degrading treatment or punishment in violation of Article 3 of the European Convention on Human Rights.³⁰ The Act required that such persons be detained as national security threats and released only when they no longer pose such a risk or at such time when a country agrees to accept them and protect them from Article 3 violations. Part 4 of the ATCSA authorised the Secretary of State to certify a person as a 'suspected international terrorist' if he 'reasonably (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist'.³¹ The evidence used to make such a determination was secret and the suspect was prohibited from gaining access to it. Appeals to the certification of a person as a suspected terrorist could be made only to the Special Immigration Appeals Commission (SIAC), but only on a point of law. Such appeal is not equal to the protection offered by a judicial system and does not meet the standards required. For example, although the detainee could be represented by a court-appointed 'special advocate', he or she has no right to legal counsel. A detainee's advocate could not reveal to the detainee or discuss the evidence upon which the original certification was issued, undermining a detainee's ability to mount an adequate defence.

The European Convention on Human Rights would ordinarily prohibit the controversial part 4 measures through its Article 5(1), which protects the rights to liberty and security and prohibits executive detention without trial. However, Britain's department of immigration and justice, the Home Office, derogated from Article 5(1) and declared itself temporarily immune from it. In June 2002 the SIAC found that detention practices permitted under part 4 of the ATCSA were discriminatory and thus violated Article 14 of the ECHR. However, the Court of Appeal, deferring to the discretion of the Home Secretary, ruled that circumstances

²⁶ Schedule 4 to the ATCSA lists 66 acts under which disclosure of information is authorised.

²⁷ ATCSA at Section 20.

²⁸ ATCSA at Section 33 (1) and (2).

²⁹ ATCSA at Section 4.

³⁰ ATCSA at Section 23.

³¹ ATCSA at Section 21(1).

justified the discriminatory nature of part 4 and overturned the SIAC's judgement. For the next year and a half, the SIAC consistently denied suspects' detention appeals.³²

In 2004, an appeal finally resulted in a House of Lords decision declaring that the ATCSA detention measures are inconsistent with the U.K.'s international human rights obligation and, thus, invalidating them. In a statement the Home Secretary accepted the Law Lords' declaration and also their judgement that new legislative measures must apply equally to nationals as well as non-nationals. The Home Secretary laid out plans to replace part 4 powers with a twin track approach:

- Deportation with assurance - for foreign nationals who can be deported;
- Control orders – for containing and disrupting those where there is information to show they are a threat and whom cannot be prosecuted in the usual way or deported.³³

3. Canada³⁴

In Canada, Bill C-36 was given assent on December 18, 2001 as the new Anti-Terrorism Act³⁵. The Act establishes a new order of "terrorist"³⁶ crimes for which the state will have special investigative and prosecutorial powers. These include preventive detention³⁷, a new police power to compel testimony from anyone they believe has information pertinent to a terrorism investigation, closed trials, and a right of the prosecution, with a judge's approval, to deny an accused and his counsel full knowledge of the evidence against him.³⁸

With the Act the government also provides new investigative tools to allow security, intelligence and law enforcement agencies to more effectively gather information about terrorist groups. Measures include increasing electronic surveillance. The investigative powers making it easier to use electronic surveillance against criminal organisations now can be applied to terrorist groups. The legal need to specify that electronic surveillance is the last resort in the investigation on terrorists has been deleted. The legislation extended the period of validity of a wiretap authorisation from sixty days to up to one year when police are investigating a terrorist group offence.³⁹

³² Chirinos, above fn 23, at 268.

³³ See www.homeoffice.gov.uk/terrorism/govprotect/legislation/atcsa.html.

³⁴ For details see, for example, Roach, above fn 9.

³⁵ Anti-Terrorism Act (ATA), full text available at http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-36/C-36_1/C-36_cover-E.html.

³⁶ Terrorism offence means an offence under any of Sections 83.01 to 83.04 or 83.18 to 83.23 of the Criminal Code, as amended by the ATA.

³⁷ Investigative procedures under the Act allow a police officer to arrest and detain a person without a warrant if the officer suspects on reasonable grounds that it is necessary to do so in order to prevent a terrorist activity.

³⁸ See Roach, above fn 9, for an overview.

³⁹ Buellbach, New Ground Rules for a Post 9/11 World?, available at www.aicgs.org/publications/PDF/scientific.pdf at pg 3-4.

4. Germany⁴⁰

In Germany, the government introduced its first ever anti-terrorism package into parliament shortly after the events of September 11, which now makes it possible to ban religious groups showing extremist tendencies, and which amended the Penal Code, making the founding membership and support of terrorist organisations a criminal offence. The second anti-terrorism package, the Anti-Terrorism Act⁴¹, took effect in January 2002 and comprehensively changed a number of existing laws. It introduced new provisions governing the gathering of information⁴² and provides for the enhanced sharing of data between immigration authorities, social insurance authorities and the intelligence services⁴³. A further amendment provides that passports, identity cards and residence permits may include biometric data relating to a person's fingers, hands or face in addition to their photograph and signature.⁴⁴

5. India⁴⁵

The Indian parliament passed its new anti-terrorism law, the Prevention of Terrorism Act (POTA), on March 26, 2002. POTA sets forth broad definitions of 'terrorist act' and 'membership of terrorist organisations' and provides for strong penalties, including the death penalty.⁴⁶ It also sets up special courts to deal with terrorist offences, in which closed proceedings may be held if the Special Court so desires.⁴⁷ Further, POTA extends the powers of the police to detain terrorist suspects for 90 days without charge or trial⁴⁸, which the Special Court can extend to 180 days on application by the Public Prosecutor.⁴⁹ Finally, POTA introduces new provisions governing surveillance measures, authorising police officers to intercept communications.⁵⁰

⁴⁰ For details see, for example, Thomas, Germany's Response to the Terrorist Attacks: the new security packages 1 and 2.

⁴¹ For the German text of the Gesetz zur Bekämpfung des Internationalen Terrorismus (Anti-Terrorism Act) see http://eng.bundesregierung.de/Anlage17379/Terrorismusbekaempfungsgesetz_Wortlaut.pdf.

⁴² German Anti-Terrorism Act at Article 1-3.

⁴³ German Anti-Terrorism Act at Article 1, 11 and 16.

⁴⁴ German Anti-Terrorism Act at Article 7, 8 and 11.

⁴⁵ For details see, for example, International Bar Association, above fn 23.

⁴⁶ POTA at Section 3.

⁴⁷ POTA at Section 30(1).

⁴⁸ POTA at Section 49(2) in connection with Section 167 of the Code of Criminal Procedure.

⁴⁹ POTA at Section 49(2)(b).

⁵⁰ POTA at Sections 36-48.

6. Conclusion

As could be seen, in their fight against terrorism, countries have taken all sorts of counter-terrorism measures, including some which are extremely questionable as they unduly restrict the exercise of basic rights such as freedom of expression, association and assembly.

The provisions that criminalize ‘terrorist acts’ or ‘terrorist groups’ often include definitions so vaguely worded and/or overly broad that they may easily result in interpretations that unduly restrict the exercise of basic rights such as freedom of expression, association and assembly. Such clauses may be selectively used against opposition groups on the basis of political, cultural or religious considerations. What is more, vaguely worded laws may violate the principle of legality. Under the cover of so-called ‘preventative’ counter-terrorism measures states are infringing the right to privacy as well as terrorist suspects’ due fair trial rights through provisions that allow for extensive ‘search and seizure’, arbitrary detention without trial, or the additional limitation on legal representation, to only name a few. Apart from the fact that such provisions bear the danger of being used in a discriminatory and/or arbitrary manner, they may impede on the essence of a right and, thus, undermine it completely. All this creates tension between the protection of human rights and counter-terrorism measures. All too easily, when it comes to the ‘war against terror’, countries seem to ignore the very same human rights standards that they are legally bound to uphold and protect. This is of growing concern to human rights bodies and organisations all over the world, who permanently warn from sacrificing fundamental rights and freedoms in the name of eradicating terrorism.

Chapter 3 - The South African Anti-Terrorism Act

Faced with the upsurge of violence in the Western Cape, in 1999, the South African Police Service (SAPS) – on request from the Minister of Safety and Security - conducted a research on terrorism and internal security and drafted an Anti-Terrorism Bill which was submitted to the South African Law Commission’s (SALC) project committee on security legislation. This draft formed the basis for Discussion Paper 92, Project 105, which was published in June 2000, soon followed by the first comprehensive draft Anti-Terrorism Bill, which was published by the SALC for public comments in October 2000.⁵¹ After encountering massive

⁵¹ The full text of the Bill and the Discussion Paper 92, Project 105, are available on <http://wwwserver.law.wits.ac.za/salc/discussn/paper92sum.html>

opposition from human rights groups both at home and abroad, the Bill was temporarily shelved.

But in the wake of the September 11 attacks, Security Council Resolution 1373 made it compulsory for all the UN member states to adopt anti-terrorism measures, and in South Africa the existing laws were believed to ‘not meet all the international requirements relating to the prevention and combating of terrorist and related activities’⁵². According to the South African Law Commission⁵³ there were ‘shortcomings in the South African legislation and they should be remedied. The South African legislation for combating terrorism should be brought in line with the international conventions, our law should provide for extra-territorial jurisdiction, the present⁵⁴ terrorism offence is too narrow and financing of terrorism must be addressed.’⁵⁵ The worldwide trend, according to the South African Law Commission, was to create specific legislation based on international instruments relating to terrorism and the reason for this was twofold: ‘Firstly, to broaden the normal jurisdiction of the courts to deal with all forms of terrorism, especially those committed outside the normal jurisdiction of courts, and secondly, to prescribe the most severe sentences in respect of terrorist acts.’⁵⁶ Accordingly, on November 12, 2004, the National Assembly adopted a new South African anti-terrorism law which came into force on May 20, 2005.

One would assume that South Africa, viewed against its historical background of Apartheid anti-terrorist legislation, which facilitated massive arrests, detention and acts of torture, has passed a law that is no ‘reversion to the apartheid era with its plethora of security legislations whose sole purpose was to neutralise opposition on the part of the majority to the policies of the then de facto as well as de jure National Party government’⁵⁷, but which is well within the limits of the constitution, which is, after all, the product of the country’s history. In considering the South African law, it is important to examine the historical context and if respectively how it affected the bill’s drafting process. I will therefore first give a brief overview over relevant Apartheid anti-terrorism legislation. By then evaluating the drafting process of the current anti-terrorism act as well as assessing the constitutionality of the act itself, the following chapters will discuss whether deficiencies in the bill, when it was first introduced, have been remedied. The comments will be confined to the most controversial provisions which will likely have substantial impact on the human rights protected by the South African Constitution.

⁵² See Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004, Preamble.

⁵³ Project 105, Review of Security Legislation (Terrorism: Section 54 of the Internal Security Act, 1982 (Act NO. 74 of 1982)), August 2002, for the whole report see <http://wwwserver.law.wits.ac.za/salc/report/report.html>.

⁵⁴ Meaning Section 54 of the Internal Security Act, 74 of 1982.

⁵⁵ Project 105-Report, above fn 53, at Summary of Recommendations, pg 18.

⁵⁶ Project 105-Report, above fn 53, at Chapter 1, pg 14.

⁵⁷ Jazbhay, Report on the Anti-Terrorism Bill 2002, Chapter 2, available at www.mediareviewnet.com/Saber%20Ahmed%20Jazbhay%20analysis%20on%20ATB%20South%20Africa.htm

1. Key elements of Terrorism Legislation during Apartheid⁵⁸

One of the main problems associated with the term ‘terrorism’ is evident in South Africa’s history: During the Apartheid era anti-terrorism and security legislation, which dates back to 1950, was used to persecute and suppress political opponents and much of the legislative history is marked by an escalation of legislative measures by the side of the state and a similar escalation in the response on the side of those against whom the legislation was directed.

In 1950, parliament passed the Suppression of Communism Act, which defined communism extremely widely and granted powers to the executive to declare unlawful any organisation whose objectives or activities were considered to be directed at promoting the aims of communism. Among other features, the act defined communism as any scheme that aimed ‘at bringing about any political, industrial, social, or economic change within the Union by the promotion of disturbance or disorder’ or that encouraged ‘feelings of hostility between the European and the Non-European races of the Union the consequences of which are calculated to further...’ disorder.

The Public Safety Act of 1953 authorised the executive to proclaim a state of emergency. In the same year the Unlawful Organisations Act was promulgated. The African National Congress (ANC) as well as the Pan Africanist Congress (PAC) were declared unlawful under the provisions of this act. As both organisations went underground and embarked on a campaign of sabotage and armed resistance, parliament, in reaction, passed the General Law Amendment Act in 1962. It introduced the statutory crime of sabotage with a definition so broad and all encompassing as to render virtually all forms of dissent illegal or dangerous including, for example, the tampering with any water supply, postal or telephone service or any property.

Government also introduced a number of detention laws⁵⁹ in the 1950’s and 1960’s, providing for detention without trial.⁶⁰ And in 1967 the Terrorism Act⁶¹ created the statutory crime of

⁵⁸ For details see Schoenteich, ISS Monograph No. 63, Chapter 4: Laws as weapons: Legislating Against Terrorism, available at: <http://www.iss.co.za/Pubs/Monographs/No63/Chap4.html>.

⁵⁹ For details see Rudolph, Security, Terrorism and Torture, Detainees’ rights in South Africa and Israel, Chapter 2.

⁶⁰ The following forms of detention without trial, according to the Final Report of the Truth and Reconciliation Commission, <http://www.truth.org.za/report/index.htm>, at Volume 2, Chapter 3 were provided for by security legislation during Apartheid:

- Detention for interrogation according to Section 21 of the General Laws Amendment Act (1963), Section 6 of the Terrorist Act (1967), and Section 29 of the Internal Security Act (1982);
- Preventative detention according to Section 10 of the Internal Security Act (1950), and Section 28 of the Internal Security Act (1982);
- Short-Term detention according to Section 22 of the General Law Amendment Act (1966), and Section 50 of the Internal Security Act (1982);

participating in terrorist activities. The struggles waged by the ANC and other organisations at the time were regarded as terrorist activities and any person who assisted or participated were regarded as terrorists. Nelson Mandela and many others were regarded as terrorists by the apartheid regime. A particularly grim aspect of the act was a detention provision without a time limit.

The Terrorism Act of 1967 was later replaced by the Internal Security Act of 1982⁶², which consolidated a variety of separate terrorism laws that existed at the time. In terms of the Act the offence of terrorism was formulated to counter the objectives of the liberation movement to bring about a change of government. Factors such as the expansion of the influence of communism, the continued activities of the ANC, PAC and others after their banning, links with Soviet-Russia and international communist movements and the close relationship between the ANC and South African Communist Party were taken into account in criminalizing what was regarded as “terrorism”.⁶³ For example, the Act authorised the Minister of Law and Order to declare any organisation unlawful if he was ‘satisfied’ that it engaged in activities that endangered the security of the state or the maintenance of law and order, or promoted the spread of communism in a variety of ways. The Act also made provision for indefinite preventive detention. The Minister had the power to issue a notice for the detention of any person for such period as he specified. There was no outer limit to the period that the Minister could fix for detention, nor was there a legal barrier to the indefinite re-issue of lapsed notices. The Minister could exercise his far-reaching powers on any one of three grounds, namely, that he had reason to believe that the person in question would commit the offence of terrorism, subversion or sabotage; that the minister was satisfied that the detainee would endanger the security of the state or the maintenance of law and order; or that he had reason to suspect that a person who had committed a specified offence or political offence would be likely to endanger state security or the maintenance of law and order.⁶⁴

To sum up what security legislation introduced during Apartheid amounted to, it can be said that it constituted of a sustained assault on the principles of the rule of law such as the

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- Detention of state witnesses according to Section 12 of the Suppression of Communism Act (1950), Criminal Procedures Act (1965), and Section 31 of the Internal Security Act (1982);
 - State of emergency detention according to the Public Safety Act (1953) and Proclamation R121 (1985).

⁶¹ Terrorism Act No. 83 of 1967.

⁶² As a result of the state president appointing a judicial commission of inquiry (known as the Rabie commission, after its chairman Mr Justice P J Rabie, and later chief justice) to examine the necessity, adequacy, fairness and efficacy of legislation relating to the protection of internal security in 1979, as criticisms of many of the security laws became stronger.

⁶³ Bulelani, *Anti-Terrorism Measures in South Africa and Challenges Facing Prosecutors*, available at www.iap.nl.com/speeches_annual_conference_2003_washington/anti_terrorism_measures_speech_by_bulelani_ngcuka.htm.

⁶⁴ Schoenteich, ISS Monograph No 63, above fn 58.

suspension of the principle of habeus corpus⁶⁵, limitations on the right to bail, the imposition by the legislature of minimum gaol sentences for a range of offences and limitations placed on courts to protect detainees.⁶⁶ It consisted of numerous laws that denied the majority of the people basic human and political rights and under which any criticism of the law was suppressed. Hence, after 1994 many of these provisions have been repealed, as they were inconsistent with the South African Constitution.

2. Key Elements of the Act - Their Evolution during the Drafting Process

As mentioned above, in its drafting and negotiation process the South African Anti-Terrorism Act was strongly criticised and even opposed.⁶⁷ No one doubted that states have legitimate and urgent reasons to take all due measures to eliminate terrorism. Acts and strategies of terrorism aim at the destruction of human rights, democracy, and the rule of law. They destabilise governments and undermine civil society. Governments therefore have not only the right, but also the duty, to protect their nationals and others against terrorist attacks and to bring the perpetrators of such acts to justice. The manner in which counter-terrorism efforts are conducted, however, can have a far-reaching effect on overall respect for human rights. The South African Bill, according to opposition groups, was ‘fundamentally flawed and the logic behind its motivation remains unclear.’⁶⁸ In light of the Apartheid history, hence, they saw the danger of reviving the country’s painful past. Others hoped that because many of the contemporary South African politicians are members of political organisations which were described by the Apartheid government as being terrorist organisations, this would make such politicians cautious with regard to the labelling of groups or activities as terrorist.⁶⁹

2.1. Defining Terrorism

As for the extraordinary measures against individuals suspected of crimes involving extreme acts of violence against people and directed to particular ends it is vital that the definition of ‘terrorism’ and ‘terrorist act’ are formulated very narrowly. While it was never approached to deliver a definition of ‘terrorism’ within the context of the adoption of a comprehensive South African anti-terrorism law⁷⁰, various draft Anti-Terrorism Bills introduced a variety of

⁶⁵ Legal principle which requires that the government must present an accused and arrested person before an impartial judge in order to prove that there exists just cause to hold that person against his or her will.

⁶⁶ Final Report of the Truth and Reconciliation Commission, <http://www.truth.org.za/report/index.htm>, at Volume 1, Chapter 2.

⁶⁷ See press statement by Freedom of Expression Institute, Forum of Non-Governmental Organisations opposes the Anti-Terrorism Bill, available at: www.mediareview.net.com.

⁶⁸ Freedom of Expression Institute, Submission on the Anti-Terrorism Bill [B12-2003], available at www.fxio.org.za at Introduction.

⁶⁹ See Matthews, South Africa: An Assessment of South African Response to September 11 and the Resulting War on Terrorism, available at: <http://www.weltpolitik.net/print/1481.html>.

⁷⁰ Reason was the lack of international agreement on what constitutes terrorism.

definitions of a ‘terrorist act’⁷¹, all too widely drawn and with the possibility to encompass legitimate political activities as for instance trade union strikes which can at times result in damage to property or the disruption of the delivery of essential services or can be intended to induce the government, employers or members of the public to agree to something. Unions objected to the original limitation that any protest or industrial action would have to be lawful in order to be included by the important exemption for advocacy, protest, dissent or industrial action and the word ‘lawful’ was eventually dropped.⁷² The definition of ‘terrorism act’ also included lawbreakers who would not be terrorists in the meaning of the word, but would ordinarily be dealt with under the less drastic common law principles of criminal law and the Criminal Procedure Act. So even if the accused or the suspect never intended a terrorist act, potentially he or she could be subjected to the extraordinary penalties in the Bill. The wide definitions thus created the potential for abuse and confusion. Consequently, any such definition posing the above mentioned dangers was strictly opposed by civil and human rights groups as well as legal experts.⁷³ Whether the current definition of ‘terrorism act’ is in tune with the Constitution, will be examined in more detail below.

⁷¹ Definitions included, for example:

Draft Anti-Terrorism Bill B12-2003:

There appears to be a typographical error in the definition of terrorist act in this section, see paragraphs 40-45 in pg 4 of the Bill. For purposes of this submission, I shall take the definition to read:

„terrorist act“ means an unlawful act, committed in or outside the Republic,
which is

- (a) a convention offence; or
- (b) likely to intimidate the public or a segment of the public.

Or Anti Terrorism Bill, 2002, as annexed to the Project 105–Report

"terrorist act" means an act, in or outside the Republic,

- (a) that is committed —

- (i) in whole or in part for a political, religious or ideological purpose, objective or cause, and
- (ii) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the person, government or organization is inside or outside the Republic, and

- (b) that —

- (i) causes death or serious bodily harm to a person by the use of violence,
- (ii) endangers a person's life,
- (iii) causes a serious risk to the health or safety of the public or any segment of the public,
- (iv) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of subparagraphs (i) to (iii), or
- (v) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, including, but not limited to: an information system; or a telecommunications system; or a financial system; or a system used for the delivery of essential government services; or a system used for, or by, an essential public utility; or a system used for, or by, a transport system, other than as a result of lawful advocacy, protest, dissent or stoppage of work that does not involve an activity that is intended to result in the conduct or harm referred to in any of subparagraphs (i) to (iii),

but, for greater certainty, does not include conventional military action in accordance with customary international law or conventional international law.

⁷² See COSATU Submission on the Anti-Terrorism Bill, at Chapter 3.1., available at: www.cosatu.org.za/docs/2003/antiterr.htm.

⁷³ See only Schoenteich, Crackdown on Terror: Tough Anti-Terrorism Law Proposed, available at <http://www.iss.org.za/pubs/CrimeIndex/01vol5No4/Crackdown.html>, Jazbhay, Objection to Anti-Terrorism Measures through the Anti-Terrorism Bill, 2003, available at www.mediareviewnet.com/Objection%20to%20ATB%20joint%20submission.htm, IDASA Submission to the Anti-Terrorism Bill 2003 or South African Human Rights Commission, Submission Anti-Terrorism Bill, B12-2003.

2.2. Detention without trial

Especially the proposed provisions on detention without trial attracted criticism and Section 16 of the 2000 draft Bill⁷⁴ was opposed as a return to Apartheid-era legislation. The purpose of the detention, as set out in Subsection 2, was interrogation and a detainee could be held up to 14 days. Given South Africa's odious history of abuse of persons in detention, with Section 12 of the Constitution⁷⁵ emerging as the product of that history, the opposition to this clause among human rights experts was tremendous. Even the SALC itself has expressed unease about such section allowing detention without trial. It emphasised that '[w]hen considering the measures to be implemented in combating terrorism in South Africa, the South African history of security legislation and the abuses committed under it should constantly be kept in mind'⁷⁶. This comment corresponds with the Constitutional Court, which has had the opportunity to comment on detention without trial⁷⁷. Justice Didcott, for example, stated that detention without trial should not be 'viewed apart from our ugly history of political repression'⁷⁸. The clear impression emerging from the pronouncements of Didcott and other judges is that detention without trial provisions are very likely to be considered unconstitutional in the sense that the limitations process in Section 36 of the Constitution cannot be utilised to justify violating the right not to be detained without trial.⁷⁹ As a result, Section 16 does not form part of the Act on the grounds that it was in conflict with the fair trial rights and the right to freedom as well as security of the person.⁸⁰

2.3. Search and Seizure

In terms of Section 22 of the 2000 draft bill any police officer above the rank of a Director could authorise any police official to stop and search any vehicle or person for articles which could be used for terrorist acts. He could do so provided that there are reasonable grounds in order to prevent such acts. In its Review of Security Legislation⁸¹ the SALC stated that the Human Rights Commission considered these search powers to go beyond those outlined in the Criminal Procedure Act of 1977 since the powers in that Act generally require judicial pre-authorization in the form of a warrant and reasonable grounds for finding items linked to an offence on a particular person. In accordance, the SALC considered the proposed clause to be

⁷⁴ Section 16 provided that a judge of the high court may issue a warrant for the detention of any person who, on the grounds of information submitted under oath by a Director of Public Prosecutions, appears to be withholding information regarding any offence under the Act.

⁷⁵ Section 12 of the Constitution provides that everyone has the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause (S 12(1)(a)), not to be detained without trial (S 12(1)(b)) and not to be tortured in any way (S 12(1)(d)).

⁷⁶ Project 105-Report, above fn 53, at Chapter 1, pg 15-16.

⁷⁷ *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

⁷⁸ *De Lange v Smuts NO*, above fn 76, at para 115.

⁷⁹ Cowling, *The Return of Detention without Trial?* (2000) 13 SACJ 344 (348).

⁸⁰ Project 105-Report, above fn 53, at Chapter 13.79, pg 570.

⁸¹ Project 105-Report, above fn 53, at Chapter 13.561, pg 910.

quite invasive and therefore recommended that applications should be made to a judge of the High Court for exercising these powers. Accordingly, Section 24 of the Act now makes it dependent on the decision of a judge whether to grant authority for the condoning off, and stopping and searching of vehicles and persons in a specified area within a period of a maximum ten days if it appears to the judge that it is necessary in order to prevent acts of terrorism.⁸² ‘Under such warrant any police official who identifies himself or herself as such may cordon off the specified area for the period specified and stop and search any vehicle or person in that area, for articles or things which could be used or have been used for or in connection with the preparation for or in the commission or instigation of any terrorist or related activity.’⁸³

In contrast to the opinion of the Congress of South African Trade Unions (COSATU), according to who the combination of the subjective determination by the judge with the vague meaning of a ‘terrorist act’ still creates ample opportunity for this provision to be applied in a discriminatory manner⁸⁴, in my view, the clause now passes constitutional muster. The fact that the power to authorise a search and seizure is given to an impartial and independent judicial authority⁸⁵ provides ‘an opportunity, before the event, for the conflicting interests of the State and the individual to be assessed, so that the individual’s right to privacy will be breached only where the appropriate standard has been met, and the interests of the State are thus demonstrably superior’⁸⁶. And the requirement that it must be ‘necessary in order to prevent any terrorist or related activity’⁸⁷ imposes an objective test.

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2.4. Bail

All the previous drafts of the Anti-Terrorism Bill as well as the Act provide for the denial of bail to suspects arrested on charges of terrorist activities, as a rule, by way of amendment of Schedules 5 and 6 of the Criminal Procedure Act and Schedule 2 of the Criminal Law Amendment Act.

Section 5 of Bill B12-2003 provided that a person charged under the Anti-Terrorism Act, will, for purposes of bail be treated as a Schedule 6 (of the Criminal Procedure Act of 1977) – offender.⁸⁸ As the Freedom of Expression Institute rightfully stated in their submission on the

⁸² See Section 24(1) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.

⁸³ Section 24(2) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.

⁸⁴ COSATU submission on the Anti-Terrorism Bill, above fn 72, Chapter 3.2.

⁸⁵ Park –Ross v Director, Office for Serious Economic Offences 1995 (2) BCLR 198 (C) 218-21, referring to Hunter v Southam Inc (1985) 11 DLR (4th) 641 (SCC).

⁸⁶ Hunter v Southam Inc, above fn 85, 654.

⁸⁷ Section 24(1) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.

⁸⁸ See Section 5 of the Anti-Terrorism Bill B12-2003.

Bill⁸⁹, the effect would have been, given the definition of ‘terrorist act’ at the time, that for purposes of bail and securing one’s liberty, persons involved in a public protest or a person who unwittingly has knowledge of another deemed by the state to be a terrorist were to be treated in exactly the same way as a person who places a bomb in a public place to cause death and destruction. It would have been the same case with a person who is ordered to stop by a police officer during a vehicle search under section 6 of the ATB but fails to do so. The Constitutional Court in *S v Dlamini; S v Dladla and others; S v Schietekat*⁹⁰ found that the amendment to Section 60 of the Criminal Procedure Act, which requires that a person accused on a Schedule 6 charge must adduce evidence (that is, the onus is on the accused) to satisfy a court that ‘exceptional circumstances’ exist which permit his or her release, was not unconstitutional but emphasised that it can only be used ‘for very serious offences’.

In the Act, the Section was therefore replaced by an amendment of Schedules 5 and 6 of the Criminal Procedure Act and Schedule 2 of the Criminal Law Amendment Act. The text distinguishes between engaging in a terrorist activity, for example, and ‘less’ serious offences which are to be treated as a Schedule 5 – offender or which are not listed at all. One of the mayor problems of the Act is that the definition of ‘terrorist activity’ still casts such a wide net that many offences, which are not objectively serious, will be classed as terrorist related activities and will be treated as such. The new bail provision may therefore be very well unconstitutional, which will be further discussed below.

2.5. Investigative hearings

Previous drafts of the Anti-Terrorism Bill included a part which was headed ‘investigative hearings’⁹¹ and which consisted of a number of provisions that gave to the police authority for the gathering of information or evidence relating to the commission of a terrorist act. Under this chapter it was possible to compel testimony by requiring people to answer questions or produce things, if there were reasonable grounds to believe they had information about a terrorist crime that had been, or would be committed.⁹² And judicial authorisation could be given for a person to be detained in custody for the purpose of interrogation⁹³.

During to the public hearings regarding the Anti-Terrorism Bill the Portfolio Committee on Safety and Security admitted that Section 8-11 of the Bill were problematic and the Committee wanted to rectify this.⁹⁴ Accordingly, on August 21, 2003, a new draft, which took

⁸⁹ See Freedom of Expression Institute, above fn 68, at Chapter 3.7.

⁹⁰ *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC).

⁹¹ See, for example, Chapter 3 of the Anti-Terrorism Bill B12-2003.

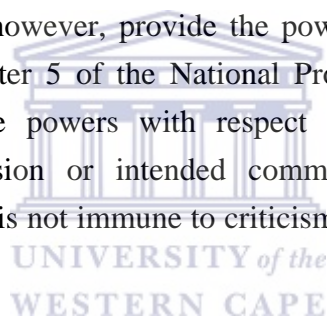
⁹² Sections 8 and 11 of the Anti-Terrorism Bill B12-2003.

⁹³ Section 10 of the Anti-Terrorism Bill B12-2003.

⁹⁴ Minute of the Safety and Security Portfolio Committee & Justice and Constitutional Affairs Portfolio Committee, 26 June 2003, available at www.pmg.org.za.

into account the public hearings and subsequent discussions, was presented.⁹⁵ As mentioned above⁹⁶, the ‘detention without trial’-provision was shelved for its inconsistency with the Constitution. And the obligation to provide information appeared to be just as constitutionally problematic. Because even though the Constitutional Court has, in three decisions, confirmed the constitutional validity of statutory compulsion to provide evidence in investigative inquiries⁹⁷, and the statutory compulsion to co-operate, to provide documents and to speak was therefore not problematic, the Court also stressed that Section 205 of the Criminal Procedures Act – which was the provision in question of being unconstitutional – met the requirements of procedural fairness as it is ‘as narrowly tailored as possible to meet the legitimate state interest of investigating and prosecuting crime’⁹⁸. The persons who are authorised to take evidence at Section 205 proceedings are either judges of the High Court or magistrates. The subpoena to attend must be authorised by the Attorney-General. The applicable Sections of the Anti-Terrorism Bill were far more intrusive in their methods of procuring information⁹⁹ and therefore in danger of not meeting constitutional muster. As a result, the Committee excluded the Chapter ‘investigative hearings’ from future drafts.

In its Section 22 the Act does, however, provide the power to institute an investigation in terms of the provisions of Chapter 5 of the National Prosecuting Authority Act, 1998¹⁰⁰, which gives broad investigative powers with respect to persons who possess relevant information about the commission or intended commission of an offence, including investigative hearings. Chapter 5 is not immune to criticism itself; its constitutionality will be discussed below.



2.6. Conclusion

The analyses carried out clearly shows that South Africa’s legislation during its drafting and negotiation process was flawed to the extent of being unconstitutional and that those in fear of the law posing a threat to some of the constitutionally guaranteed fundamental freedoms were right in claiming so. Whether the Anti-Terrorism Act, that was finally adopted, is always keeping the balance between combating terrorism and protecting the rights of individuals, will be analysed in the following.

⁹⁵ See Minute of the Safety and Security Portfolio Committee & Justice and Constitutional Affairs Portfolio Committee, 21 August 2003, available at www.pmg.org.za.

⁹⁶ See Chapter 3.2.2.

⁹⁷ Ferreira v Levin NO 1996 (1) BCLR 1; 1996 (1) SA 984 (CC) Bernstein v Bester NO 1996 (4) BCLR 449 (CC); Nel v Le Roux NO 1996 (4) BCLR 592 (CC).

⁹⁸ Nel v Le Roux NO 1996 (4) BCLR 592 (CC) at para 20.

⁹⁹ See Freedom of Expression Institute, above fn 68, at Chapter 3.9.

¹⁰⁰ Act No 32 of 1998.

3. Constitutionality of the Anti-Terrorism Act

Despite the fact that South Africa's anti-terrorism legislation approved considerably during its drafting process, the constitutionality of a number of provisions is still in doubt. In the eyes of many¹⁰¹ the law poses a threat to constitutionally guaranteed fundamental rights and freedoms to which everyone is entitled and which the state is obliged to respect, protect, promote and fulfil.¹⁰²

But even the most fundamental rights and freedoms are not absolute. Their boundaries are set by the rights of others and by the legitimate needs of society. The South African Constitution sets out specific criteria for the restriction of the Bill of Rights.¹⁰³ An enactment may only limit these rights if - and to the extent that - the limitation can be justified under Section 36 of the Constitution. The limitation exercise of Section 36 determines the manner in which all the rights in the Bill of Rights can be limited; it requires the weighing-up of the nature and importance of the rights limited against the importance and purpose of the limiting enactment. As Minister of Justice Penuell Maduna emphasised in September 2001 at a media briefing at Parliament, 'it was unthinkable that the South African Parliament would pass a law which was not in tune with the Constitution's limitation clauses.'¹⁰⁴ The question to be answered with regard to the Anti-terrorism Act is therefore whether the fight against terrorism justifies the imposition of the above prescribed restrictions on the exercise of fundamental rights by the Act.

3.1. Defining Terrorism¹⁰⁵

The Anti-Terrorism Act, as suggested by Jazbhay¹⁰⁶, rather than attempting to define what a 'terrorist act' is, focuses on defining the activity that constitutes a crime and listing the various levels of conditions of a 'terrorist activity'. Most of the enumerations of conditions use the operator 'or' at the end of the previous last condition in a list, resulting in an interpretation that allows for any one of the enumerated conditions to be sufficient to trigger the fearsome legal consequences of the existence of a terrorist activity.¹⁰⁷ This is particularly

¹⁰¹ See, for example, Powell, Terrorism and the separation of powers in the national and international spheres, (2005) 2 SACJ 151, and Powell, Terrorism and Governance in South Africa and Eastern Africa, in VV Ramraj, M Hor and K Roach (eds) Global Anti-Terrorism Law and Policy (forthcoming November 2005).

¹⁰² See Section 7(2) of the Constitution read with Section 8(1), which provides as follows:

"8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

¹⁰³ See De Waal, The Bill of Rights Handbook, 2000, Chapter 7.

¹⁰⁴ See GCIS Ministerial Media Briefing, Minister of Justice and Constitutional Affairs, 20 September 2001, available at www.pmg.org.za.

¹⁰⁵ See in detail Roach, above fn 9, at pg 132-140.

¹⁰⁶ Jazbhay, above fn 57, at Part B.

¹⁰⁷ Thomashausen, Constitutional Democracy Against Terrorist and Related Activities Act 2004, available at www.mediareviewnet.com/ConDemTraaAT2.htm.

troublesome when, for example, the ‘systematic, repeated or arbitrary use of violence’¹⁰⁸ constitutes a ‘terrorist act’. As Powell rightfully states, it is hard to imagine which form of violence could not be qualified by one of those three adjectives. That means that it is only the requirement of intention and motivation - themselves very broad – which distinguish between any act of violence and the very serious crime of terrorism.¹⁰⁹ Another example for broadly and vaguely defined harms can be found in Section 1(1)(a)(vii) and (viii), which provide that causing ‘any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country’ and creating ‘a serious public emergency situation or a general insurrection in the Republic’ can qualify as terrorist activities. Even if, in light of past abuses of states of emergency and the clear intent of the Constitution to limit the concept as much as possible, the reference to creating a serious public emergency or a general insurrection should be read as requiring a constitutionally valid and declared emergency, the concept of terrorism could still be stretched too far by applying it to ‘any major economic loss’. I agree with Roach, who says ‘economic harm may be an unfortunate consequence of acts of terrorism’, but the essence of terrorism is the intentional endangerment of life or cause of serious bodily harm in order to intimidate a population or influence a government. It ‘is not the causing of major economic harm’.¹¹⁰ The South African law in Section 1(1)(b) also relies on vague concepts like ‘feelings of security’ and ‘economic security’, which are extremely expansive and therefore questionable. And in addition, the Act provides fault requirements that do not reflect the seriousness of terrorist offences.¹¹¹

As Thomashausen puts it, it is created the illusion ‘of a comprehensive and tight definition, when in fact an extraordinarily wide choice of possible criteria and circumstances is offered to the law enforcement agencies, for them to choose and pick which one might be best suited to inescapably classify virtually any kind of even only mildly unlawful conduct as “terrorist activity”’¹¹². So even if not outright unconstitutional, the definition of ‘terrorist activity’ may certainly be challenged on the basis of being too broad and vague.

3.2. Listing of Terrorist groups

The Act gives effect to the Security Council’s procedure of drawing up lists of terrorist groups to then impose obligations on states to take particular measures against entities on the list. Section 25 of the South African Act requires the President to issue a proclamation when the Security Council has listed a terrorist group under Chapter VII of the UN Charter. Under Section 26, such a proclamation shall be tabled in Parliament which may then ‘take such steps

¹⁰⁸ Section 1(1)(a)(ii) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.

¹⁰⁹ Powell, *Terrorism and Governance in South Africa and Eastern Africa*, above fn 101, at pg 16.

¹¹⁰ Roach, above fn 9, at pg 136.

¹¹¹ Roach, above fn 9, at pg 140-144.

¹¹² Thomashausen, above fn 107.

it may consider necessary'. This allows for a legislative ratification procedure of the UN list which is problematic as legislatures a majoritarian institutions that do not necessarily respect rules of procedural fairness before listing a group as terrorist. Furthermore, the listing of terrorist groups may affect the ability of judges to determine in individual cases whether a group is actually a terrorist group. Such a substitution of a judicial decision by a legislative one could undermine the presumption of innocence as well as the separation of powers.

In addition, Section 25 does not give the President any discretion to proclaim the Security Council list, which makes the President merely the instrument by which the Security Council gains force in South African domestic law.¹¹³ This could be seen as an unconstitutional delegation of legislative power. Because the Constitution bestows legislative power on the legislature¹¹⁴, the Constitutional Court has already struck down the delegation of such powers¹¹⁵. It can be argued that a delegation of these powers to an international body, which has no democratic mandate from South African citizens, is even less acceptable.¹¹⁶

3.3. Bail

Section 35(1) of the 1996 Constitution provides that 'everyone who is arrested for allegedly committing an offence has the right ... (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.' This provision makes it plain that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences, and may for that reason be detained in custody. The Constitution itself therefore places a limitation on the liberty interest of a person. But notwithstanding lawful arrest, the person concerned has a right to be released from custody subject to reasonable conditions.¹¹⁷ The objective of the right to bail is to minimise the interference with an accused's freedom and to avoid anticipatory punishment before conviction and sentence.¹¹⁸ Its derived from the right to freedom¹¹⁹, which, along with human dignity and equality, is one of the basic values of the South African Bill of Rights.¹²⁰ Hence, the purpose, effects and importance of a refusal of the right to bail to persons accused of having committed a terrorist activity need to be counterpoised against the nature and importance of the right itself.

The Anti-terrorism Act, by way of amending the Criminal Procedure Act, provides that a person charged with certain offences under the Act, will, for purposes of bail be treated as a

¹¹³ Powell, Terrorism and the separation of powers, above fn 101, at pg 156.

¹¹⁴ Section 44 of the Constitution.

¹¹⁵ Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (10) BCLR 1289 (CC).

¹¹⁶ Powell, above fn 109, at pg 22.

¹¹⁷ S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (7) BCLR 771 (CC) at para 6.

¹¹⁸ Steytler, Constitutional Criminal Procedure, Chapter 7.3.

¹¹⁹ Section 12(1) of the Constitution.

¹²⁰ Steytler, above fn 118, Chapter 27.3.

Schedule 5, respectively Schedule 6 (of the Criminal Procedure Act of 1977) – offender.¹²¹ Accordingly, an application for release on bail becomes subject to Section 60(11)(a) or (b) of the Criminal Procedure Act. Section 60(11)(a) provides that where an accused is charged with an offence listed in Schedule 6, “the court shall order that the accused be detained ... unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release”. Section 60(11)(b) provides that where an accused is charged with a Schedule 5 offence, the court shall refuse bail “unless the accused ... adduces evidence which satisfies the court that the interests of justice permit his or her release”. Parliament enacted those provisions with the clear purpose of deterring and controlling serious crime and the Constitutional Court found them to be constitutional as they do not contain an outright ban on bail in relation to certain offences.¹²² Section 60(11)(a) applies only to a narrow category of the most serious violent crimes involving the infliction of grievous bodily harm and the ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provision.¹²³

According to the Anti-terrorism Act, on the other hand, Section 60(11)(a) applies, among others, to any person who engaged in a terrorist activity.¹²⁴ This application could, for example, include, given the definition of a terrorist activity, any act which ... causes the destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private¹²⁵, or causes any major economic loss of a country¹²⁶. To make a comparison, the Canadian Law in its Section 83.01(1)(b)(ii)(D) only covers substantial property damage *if* causing such damage is likely to cause death or serious bodily harm or endanger life, health or safety.¹²⁷ This only clarifies that the offences listed in Section 1(1)(xxv) can't in their seriousness be compared to the other crimes enumerated in Schedule 6, which all include the infliction of serious bodily harm or death. In addition to

¹²¹ According to the Schedule of the Anti-terrorism Act it amends the Criminal Procedures Act 51 of 1977 as follows:

“1. The insertion in Schedule 5 of the following offences:

‘The offences referred to in section 4(2) or (3), 13 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004’.

2. The insertion in Schedule 6 of the following offences:

‘The offences referred to in section 2, 3(2)(a), 4(1), 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, Section 2(1) and (2) of the Civil Aviation Offences Act, 1972 (Act No. 10 of 1972), section 26(1)(j) of the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993) and section 56(1)(h) of the Nuclear Energy Act, 1999 (Act No. 46 of 1999).’

¹²² S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (7) BCLR 771 (CC) at para 74.

¹²³ S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (7) BCLR 771 (CC) at para 74.

¹²⁴ Section 2 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.

¹²⁵ Section 1(1)(xxv)(a)(v) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.

¹²⁶ Section 1(1) (xxv)(a)(vii) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.

¹²⁷ See Roach, above fn 9, at pg 134.

that, the South African Anti-terrorism Act does not explicitly require that the aforementioned harmful consequences of a terrorist activity be committed intentionally. Thus, people who were only negligent about their participation in a terrorist activity and, as a result, caused, for example, a substantial damage to any property, would be treated as harshly as an intentional terrorist who caused the death of any number of people. Such a wide use of negligence has yet to be tested in court. The Constitutional Court has interpreted Section 12(1)(a) of the Constitution, which guarantees the right to freedom and security of the person, including the right ‘not to be deprived of freedom arbitrarily or without just cause’, as comprising both a procedural and a substantive ‘due process’ component.¹²⁸ As Powell rightfully states, a penalty of imprisonment which is imposed for negligence could be argued to violate Section 12 if the reason for which the State is depriving an individual of his or her liberty is insufficient.¹²⁹

What is more, the bail provisions introduced by the new South African Anti-terrorism law constitute a serious departure from the principle of proportionality, which requires that the more substantial the inroad into substantial rights, the more persuasive the grounds of justification must be.¹³⁰ The Constitutional Court in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*¹³¹ made it clear that Section 60(11)(a) only passes constitutional muster because the offences listed in Schedule 6 are very serious ones all including the infliction of death or serious bodily harm. In the light of this judgement and the fact that the right to freedom is one of the basic values of the South African Bill of Rights, which the right to bail aims to minimise interference with, the bail provisions could very well be facing constitutional challenges.

3.4. Offences relating to the “harbouring” and “concealment” of suspects and the duty to report offences

The new Anti-terrorism law further includes new Sections relating to the harbouring or concealment of suspects and the duty to report presence of person suspected of intending to commit or having committed an offence and failure to so report.

Section 11 makes it an offence to harbour or conceal a person, whom he or she knows, or ought to reasonably to have known or suspected to be a person who is suspected of intending or having committed a terrorism offence. Such an offence - punishable by a maximum

¹²⁸ *Bernstein v Bester* 1996 (2) SA 751 (CC) and 1996 (4) BCLR 449 (CC); *De Lange v Smuts NO* 1998 (3) SA 785 (CC); *S v Coetzee* 1997 (1) SACR 379 (CC).

¹²⁹ Powell, *Terrorism and Governance in South Africa and Eastern Africa*, above fn 101, at pg 21, with reference to VV Ramraj, *Freedom of the person and the principle of criminal fault*, (2002) 18 SAJHR 225 on the development of the substantive element of due process and its impact on criminal fault.

¹³⁰ *S v Bhulwana* 1996 (1) SA 388 (CC) at para 18.

¹³¹ *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC).

sentence of 15 years¹³² - appears, as discussed above¹³³, problematic as it calls for negligence-based liability.

Section 12(2) makes it an offence for a person to fail to report to the police as soon as reasonable possible if they have reason to suspect that another person intends to commit a terrorism offence or has committed a terrorism offence, or if they are aware of such a persons location. The scope of Section 12 and therefore of the duty to report is quite extensive. It is not restricted to particular types of terrorist activity and it applies to both past and future offences. Such conscription of individuals, on pain of criminal conviction, is especially problematic as it occurs on the basis of suspicion. This appears to be a level of knowledge which could be too low to pass constitutional scrutiny. A potential reporter does not have to be certain or even believe that a terrorist act had been or will be committed. It is enough that a reasonable person would have suspected so. Moreover, Section 12 does not provide the person making the report with civil or criminal immunity for good faith reports. This could lead, as Roach rightfully states¹³⁴, to the absurd situation in which people who in subjective good faith report their suspicions about terrorism as required under Section 12 will be prosecuted under Section 13(1)(b) for a hoax about terrorism that they ought reasonably to have known or suspected was false. Such people would face possible prosecution either for reporting or for not reporting their suspicions.

Furthermore, the Section 12-offence says nothing about privilege. 'Any person' could be 'guilty of the offence'. Examples of privileges are the legal professional privilege¹³⁵, marital privilege¹³⁶ and the privilege against self incrimination¹³⁷. Hence, the privilege protects the contents of certain communications which cannot be required to be produced in court and used as evidence in legal proceedings. In contrast, Section 12, according to its wording, could apply to spouses as well as legal professionals and the information provided may also be used against the person who reported it. Even though inconsistent with aforementioned privileges, the duty to report in Section 12 might be saved by reading down the offence so as to not apply if the information would require people to a) incriminate themselves, or b) be in breach with their legal professional or marital privilege¹³⁸, because of what the Constitutional Court held

¹³² See Section 18(1)(b) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.

¹³³ See Chapter 3.3.3.

¹³⁴ Roach, above fn 9, at 145.

¹³⁵ The legal professional privilege protects from disclosure communications between attorneys and their clients which are made in confidence for the purpose of enabling the client to obtain legal advice, see *S v Nkabinde* 1998 (8) BCLR 996 (N).

¹³⁶ According to the marital privilege spouses cannot be compelled in criminal proceedings to disclose communications made to each other during the marriage.

¹³⁷ The privilege against self-incrimination entitles a person to refuse to give evidence against themselves, i.e. to make a confession.

¹³⁸ See Roach, above fn 9, at pg 146 and Powell, *Terrorism and Governance in South Africa and Eastern Africa* above fn 101, at pg 21.

in *Shaik v Minister of Justice and Constitutional Development and Others*¹³⁹. According to the Court, ‘although the word “any” is, on the face of it a word of “wide and unqualified generality” it “may be restricted by the subject matter or the context”¹⁴⁰. Giving an unlimited meaning to “any person” ... would mean that, literally, any accused person could be summoned ... to answer questions... . It could not have been the purpose to cut across the well-established rules of criminal procedure and evidence established over centuries that have become part of our law.’¹⁴¹ Section 12 might thus be saved by reading down the provision in question.

3.5. Investigative hearings

As discussed above¹⁴², Section 22 of the Anti-Terrorism Act incorporates Chapter 5 of the National Prosecuting Authority Act, 1998, which provides for broad investigative powers, including investigative hearings¹⁴³.

Firstly, unlike in Sections 23 and 24, in which the Act provides for prior judicial authorisation of freezing orders and the stopping and searching of vehicles and persons, Section 22 does not include such a requirement. It is not understandable why the same high safeguards that are applicable to Section 23 and 24 as well as Section 205 of the Criminal Procedures Act, which, according to the Constitutional Court, only meets the requirements of procedural fairness as it is ‘as narrowly tailored as possible to meet the legitimate state interest of investigating and prosecuting crime’¹⁴⁴, have not to be met with regard to the investigating powers in Section 22.

But even more of a surprise is the fact that Section 22 incorporates Chapter 5 of the National Prosecuting Authority Act, given the fact that the Constitutional Court, even though not actually declaring Section 28 of the National Prosecuting Authority Act unconstitutional, expressed concerns about its constitutional validity in December 2003, almost a year prior to the South African Parliament approving the country’s new anti-terrorism legislation. In the case before the Court it was not necessary to reach a conclusion with regard to the constitutionality of Section 28 as it had been, even though targeted by the applicant for constitutional invalidity, the wrong statutory provision to attack. Yet, while refraining from pronouncing on it, the Court ‘could not allow [its] concern to pass unmentioned’¹⁴⁵. ‘It relates to the fact that, under subsection 28(6)(b), the “Investigating Director or a person designated by him” questions the person summoned under oath or affirmation, without the necessity of

¹³⁹ 2004 (4) BCLR 33 (CC).

¹⁴⁰ *R v Hugo* 1926 AD 268 at 271.

¹⁴¹ *Shaik v Minister of Justice and Constitutional Development and Others* 2004 (4) BCLR 333 (CC) at para 17.

¹⁴² See Chapter B. 2.5.

¹⁴³ Section 26 (6) of the National Prosecuting Authority Act.

¹⁴⁴ *Nel v Le Roux NO* 1996 (4) BCLR 592 (CC) at para 20.

¹⁴⁵ *Shaik v Minister of Justice and Constitutional Development and Others* 2004 (4) BCLR 333 (CC) at para 38.

any other person being present, let alone a person who is independent of the Directorate of Special Operations.’ ... ‘This concern must moreover be viewed in the context of subsection (3), that makes it obligatory for all proceedings contemplated in subsections (6), (8) and (9) to take place in camera, and that, under subsection (5), these proceedings are to be recorded “in such manner” as the Investigating Director may deem fit. An Investigating Director could decide to keep a long-hand minute herself, or by the person designated to conduct the examination. ... The Act raises relatively novel problems about how to reconcile the need for effective control of organised crime with respect for the constitutional protection of a fair trial.’¹⁴⁶

In light of these comments from Ackermann J on behalf of his Court it must be concluded that Section 22, through the incorporation of Chapter 5 of the National Prosecuting Authority Act, is in danger of not passing constitutional muster.

3.6. Conclusion

Despite the attempt to rid earlier drafts of the greater flaws, the constitutionality of the Act is still in doubt. But when applying the limitation clause, courts have to consider, amongst other factors, the purpose of the limitation. Given the fact that the purpose for the adoption of the Act, that is, the protection of South Africa’s citizens and others against the threats of terrorism, is a highly regarded and important one, may motivate the courts when they consider the anti-terrorism legislation to generally respond to it sympathetically. It is therefore difficult to predict the fate of some of the provisions in question. In my view though, it will be difficult if not impossible to justify the limitation of some of the most fundamental constitutional rights with the mere fact that the threat of terrorism exists.

Chapter 4 - Conclusion

Terrorism, being the unlawful, or threatened, use of violence against individuals or property to coerce and intimidate governments or societies for political, religious or ideological objectives, is in itself a massive violation of human rights, which States have all reason to take due measures to eliminate. But in analysing some of these counter-terrorism measures one cant but draw the conclusion that especially since the September 11 events and the subsequent Security Council Resolution 1373 it seems to be a common perception among some states that, in their fight against terrorism, they need to make a choice between security

¹⁴⁶ Shaik v Minister of Justice and Constitutional Development and Others 2004 (4) BCLR 333 (CC), above fn 141.

and public safety on the one hand, and the protection of human or civil rights on the other. All the analysed acts establish various new offences with regard to terrorism, limit fundamental civil rights and freedoms, grant extraordinary powers to the executive and police to investigate and prosecute terrorism and associated offences.¹⁴⁷

And South Africa does not seem to be an exception, which is all the more astonishing in the country's historical context. On May 8, 1996, after decades of apartheid regime, South Africa adopted a constitution that is considered to be one of the most advanced in terms of human rights. One had therefore assumed that the government, in an attempt to achieve a sense of security without calling up the images of the country's history, would limit itself in the measures which it may adopt in order to counter the threat of terrorism and adopt an Anti-Terrorism Act that is well within the boundaries of the new Constitution. Especially with a Minister of Justice stressing that 'it was unthinkable that the South African Parliament would pass a law which was not in tune with the Constitution's limitation clauses.'¹⁴⁸

All published drafts as well as the final version of South Africa's anti-terrorism legislation have proven this ministerial statement wrong. Instead of being mindful of South Africa's repressive past, a review of the first draft bill, as Steyn puts it, left one 'with a sense of being trapped in a time warp'¹⁴⁹. A detention without trial provision was introduced in the face of the almost simultaneously published Final Report of the Truth and Reconciliation Commission that disclosed dreadful instances of police brutality whilst detaining prisoners without trial. Up until the appointment of the Rabie Commission in 1979 alone, there had been 47 reported deaths in detention.¹⁵⁰ This particular provision was deleted from future drafts and the final act but that, unfortunately, did not allow assumptions about the constitutionality of its remaining provisions. The different bills included definitions of 'terrorist activities' that declared virtually all forms of violence a terrorist offences. Legitimate political activities as for instance trade union strikes were encompassed in the definition, again a sad reminder of past times. This is all the more astonishing as, like mentioned before, many of the contemporary South African politicians are members of political organisations which were described by the Apartheid government as being terrorist organisations. Furthermore, the Organisation of African Unity Convention on the Prevention and Combating of Terrorism (Algiers Convention) differentiates from other conventions on terrorism as it excludes struggles for national self-determination from its definition of

¹⁴⁷ For a comparative analysis of the different definitions see Golder & Williams, What is 'Terrorism? Problems of legal definition, (2004) 27 UNSW Law Journal 270.

¹⁴⁸ Minister of Justice Penuell Maduna at a Ministerial Media Briefing, see above fn 104.

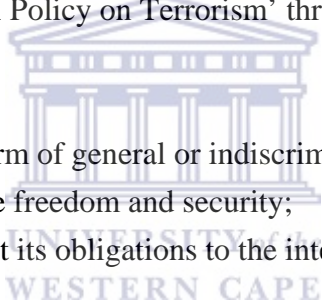
¹⁴⁹ Steyn, The draft Anti-Terrorism Bill 2000: the lobster pot of the South African criminal justice system? (2001) 14 SACJ 179 (182).

¹⁵⁰ Schoenteich, above fn 58.

terrorism.¹⁵¹ South Africa has not only signed and ratified but was one of the primary role-players to promote the Algiers Convention.¹⁵²

And the Act itself, even though it considerably approved during the drafting process, is not without doubt of being unconstitutional. The definition of what constitutes a ‘terrorist activity’ is still exceptionally wide encompassing all kinds of activities that aren’t terrorist offences in the traditional sense. Such a wide definition is dangerous, especially in light of the harsh consequences deriving from it. What’s most striking are the provisions of the Act that remained uncensored even though the Constitutional Court itself had doubts as to whether those provisions would pass constitutional muster.

In the eyes of the writer, a successful anti-terrorism legislation must endeavour to build strong norms and institutions based on human rights and not provide a new rationale for avoiding and undermining them. The legislation should maintain a balance between combating the threat of national and international terrorism whilst maintaining the hard-won rights enshrined in the Constitution. In March 1998 the South African Government announced its commitment to counter terrorism in its ‘Official Policy on Terrorism’ through adopting a four-part strategy:

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- i) to uphold the rule of law;
 - ii) to never to resort to any form of general or indiscriminate repression;
 - iii) to defend and to uphold the freedom and security;
 - iv) to acknowledge and respect its obligations to the international community.¹⁵³

The South African *Protection of Constitutional Democracy Against Terrorist and Related Activities Act* does not accomplish such aim. It does not entail all the necessary safeguards and therefore raises way too many questions about meeting with South Africa’s Constitutional framework.

¹⁵¹ See Article 3(1) of the Algiers Convention, which provides as follows:

1. Notwithstanding the provisions of Article 1, the struggles wages 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.

For the full text of the Algiers Convention see: http://untreaty.un.org/English/Terrorism/oau_e.pdf.

¹⁵² Institute for Security Studies, Submission to the Portfolio Committee on Safety and Security, Anti-Terrorism Bill 2002, available at: <http://www.iss.org.za/Pubs/Other/ISSSubmis.pdf>, at pg 10.

¹⁵³ Institute for Security Studies, above fn 152, at pg 3.


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